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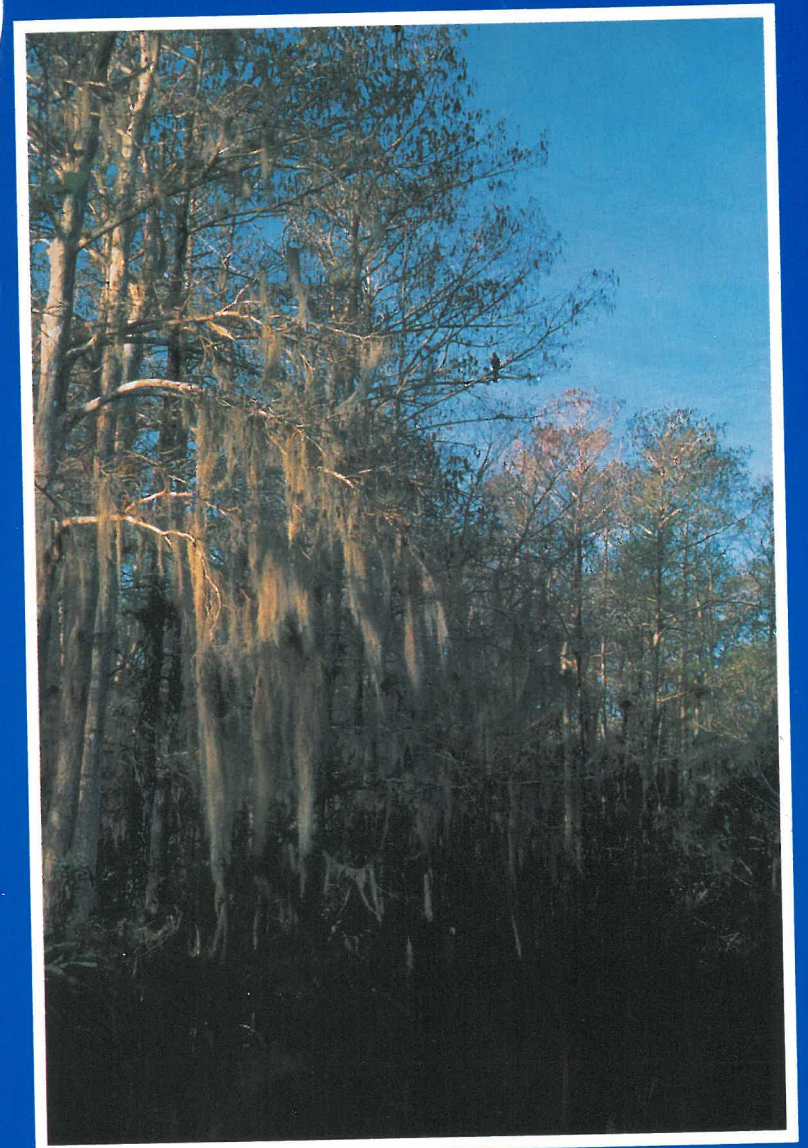
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# NOVA LAW REVIEW

**Growth Management:  
A Plan for Florida's Future**



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## Introduction

Joel A. Mintz\*

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It has been more than a decade since the Florida Legislature enacted the Local Government Comprehensive Planning and Land Development Act. A product of contention and uneasy compromise, this pathbreaking statute, commonly referred to as Florida's Growth Management Act, has engendered much controversy. For all the diverse stakeholders whose concerns the Act touches, its implementation has led to both triumphs and disappointments. The land use planning process created by the statute remains very much a "work in progress," whose specific requirements are still being adopted and implemented by local government officials, Florida state agencies, land owners and developers, and concerned private citizens.

This *Symposium* reviews the considerations that led to the statute's passage in 1985. It summarizes the key elements of the Florida Growth Management Act and the intricate growth management process which resulted. The *Symposium* assays, from a variety of perspectives, the Act's strengths and shortcomings; and it examines the discrete body of case law and follow-up legislation the statute has spawned.

In its opening piece attorney Richard Grosso, a seasoned and highly effective advocate of the growth management cause, describes the requirements of the Growth Management Act in considerable detail. Grosso considers the statute's purposes and procedures. He also surveys some significant substantive issues that have arisen in its implementation.

Among other matters, Grosso focuses on the adequacy of the support data used to determine whether locally prepared comprehensive land use plans are consistent with the statute's mandates, the role of future land use elements and maps, the appropriateness of local land development regulations as a means of implementing comprehensive plan policies, and the enforcement of comprehensive plans in the context of challenges to particular development orders. Before concluding, Grosso evaluates Florida's ongoing effort to manage its own growth. He notes both the extent to which the Florida Growth Management Act has transformed land use planning in certain parts of the state and the "compartmentalization" of land use regulation that has kept the Act from achieving its highest potential as a mechanism for rational, managed growth and development.

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Two informative student notes provide ecological, historical, and comparative perspectives on Florida's growth management efforts. Joy Brockman's essay describes two sensitive ecosystems found throughout Florida, beaches and sandy shores and coastal wetlands and estuaries, and notes the problems that development may cause for each. She also considers the mechanisms that are presently in place under Florida law for the regulation and protection of these threatened resources.

Vanessa Steinberg-Prieto's note explores the historical evolution of growth management legislation in Florida. She also discusses the interrelationship of Florida's Growth Management Act and an important federal environmental statute, the Endangered Species Act, as well as efforts by the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency to protect Florida wetlands under section 404 of the Federal Clean Water Act. Steinberg-Prieto investigates the growth management statutes of Vermont, Oregon and other states and she considers the effect of a key provision of Florida's Growth Management Act, and its "concurrency requirement," on the overcrowding of Florida public schools.

Concurrency, the statutory requirement that local comprehensive plans require the availability of adequate public facilities and services to support new development, is the focus of two other contributions to the *Symposium* as well. In *Waiting for The Go: Concurrency, Takings and the Property Rights Act*, Brenna Durden, David Layman and Sid Ansbacher analyze when the concurrency requirement constitutes a compensable taking of private property. Their article considers pertinent decisions of the Supreme Court of the United States and the Supreme Court of Florida. It also examines the impact of the Harris Act, a 1995 Florida statute which created enforceable rights for property owners where future government actions "inordinately burden" private property.

Craig Robertson's student note describes the gradual development of the concurrency doctrine in Florida over the 1970s and 80s. He considers judicial review of concurrency, and analogous requirements in Florida and other states. Robertson's note also discusses the effect of concurrency on school overcrowding; he examines the "even swap" technique employed to implement concurrency in Jacksonville—a technique that Robertson argues, with some force, is unauthorized by the Growth Management Act.

Finally, Charles Siemon and Julie Kendig critique the standards established by the Supreme Court of the United States and the Supreme Court of Florida respecting judicial review of local government decision-making regarding land use regulation. Their article includes a close analysis of the leading Florida case in this area, *Board of County Commissioners v.*

*Snyder*, which defines certain local rezoning decisions as “quasi-judicial actions,” subject to greater judicial scrutiny than “legislative acts.”

The remaining articles in this *Symposium* consider a significant subset of the plethora of legal and public policy issues raised by Florida’s Growth Management Act in the eleven years since its passage. Very clearly, the writings that constitute this *Symposium* will not resolve those issues conclusively. Instead, one may hope that, against a background of continued rapid population growth—with the stress on natural resources and the pressure for new construction which such growth inevitably brings—these essays will focus and inform a thoughtful debate as to the future direction of land use planning and growth management in the nation’s fourth largest state.

# Florida's Growth Management Act: How Far We Have Come, and How Far We Have Yet to Go

Richard Grosso\*

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## I. INTRODUCTION

In 1985, Florida adopted the Local Government Comprehensive Planning and Land Development Regulation Act (the "Act").<sup>1</sup> The Act requires that each local government in Florida adopt a local comprehensive plan consistent with the Act.<sup>2</sup> The Act calls for the adoption of these comprehensive plans over a three-year period.<sup>3</sup> The last of these plans was adopted in the middle of 1992. Although a number of plans are still in litigation and have therefore not been brought into "compliance" with the

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1. 1985 Fla. Laws ch. 85-55 (current version at FLA. STAT. §§ 163.3161-.3215 (1995)).

2. FLA. STAT. §§ 163.3181, .3184; *see also* FLA. ADMIN. CODE ANN. r. 9J.11 (1995).

3. FLA. STAT. § 163.3167(4).

Act,<sup>4</sup> most local governments have moved onto the next critical phase of growth management—the implementation and enforcement of the plans through plan amendments and individual development orders.

The planning process now shifts from the review of the initial plans to the refinement and application of the plans through subsequent amendments and more detailed Land Development Regulations (“LDRs”). Also, individual development orders issued by local governments must be consistent with the adopted plans<sup>5</sup> and LDRs. These orders are subject to “consistency” challenges under a statutory cause of action.<sup>6</sup> In theory then, all development orders issued by local governments are consistent with the state’s adopted growth management policies. At the same time, many local governments are revisiting their plans through the amendment process.

The first decade of Florida’s modern era of growth management has produced an incredible, but not an unpredictable, amount of change, controversy, disappointment, and even some success stories. As growth management enters its second decade, it seems an appropriate time to assess where we have come from and where we are headed.

This article will begin by presenting a primer on the basics of the growth management process in Florida. Next, it will discuss the important substantive issues which have arisen during the implementation of the Growth Management Act as a means of providing a practice guide to the practitioner. Finally, this article will analyze the success or failure of growth management and will offer some suggestions for changes which the author thinks are necessary to make growth management in Florida more effective.

## II. THE BASICS OF THE GROWTH MANAGEMENT PROCESS IN FLORIDA

### A. *Purposes and Basic Requirements*

#### 1. Purposes of the Growth Management Act

The purposes of the Growth Management Act are, among other things, to “guide and control future development,”<sup>7</sup> to “overcome present handi-

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4. As of this writing, Monroe, Walton, and Polk Counties have not yet brought their plans into compliance.

5. FLA. STAT. § 163.3194(1)(a).

6. *Id.* § 163.3215.

7. *Id.* § 163.3161(2).

caps; and deal effectively with future problems which may result from the use and development of land[,]” to “preserve, promote, protect, and improve the public health, safety, comfort and good order,”<sup>8</sup> and “to protect human, environmental, social and economic resources[.]”<sup>9</sup> The Act is to be “construed broadly to accomplish its stated purposes and objectives.”<sup>10</sup>

## 2. The Form and Content of Plans

The Act specifies that “comprehensive plans must consist of material in such descriptive form, written or graphic, as may be appropriate to the prescription of principles, guidelines, and standards for the orderly and balanced future economic, social, physical, environmental, and fiscal development of the area.”<sup>11</sup> Comprehensive plans must have a capital improvements element and a future land use plan element. In addition, the plan must have a traffic circulation element consisting of proposed and existing thoroughfares and transportation routes. The plan must also have a sanitary sewer, solid waste, drainage, potable water and natural groundwater aquifer recharge element, a natural resource conservation element, a recreation and open space element, a housing element, a coastal management element, and an intergovernmental coordination element.<sup>12</sup> In recognition of Florida’s critical need to protect its coastal areas from natural disasters and environmental degradation, an entire subsection of the Act is devoted to establishing requirements for coastal management elements.<sup>13</sup> Coastal

8. *Id.* § 163.3161(3).

9. *Id.* § 163.3161(7).

10. FLA. STAT. § 163.3194(4)(b).

11. *Id.* § 163.3177(1).

12. *Id.* § 163.3177(6)(c).

13. *Id.* § 163.3178; *see also id.* § 163.3177(6)(d), (g). The intent of the coastal management portions of that law is that local plans “restrict development activities where such activities would damage or destroy coastal resources, and that such plans protect human life and limit public expenditures in areas that are subject to destruction by natural disaster.” FLA. STAT. § 163.3178(1).

Section 163.3178(2) of the *Florida Statutes* requires that the coastal management element of a local comprehensive plan be based on studies, surveys, and data. Further, it requires that it be consistent with coastal resource plans “prepared and adopted pursuant to general or special law.” *Id.* § 163.3178(2). In addition, the plan must contain, among other things:

(a) A land use and inventory map of existing coastal uses, wildlife habitat, wetland and other vegetative communities, undeveloped areas, areas subject to coastal flooding, public access routes to beach and shore resources, historic preservation areas, and other areas of special concern to local government.

management elements which must be designed to “restrict development activities where such activities would damage or destroy coastal resources. . . .”<sup>14</sup> Local governments are also authorized to adopt optional elements including a mass transit element, a port, aviation, and related facilities element, a recommended community design element, and a general area

(b) An analysis of the environmental, socioeconomic, and fiscal impact of development and redevelopment proposed in the future land use plan, with required infrastructure to support this development or redevelopment, on the natural and historical resources of the coast, and the plans and principles to be used to control development and redevelopment to eliminate or mitigate the adverse impacts on coastal wetlands; living marine resources; barrier islands, including beach and dune systems; unique wildlife habitat; historical and archaeological sites; and other fragile coastal resources.

....  
 (d) A component which outlines principles for hazard mitigation and protection of human life against the effects of natural disaster, including population evacuation, which take into consideration the capability to safely evacuate the density of coastal population proposed in the future land use plan element in the event of an impending natural disaster.

(e) A component which outlines principles for protecting existing beach and dune systems from human-induced erosion and for restoring altered beach and dune systems.

(f) A redevelopment component which outlines the principles which shall be used to eliminate inappropriate and unsafe development in the coastal areas when opportunities arise.

....  
 (h) Designation of high-hazard coastal areas, which for uniformity and planning purposes herein, are defined as category 1 evacuation zones. However, application of mitigation and redevelopment policies, pursuant to s. 380.27(2) and any rules adopted thereunder, shall be at the discretion of local government.

....  
 (j) An identification of regulatory and management techniques that the local government plans to adopt or has adopted in order to mitigate the threat to human life and to control proposed development and redevelopment in order to protect the coastal environment and give consideration to cumulative impacts.

*Id.* § 163.3178(2)(a), (b), (d)-(f), (h), (j).

Also, under § 163.3178(8) of the *Florida Statutes*, each county that is required to prepare a coastal management element must establish a county-based process for identifying and prioritizing coastal properties so they may be acquired as part of the state’s land acquisition programs. The process must include the establishment of criteria for prioritizing coastal acquisitions which, in addition to recognizing pristine coastal properties and coastal properties of significant or important environmental sensitivity, recognize hazard mitigation, beach access, beach management, urban recreation, and other policies necessary for effective coastal management. *Id.* § 163.3178(8).

14. *Id.* § 163.3178(1).

redevelopment element.<sup>15</sup> In comprehensive plans for a city or country covering a population greater than 50,000, the mass transit element and the coordination of port, aviation, and similar facilities are mandatory.<sup>16</sup>

The Department of Community Affairs ("DCA") adopted an administrative rule to implement the statutory requirement for "principles, guidelines and standards" by requiring that plans contain specific types of goals, objectives, and policies. A goal is defined as "the long-term end toward which programs or activities are ultimately directed."<sup>17</sup> An objective is "a specific, measurable, intermediate end that is achievable and marks progress toward a goal."<sup>18</sup> Policies answer the question of how "programs and activities are conducted to achieve an identified goal."<sup>19</sup> The Act, and the administrative rule which guide the Department in its review of comprehensive plans include very specific requirements for the subject matter and intended result of the adopted plans.<sup>20</sup>

15. FLA. STAT. § 163.3177(7).

16. *Id.* § 163.3177(6)(i).

17. FLA. ADMIN. CODE ANN. r. 9J-5.003(54) (1995).

18. *Id.* at r. 9J-5.003(86).

19. *Id.* at r. 9J-5.003(95).

20. Among the most notable substantive requirements, the plans must:

1. Conserve, use, and protect natural resources, including water, water recharge areas, marshes, soils, floodplains, and other natural resources. FLA. STAT. § 163.3177(6)(d).
2. Conserve, develop, utilize, and protect natural resources within their jurisdictions. *Id.* § 163.3161(3).
3. Include an objective which protects the functions of natural resources. FLA. ADMIN. CODE ANN. r. 9J-5.006(3)(b)4. (1995).
4. Include an objective which addresses protecting the functions of natural groundwater recharge areas and natural drainage features. *Id.* at r. 9J-5.011(2)(b)5.
5. Include a policy which regulates land use and development to protect natural drainage features. *Id.* at r. 9J-5.011(2)(c)4.
6. Include an objective which protects surface waters. *Id.* at r. 9J-5.013(2)(b)2.
7. Include an objective which protects soils and native vegetation. *Id.* at r. 9J-5.013(2)(b)3.
8. Include an objective which conserves, appropriately uses, and protects wildlife habitat. FLA. ADMIN. CODE ANN. r. 9J-5.013(2)(b)4. (1995).
9. Include a policy which restricts activities and land uses known to adversely affect the quality and quantity of identified water sources. *Id.* at r. 9J-5.013(2)(c)1.
10. Include a policy which protects native vegetative communities from destruction by development activities. *Id.* at r. 9J-5.013(2)(c)3.
11. Include a policy which restricts activities known to adversely affect the survival of endangered and threatened wildlife. *Id.* at r. 9J-5.013(2)(c)5.
12. Include a policy which protects the natural functions of existing soils, wildlife habitat, wetlands, and floodplains. *Id.* at r. 9J-5.013(2)(c)6.
13. Include a policy which designates and protects environmentally sensitive lands. FLA. ADMIN. CODE ANN. r. 9J-5.013(2)(c)9. (1995).

The goals, objectives, policies, standards, findings, and conclusions within the proposed comprehensive plan must be supported by relevant and appropriate data which is gathered in a professionally accepted manner.<sup>21</sup> The data and analysis which need not be adopted as part of the plan will be discussed at length below. It is the goals, objectives, and policies which constitute the operative, adopted parts of the plan since they have the force of law. Essentially, these requirements mean that comprehensive plans must firmly establish the fundamental value judgments which will govern land use decisions within a given jurisdiction.

Interpreting these provisions, several administrative orders have ruled that a policy in a plan which states simply that the local government will subsequently adopt an LDR that addresses a specific rule requirement is unacceptable. The plan itself must contain a policy which provides some guidance, value or "policy" judgment on each issue required to be addressed in chapter 9J-5 of the *Florida Administrative Code*. Simply deferring to LDRs does not provide the same level of attention to the issue because LDRs, which can be amended, revised, or repealed without the procedural safeguards that apply to plan amendments, do not have the same legal status as policies within a plan. Furthermore, deferring the establishment of meaningful standards to the LDRs would not fulfill the requirements of

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14. Include an objective which coordinates future land uses with soil conditions and topography. *Id.* at r. 9J-5.006(3)(b)1.

15. Include an objective which encourages the elimination or reduction of uses inconsistent with the community character. *Id.* at r. 9J-5.006(3)(b)3.

16. Include a policy which provides for the compatibility of adjacent land uses. *Id.* at r. 9J-5.006(3)(c)2.

17. Include an objective addressing the extent to which future development will bear a proportionate cost of facility improvements necessitated by the development in order to adequately maintain adopted level of service standards. *Id.* at r. 9J-5.016(3)(b)4.

18. Include a policy assessing new developments and appointing a pro rata share of the costs to finance public facility improvements necessitated by their development. FLA. ADMIN. CODE ANN. r. 9J-5.016(3)(c)8. (1995).

19. Include an objective which encourages the redevelopment and renewal of blighted areas. *Id.* at r. 9J-5.006(3)(b)2.

20. Include an objective discouraging the proliferation of urban sprawl. *Id.* at r. 9J-5.006(3)(b)8.

21. Include a policy addressing the provision for drainage and stormwater management. *Id.* at r. 9J-5.006(3)(c)4.

22. Include an objective to coordinate future land uses with the appropriate topography and soil conditions, and the availability of facilities and services. *Id.* at r. 9J-5.006(3)(b)1.

21. FLA. STAT. § 163.3177(10)(e). The "professionally acceptable" standard is discussed in a Department Declaratory Statement in *Clay County v. Department of Community Affairs*, 13 Fla. Admin. L. Rep. 1457, 1462 (Dep't of Community Affairs 1991).

section 163.3177(9)(e) of the *Florida Statutes* or rule 9J-5.005 of the *Florida Administrative Code*. However, leaving it to the LDRs to establish the specific performance standards for the granting of special exceptions does not necessarily render a plan not “in compliance.”<sup>22</sup>

These issues concern the level of detail and specificity which must be included in a plan so that is to be found in compliance. Most local governments have fought attempts to require a great level of detail in plans. They did not want to give away their ability to exercise discretion when later deciding the content of more specific land development regulations, or in deciding whether a specific development proposal was consistent with that plan. Obviously, the more vague the plan, the greater range of decisions that will be consistent with that plan. This is still the preferred approach of local governments who typically want greater latitude to approve, or disapprove, of development proposals, without strictly complying with a predetermined standard. However, judicial interpretations of the “consistency” requirement have begun to greatly diminish the ability of a local governments to disapprove of something which is “consistent” with their plans. Therefore, this has removed much of the discretion the governing body believed it had reserved for itself. This development, which will be described in greater detail below, has called into question the practice of leaving too much room for interpretation in plans.

### 3. Internal Consistencies

Coordinating the elements of the plan is a “major goal” of the planning process, and the various elements of a plan must be consistent with each other.<sup>23</sup> This means that adopted goals, objectives, and policies are not just binding on decisions concerning land development regulations and development orders. The balance of a plan’s provisions, and subsequent plan amendments, must also be internally consistent with adopted goals, objectives, and policies.<sup>24</sup> Thus, the plan’s adopted goals, objectives and policies must guide future amendments to the plan.

This “internal consistency” requirement is strongest as it applies to the role of the Future Land Use Map (“FLUM”). The FLUM must “reflect [the plan’s] goals, objectives, and policies within all elements . . . .”<sup>25</sup> This

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22. *Friends of Lloyd, Inc. v. Jefferson County*, 13 Fla. Admin. L. Rep. 3643, 3645 (Dep’t of Community Affairs 1991).

23. FLA. STAT. § 163.3177(2).

24. *Id.* § 163.3187(2).

25. FLA. ADMIN. CODE ANN. r. 9J-5.005(5)(b) (1995).



provision establishes the critical role of FLUM decisions in determining whether the plan implements and complies with stated planning objectives. As the majority of planning activity currently taking place involves the adoption of amendments to FLUMs, this is possibly the most important requirement in the rule and will be discussed in greater detail below.

#### 4. Concurrency

The Act's concurrency provisions require that every plan include 1) a requirement that adequate public facilities be available when a development order is issued and 2) that this requirement be enforced at the development order stage.<sup>26</sup> An early decision of a hearing officer strictly interpreted the Act's initial concurrency provisions. Transportation concurrency has clearly proven to be the most difficult issue, and the Act has been revised in several ways over the past three years to allow for a more flexible application of this policy. Since a number of recent articles have quite adequately discussed the concurrency requirement,<sup>27</sup> it will only be mentioned briefly in this article.

The hottest issue regarding the Act at this time is school concurrency. The Act does not require that there be adequate public school facilities to save new development but does allow a local government to require school concurrency if it has a study to show how it can be implemented.

#### B. *Procedural Issues*

##### 1. Review of the Draft Plan or Amendment

Plans developed to initially meet the requirements of the Act were first transmitted as draft plans for review by the DCA.<sup>28</sup> This procedure was also required for all amendments.<sup>29</sup>

The Act requires a local planning agency hearing and recommendation prior to a local government transmittal hearing.<sup>30</sup> The First District Court of Appeal has stated that the requirement concerning the local planning

26. FLA. STAT. § 163.3180.

27. See generally David L. Powell, *Recent Changes in Concurrency*, 68 FLA. B.J. 67 (Nov. 1994).

28. FLA. STAT. § 163.3184(3).

29. *Id.* § 163.3184(10).

30. *Id.* § 163.3174(4)(a).

agency can be met de facto and strict compliance is not necessary.<sup>31</sup> However, notice must be given seven days prior to the local governing board's transmittal hearing.<sup>32</sup>

Prior to a 1993 law,<sup>33</sup> the Environmental Lands Management Study ("ELMS"), which largely implemented the Final Report of the Third Environmental Lands Management Study Committee, the DCA automatically reviewed each proposed or "transmitted" amendment. Working with other review agencies, the DCA reviewed the draft plan within ninety days of receipt and issued its Objections, Recommendations, and Comments Report ("ORC Report"), which identified deficiencies in the draft plan or amendment and provided specific guidance on how the deficiencies should be corrected. Now, the Act requires a copy of a "proposed" amendment to be transmitted to the DCA and also to the appropriate regional planning council and water management district, the Department of Environmental Protection, and the Department of Transportation.<sup>34</sup> The legislature also deleted the requirement for an automatic review and gave the DCA the discretion to decide, within forty-five days of the transmittal of the plan or amendment, whether to conduct a review.<sup>35</sup> However, the DCA must conduct a review if requested to do so by a regional planning council, an affected person as defined in section 163.3184(1)(a) of the *Florida Statutes*, or the local government, as long as such request is received within forty-five days of the transmittal of the proposed amendment.<sup>36</sup>

Once the DCA issues the ORC Report, a local government has sixty days to review the ORC Report and adopt the plan or amendment.<sup>37</sup> A plan or amendment thereto is adopted by ordinance.<sup>38</sup> For amendments adopted pursuant to an Evaluation and Appraisal Report ("EAR"), legislation adopted in 1992 extended this time period to 120 days.<sup>39</sup>

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31. *B & H Travel Corp. v. Department of Community Affairs*, 602 So. 2d 1362, 1366 (Fla. 1st Dist. Ct. App. 1992). Most local governments governing boards have appointed a local planning agency and usually a body of lay volunteers. In addition, some governing boards sit themselves as the local planning agency.

32. FLA. STAT. § 163.3184(15)(b)1.

33. Act of May 11, 1993, ch. 93-206, 1993 Fla. Laws 1887.

34. FLA. STAT. § 163.3184(4) (1995).

35. Ch. 93-206, § 10, 1993 Fla. Laws at 1902. In 1995, the legislature changed the 45-day review period to 30 days. See Act of June 15, 1995, ch. 95-322, 1995 Fla. Laws 2867.

36. FLA. STAT. § 163.3184(5) (1995).

37. *Id.* § 163.3184(7).

38. *Id.* § 163.3184(15)(a).

39. *Id.* § 163.3184(7).

Legislation adopted in 1995 exempted small scale plan amendments from review and challenge by the DCA.<sup>40</sup> Such amendments can only be challenged by affected persons.<sup>41</sup>

## 2. Review of Adopted Plan or Amendment

After a local government adopts its plan or amendment, it is again transmitted to the DCA for review. The DCA then has forty-five days to review the plan or amendment and publish a Notice of Intent finding the plan in compliance, or not in compliance, with the Act.<sup>42</sup> The DCA's statement of intent must be based upon matters raised in its ORC Report, or adopted plans or amendments, or portions thereof, that were not previously transmitted for an ORC review.<sup>43</sup> This forty-five day requirement has been held not to be jurisdictional and the DCA's failure to strictly comply does not preclude a formal challenge to the plan or amendment.<sup>44</sup>

Prior to the ELMS bill, the DCA, if requested to do so, had to "participate" in the local plan or amendment adoption hearing in order to find a plan or amendment not in compliance. This requirement gave rise to a number of unsuccessful claims of non-participation by local governments, but was interpreted to require little more than mere attendance at the hearing. It was later deleted in the ELMS bill.<sup>45</sup>

The ELMS bill evidences the intent only to allow for a shorter amendment process and does not foreclose the DCA, or any affected person, from challenging the adoption of an amendment which had not previously been reviewed. In cases where a review of the transmitted plan was not conducted, the compliance determination must be based solely on the plan or amendment as adopted.

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40. Ch. 95-322, § 3, 1995 Fla. Laws at 2875 (codified at FLA. STAT. § 163.3187(3)(a) (1995)) (stating that "[a]ny affected person may file a petition with the Division of Administrative Hearings pursuant to § 120.57").

41. See FLA. STAT. § 163.3187(3)(a)-(c) (1995).

42. *Id.* § 163.3184(8)(a).

43. *Id.* § 163.3184(8).

44. *Caliente Partnership v. Department of Community Affairs*, 604 So. 2d 886, 887 (Fla. 1992).

45. See *Department of Community Affairs v. Charlotte County*, 12 Fla. Admin. L. Rep. 2760 (Admin. Comm'n 1990).

### 3. Adoption of the Plan or Amendment and Legal Effect Thereof

The procedures for adopting plans and amendments are contained in sections 163.3181 and 163.3184 of the *Florida Statutes*, and chapter 9J-11 of the *Florida Administrative Code*. Prior to the 1993 law,<sup>46</sup> plans and amendments were effective and governed the adoption of land development regulations and the issuance of development orders immediately upon adoption.<sup>47</sup> Now, however, plan amendments are not effective until the issuance of a final order by the DCA or when the Administration Commission ("Commission") finds the amendment to be "in compliance."<sup>48</sup> It is important to note that chapter 163 of the *Florida Statutes* does not give the state, either through the DCA or through the governor and cabinet, the authority to adopt, repeal, amend, or render ineffective, an adopted plan or plan amendment. The "teeth" of the Act is in the authority of the governor and cabinet to levy "sanctions." These sanctions are mostly financial and are levied against a local government which either does not adopt a plan that is in compliance, or which adopts an amendment which causes its plan to lose compliance.<sup>49</sup>

The commission may order that the local government is not eligible for grants administered under certain programs, including the Florida Small Cities Community Development Block Grant Program; the Florida Recreation Development Assistance Program; and revenue sharing. In addition, the commission may direct the Trustees of the Internal Improvement Trust Fund to consider the noncompliance of the plan when determining whether to issue permits under section 161.053 of the *Florida Statutes*. Sanctions can also include ordering state agencies not to provide funds to improve roads, bridges, or water systems within the boundaries of those local governments which have not complied with the Growth Management Act in the plan adoption and amendment stages.<sup>50</sup>

The governor and cabinet may impose economic sanctions against the local government if they determine that the plan or amendment is out of compliance.<sup>51</sup> These sanctions take the form of ineligibility for state grants under a number of specific programs. Any funds so withheld must be deposited into the Growth Management Trust Fund created by section

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46. Act of May 11, 1993, ch. 93-206, 1993 Fla. Laws 1887.

47. FLA. STAT. § 163.3194(1)(a) (1995).

48. *Id.* § 163.3189(2)(a).

49. *Id.* § 163.3184(11).

50. *Id.* § 163.3184(11)(a).

51. *Id.*

186.911 of the *Florida Statutes*. An additional sanction can be a direction to The Department of Natural Resources (“DNR”) that the noncompliance be “a consideration” when deciding whether to grant coastal permits or interests in sovereignty lands.<sup>52</sup>

The effect of a recommended or final order finding a plan amendment not in compliance is that any previous plan provisions are not reinstated. Only a local government can adopt a legally effective plan provision.<sup>53</sup> A local government may choose to make its amendment effective and subject itself to the imposition of sanctions after the entry of a final order of noncompliance. This decision must be made by resolution at a duly noticed public meeting.<sup>54</sup>

#### 4. Public Notice

The local governing body is required to hold at least two advertised public hearings regarding a comprehensive plan or plan amendment.<sup>55</sup> The first public hearing must be held at the transmittal stage while the second public hearing must be held at the plan adoption stage.<sup>56</sup> A comprehensive plan may be adopted only after the required public hearings have been held and advertised according to section 163.3184(15) of the *Florida Statutes*. For plan amendments which will change the allowable use of land, the notice requirements include no less than a quarter-page advertisement in a standard size newspaper of general interest and with general distribution in the county. The advertisement may not be placed where legal notices and advertisements appear.<sup>57</sup>

### C. The Legal Standard

#### 1. “Compliance”

The legal standard for judging the content of a plan or plan amendment is that it must be “in compliance” with chapter 163 of the *Florida Statutes*.<sup>58</sup> Under the terms of the Act, a plan or amendment is “in compli-

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52. FLA. STAT. § 163.3184(11)(b).

53. *Sheridan v. Lee County*, 16 Fla. Admin. L. Rep. 654, 722-23 (Div. of Admin. Hearings 1994).

54. FLA. STAT. § 163.3181(2).

55. *Id.* § 163.3184(15)(b).

56. *Id.* § 163.3184(15)(b)1.-2.

57. *Id.* § 163.3184(15)(c).

58. *Id.* § 163.3184(1)(b).

ance” if it is consistent with sections 163.3177 and 163.3178 of the *Florida Statutes*, the State Comprehensive Plan<sup>59</sup> as codified in chapter 187 of the *Florida Statutes*,<sup>60</sup> the relevant regional policy plan adopted by rule pursuant to section 186.508, and the Minimum Criteria Rule contained in chapter 9J-5 of the *Florida Administrative Code*.<sup>61</sup>

A local comprehensive plan will be considered consistent with the state plan and the applicable regional plan if the local plan, as amended, is “compatible with” and “furthers” those plans.<sup>62</sup> “Compatible with” means “not in conflict with” and “furthers” means “to take action in the direction of realizing . . . .”<sup>63</sup> In determining consistency with the state or regional plans, “the state or regional plan shall be construed as a whole and no specific goal or policy shall be construed or applied in isolation from the other goals and policies in the plan.”<sup>64</sup>

Plan amendments must be “in compliance” when judged individually and must not cause the plan as a whole to become out of compliance.<sup>65</sup> All plan amendments must meet the requirements of chapter 9J-5 of the *Florida Administrative Code*.<sup>66</sup> This was a big issue which arose in the context of a challenge by the DCA to FLUM amendments adopted by Dade County. The county argued that the amendments could be found out of compliance only if they had the effect of rendering the entire FLUM out of compliance. The DCA and citizen’s groups argued that a FLUM amendment for an individual parcel of land could be out of compliance as an individual planning decision, regardless of its impact on the rest of the FLUM. While the hearing officer sided with the county, the parties subsequently settled and the governor and cabinet entered a stipulated final order. That order and the other orders of the Commission, as well as subsequently enacted legislative changes, make it clear that the department’s interpretation is the law. However, the plan in its entirety must still be

59. FLA. STAT. ch. 187 (1995).

60. FLA. STAT. § 186.508 (1995).

61. FLA. ADMIN. CODE ANN. ch. 9J-5 (1995).

62. FLA. STAT. § 163.3177(10)(a).

63. *Id.*

64. *Id.*; see also *Department of Community Affairs v. City of Jacksonville*, No. 90-7496GM, 1994 Fla. ENV LEXIS 53, at \*41 (Dep’t of Community Affairs Feb. 24, 1994).

65. See the following cases for examples of when an amendment is not in compliance: *Cooper v. City of St. Petersburg Beach*, 14 Fla. Admin. L. Rep. 3589, 3590 (Admin. Comm’n 1992); *Department of Community Affairs v. St. Lucie County*, 15 Fla. Admin. L. Rep. 4744, 4745 (Dep’t of Community Affairs 1993); *Pope v. City of Cocoa Beach*, 12 Fla. Admin. L. Rep. 4758 (Dep’t of Community Affairs 1990).

66. FLA. ADMIN. CODE ANN. IT. 9J-5.005(8), 9J-11.006(3) (1995).

considered in an amendment compliance review when judging the effect of textual changes to a plan.<sup>67</sup>

If a plan amendment is inconsistent with the existing comprehensive plan, chapter 163 of the *Florida Statutes*, rule 9J-5 of the *Florida Administrative Code*, the regional policy plan, or the state comprehensive plan, neither amendment nor the comprehensive plan, as amended, is in compliance with the Act.<sup>68</sup>

Compliance decisions are made based on the circumstances (as evidenced by the data and analysis) as they exist at the time the plan or amendment is adopted. A subsequent change in circumstances, or in the interplay of the plan's textual provisions with the plan's land use designations, or any other change in how the plan as a whole would be expected to operate, can cause a plan to lose compliance.

## 2. The Bottom Line: Sanctions

The Administration Commission was given the authority to levy sanctions against local governments for the complete failure to submit and adopt a comprehensive plan, and for adopting a plan that is not in compliance. The Commission has only the authority to impose economic sanctions or to require the noncompliance of a plan to be considered when the state is considering the issuance of permits necessary for coastal construction.<sup>69</sup>

There were three local governments which were sanctioned for failing to submit their plans for review.<sup>70</sup> In one of the earliest reported cases under the new Act,<sup>71</sup> the sanctions, and the statutory provision upon which they were based, were upheld against an unlawful delegation argument. In that case, the First District Court of Appeal held that the Commission, through a chapter 120.57(1) hearing process, may validly apply "incipient" policy concerning sanctions for three local governments which had failed to submit their plans on time.<sup>72</sup> The court ruled that the policies could be applied to the three municipalities, but remanded the case back to the commission to provide the municipalities an opportunity to challenge the

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67. Department of Community Affairs v. Lee County, 12 Fla. Admin. L. Rep. 3755, 3757 (Admin. Comm'n 1990).

68. FLA. STAT. §§ 163.3189(2)(a), .3184(10).

69. *Id.* § 163.3184(11).

70. See Florida League of Cities v. Administration Comm'n, 12 Fla. Admin. L. Rep. 1149 (Div. of Admin. Hearings 1990).

71. Florida League of Cities v. Administration Comm'n, 586 So. 2d 397 (Fla. 1st Dist. Ct. App. 1991).

72. See *id.* at 412-13.

underlying basis for the finding of non-submittal in a formal administrative hearing.

Although all plans are now in, this issue will become relevant again as local government EAR amendments become due for adoption.

Only two local governments, the City of Islandia<sup>73</sup> and Escambia County,<sup>74</sup> have ever been sanctioned for adopting a plan that was out of compliance with the Act.

#### D. *Exclusivity of Proceedings*

The Act clearly states that it has established the sole process for the adoption, amendment, and review of comprehensive plans.<sup>75</sup> The courts have respected this admonition. When Lee County tried to enjoin affected persons from challenging its amended plan, the circuit court ruled that only the hearing officer for the Division of Administrative Hearings (“DOAH”) had jurisdiction to decide whether the amendments were “substantially similar” to those which had been agreed to in a settlement agreement.<sup>76</sup> The court rejected the notion that the agreement was a contract which it could enforce and instead deemed it a stipulation of the parties which the hearing officer should abide by in his decision on the merits.<sup>77</sup> The First District Court of Appeal issued a related order that encouraged the hearing officer to take this approach.<sup>78</sup>

In another case, the First District Court of Appeals ruled that a circuit court had no jurisdiction to prevent the DOAH from conducting a compliance hearing under the Act.<sup>79</sup>

#### E. *The “Consistency” Requirement*

Once a comprehensive plan is adopted, all development and actions in regard to development orders taken by government agencies regarding land

73. Department of Community Affairs v. City of Islandia, 12 Fla. Admin. L. Rep. 3132, 3134-35 (Admin. Comm’n 1990).

74. Department of Community Affairs v. Escambia County, No. 92-010, 1992 Fla. ENV LEXIS 115, at \*244 (Admin. Comm’n July 22, 1992).

75. FLA. STAT. § 163.3211.

76. Lee County v. Department of Community Affairs, No. 91-6639 (Fla. 20th Cir. Ct. Feb. 10, 1992).

77. *Id.*

78. Department of Community Affairs v. Lee County, 588 So. 2d 272 (Fla. 1st Dist. Ct. App. 1991).

79. Department of Community Affairs v. Escambia County, 582 So. 2d 1237 (Fla. 1st Dist. Ct. App. 1991).



covered by the plan must be consistent with the plan.<sup>80</sup> Therefore, all decisions concerning specific developments must be consistent with the plan as a whole. This essentially means that goals, objectives, and policies included in an adopted plan are binding, not merely advisory. This is demonstrated by the express terms of the Act, including the definitions of "goal," "objective," and "policy," and by sections 163.3177(2), and 163.3194 of the *Florida Statutes*, and rule 9J-5.006 of the *Florida Administrative Code*. All adopted provisions in a plan are legally enforceable, and not merely aspirational statements. To implement this requirement, courts will review consistency challenges to a development order of consistency with "strict scrutiny."<sup>81</sup> This strict scrutiny review considers all parts of an adopted plan, including the FLUM, the density and intensity standards, and the textual goals, objectives and policies.<sup>82</sup> The consistency requirement, which has caused something of a revolution in land use law in Florida, will be discussed in detail below.

## F. *Administrative Proceedings*

### 1. Initiation of Proceedings

If the plan or amendment is determined by the DCA to be not in compliance, the DCA is required to file a petition with the DOAH for the assignment of a hearing officer and scheduling of a formal administrative hearing.<sup>83</sup> Affected persons may intervene in support of the plan, in support of the DCA's challenge to the plan, or raise new issues challenging the plan. Any new issues must be raised within twenty-one days of the publication of the DCA's Notice of Intent.<sup>84</sup> Under the DOAH's procedural rules, intervenors not raising new issues may intervene up to five days prior to hearing.

If the DCA finds the plan or amendment to be "in compliance," affected persons may challenge that determination by filing a petition for administrative hearing with the DCA within twenty-one days of publication of the notice.<sup>85</sup>

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80. FLA. STAT. § 163.3194(1)(a).

81. Board of County Comm'rs v. Snyder, 627 So. 2d 469, 475 (Fla. 1993).

82. B.B. McCormick & Sons, Inc. v. City of Jacksonville, 559 So. 2d 252 (Fla. 1st Dist. Ct. App. 1990); Machado v. Musgrove, 519 So. 2d 629, 632 (Fla. 3d Dist. Ct. App. 1987).

83. FLA. STAT. § 163.3184(10)(a).

84. *Id.*

85. *Id.* § 163.3184(9)(a).

The following charts were printed in the Miami Herald on April 18th, 1995 in commemoration of Earth Day's 25th Anniversary. They depict the rapid increases of land development and the conversion of undeveloped land to agriculture in south Florida from 1900 to 1995.

**LEGEND**



Native plant communities



Other agriculture / pastureland



Canals

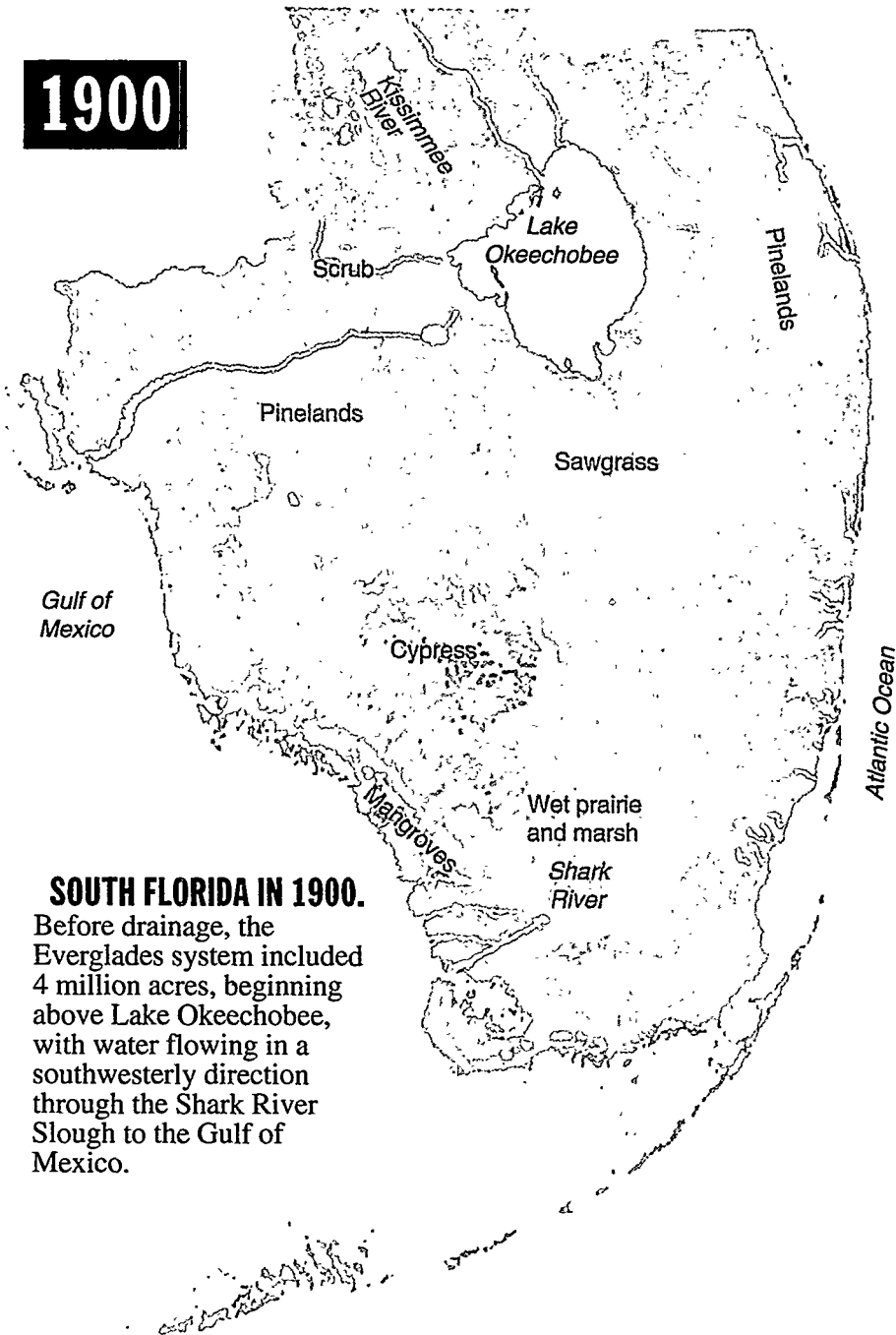


Urban areas



Everglades agricultural area (Sugar cane)

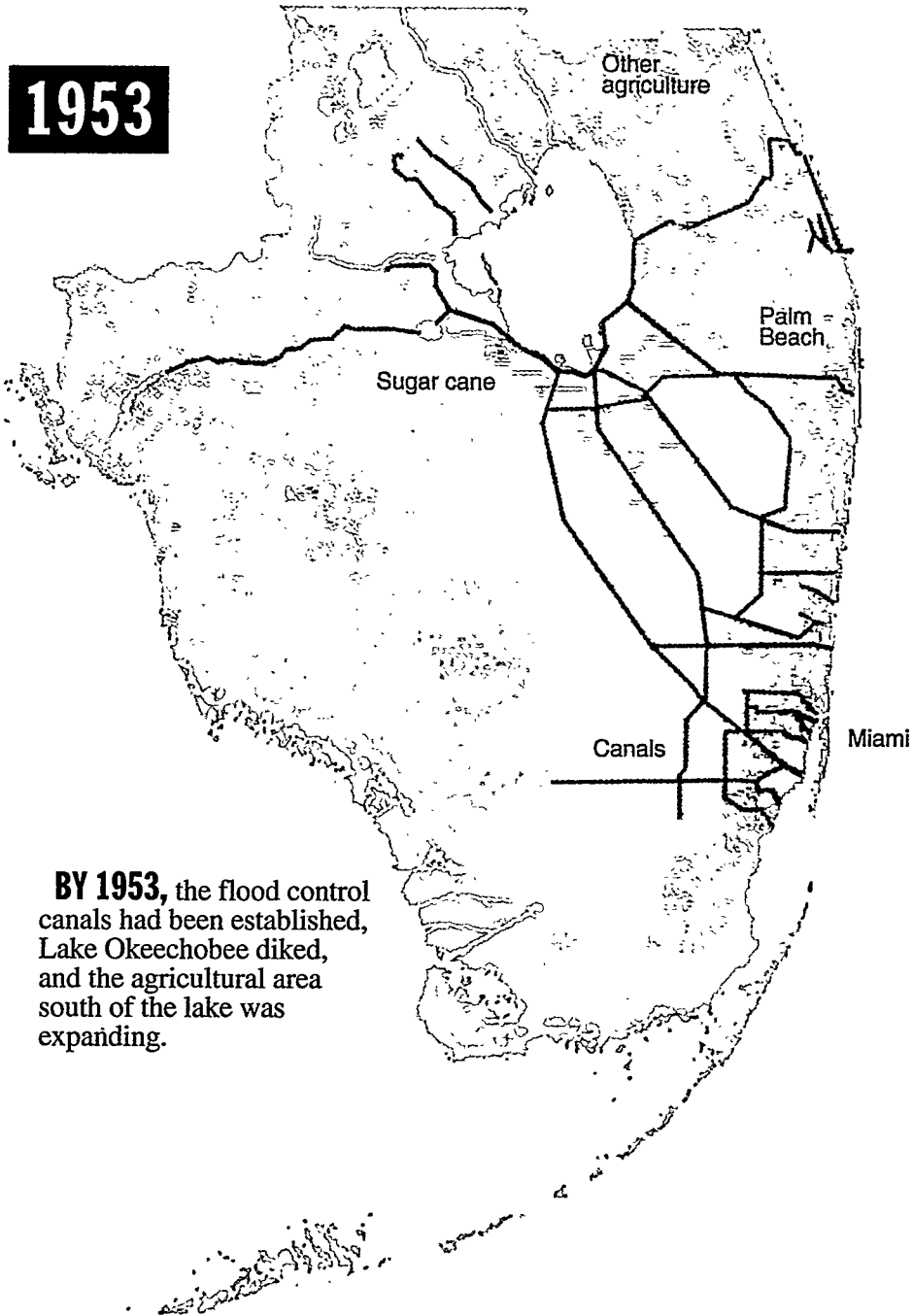
**1900**



**SOUTH FLORIDA IN 1900.**

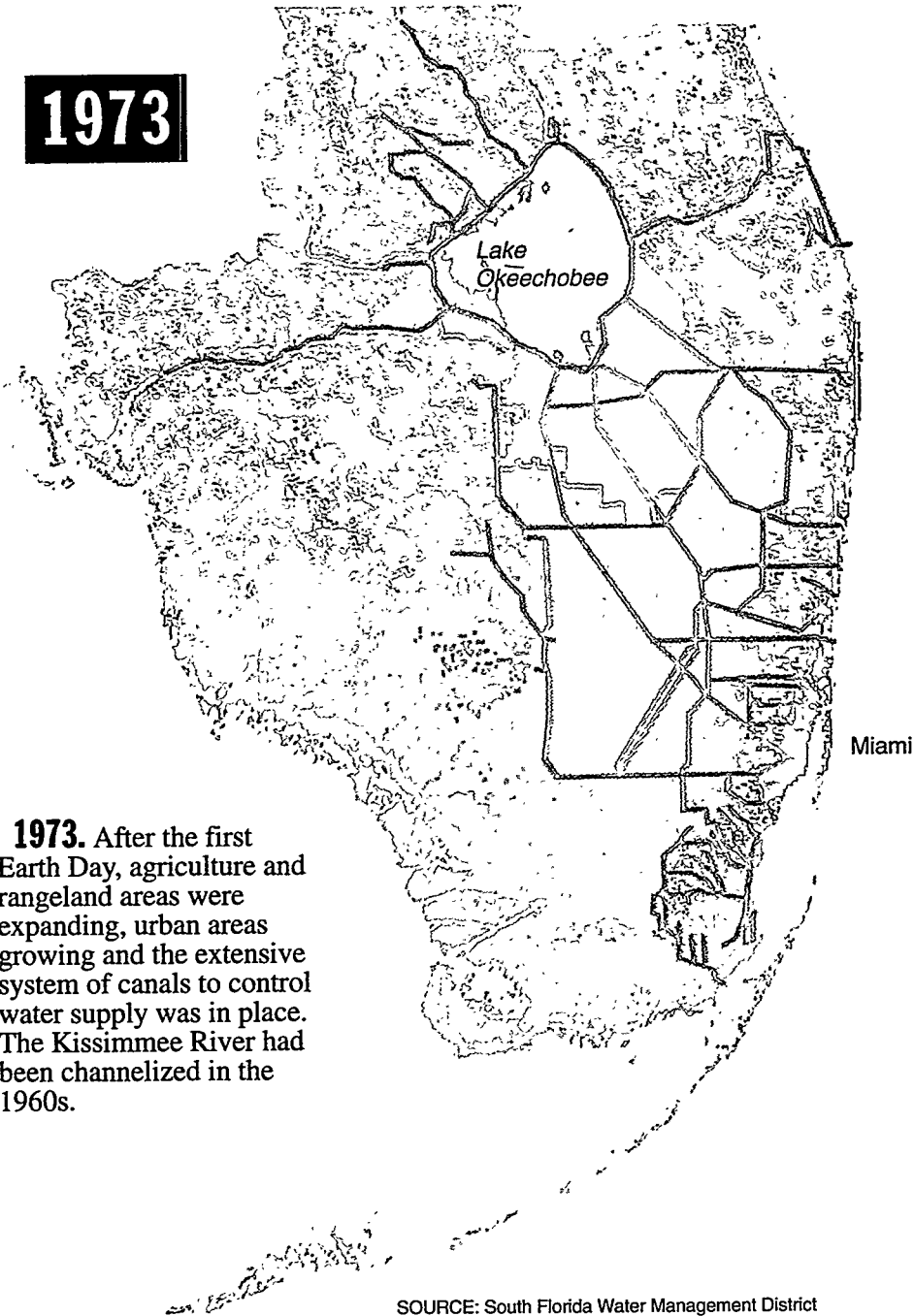
Before drainage, the Everglades system included 4 million acres, beginning above Lake Okeechobee, with water flowing in a southwesterly direction through the Shark River Slough to the Gulf of Mexico.

**1953**



**BY 1953**, the flood control canals had been established, Lake Okeechobee diked, and the agricultural area south of the lake was expanding.

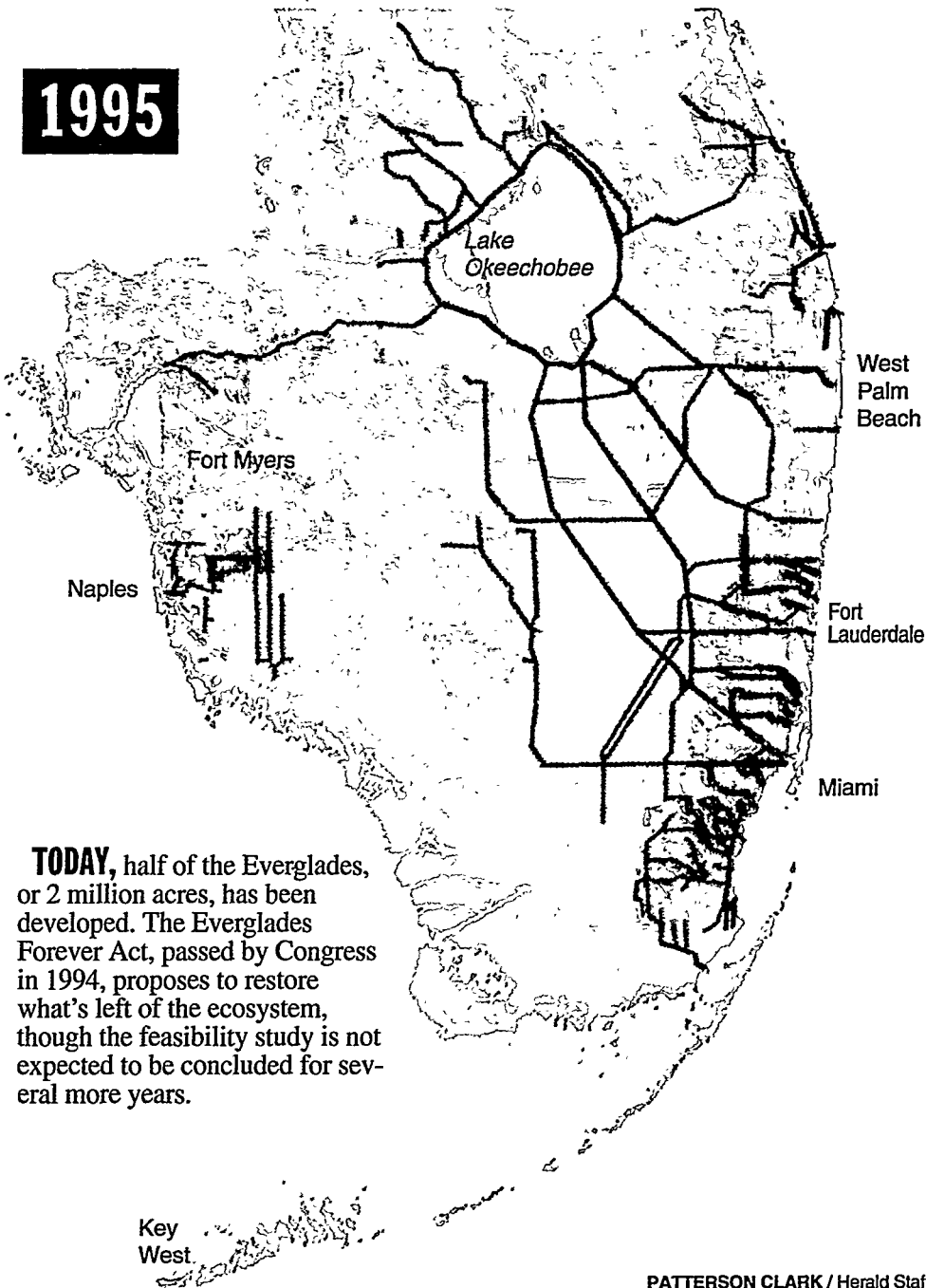
**1973**



**1973.** After the first Earth Day, agriculture and rangeland areas were expanding, urban areas growing and the extensive system of canals to control water supply was in place. The Kissimmee River had been channelized in the 1960s.

SOURCE: South Florida Water Management District

**1995**



**TODAY**, half of the Everglades, or 2 million acres, has been developed. The Everglades Forever Act, passed by Congress in 1994, proposes to restore what's left of the ecosystem, though the feasibility study is not expected to be concluded for several more years.

PATTERSON CLARK / Herald Staff



## 2. Standing/Intervention

In enacting the Act, the legislature expressed its intent “that the public participate in the comprehensive planning process to the fullest extent possible.”<sup>86</sup> This intent is reflected in the broad standing allowances that are provided for in the Act.

Section 163.3184(1)(a) of the *Florida Statutes* which governs standing to initiate and intervene in “compliance” proceedings, reads as follows:

“Affected person” includes the affected local government; persons owning property, residing, or owning or operating a business within the boundaries of the local government whose plan is the subject of the review; and adjoining local governments that can demonstrate that the plan or plan amendment will produce substantial impacts on the increased need for publicly funded infrastructure or substantial impacts on areas designated for protection or special treatment within their jurisdiction. Each person, other than an adjoining local government, in order to qualify under this definition, shall also have submitted oral or written comments, recommendations or objections to the local government during the period of time beginning with the transmittal hearing for the plan or plan amendment and ending with the adoption of the plan or plan amendment.

The administrative and judicial interpretations of this standing provision have generally been read broadly. For instance, an Administration Commission final order ruled that this list of persons or entities, who are included within the definition of “affected person,” is not exclusive, and granted standing to an owner of property directly adjacent to property covered by the Plan.<sup>87</sup> The Commission found that this owner, whose property would have been adversely affected by the Plan, (i.e., adverse traffic impacts, adverse impact on natural resources, increased hurricane evacuation times, etc.) had standing.<sup>88</sup> Furthermore, a nonprofit public interest corporation which was established to promote sound planning has been found to be an “affected person” both as a corporation which does business in various local governments and as a representative of its members who would have

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86. *Id.* § 163.3181(1).

87. *Pope v. City of Cocoa Beach*, 13 Fla. Admin. L. Rep. 2867, 2889 (Admin. Comm’n 1991).

88. *Id.*



standing to bring such a challenge in their own right.<sup>89</sup> The Commission found that the organization's members did not have to submit oral or written objections themselves in order for the organization to have standing. In addition, the term "[a]ffected persons" has been read to include unincorporated associations.<sup>90</sup>

There are two decisions which can be read to inhibit overly-broad interpretations of the Act's standing provisions. A 1990 recommended order adopts a hearing officer's holding that a business, for the purpose of this section, is an activity engaged in for a pecuniary gain or the other compensation.<sup>91</sup> More recently, the First District Court of Appeal ruled that holding periodic meetings with its members and appearing at local government public hearings does not constitute the conduct of a business in a local jurisdiction which would confer standing on a public interest group as a party in its own right.<sup>92</sup> Rather, the organization will have to base its standing on the associational standing which has developed under chapter 120. In addition, it must actually prove on the record its allegations that it has members who reside in, own property in, or operate a business within a local jurisdiction.

Finally, nothing in section 163.3184(1)(a) of the *Florida Statutes* prohibits an affected person from raising issues in a section 163.3184 proceeding that he or she did not raise in his or her oral or written objections during the local government plan review and adoption proceedings. Once an affected person establishes standing by showing that he or she submitted timely objections, there is no basis for estopping him or her from raising additional issues in the section 163.3184 proceeding.<sup>93</sup>

89. *Department of Community Affairs v. Board of County Comm'rs of Monroe County*, 11 Fla. Admin. L. Rep. 4004 (Dep't of Community Affairs 1989) (granting 1000 Friends of Florida's Petition to Intervene).

90. *See Falk v. City of Miami Beach*, 12 Fla. Admin. L. Rep. 4548 (Dep't of Community Affairs 1990); *Southwest Ranches Homeowners Ass'n v. Broward County*, 502 So. 2d 931, 934-35 (Fla. 4th Dist. Ct. App. 1987).

91. *Department of Community Affairs v. City of Islandia*, 12 Fla. Admin. L. Rep. 3136, 3143 (Div. of Admin. Hearings 1990).

92. *St. Joe Paper Co. v. Department of Community Affairs*, 657 So. 2d 27, 29 (Fla. 1st Dist. Ct. App. 1995).

93. FLA. STAT. § 163.3184(8) (limiting notice of intent issued by the DCA on a plan or plan amendment to issues that the DCA raised earlier in its ORC Report). *See Manasota 88 v. Department of Community Affairs*, 14 Fla. Admin. L. Rep. 1447 (Div. of Admin. Hearings 1992) (holding that petitioner failed to prove standing to initiate formal proceedings). Note that this opinion was filed prior to the 1992 amendments to § 163.3184(10)(a).

### 3. Indispensable Parties

A petition challenging the DCA's determination that a local government plan or amendment is "in compliance" must include both the DCA and the local government as respondents.<sup>94</sup>

### 4. Standard of Proof

When the DCA is challenging a plan or amendment it, and parties on its side, must prove its case by a "preponderance of the evidence."<sup>95</sup> When a plan or amendment is initially determined by the DCA to be in compliance, the challenger must meet a more difficult standard of proof—that the compliance determination is not "fairly debatable."<sup>96</sup> In all cases, the issue of whether a plan or amendment is internally consistent is governed by the "fairly debatable" rule.<sup>97</sup> The "fairly debatable" standard is "a deferential one that requires affirmance of a local government's action if reasonable persons could differ as to its propriety."<sup>98</sup> "If reasonable minds could conclude that the [city's] determination that its plan amendment is 'in compliance' is correct, the plan amendment must be found to be 'in compliance.'"<sup>99</sup>

### 5. The Hearing

Administrative hearings in "compliance" cases are full-blown trials similar to some bench trials in circuit court. Expert witnesses and evidence are submitted and subject to cross-examination and rebuttal. The *Florida Evidence Code* and other procedural requirements are loosely adhered to, and the atmosphere is generally more relaxed than in a formal courtroom setting. The plan or amendment and the supporting data and analysis are

94. *Monroe County v. Department of Community Affairs*, No. 93-6448GM (Div. of Admin. Hearings Nov. 30, 1993) (order granting Motion to Dismiss). In *Monroe*, a hearing officer dismissed the petition of Monroe County challenging the DCA's determination that the City of Key West's plan was in compliance on the basis that the city was an indispensable party. *Id.* The petition was dismissed with leave to amend. *Id.*

95. FLA. STAT. § 163.3184(10)(a).

96. *Id.*

97. *Id.*

98. *B & H Travel Corp. v. Department of Community Affairs*, 602 So. 2d 1362, 1365 (Fla. 1st Dist. Ct. App. 1992); *see also Environmental Coalition of Fla., Inc. v. Broward County*, 586 So. 2d 1212, 1215 n.4 (Fla. 1st Dist. Ct. App. 1991).

99. *Boaz Bar-Navon v. Brevard County*, 15 Fla. Admin. L. Rep. 2151, 2162 (Div. of Admin. Hearings 1993).

typically the most important documents introduced into evidence, however, other relevant information may also be admitted.

## 6. Evidence

It is not necessary to submit evidence other than the plan or amendment itself to support a challenge to a plan or amendment.<sup>100</sup> Contents of settlement discussions and proposed settlement positions are not relevant evidence in a compliance hearing.<sup>101</sup> Plans must be evaluated solely based on what they allow or disallow. Deed restrictions are ineffective to demonstrate that a parcel will develop at less than the maximum allowable density under the plan.<sup>102</sup>

### G. Post-Hearing Procedure

After the close of the hearing, each party may submit to the hearing officer a "proposed" recommended order which includes the findings of fact (based on references to specific evidence or testimony) and conclusions of law that the party thinks the hearing officer should make. The hearing officer's recommended order specifically rules upon each party's proposed findings of fact.<sup>103</sup> When the recommended order is issued, its factual findings (e.g., parcel x is a habitat for woodpeckers) are binding upon the agency issuing the final order, but, its legal conclusions (e.g. the land use element is consistent with section 163.3177(6) of the *Florida Statutes*) may be changed by the final order.

In cases where the DCA's initial determination is that the plan or amendment is not in compliance, the recommended order is forwarded to the governor and cabinet, sitting as the Administration Commission, for the entry of a final order.<sup>104</sup> In cases where the DCA's initial determination was that the plan or amendment was in compliance, the recommended order is forwarded to the DCA for review. If, after reviewing the recommended order, the DCA determines that the plan or amendment is in compliance, the

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100. *Sheridan v. Lee County*, 16 Fla. Admin. L. Rep. 654 (Div. of Admin. Hearings 1994).

101. *Department of Community Affairs v. Escambia County*, No. 92-010, 1992 Fla. ENV LEXIS 115, at \*74 (Admin. Comm'n July 22, 1992).

102. *Pope v. City of Cocoa Beach*, 12 Fla. Admin. L. Rep. 4758 (Div. of Admin. Hearings 1990).

103. *See Wong v. Career Serv. Comm'n*, 371 So. 2d 530, 531 (Fla. 1st Dist. Ct. App. 1979).

104. FLA. STAT. § 163.3184(10).

DCA will enter a final order to that effect within thirty days of the issuance of the recommended order.<sup>105</sup> If the DCA determines the plan or amendment is out of compliance, the DCA will send the recommended order to the governor and cabinet for entry of the final order.<sup>106</sup> Whenever a recommendation of noncompliance is forwarded to the Commission, the DCA must provide a recommendation on remedial actions and sanctions within fifteen days.<sup>107</sup> Unless the time requirement is waived or extended by the parties, the Commission must enter a final order within ninety days of receipt of the recommended order.<sup>108</sup>

#### H. *The Evaluation and Appraisal Process*

Under the Act, planning is an ongoing and continuing process.<sup>109</sup> This is reflected in the requirement that local governments prepare Evaluation and Appraisal Reports (“EAR”) to assess the extent to which the plan’s goals, objectives, and policies have been met, and to recommend necessary changes to the plan to react to changing circumstances. After the submission of the EAR, each local government must adopt an amendment or set of amendments to the plan based upon the EAR. While the EAR itself is subject only to a sufficiency, but not a compliance, review, the amendments must be in compliance with the Act and based upon the EAR. The first EAR report was due to be submitted to the DCA on November 1, 1995.<sup>110</sup> Thereafter, an EAR must be prepared and submitted every five years.<sup>111</sup>

#### I. *Significant Substantive Issues: Data and Analysis*

##### 1. Generally

All elements in a comprehensive plan, including “all goals, objectives, policies, standards, findings, and conclusions” must be “clearly based” upon

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105. *Id.* § 163.3184(9)(b).

106. *Id.* § 163.3184(10).

107. FLA. ADMIN. CODE ANN. r. 28-39.005(1) (1995).

108. *Id.* at r. 28-39.005(3).

109. FLA. STAT. § 163.3191(1).

110. FLA. ADMIN. CODE ANN. r. 9J-33.005 (1995).

111. The requirements for EARs and EAR amendments are specified in § 163.3191 of the *Florida Statutes* and chapter 9J-33 of the *Florida Administrative Code*.

relevant and appropriate data.<sup>112</sup> This support data is used in the determination of compliance and consistency. This compliance review requires an evaluation of “whether the data [was] collected and applied in a professionally acceptable manner.”<sup>113</sup> The science/art of planning fundamentally requires that data be gathered and analyzed before determining what the plan should be. Thus, an adopted plan was easily found to be not in compliance when the City Commission first voted to designate the entirety of its jurisdiction (which consisted almost entirely of submerged Biscayne Bay bottom) as appropriate for residential development at six units per acre, and then hired a consultant to prepare a plan for submittal to the DCA.<sup>114</sup>

The data used shall be the best available existing data.<sup>115</sup> Appropriate data is the best data, or the most specific data, and what is appropriate for any case will vary with the nature of the amendment. The discretion which local governments have under the Act includes the ability to determine which two or more professionally acceptable data sources on the same issue to use as the basis for a plan or amendment.<sup>116</sup> However, if an uncontroverted, professionally acceptable source of information on a relevant planning matter exists, the “best available data” requirement means that a plan, and subsequently a compliance decision, must consider and be based on that information. Essentially the requirement is a “call to action” which requires a local government to react in a meaningful way to that data which does exist; it does not allow a local government to wholly fail to implement any planning strategy on the basis that more data may be forthcoming in the future.<sup>117</sup>

Chapter 9J-5 of the *Florida Administrative Code* places great emphasis on the need for scrutiny of data and analysis to support an assumption that a particular strategy in a plan is reasonably calculated to work. For example, the *Code* requires that “[a]ll background data, studies, surveys, analyses and inventory maps not adopted as part of the comprehensive plan . . . be available for public inspection while the comprehensive plan is being considered for adoption and while it is in effect.”<sup>118</sup> The *Code* also

112. FLA. STAT. § 163.3177(8), (10)(e); FLA. ADMIN. CODE ANN. r. 9J-5.005(2)(a) (1995).

113. FLA. ADMIN. CODE ANN. r. 9J-5.005(2)(a) (1995).

114. Department of Community Affairs v. City of Islandia, 12 Fla. Admin. L. Rep. 3132 (Admin. Comm’n 1990).

115. FLA. ADMIN. CODE ANN. r. 9J-5.005(2)(c) (1995).

116. FLA. STAT. § 163.3177(10)(e).

117. See Department Community Affairs v. Monroe County, No. 91-1932GM, 1995 Fla. ENV LEXIS 129, at \*2 (Admin. Comm’n 1995).

118. FLA. ADMIN. CODE ANN. r. 9J-5.005(1)(c) (1995).

requires that “[a]ll goals, objectives, policies, standards, findings and conclusions within the comprehensive plan and its support documents . . . shall be based upon relevant and appropriate data.”<sup>119</sup> Where underlying data is crucial to a determination as to how a goal, objective, or policy will operate, such data must be submitted for a compliance determination or administrative hearing.<sup>120</sup>

The Act contemplates that the level of required specificity and detail of data and analysis is to be based upon a flexible standard applied depending upon the appropriate circumstances. It requires the district courts to take into account the five factors in rule 9J-5.002(2) as it “applies the rule in specific situations with regard to the detail of the data and analysis required.”<sup>121</sup> As a whole, the statutory and rule requirements concerning data and analysis clearly indicate that the type of required data will vary depending on the relevant planning issues and circumstances.<sup>122</sup>

## 2. Requirements for Plan Amendments

No language in chapter 163 of the *Florida Statutes* or chapter 9J-5 of the *Florida Administrative Code* absolutely requires the collection of new data and analysis to support plan amendments, unless the local government annexes land over which it has not previously exercised planning jurisdiction. The courts have expressly recognized that data and analysis may support more than one land use designation.<sup>123</sup>

Although the Act does not require site-specific information gathering as part of the review of a plan amendment, such information, when it is available, must be considered. When Broward County’s entire plan was challenged based on an allegedly deficient wetland map, the hearing officer

119. *Id.* at r. 9J-5.005(2)(a).

120. *See Sheridan v. Lee County*, 15 Fla. Admin. L. Rep. 654, 723-24 (Div. of Admin. Hearings 1994).

121. FLA. STAT. § 163.3177(10)(i).

122. In addition to the important substantive data and analysis requirements, plans must include a number of additional elements. Plans must also:

1. contain an assessment of the impacts of development based on the proposed adverse impacts on water quality as a result of facilities proposed in the plan;
2. contain an objective addressing the protection of the functions of natural drainage features; and
3. contain a policy for “[l]imiting the specific and cumulative impacts of development or redevelopment upon wetlands, water quality, water quantity, [and] wildlife habitat.” FLA. ADMIN. CODE ANN. r. 9J-5.011(1)(f)2., (2)(b)5., 9J-5.012(2)(b), (3)(c)1. (1995).

123. *Wilson v. City of Cocoa*, 13 Fla. Admin. L. Rep. 3848 (Dep’t of Community Affairs 1991).

found that reliable site specific data concerning each wetland did not exist and upheld the plan.<sup>124</sup> The city's failure to base the plan on incomplete information was justified.

A challenge to a set of map amendments adopted by Dade County highlights this issue. When Dade County adopted the amendments, site specific information concerning the three parcels at issue was available. Dade County's Planning Department ("Department") explicitly analyzed this data, which was transmitted to the Department along with the adopted amendments. During the review of the amendment, the Department found the amendments were not in compliance and brought an administrative challenge. The hearing officer, after making findings of fact that were favorable to those proposed by the Department, and its co-parties concluded as a matter of law that consideration of site specific information was not required and that an amendment was objectionable only if it caused the entire comprehensive plan to come out of compliance. This recommendation was inconsistent with previous recommended and final orders which had interpreted the Act.<sup>125</sup> The parties, however, reached a settlement before the case was heard by the Administration Commission, which subsequently entered a Stipulated Final Order stating that the Recommended Order had no effect.

The most relevant and important case on the issue of admissibility of evidence in a compliance proceeding is *Department of Community Affairs v. St. Lucie County*.<sup>126</sup> In *St. Lucie County*, the hearing officer agreed with the county that information concerning the effect of previously issued development orders on the actual remaining supply of land was relevant to the compliance review.<sup>127</sup> This information concerned areas of the county which had in fact received development for densities which were lower than those allowed on the face of the plan. These prior approvals reduced the number of dwelling units available for development approval under the plan. This evidence was admitted and considered, although it was not included in the plan, or its data and analysis, because it revealed the "reality" of the

124. *Sunshine Ranches Homeowner's Ass'n v. Broward County*, 12 Fla. Admin. L. Rep. 3545, 3567 (Dep't of Community Affairs 1990), *aff'd sub nom.* *Environmental Coalition of Fla., Inc. v. Broward County*, 586 So. 2d 1212, 1213 (Fla. 1st Dist. Ct. App. 1991).

125. See *Department of Community Affairs v. Sarasota County*, No. 91-6018GM, 1993 Fla. ENV LEXIS 6, at \*1 (Admin. Comm'n January 26, 1993); *Department of Community Affairs v. St. Lucie County*, 15 Fla. Admin. L. Rep. 4744 (Div. of Admin. Hearings 1993); *Pope v. City of Cocoa Beach*, 13 Fla. Admin. L. Rep. 2867 (Admin. Comm'n 1991). These cases have held that amendments must be supported by data and analysis.

126. 15 Fla. Admin. L. Rep. 4748, 4750 (Div. of Admin. Hearings 1993).

127. *St. Lucie County*, 15 Fla. Admin. L. Rep. at 4763.

land supply/demand issue.<sup>128</sup> On the merits, the hearing officer found that the previously issued development orders had not reduced the amount of available land to an acceptable amount.<sup>129</sup> The opinion however, makes it clear that while compliance decisions are to be based upon what a plan or plan amendment allows on its face, data about the underlying situation must also be considered.

A 1991 order of the DCA described the proper relationship between plan amendments and the data and analysis requirements. Every plan amendment, of any scope or impact, need not solely comply with every data, analysis, goal, objective, and policy requirement. However, each amendment, as a distinct planning decision, must comply with each requirement which it implicates, “[t]he nature of the criterion and the plan amendment are critical. For instance, all plan provisions, including amendments, must be supported by data and analysis. A plan amendment that is unsupported by the data and analysis is inconsistent with this criterion.”<sup>130</sup>

### 3. “Professionally Acceptable” Standard

A Declaratory Statement issued by the DCA to Clay County discussed the requirement that data be gathered and applied in a professionally acceptable manner, and found that the county’s population projections failed to meet this standard.<sup>131</sup> The reason for this determination is discussed below.

### 4. Population Projections

Chapter 9J-5 states that a local government must base its population projections upon those provided by the Bureau of Business and Economic Research at the University of Florida (“BEER”) unless it can demonstrate that its own projections are also professionally acceptable. The Clay County population projections were not professionally acceptable because they did not identify the source of baseline data, describe methodology, or justify departure from the BEER projections. Also, the population projections were

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128. *Id.* at 4776.

129. *Id.* at 4777.

130. *Wilson v. City of Cocoa*, 13 Fla. Admin. L. Rep. at 3848 (Dep’t of Community Affairs 1991).

131. *Clay County v. Department of Community Affairs*, 13 Fla. Admin. L. Rep. 1457, 1462 (Dep’t of Community Affairs 1991).



based on subjective estimates, not objective data, and contained mathematical errors.<sup>132</sup>

A local government is not required to update its population projections every time it amends its FLUM. Between the adoption of the original plan and the submittal of its EAR, a local government may amend its plan without having to base the amendment on the 1990 Census data.<sup>133</sup>

## 5. Natural Resource Maps

The First District Court of Appeal, in *Environmental Coalition of Florida v. Broward County*,<sup>134</sup> found a wetland's map was "based upon the best available data" even though it was incomplete because no complete map existed at the time of plan adoption and a map proffered by a challenger was justifiably rejected as unreliable.<sup>135</sup> This case stands for the proposition that a comprehensive plan should be based on whatever data a local government does have, even if that data is not complete.<sup>136</sup> In this case, an environmental group challenged the plan alleging that the wetlands map was not based on "the best available data."<sup>137</sup> The group wanted the county to adopt a map based on the findings of a local botanist with whom they had consulted. However, the map received strong criticism from the commenting agencies. Therefore, the County Commission determined that the map was unreliable and instead relied on an incomplete map prepared by the county's Planning Council.

The hearing officer, and subsequently the appellate court, found that since the county did not have maps depicting wetlands the county had reasonably rejected the environmental consultant's map as unreliable.<sup>138</sup> Thus, the county acted reasonably in adopting the incomplete wetland's map along with a policy which committed the county to conduct further studies and supplement the map.<sup>139</sup> The court found that the hearing officer's factual findings clearly explained why the county had logically rejected certain data based on the "[c]ounty's inability to obtain additional reliable

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132. *Id.*

133. 1000 Friends of Fla. v. City of Daytona Beach, 16 Fla. Admin. L. Rep. 2445, 2454 (Div. of Admin. Hearings) (recommended order), *aff'd*, 16 Fla. Admin. L. Rep. 2459 (Dep't of Community Affairs 1994) (final order).

134. 586 So. 2d 1212 (Fla. 1st Dist. Ct. App. 1991).

135. *Id.* at 1216.

136. *Id.*

137. *Id.* at 1213.

138. *Id.* at 1216.

139. *Environmental Coalition of Fla., Inc.*, 586 So. 2d at 1216.

data in a timely manner.”<sup>140</sup> Additionally, the methodology was not challenged and district courts “may not determine whether one accepted methodology is better than another.”<sup>141</sup>

## 6. Use of Data and Analysis at a Hearing

The requirement that plans and amendments be based on the “best available data” precludes the introduction into evidence of data that was not available at the time of adoption. However, “analysis” of preexisting data, even if first performed after the date of adoption, may be used as evidence in a compliance hearing. Data and analysis which is otherwise admissible need not have been expressly relied upon or addressed by the local government in adopting its plan. A district court’s final order, however, ruled that data generated after a plan is adopted cannot be used at a hearing to demonstrate that a plan violates the “best available data” requirement.<sup>142</sup> The order can be read to indicate that it applied to *analysis* as well, although the order did not refer to the recommended order discussed above. The order seems to suggest that “later-available” data and analysis can be used to demonstrate that the data and analysis employed by the local government was not collected or applied in a professionally acceptable manner.<sup>143</sup>

Where underlying data is crucial to a determination as to how a goal, objective, or policy will operate, such data must be submitted for a compliance determination or an administrative hearing.<sup>144</sup>

## 7. Land Supply/Demand

This issue is best understood and most relevant within the context of its role as the initial step in the future land use planing process and is therefore discussed under that heading below.

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140. *Id.*

141. *Id.*

142. *Zemel v. Lee County*, 15 Fla. Admin. L. Rep. 2735, 2739 (Dep’t of Community Affairs 1993).

143. *Id.* at 2738-39.

144. *Sheridan v. Lee County*, 16 Fla. Admin. L. Rep. 654, 722-23 (Div. of Admin. Hearings 1994).

### III. FUTURE LAND USE ELEMENT AND MAP

#### A. *Factors Affecting Land Use Decisions*

Possibly the most essential part of a comprehensive plan is the future land use element. The Act requires plans to include:

A future land use plan element designating proposed future general distribution, location, and extent of the uses of land for residential uses, commercial uses, industry, agriculture, recreation, conservation, education, public buildings and grounds, other public facilities, and other categories of the public and private uses of land. The future land use plan shall include standards to be followed in the control and distribution of population densities and building and structure intensities. The proposed distribution, location, and extent of the various categories of land use shall be shown on a land use map or map series which shall be supplemented by goals, policies, and measurable objectives.<sup>145</sup>

Future land uses are to be allocated “based upon surveys, studies, and data regarding the area, including the amount of land required to accommodate anticipated growth; the projected population of the area; the character of undeveloped land; the availability of public services; and the need for redevelopment.”<sup>146</sup> Specific data and analysis requirements in other sections of the statute supplement the general data and analysis requirement. chapter 9J-5, which concerns identification and analysis of natural resources and other areas with development constraints, the suitability of land for various uses, and the availability of facilities, services and infrastructure also supplements the general data and analysis requirement.<sup>147</sup>

Plans are, in turn, required to include goals, objectives, and policies which, among other requirements, protect, conserve and appropriately use natural resources and other areas with development constraints,<sup>148</sup> coordinate land uses with topography, soils, and the availability of infrastructure,<sup>149</sup> and provide for the compatibility of adjacent land uses.<sup>150</sup>

These requirements reveal an understanding that not all land is equally suitable for all uses and that undeveloped land cannot be assumed to be

145. FLA. STAT. § 163.3177(6)(a).

146. *Id.*

147. *See, e.g.*, FLA. ADMIN. CODE ANN. r. 9J-5.006(2)(a), (b), 9J-5.013(1) (1995).

148. FLA. STAT. § 163.3177(6)(d).

149. FLA. ADMIN. CODE ANN. r. 9J-5.006(3)(b)1 (1995).

150. *Id.* at r. 9J-5.006(3)(c)2.

available for a specific land use simply by virtue of the fact that it is vacant and previously zoned for such use.

The Act also includes a little known provision which has never been applied or interpreted, requiring all land uses identified on adopted FLUMs to be "consistent with applicable state laws and rules."<sup>151</sup> However, an interesting argument could be made that if a certain use could not receive a permit which is necessary under Florida law, such as an environmental resource permit under chapters 373 or 403, or a coastal development permit under chapter 161, then it should not be allowed in the plan.

## B. *The Role of FLUM: Does It "Reflect" the Plan's Goals, Objectives, and Policies?*

### 1. The "Multiplier" Issue

Future land uses are allocated based upon "surveys, studies, and data regarding the area, including, [among other things], the amount of land required to accommodate anticipated growth[.]"<sup>152</sup> This roughly translates into a requirement that future land uses demonstrate the "need" for a given amount any specific type of land use allowed in a plan or amendment. While this issue is discussed in greater detail below, a few basic issues should be discussed here.

First, maximum land use densities must be used to judge whether plan amendments are supported by data and analysis.<sup>153</sup> Therefore, the expressed intent or likelihood of the landowner to build at a lesser density, based on factors such as the surrounding densities or historic building at less than maximum, will not justify an analysis of the amendment based on a lower number. Only binding, actual restrictions in the plan itself can be considered.

Importantly, the Act does not establish the specific nexus which must exist between documented demand and the supply provided in the plan. In a technical memorandum published in the early stages of plan reviews, the DCA stated that once a plan allows more than 125% of the documented need, this may indicate that the required relationship does not exist.<sup>154</sup> Also, the DCA's view of plans adopted early in the process took this

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151. FLA. STAT. § 163.3177(6)(d).

152. *Id.* § 163.3177(6)(a); FLA. ADMIN. CODE ANN. r. 9J-5.006(2)(c) (1995).

153. *Sheridan v. Lee County*, 16 Fla. Admin. L. Rep. 654, 722-23 (Div. of Admin. Hearings 1994).

154. DEPARTMENT OF COMMUNITY AFFAIRS, TECHNICAL MEMO 11 (1989).

approach rather scrupulously, and the agency routinely sought to have local governments reduce densities outside of existing urbanized areas in order to reduce the "overall location." This produced some intense political and legal controversies as well as an impressive series of successful defenses of DCA's policies.<sup>155</sup> In later years, the DCA applied this requirement more liberally.

The clearest administrative order on the subject found a FLUM amendment increasing development potential from sixty-five units (clustering required) to 163 units (without clustering) on a 164-acre agricultural parcel outside of a proposed urban service area was unsupported by the data and analysis. There was currently three times the number of acres designated for residential development as were needed to accommodate projected needs.<sup>156</sup> This case, concerning St. Lucie County, held that a previously approved, currently existing oversupply of land must be considered when proposing amendments to increase density to avoid exacerbating the problem.

## 2. The FLUM Must "Reflect" Relevant Policies

The required link between the textual provisions of a plan and the actual land uses allowed on the ground is supplied by rule 9J-5.005(5)(b) which mandates that all maps depicting future conditions, including the FLUM, "reflect" the plan's goals, objectives, and policies. "The Future Land Use Map is a critical component of the plan. . . . [It] provides an essential visual representation of the commitment to uphold local comprehensive plan goals, objectives, and policies, as supported by appropriate data and analysis . . . ."<sup>157</sup>

Based on this rule, a challenge to Sarasota's plan was successful when the FLUM allowed extensive development on septic tanks in flood plains. This was found to be inconsistent with and not reflective of the plan's objective<sup>158</sup> to coordinate land uses with topography and soil types. The

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155. See, e.g., *Charlotte County v. Department of Community Affairs*, 12 Fla. Admin. L. Rep. 79, 88 (1990) (noting that relatively high densities in agricultural and rural areas prematurely converted land to urban uses); *Department of Community Affairs v. Escambia County*, No. 92-010, 1992 Fla. ENV LEXIS 115, at \*87 (Admin. Comm'n July 22, 1992).

156. *Department of Community Affairs v. St. Lucie County*, 15 Fla. Admin. L. Rep. 4744, 4746-47 (Dep't of Admin. Hearings 1993).

157. *Austin v. City of Cocoa*, No. 89-31, 1989 Fla. ENV LEXIS 147, at \*7 (Admin. Comm'n Sept. 29, 1989).

158. The plan was adopted in compliance with the requirement in FLA. ADMIN. CODE ANN. r. 9J-5.006(3)(b)1. (1995).

FLUM was not in compliance because, as a practical matter, it undermined the plan's stated objectives.

Similarly, a FLUM amendment which increased density on a 2.3 acre parcel to allow High Density Multi-Family Development within the Coastal High Hazard Area was inconsistent, beyond a fair debate, with an adopted objective to direct population concentration landward of the Coastal High Hazard Area ("CHHA"). The amendment was not in compliance despite the obvious possibility that the subject property or any of the other lands in the CHHA would not actually develop to the maximum densities allowed.<sup>159</sup> It was the potential for this to happen which caused the amendment to violate the Act.

In a case which was controversial for other reasons, a FLUM amendment which converted agricultural land outside of an Urban Service Boundary ("USB") to a residential use was not in compliance with rule 9J-5.006(3)(b)1 because it failed to reflect policies which called for discouraging urban sprawl, maintaining agricultural lands, promoting land use compatibility, and other objectives.<sup>160</sup> The amendment was contrary to those provisions and thus was not in compliance, even though the evidence did not prove that agricultural lands adjacent to the subject property would no longer be used for agricultural purposes upon the conversion of the subject property or that such a phenomenon had previously occurred in the county. The likelihood of such impacts was evidenced and recognized by objectives and policies in the plan.

The possibility or speculation that the property owner would choose not to develop the property for residential uses or that adjacent owners of agricultural land would not feel market pressure to convert their land could not save the amendment. The amendment constituted a planning decision which ran counter to the objectives and policies previously adopted in the plan and thus violated the Growth Management Act. Indeed, one of the main reasons the amendment was not in compliance was because it exacerbated a previously existing problem in the County. In this case, the existing problem was an oversupply of land for residential use:

While the existing provisions of the Plan are not subject to review, when asked to consider an amendment providing for an increase in residential property, the existence of excessive residential property should not be ignored. In this case, to ignore the realities of the

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159. *Pope v. City of Cocoa Beach*, 13 Fla. Admin. L. Rep. 2867 (Div. of Admin. Hearings 1991).

160. *St. Lucie County*, 15 Fla. Admin. L. Rep. at 4775-78.

excessive allocation of land for residential purposes in the County contained in the Plan and approve the classification of additional property as residential, would simply exacerbate an already existing excessive allocation.<sup>161</sup>

These cases and others<sup>162</sup> make it clear that a FLUM amendment that runs counter to the established policies in an adopted plan is particularly vulnerable to an administrative challenge. Indeed, it is most likely the real world impact of such an amendment which determines whether or not it is in compliance. These cases, and the terms of chapter 163, make it clear that a compliance decision is not based on segmenting any distinct part of a plan to determine whether, on its face, it says the right things. A compliance decision is a determination of whether a plan establishes appropriate end results, requires specific strategies that are reasonably calculated to achieve those results, and, most importantly, translates these strategies and results into what will actually happen on the ground.

### 3. Urban Sprawl

The requirements concerning future land uses and “need” merged together to create the “urban sprawl” issue, one of the most controversial issues surrounding growth management. Chapter 9J-5 requires that plans include an objective to “[d]iscourage the proliferation of urban sprawl.”<sup>163</sup> The DCA’s efforts to strictly require FLUMs to “reflect” such an objective created an uproar, leading to agency secretaries being hung in effigy, challenges to unadopted interpretations concerning urban sprawl,<sup>164</sup> and challenges to adopted rules which sought to more specifically define the term.

The DCA was extremely successful in the early application of the Act in challenging relatively high densities<sup>165</sup> through settlement or final order, resulting in plan amendments significantly reducing densities.<sup>166</sup> The

161. *Id.* at 4764.

162. *See, e.g.*, Cooper v. City of St. Petersburg Beach, 14 Fla. Admin. L. Rep. 294 (Div. of Admin. Hearings 1991).

163. FLA. ADMIN. CODE ANN. r. 9J-5.006(3)(b)8. (1995).

164. *See* Charlotte County v. Department of Community Affairs, 12 Fla. Admin. L. Rep. 79, 87 (Dep’t of Community Affairs 1990).

165. These high densities were between one unit per acre and one unit per 20 acres.

166. Densities were reduced to one unit per 20 acres or lower. *See, e.g.*, Department of Community Affairs v. Escambia County, No. 92-010, 1992 Fla. ENV LEXIS 115, at \*87 (Admin. Comm’n July 22, 1992); *Charlotte County*, 12 Fla. Admin. L. Rep. at 91.

DCA's non-rule application and interpretation of the term "urban sprawl" was upheld and found not to constitute a rule which was required to be formally adopted.<sup>167</sup> In this rule challenge, the hearing officer found that the DCA's interpretation of this term appropriately varied with the circumstances of each local government and had a basis in chapters 163 and 187 of the *Florida Statutes*, the State Comprehensive Plan.<sup>168</sup>

Even though the term "urban sprawl" is not used in chapter 163, or chapter 187, the rule requirement to discourage "urban sprawl" was found not to be an unreasonable interpretation of those statutes.<sup>169</sup> The specific location of a proposed land use is relevant to the issue of whether it constitutes urban sprawl.<sup>170</sup>

The DCA has now adopted a lengthy section of chapter 9J-5 to define and identify factors that are indicators of urban sprawl.<sup>171</sup> This section

167. *Charlotte County*, 12 Fla. Admin. L. Rep. at 79.

168. *See id.* at 98.

169. *Home Builders & Contractors Ass'n of Brevard, Inc. v. Department of Community Affairs*, 585 So. 2d 965, 970 (Fla. 1st Dist. Ct. App. 1991).

170. *Department of Community Affairs v. St. Lucie County*, 15 Fla. Admin. L. Rep. 4744 (Div. of Admin. Hearings 1993).

171. FLA. ADMIN. CODE ANN. r. 9J-5.006(5)(g) (1995).

The primary indicators that a plan or plan amendment does not discourage the proliferation of urban sprawl are listed below. . . .

. . . .

2. Promotes, allows or designates significant amounts of urban development to occur in rural areas at substantial distances from existing urban areas while leaping over undeveloped lands which are available and suitable for development.

. . . .

8. Allows for land use patterns . . . which disproportionately increase the cost in time, money and energy, of providing and maintaining facilities and services, including roads, potable water, sanitary sewer, stormwater management, law enforcement, education, health care, fire and emergency response, and general government.

. . . .

10. Discourages or inhibits infill development or the redevelopment of existing neighborhoods and communities.

. . . .

13. Results in the loss of significant amounts of functional open space.

*Id.* at r. 9J-5.006(5)(g)2., 8., 10., 13.

Development controls are set forth in rule 9J-5.006(5)(j) of the *Florida Administrative Code*. These include: "[a]llocation of the costs of future development based on the benefits received"; "[t]he extent to which new development pays for itself"; "[i]and use functional relationship linkages and mixed land uses"; "[j]obs-to-housing balance requirements"; "[p]olicies specifying the circumstances under which future amendments could designate new



was upheld against a rule challenge. In *Florida East Coast Industries, Inc. v. Department of Community Affairs*,<sup>172</sup> the hearing officer found that the proposed rules were supported by chapters 163 and 187 because a consideration of “urban sprawl” fell within the “myriad of goals, objectives and policies addressed by the Act.”<sup>173</sup> Also, the officer found that the rule was not vague because, although it required the exercise of professional planning judgement, the rule could reasonably be applied by persons of common intelligence.<sup>174</sup>

#### a. *Special Regulations*

A “future land use plan may designate areas for future planned development involving combinations of types of uses for which special regulations may be necessary to ensure development in accord with the principles and standards of the comprehensive plan and this act.”<sup>175</sup> This contemplates that a local government would expressly provide in its plan that a certain land area or areas will be subject to specific regulations. This would be appropriate where the local government had reason to believe that special regulations would be necessary to ensure development in a manner that would be consistent with particular objectives in its plan. Examples include the Wekiva River Protection Zone in Lake County and the Econfina River Protection Zone in Seminole County.

#### b. *Carrying Capacity Approach*

The “based upon” factors identified in section 163.3177(6)(a) of the *Florida Statutes*, essentially establish the environmental, technical, and infrastructural limitations of an area as the primary basis for land use plans. The Monroe County (Florida Keys) Comprehensive Plan explicitly uses the “carrying capacity” approach to planning. A recent DOAH’s order affirmed the use of a “carrying capacity” based plan to implement the future land use

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lands for the urbanizing area”; “[p]rovision for new towns, rural villages or rural activities centers”; “[r]estriction on expansion of urban areas”; “[u]rban service areas”; “[u]rban growth boundaries”; and “[a]ccess management controls.” *Id.* at r. 9J-5.006(5)(j). Rule 9J-5.006(5)(h) reflects the factors included in the evaluation of land uses. These include: extent, location, distribution, density, intensity, compatibility, suitability, functional relationship, land use combinations, and demonstrated need over the planning period. *See id.* at 9J-5.006(5)(h).

172. 16 Fla. Admin. L. Rep. 1631 (Div. of Admin. Hearings 1994).

173. *Id.* at 1661.

174. *Id.* at 1662.

175. FLA. STAT. § 163.3177(6)(a).

requirements.<sup>176</sup> The order rejected the argument that a Comprehensive Plan must accommodate all of the projected population regardless of the impact on the other factors established in the Act, such as the natural character of the land and the availability of infrastructure. In this case, Monroe County's limited ability to evacuate its citizens in the event of a hurricane, to properly treat wastewater, and to protect special habitat areas through permitting standards rendered it unrealistic to plan for the amount of population growth which might otherwise have been projected. Not only did the hearing officer affirm the use of an annual permit cap as a means of coordinating growth with these limitations, he also ruled that the Monroe County comprehensive plan allowed too much growth based on these limitations. Because of its unique environmental sensitivity and geography, Monroe County represents the first and most acute application of the carrying capacity approach. However, there are many distinct geographic areas in Florida such as drainage basins, bays, and peninsulas, for which this approach is appropriate. The Monroe County order clearly establishes that chapter 163 does not require, in all cases, that a community accommodate all of its projected population regardless of its development constraints. Thus, the Act provides the most appropriate legal mechanism to implement the concepts of ecosystem management and sustainable development.<sup>177</sup>

### c. *Planning Versus Permitting*

The Act emphasizes the establishment of the appropriate type and density of land use, not permitting standards to duplicate those of regional and state agencies. Indeed the Act does not allow the DCA to require a local government to duplicate or exceed a permitting program that is implemented by another agency.<sup>178</sup> In the author's opinion, the DCA routinely violates the spirit of this intent by allowing densities that are not inherently suitable for a given area based on the adoption of "performance standards" within the plan that are intended to mitigate the impacts of the density. The local government is usually willing to accept the tradeoff because the DCA has no direct role at the later stages of the development process when the performance standards are being interpreted, applied, and often ignored through the issuance of development orders.

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176. Department of Community Affairs v. Monroe County, No. 91-1932GM, 1995 Fla. ENV LEXIS 129, at \*4 (Admin. Comm'n 1995).

177. Department of Community Affairs v. Monroe County, 11 Fla. Admin. L. Rep. 4004 (Dep't of Community Affairs 1989).

178. FLA. STAT. § 163.3184(6)(c).

### C. *Vested Rights and Property Rights*

The Act specifically identifies those rights which are vested from the requirements of new comprehensive plans:

[n]othing in this act shall limit or modify the rights of any person to complete any development that has been authorized as a development of regional impact pursuant to chapter 380 or who has been issued a final local development order and development has commenced and is continuing in good faith.<sup>179</sup>

While the application of new growth management rules makes vested rights a crucial issue in the implementation of the Act, the Act itself has generated very little case law on the subject.

The vast majority of administrative opinions on vested rights arise from petitions for declaratory statements that were filed by developers seeking to determine whether previous “binding letters” under chapter 380 informing them that they were exempt from the Development of Regional Impact (“DRI”) requirements vested them from the requirements of the new chapter 163. Generally, the answer was no.<sup>180</sup> In a 1990 ruling which reflected a facial “takings” challenge to an adopted plan, the purposes of the Act were discussed and cited with approval.<sup>181</sup>

### D. *Notice/Public Participation Requirements*

The adequacy of the public participation procedures leading up to the adoption of a plan or amendment is a relevant “compliance” issue.<sup>182</sup>

179. *Id.* § 163.3167(8).

180. *See, e.g.*, Petition for Declaratory Statement by Sarasota County, 14 Fla. Admin. L. Rep. 772 (Dep’t of Community Affairs 1992); Petition for Declaratory Statement by Orlando Central Park, Inc., 12 Fla. Admin. L. Rep. 944 (Dep’t of Community Affairs 1990); Huckleberry Land Joint Venture v. Department of Community Affairs, 11 Fla. Admin. L. Rep. 5706 (Dep’t of Community Affairs 1989); American Newland Assocs. v. Department of Community Affairs, 11 Fla. Admin. L. Rep. 5205 (Dep’t of Community Affairs 1989); Gulfstream Dev. Corp. v. Department of Community Affairs, 11 Fla. Admin. L. Rep. 1047 (Dep’t of Community Affairs 1988); General Dev. Corp. v. Department of Community Affairs, 11 Fla. Admin. L. Rep. 1032 (Dep’t of Community Affairs 1988).

181. *Glisson v. Alachua County*, 558 So. 2d 1030, 1036-37 (Fla. 1st Dist. Ct. App. 1990).

182. *Austin v. Department of Community Affairs*, No. 89-31, 1989 Fla. ENV LEXIS 147 (Admin. Comm’n Sept. 29, 1989), held that the public participation requirements of § 163.3181 is included within the scope of compliance review under § 163.3184(1)(b), although not expressly referenced in the definition of compliance. *Id.* at \*4-6.

Some courts strictly construe notice requirements. In *Benson v. City of Miami Beach*,<sup>183</sup> the Third District Court of Appeal invalidated the plan for the City of Miami Beach because notice of its intended adoption was not provided in a newspaper of general circulation in Dade County.<sup>184</sup>

Not all courts, however, strictly construe compliance requirements. In *Gong v. Department of Community Affairs*,<sup>185</sup> a less strict view of the Act's notice requirements was taken concerning the City of Hialeah's plan. In this case, both the hearing officer and the DCA found a plan amendment to be in compliance, even though the public notice did not strictly comply with section 163.3184 of the *Florida Statutes*.<sup>186</sup> The orders held that the petitioners failed to demonstrate prejudice as a result of the noncompliance and that, despite the technical defects, the notice did comply with the Act as a whole.<sup>187</sup>

The statutory requirements of public participation do not require the consideration or response of local government to public comments to meet any minimum qualitative standard, unless the response is so meritless as to have precluded consideration of the comment. Further, when a local government official responds with an opinion, "[n]othing in the law requires that the opinion reflect the provisions of a plan or its data and analysis, or even that the opinion be informed."<sup>188</sup>

A public participation challenge was also rejected where the petitioners suffered little, if any, prejudice from the defect when a local government failed to include the petitioner's parcels in the map which appeared in the public notice for a "transmittal" hearing and petitioners had five months to participate and change the vote as to their property prior to the final adoption of the map.<sup>189</sup> Plan amendments will not be found out of compliance by an unnecessarily restrictive reading of the map notice requirements in section 163.3184(15)(c) of the *Florida Statutes*, when the defect occurs months before the final adoption and the adoption notice is adequate.<sup>190</sup>

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183. 591 So. 2d 942 (Fla. 3d Dist. Ct. App. 1991), *rev. denied*, 601 So. 2d 551 (Fla. 1992).

184. *Id.* at 943.

185. 17 Fla. Admin. L. Rep. 309 (Div. of Admin. Hearings 1995).

186. *Id.* at 312-14.

187. *Id.* at 314.

188. *Wilson v. City of Cocoa*, 13 Fla. Admin. L. Rep. 3848, 3571 (Dep't of Community Affairs 1991).

189. *Id.*

190. *Id.*

If the defect is not prejudicial, the plan will not be rejected. In one case, the petitioners experienced problems in examining the adopted plan.<sup>191</sup> The court stated the conduct did not rise to the level such that the petitioners were unable to reasonably advance their opposition to the adopted plan. In this case, the procedural infirmity and the inconvenience to the petitioners was not so prejudicial as to cause the plan to be rejected.<sup>192</sup>

#### E. *Consistency with Chapter 9J-5*

Although the chapter refers to itself as a “minimum criteria” rule, it has in practice been interpreted as a “consistency” rule. This means that so long as the purpose of a specific rule provision is served by the plan as a whole, a plan or amendment can still be found “in compliance” even if a particular rule provision has not been strictly met.<sup>193</sup>

The statutory definition of “consistent” in section 163.3177(2) of the *Florida Statutes* does not apply to internal consistency. A plan is internally consistent as long as its various elements do not conflict with each other. There is no reason to insist that all objectives and policies of a plan take action in the direction of realizing the other objectives and policies of the same plan.<sup>194</sup>

#### F. *Authority to Plan for Specific Areas*

The Act specifically authorizes planning agreements between local governments.<sup>195</sup> Absent a joint agreement with the county, a city may not amend its FLUM to plan for a property which it has not yet annexed.<sup>196</sup>

#### G. *Consistency with Other Jurisdictions*

Nothing in chapter 163 or 9J-5 requires adjacent land uses in neighboring counties to be identical. Therefore, decisions made in one county with

191. Problems were due to the illness of the town clerk. See *Harris v. Town of McIntosh*, 15 Fla. Admin. L. Rep. 2977, 2983 (Dep’t of Community Affairs 1993).

192. *Id.* at 2983-84.

193. *B & H Travel Corp. v. Department of Community Affairs*, 602 So. 2d 1362, 1366 (Fla. 1st Dist. Ct. App. 1992).

194. See *Hiss v. Department of Community Affairs*, 16 Fla. Admin. L. Rep. 2408 (Dep’t of Community Affairs 1994).

195. FLA. STAT. § 163.3171(3).

196. *Pope v. City of Cocoa Beach*, 12 Fla. Admin. L. Rep. 4758 (Div. of Admin. Hearings 1990).

respect to its plan are not binding on the adjacent local government.<sup>197</sup> A plan was found to have met the data and analysis requirements, as well as the requirements for consistency with the plans of adjacent local governments, when it discussed in its data and analysis, a planned bridge shown on the plans of adjacent local governments but did not plan for or depict the bridge as part of its future transportation network.<sup>198</sup>

#### H. *What May Plans Regulate?*

As described above, the Act requires plans to include:

A future land use plan element designating proposed future general distribution, location, and extent of the uses of land for residential uses, commercial uses, industry, agriculture, recreation, conservation, education, public buildings and grounds, other public facilities, and other categories of the public and private uses of land. The future land use plan shall include standards to be followed in the control and distribution of population densities and building and structure intensities. The proposed distribution, location, and extent of the various categories of land use shall be shown on a land use map or map series which shall be supplemented by goals, policies, and measurable objectives.<sup>199</sup>

In a declaratory statement, since overturned on other grounds, the DCA determined that comprehensive plans may control the placement and maintenance or upgrading of electric power lines as a “use of land,” even though such activities are not “development” as defined in the Act.<sup>200</sup> The reasoning of that declaratory statement, and the express identification of agriculture as a use of land which shall be shown on a land use map or map series which shall be supplemented by goals, policies, and measurable objectives make a strong argument that plans can and should manage the impacts of agricultural uses, even though agriculture is excluded from the Act’s definition of “development.”

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197. *See* Davis, Dekle & Acree v. Department of Community Affairs, 16 Fla. Admin. L. Rep. 2480 (Div. of Admin. Hearings 1994).

198. *See* City of Cape Coral v. City of Fort Myers, No. 89-2159GM, 1992 Fla. ENV LEXIS 36, at \*1 (Div. of Admin. Hearings Apr. 8, 1992).

199. FLA. STAT. § 163.3177(6)(a).

200. *Polk County v. Department of Community Affairs*, 16 Fla. Admin. L. Rep. 2515, 2520 (Dep’t of Community Affairs 1994).

## I. *Intergovernmental Coordination*

Intergovernmental coordination has always been a primary stated objective of the Act, but is commonly understood to be a weak link in the process. The 1993 ELMS legislation adopted a phase out of the DRI process in Florida, along with a significant increase in the intergovernmental coordination requirements for local plans designed to provide the extra-jurisdictional reviews for all projects that is currently provided only for DRIs.<sup>201</sup> The question remains unresolved whether these changes will result in more meaningful coordination among the various levels of government in Florida. This legislation may not change the political realities attendant with the sovereignty of each municipality and county in Florida. Whenever a local government that is making a land use decision has the ability to increase its tax base while straining the infrastructure or service capacity of an adjoining local government or causing other adverse impacts, the inherent disincentives to real coordination may be too much to overcome absent aggressive oversight by the state.

## J. *Obstacles to Bringing an Action*

When a final order of the Administration Commission requires specific plan amendments, the doctrine of *res judicata* will bar a local government, in a subsequent compliance challenge, from arguing that the plan is in compliance without such amendments.<sup>202</sup>

Lack of standing may also bar a party once a compliance agreement has been entered. The Supreme Court of Florida has ruled that once a county entered into a compliance agreement with the DCA to bring its plan into compliance, it had no standing to seek a declaratory judgement that chapter 163 is unconstitutional.<sup>203</sup>

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201. See FLA. STAT. ch. 163.

202. *Hiss v. Sarasota County*, 15 Fla. Admin. L. Rep. 839, 879 (Div. of Admin. Hearings 1993).

203. *Santa Rosa County v. Administration Comm'n*, No. 84-545, 1995 Fla. ENV LEXIS 55, at \*4-5 (Fla. 1995).

## K. Settlement and Mediation Process

### 1. Mediation

In 1993, the Florida Legislature established a process designed to “speed up” the administrative hearing process.<sup>204</sup> At any time after a matter has been referred to the DOAH, the local government proposing the amendment may demand formal mediation.<sup>205</sup> Neither the DCA nor any other party appears to have this same right. The local government or any affected person who has intervened may demand informal mediation or expeditious resolution of the amendment proceedings by serving written notice.<sup>206</sup> The hearing officer must set the matter for final hearing no more than thirty days after receipt of any such request.<sup>207</sup> Once such hearing has been set, “no continuance . . . and no additional time for post-hearing submittals, may be granted without the written agreement of the parties absent a finding . . . of extraordinary circumstances.”<sup>208</sup>

Final orders in cases proceeding under the mediation subsection must, absent a showing of extraordinary circumstances or a written agreement of the parties, be entered within forty-five days of the issuance of the recommended order.<sup>209</sup>

### 2. Compliance Agreements

The Act establishes a very detailed settlement process.<sup>210</sup> The DCA and the local government may voluntarily enter into a compliance agreement to resolve one or more of the issues raised in a compliance proceeding.<sup>211</sup> “Affected persons who have initiated a formal proceeding or intervened may also enter into the compliance agreement.”<sup>212</sup> “All parties granted intervenor status shall be provided reasonable notice of, and a reasonable

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204. See Act of May 11, 1993, ch. 93-206, 1993 Fla. Laws 1887. This law implemented the majority of the recommendations of the Third Environmental Lands Management Study Commission.

205. FLA. STAT. § 163.3189(3)(a).

206. *Id.*

207. *Id.* § 163.3189(3)(b).

208. *Id.* “Extraordinary circumstances do not include matters relating to workload or need for additional time for preparation or negotiation.” *Id.*

209. FLA. STAT. § 163.3189(3)(c).

210. *Id.* § 163.3184(16)(a).

211. *Id.*

212. *Id.*



opportunity to participate in, the negotiation process.”<sup>213</sup> Negotiation meetings must be open to the public.<sup>214</sup> The DCA must provide each intervenor with a copy of the compliance agreement within ten days after the agreement is executed.<sup>215</sup>

The compliance agreement shall list each portion of the plan or plan amendment which is not in compliance, and shall specify remedial actions which the local government must complete within a specified time in order to bring the plan or plan amendment into compliance, including adoption of all necessary plan amendments. The compliance agreement may also establish monitoring requirements and incentives to ensure that the conditions of the compliance agreement are met.<sup>216</sup>

Upon filing “of a compliance agreement executed by the agency and the local government with the [DOAH], any administrative proceeding . . . regarding the plan or plan amendment covered by the compliance agreement shall be stayed.”<sup>217</sup> “Prior to [the] execution of a compliance agreement, the local government must approve the compliance agreement at a public hearing advertised at least [ten] days before the public hearing in a newspaper of general circulation in the area in accordance with the [statutory requirements].”<sup>218</sup>

Compliance agreement amendments can be adopted without first being transmitted as proposed amendments and subjected to an ORC Report.<sup>219</sup> Within ten working days after adoption of a compliance amendment, the local government must transmit the amendment to the DCA and one copy to any party to the administrative proceeding.<sup>220</sup> Then the DCA will “issue a cumulative notice of intent addressing both the compliance agreement amendment and the plan or plan amendment that was the subject of the agreement . . . .”<sup>221</sup>

“If the local government adopts a comprehensive plan amendment pursuant to a compliance agreement and a notice of intent to find the plan amendment in compliance is issued, [the DCA must] forward the notice of

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213. *Id.*

214. FLA. STAT. § 163.3184(16)(a).

215. *Id.*

216. *Id.*

217. *Id.* § 163.3184(16)(b).

218. *Id.* § 163.3184(16)(c).

219. FLA. STAT. § 163.3184(16)(d).

220. *Id.*

221. *Id.* § 163.3184(16)(e).

intent to the DOAH<sup>222</sup> At least three different approaches had been taken by hearing officers. Some ruled that the petitions of non-signing intervenors are not dismissed.<sup>223</sup> However, the Department has consistently ruled that after it finds a plan as amended pursuant to a compliance agreement to be “in compliance,” the petitions of any intervenors are completely dismissed and the petitioners must file a new petition directed to the new statement of intent in order to protect their rights to challenge the plan.<sup>224</sup> Yet a third approach did not dismiss the intervenors but judged their challenges using the “fairly debatable” standard.<sup>225</sup> Legislation adopted in 1995 ended the debate by clearly stating that existing intervenors are not dismissed but that they must file an amended petition directed to the plan as amended if the amendment mooted or changed any previously raised issue or gave rise to a new issue.<sup>226</sup> The legislation also provides that their challenge will be governed by the “fairly debatable” standard.

If the local government adopts a comprehensive plan amendment pursuant to a compliance agreement and a notice of intent to find the plan amendment not in compliance is issued, the DCA shall forward the notice of intent to the DOAH. The DOAH will then consolidate the proceeding with the pending proceeding and set a date for hearing in the pending proceeding.<sup>227</sup> Affected persons who are not a party to the underlying proceeding may challenge the plan amendment adopted pursuant to the compliance agreement by filing a petition.<sup>228</sup>

If the local government fails to adopt a comprehensive plan amendment pursuant to a compliance agreement, the DCA shall notify the DOAH, which shall set the hearing in the pending proceeding at the earliest convenience.<sup>229</sup> Additionally, at least one hearing officer has ruled that, based on the “cumulative notice” language of the statute, when the DOAH issues a *cumulative notice of intent* to find a plan or amendment in

222. *Id.* § 163.3184(16)(f).

223. *See* Department of Community Affairs v. Hillsborough County, No. 89-5157GM (Fla. Div. of Admin. Hearings Dec. 8, 1992) (recommended order); *see also* Department of Community Affairs v. City of Daytona Beach, No. 93-4224GM (Fla. Div. of Admin. Hearings Apr. 19, 1994) (admin. order); Department of Community Affairs v. City of Jacksonville, No. 90-7496GM (Fla. Div. of Admin. Hearings Apr. 2, 1993) (admin. order).

224. Department of Community Affairs v. DeSoto County, No. 91-6039 (Div. of Admin. Hearings Jan. 19, 1993) (recommended order of dismissal).

225. *See generally* FLA. STAT. § 163.3184.

226. *Id.* § 163.3184(16)(f).

227. *Id.* § 163.3184(10)(a).

228. *See id.*

229. *Id.*

compliance following the adoption of remedial amendments, an affected person can challenge any part of the plan including parts that had been in the plan and remained unchallenged since its original adoption.<sup>230</sup>

### 3. Attorney's Fees

Any award of attorney's fees or costs in administrative compliance proceedings is governed by section 163.3184(12) of the *Florida Statutes* which provides:

The signature of an attorney or party constitutes a certificate that he or she has read the pleading, motion, or other paper and that, to the best of his knowledge, information, and belief formed after reasonable inquiry, it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay, or for economic advantage, competitive reasons, or frivolous purposes or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the hearing officer, upon motion or his own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.<sup>231</sup>

The DCA interpreted this provision in a case in which the DCA affirmed a hearing officer's denial of a motion for attorney's fees.<sup>232</sup> The DCA reasoned that, although each of the petitioners' challenges had been rejected on the merits, an award of fees and costs was not proper because the petitioners "were motivated only by a desire to improve the quality of life in their city."<sup>233</sup> The DCA found that the petitioners had no ulterior motive. They filed their petitions because they felt that it was in the best interests of the City of Key West that they do so.<sup>234</sup>

The preceding discussion of the basic substantive procedural issues demonstrates that comprehensive planning is a simple concept but complex in application. The next section describes the basic requirements and

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230. Department of Community Affairs v. City of Key West, No. 92-0515GM (Fla. Div. of Admin. Hearings Nov. 30, 1993) (admin. order).

231. FLA. STAT. § 163.3184(12).

232. Frame v. Department of Community Affairs, No. 89-3931GM (Fla. Dep't of Community Affairs June 20, 1990) (final order).

233. *Id.*

234. *Id.*

procedures for the implementation of plans through land development regulations.

#### IV. LAND DEVELOPMENT REGULATIONS

##### A. *Contents of the LDRs*

Within one year after submission of its initial draft plan to the DCA, each local government was required to adopt LDRs that are consistent with and implement the comprehensive plan. The procedures for adopting LDRs are set out at section 163.3202 of the *Florida Statutes*, and rule 9J-24 of the *Florida Administrative Code*. Substantive requirements specifying the content of LDRs are contained in section 163.3202(2) of the *Florida Statutes*.

##### B. *Enforcement of Plans Through LDRs*

There are two enforcement mechanisms for determining whether LDRs conform with the Act. First, the DCA can pursue judicial proceedings to require local governments that have failed to adopt LDRs to do so.<sup>235</sup> Second, citizens with the requisite interest<sup>236</sup> can initiate administrative proceedings to determine whether LDRs that have been adopted are consistent with the adopted plan.<sup>237</sup> Distinct from its role regarding comprehensive plans, the DCA does not automatically review local government action to determine that required LDRs have been adopted, or that they are consistent with the plan.<sup>238</sup>

##### 1. Challenging the Complete Failure to Adopt a Required LDR

The Act establishes a detailed procedure for determining whether a local government has adopted required LDRs.<sup>239</sup> Under this process, the DCA requires local governments to submit LDRs for review only if it has reasonable grounds to believe that there has been a failure to adopt required

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235. FLA. STAT. § 163.3215.

236. The Act grants standing to "substantially affected persons" as defined by chapter 120 of the *Florida Statutes*. Because there are no final decisions interpreting the standing requirements for LDR challenges, the practitioner should consult cases that interpret standing under chapter 120. *See, e.g.,* Agrico Chemical Co. v. Department of Env'tl. Regulation, 406 So. 2d 478, 481-82 (Fla. 2d Dist. Ct. App. 1981).

237. *See* FLA. STAT. § 163.3213(3).

238. *Id.* § 163.3213(5).

239. *See id.* § 163.3202; *see also* FLA. ADMIN. CODE ANN. r. 9J-24.004 to .006 (1995).

regulations.<sup>240</sup> The DCA will consider reasonable grounds to exist only if it receives a letter stating that required regulations have not been adopted.<sup>241</sup> When it receives such a letter, the DCA directs the local government to submit LDRs for review.<sup>242</sup> If the local government has not adopted the LDRs, it is required to advise the DCA, and establish a schedule for adopting the regulations within 120 days.<sup>243</sup> If the local government does not respond to the DCA's request to submit the LDRs for review, the DCA will institute an action in circuit court to require the response.<sup>244</sup>

Once LDRs are submitted, they are reviewed to determine whether there has been a complete failure to adopt required regulations.<sup>245</sup> This review is conducted for that purpose only, and does not involve any determination of whether the LDRs which have been adopted are consistent with the adopted comprehensive plan.<sup>246</sup> If the DCA determines that there has been a failure to adopt, it notifies the local government and specifies required regulations that need to be adopted.<sup>247</sup> The local government then has thirty days to adopt the required regulations. If it does not, the DCA can then initiate a proceeding in circuit court.<sup>248</sup>

There is very little case law in this area. Usually, a local government is able to point to some provision in its LDRs which arguably addresses any part of its plan, which thereby converts the challenge into one concerning the consistency, rather than the existence of the LDR.

## 2. Administrative Review of LDRs for Consistency with a Comprehensive Plan

Proceedings to determine whether LDRs adopted by a local government are consistent with its comprehensive plan are administrative proceedings, conducted in accordance with the Florida Administrative Procedure Act, chapter 120 of the *Florida Statutes*.<sup>249</sup> The DCA does not automatically review LDRs. Review occurs only if a substantially interested person files

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240. FLA. STAT. § 163.3202(1).

241. *Id.* § 163.3202(4).

242. *Id.*

243. *Id.*

244. *Id.*

245. *See* FLA. STAT. § 163.3213(3).

246. *Id.*

247. *Id.*

248. *Id.*

249. *See id.* § 163.3213.

a petition for review with the local government.<sup>250</sup> After the deadline for adopting LDRs passes, a substantially affected person can challenge them within twelve months of adoption. A substantially affected person commences such a challenge by filing a petition with the local government, directing a copy to the DCA.<sup>251</sup>

The local government then has thirty days to provide a written response to such a petition with a copy sent to the DCA.<sup>252</sup> However, the thirty-day period can be extended by mutual agreement of the parties.<sup>253</sup> The substantially affected person may submit a petition to the DCA within thirty days from receiving the local government's response.<sup>254</sup> If there is no response, such a petition can be submitted to the DCA within ten days from the end of the thirty-day response period.<sup>255</sup> A copy of the petition must be submitted concurrently to the local government.<sup>256</sup>

If the DCA determines that the petition is sufficient, it notifies the local government within twenty-one days.<sup>257</sup> The DCA can then request further information necessary to review the regulations, conduct informal hearings, receive oral and written testimony, and conduct whatever inquiry it deems necessary.<sup>258</sup> The DCA issues its decision with regard to the consistency of the LDRs not earlier than thirty days and not later than sixty days after receiving the petition.<sup>259</sup>

If the DCA determines that the LDRs are consistent with the comprehensive plan, the substantially affected person can request a hearing from the DOAH within twenty-one days.<sup>260</sup> If the district court of appeal finds the LDRs inconsistent with the plan, it requests a hearing with the DOAH. The hearing before DOAH must be held in the affected jurisdiction, but no sooner than thirty days after the DCA's determination. The necessary

250. FLA. STAT. § 163.3213(3).

251. *Id.* Requirements for the content of this petition are set out at rule 9J-24.007(3) of the *Florida Administrative Code*.

252. FLA. ADMIN. CODE ANN. r. 9J-24.007(4) (1995).

253. *Id.*

254. *Id.* at r. 9J-24.007(5).

255. *Id.*

256. *Id.* The requirements for the content of this petition are set out in rule 9J-24.007(6) of the *Florida Administrative Code*.

257. FLA. ADMIN. CODE ANN. r. 9J-24.007(7) (1995).

258. *Id.*

259. *Id.*

260. *Id.* at r. 9J-24.007(10).

parties to the hearing are the petitioner, any intervenor, the DCA, and the local government.<sup>261</sup>

The hearing officer conducts a formal proceeding in accordance with section 120.57(1) of the *Florida Statutes*.<sup>262</sup> If the hearing officer determines the LDR is inconsistent with the plan, the final order is submitted to the Administration Commission for the sole purpose of determining what sanctions may be appropriate.<sup>263</sup>

The most detailed discussion of the relationship of comprehensive plans and land development regulations is included in an order from the DCA which upheld Lee County's wellfield protection ordinance.<sup>264</sup> The DCA found that an ordinance which protects most of the wellfields in Lee County was consistent with a comprehensive plan which required, without qualification, the protection of wellfields.<sup>265</sup> However, in a case which took a stricter view of the required relationship between plans and LDRs, substantial portions of Lake County's vested rights ordinance were found inconsistent with the comprehensive plan because the plan did not authorize the vested rights granted by the LDRs.<sup>266</sup> A relatively small number of orders or decisions on LDR challenges leave this a very unsettled area of the law. As a practical matter, the deadlines and the time frames for the adoption of LDRs came and went while the initial plan adoption was still being debated, negotiated, and litigated. The adoption and enforcement of consistent LDRs which implement comprehensive plans continues to be a weak link in the planning process.<sup>267</sup>

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261. *Id.*

262. FLA. ADMIN. CODE ANN. r. 9J-24.007(10) (1995).

263. *Id.* at r. 9J-24.007(12).

264. *See* Responsible Growth Management Coalition, Inc. v. Lee County, 14 Fla. Admin. L. Rep. 2110 (Div. of Admin. Hearings 1991).

265. *Id.* at 2127.

266. Department of Community Affairs v. Lake County, 16 Fla. Admin. L. Rep. 4031 (Div. of Admin. Hearings 1994).

267. Other LDR cases include: Challenge to Consistency of Ordinance No. 16-1992 with Monroe County Comprehensive Plan, 16 Fla. Admin. L. Rep. 4702 (Dep't of Community Affairs 1994); Citizen's Political Comm. v. Collier County, 14 Fla. Admin. L. Rep. 4702 (Dep't of Community Affairs 1992).

## V. ENFORCEMENT OF COMPREHENSIVE PLANS THROUGH DEVELOPMENT ORDER CHALLENGES

### A. *Consistency Requirement*

As mentioned earlier, the Act's bottom line requires that all public and private development be consistent with adopted, effective comprehensive plans.<sup>268</sup> The Act defines development order as "any order granting, denying, or granting with conditions an application for a development permit."<sup>269</sup> The Act defines development permit as "any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land."<sup>270</sup>

#### 1. Statutory Cause of Action

The Act authorizes

[a]ny aggrieved or adversely affected party [to] maintain an action for injunctive or other relief against any local government to prevent such local government from taking any action on a development order . . . which materially alters the use or density or intensity of use on a particular piece of property that is not consistent with the comprehensive plan . . . .<sup>271</sup>

"Suit under this section [is the sole remedy] available to challenge the consistency of a development order with a comprehensive plan."<sup>272</sup>

"Aggrieved or adversely affected party" means any person or local government which will suffer an adverse effect to an interest protected or furthered by the local government comprehensive plan, including interests related to health and safety, police and fire protection service systems, densities or intensities of development, transportation facilities, health care facilities, equipment or services, or environmental or natural resources. The alleged adverse interest may be shared in common with

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268. FLA. STAT. §§ 163.3161(5), .3194(1)(a).

269. FLA. STAT. § 380.031(3) (1995).

270. *Id.* § 163.3164(8).

271. *Id.* § 163.3215(1).

272. *Id.* § 163.3215(3)(b).



other members of the community at large, but shall exceed in degree the general interest in community good shared by all persons.<sup>273</sup>

## 2. Procedure

As a precondition to filing a complaint for injunctive or other relief, the complaining party, within thirty days after the alleged inconsistent action has been taken, must file a verified (sworn) complaint "setting forth the facts upon which the complaint is based and the relief sought."<sup>274</sup> The verified complaint has been interpreted by the courts to be jurisdictional.<sup>275</sup> Further, the complaint must be filed within thirty days of the decision, whether or not the decision has been reduced to writing.<sup>276</sup> After receipt of a verified complaint, the local government has thirty days to respond. If an adequate response is not forthcoming, the legal action must be instituted within thirty days of the expiration of the local government's response period.<sup>277</sup> In a 1993 decision which may have reflected what the legislature intended, the Supreme Court of Florida ruled that the statutory consistency cause of action is available only to aggrieved third parties and that an applicant for a development order who wishes to challenge the local government's decision thereon may not invoke this procedure, but has as the only remedy, a petition for writ of certiorari.<sup>278</sup>

## 3. Consistency Standard

The statute defines "consistent" but does not assign the burden of proof in consistency challenges. Florida courts have confused and struggled with these issues. The statutory definition of "consistent" is as follows:

a development order or land development regulation shall be consistent with the comprehensive plan if the land uses, densities or intensities, and other aspects of development permitted by such order or regulation are compatible with and further the objectives, policies, land

273. *Id.* § 163.3215(2).

274. FLA. STAT. § 163.3215(4).

275. *See Leon County v. Parker*, 566 So.2d 1315, 1317 (Fla. 1st Dist. Ct. App. 1990), *quashed*, 627 So. 2d 476 (Fla. 1993).

276. *Board of County Comm'rs v. Monticello Drug Co.*, 619 So. 2d 361, 363 (Fla. 1st Dist. Ct. App. 1993), *quashed*, 630 So. 2d 578 (Fla. 1994); *Board of Trustees of the Internal Improvement Trust Fund v. Seminole County Bd. of County Comm'rs*, 623 So. 2d. 593, 595-56 (Fla. 5th Dist. Ct. App. 1993).

277. FLA. STAT. § 163.3215(4).

278. *Parker v. Leon County*, 627 So. 2d 476, 479 (Fla. 1993).

uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.<sup>279</sup>

Further,

[a] development approved or undertaken by a local government shall be consistent with the comprehensive plan if the land uses, densities or intensities, capacity or size, timing, and other aspects of the development are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.<sup>280</sup>

In addition,

A court, in reviewing local governmental action or development regulations under this act, may consider, among other things, the reasonableness of the comprehensive plan, or element or elements thereof, relating to the issue justiciably raised or the appropriateness and completeness of the comprehensive plan, or element or elements thereof, in relation to the governmental action or development regulation under consideration. The court may [also] consider the relationship of the comprehensive plan, or element or elements thereof, to the governmental action taken or the development regulation involved in litigation, but private property shall not be taken without due process of law and the payment of just compensation.<sup>281</sup>

#### 4. Current Issues

##### a. *Relationship with Non-Statutory Remedies*

The Act does not discuss the relationship of the statutory “consistency” cause of action, which has been interpreted to be de novo in nature, with the certiorari and declaratory action remedies that have traditionally been used to challenge local land use decisions. These remedies are probably still available on the same theories previously available but “consistency” per se may not be raised in those actions.<sup>282</sup> Most courts have recognized the exclusivity of the statutory “consistency” cause of action and have not

279. FLA. STAT. § 163.3194(3)(a).

280. *Id.* § 163.3194(3)(b).

281. *Id.* § 163.3194(4)(a).

282. *See* Gregory v. City of Alachua, 553 So. 2d 206, 208-09 (Fla. 1st Dist. Ct. App. 1989).

allowed parties to raise consistency as an issue in a petition for writ of certiorari.<sup>283</sup> Nevertheless, a number of “consistency” cases have erroneously been decided by courts by way of petition for writ of certiorari.

The statutory requirement for the filing of a verified complaint as a precondition to maintaining a “consistency” suit does not toll the thirty-day requirement for the filing of a petition for writ of certiorari. Thus, if a third party has a basis to challenge the development order because it is inconsistent with the comprehensive plan and also on the basis that the local government’s record does not include evidence which demonstrates entitlement to the development order under the applicable regulations, that party would at the same time raise the former issue in a verified complaint filed with the local government, and the latter issue in a petition for writ of certiorari filed with the circuit court.

#### b. *Burden of Proof*

The Act does not establish the required burden of proof. However, the Supreme Court of Florida, in a now famous case, *Board of County Commissioners v. Snyder*,<sup>284</sup> quashed a Fifth District Court of Appeal ruling<sup>285</sup> that upon a rezoning applicant’s prima facie showing that a requested rezoning is consistent with the plan, the burden shifts to the local government to show “by clear and convincing evidence that a specifically stated public necessity requires a more specified restrictive use.”<sup>286</sup> The Supreme Court of Florida overruled the requirement for clear and convincing evidence and placed the burden of proof on the party challenging the denial of the rezoning to show that the denial was inconsistent with the plan.<sup>287</sup> At least one district had previously held that the proponent of the development order always bears the burden of proof in a “consistency” challenge.<sup>288</sup>

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283. See, e.g., *Turner v. Sumter County Bd. of County Comm’rs*, 649 So. 2d 276 (Fla. 5th Dist. Ct. App. 1995).

284. 627 So. 2d 469 (Fla. 1993).

285. *Snyder v. Board of County Comm’rs*, 595 So. 2d 65, 81 (Fla. 5th Dist. Ct. App. 1991), *quashed*, 627 So. 2d 469 (Fla. 1993).

286. *Snyder*, 627 So. 2d at 475.

287. *Id.* at 476.

288. See *Machado v. Musgrove*, 519 So. 2d 629, 635 (Fla. 3d Dist. Ct. App. 1987).

### c. *Standard of Review*

Both before and after the passage of the Act, courts have struggled with the issue of which standard of review to apply. This issue may be the most problematic and controversial one presented by “consistency” challenges.

In *Snyder*, the Supreme Court of Florida established new rules for the judicial review of local government zoning decisions in the era of comprehensive planning.<sup>289</sup> The court redefined local government rezoning decisions as quasi-judicial, raised the level of scrutiny courts should apply to rezoning decisions, and required greater consistency between rezonings and comprehensive plans.<sup>290</sup> The standard of review is “strict scrutiny,” under which a court will review a development order to determine whether it complies with the entire comprehensive plan.<sup>291</sup> However, the court upheld the discretion of local governments to act within the range of options established within their comprehensive plan.<sup>292</sup> *Snyder* continued the judicial trend toward reasoning that most zoning and other development order decisions implement previously determined policy decisions (those made in the comprehensive plan) and are thus quasi-judicial, or at least no longer purely legislative in nature.

This is a great departure from the traditional view that rezonings are legislative. The *Snyder* court, as well as other courts, have determined that quasi-judicial decisions of local governments should be reviewed by courts using a “strict scrutiny” standard, not the “fairly debatable” standard historically employed to review local legislative decisions.<sup>293</sup> Site plan approvals, variances, special exceptions and the like, have more or less uniformly been treated as quasi-judicial and reviewed under a strict scrutiny standard.

The Fifth District Court of Appeal in the *Snyder* decision limited its analysis to small, site-specific rezonings, and ruled that large-scale, jurisdiction-wide rezonings still involve policy making on a general scale, and are, therefore, legislative.<sup>294</sup> Since all rezonings must be consistent with adopted plans, the distinction is not immediately obvious; the distinction seems to be one of scale and not one of concept. Moreover, the *Snyder* opinion gives no real guidance as to the dividing line between

289. *Snyder*, 627 So. 2d at 474-75.

290. *Id.* at 475-76.

291. *Id.* at 475; see also *B.B. McCormick & Sons, Inc. v. City of Jacksonville*, 559 So. 2d 252, 255 (Fla. 1st Dist. Ct. App. 1990).

292. *Snyder*, 627 So. 2d at 475.

293. See *id.*; see also *B.B. McCormick & Sons, Inc.*, 559 So. 2d at 255.

294. See *Snyder*, 595 So. 2d at 80.

individual, quasi-judicial rezonings, and large scale rezonings which would continue to be viewed as legislative decisions. There is little judicial guidance for determining which rezonings are subject to *Snyder* and which are not.

#### d. *Definition of Consistency*

*Snyder* emphasized the statutory definition of "consistent" and rejected any presumption that a landowner was entitled to the most intensive use potentially allowed on the face of a comprehensive plan. The statutory definition<sup>295</sup> contemplates that any zoning decision which provides for a level of development that is within the *range* of densities allowed by the plan would be consistent with that plan.

#### e. *Local Hearing Procedures*

The trend to characterize decisions which implement comprehensive plans as quasi-judicial has raised a number of controversial procedural issues which are discussed below.

*Ex Parte Communications.* The Third District Court of Appeal has held that *ex parte* communications have been held to give rise to a presumption that the party against whom the decision was ultimately made was prejudiced thereby, which would seem to render the decision invalid.<sup>296</sup> However, legislation adopted by the 1995 Florida Legislature has attempted to overrule *Jennings*. This legislation grants counties and cities the option of establishing a process to disclose *ex parte* communications in and on the public record so as to rebut any presumption of prejudice.<sup>297</sup> The Act applies to "elected or appointed public official[s] holding a county or municipal office."<sup>298</sup> Therefore, communication between staff members and involved parties are not *ex parte*, while communication between the local community's attorney and the involved parties would be governed by *ex parte* rules.

*Quasi-judicial Procedures.* Although the court in *Snyder* stated that findings of fact should be encouraged, it declined to require local governments to make formal findings of fact to support a zoning decision.<sup>299</sup>

295. See FLA. STAT. § 163.3194(3).

296. *Jennings v. Dade County*, 589 So. 2d 1337, 1341 (Fla. 3d Dist. Ct. App. 1991).

297. See Act of June 17, 1995, ch. 95-352, § 1, 1995 Fla. Laws 3060, 3060-61 (codified at FLA. STAT. § 286.0115 (1995)).

298. *Id.*

299. *Snyder*, 627 So. 2d at 476.

Courts and commentators have reached no consensus on whether sworn testimony, cross examination or other trappings of quasi-judicial proceedings are essential requirements of due process in rezoning hearings. This is possibly the most confused issue because a local decision is reviewable both *de novo*, based on the “consistency” issue by an action for declaratory relief, and via appeal by way of a writ of certiorari. For *de novo* action, the existence of a complete record below is not necessary to further review, whereas a complete record is required for certiorari review.

*What is Competent Substantial Evidence?* One of the primary implications of characterizing a decision as quasi-judicial is that stricter rules will apply in terms of who is competent to testify and what they can testify about. Generally, in a quasi-judicial hearing an expert or experts will be required to establish a competent record. However, the testimony of lay persons can constitute competent evidence on certain issues. Lay persons can provide competent testimony based on their own personal observations. For instance, the Second District Court of Appeal held that lay persons could competently testify on issues of natural beauty and recreational advantages of an area.<sup>300</sup> This court opined that “[t]he local, lay individuals with first-hand knowledge of the vicinity . . . were as qualified as expert [area] witnesses to offer views on the ethereal, factual matter of whether the [application] would materially impair the natural beauty and recreational advantages of the area.”<sup>301</sup> In this case the court found the local residents had expertise equivalent to the engineers and planners, and held that the local agency, as finder of fact, could base its decision on the “expert” testimony of the residents.<sup>302</sup>

The Second District Court of Appeal has also found lay testimony regarding aesthetics, compatibility, and high residential vacancy rates to be valid.<sup>303</sup> In a non-Florida case, a local planning board found the personal observations of local residents concerning the location of a high water line to be more persuasive than the testimony of an expert.<sup>304</sup> On appeal, the court found the local government board could accept the testimony of the residents based on their personal observations, even though the testimony was in direct conflict with the testimony of the “expert witnesses” supplied

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300. Board of County Comm’rs v. City of Clearwater, 440 So. 2d 497, 499 (Fla. 2d Dist. Ct. App. 1983).

301. *Id.*

302. *Id.*

303. City of St. Petersburg v. Cardinal Indus. Dev. Corp., 493 So. 2d 535, 538 (Fla. 2d Dist. Ct. App. 1986).

304. See Mack v. Municipal Officers, 463 A.2d 717, 720 (Me. 1983).

by the applicant.<sup>305</sup> The Third District Court of Appeal invalidated the denial of a rezoning because a lay-person had testified about a matter deemed to require planning expertise.<sup>306</sup> However, just recently, the Third District granted a petition to hear the case en banc and reversed the three judge panel.<sup>307</sup> The *Miami Herald* summarized the holding by stating that “citizens don’t have to be experts to [speak up] about unwelcome development in their neighborhoods, removing a legal muzzle that Dade’s homeowner activists say threatened to render them powerless.”<sup>308</sup>

#### f. *Applicability*

*Snyder* was a rezoning case but its discussion and analysis of the consistency requirement would appear to make it applicable to challenges to any development order under the terms of chapter 163 of the *Florida Statutes*. However, at least one Florida trial court has ruled that the strict scrutiny standard of review, as used in land use cases, does not apply to a case in which the applicant is seeking a special exception, rather than a rezoning.<sup>309</sup>

The procedural and substantive issues which govern development orders have significantly increased the scope and complexity of local public hearings and legal challenges. Although not mentioned in the *Snyder* opinion, even comprehensive plan amendment decisions have been treated by some jurisdictions as quasi-judicial.<sup>310</sup> The evolution of the law concerning enforcement of development orders, and the existing interpretations of the requirements for plans and LDRs brings us full circle and requires a reassessment of the relationships between plans, LDRs and development orders. The following section of this article analyzes the current status of the planning and development process and offers suggestions about how to better integrate the various steps in the process and provide for simpler and more meaningful governmental and citizen review.

305. *Id.*

306. *Blumenthal v. Metropolitan Dade County*, No. 95-52, 1995 Fla. App. LEXIS 6702, at \*8 (3d Dist. Ct. App. June 21, 1995), *reversed*, *MIAMI HERALD*, Feb. 22, 1996, at 1B (Fla. 3d Dist. Ct. App. Feb. 21, 1996).

307. *Metropolitan Dade County v. Blumenthal*, *MIAMI HERALD*, Feb. 22, 1996, at 1B.

308. Joseph Tanfani, *Homeowner Opinions Do Count*, *MIAMI HERALD*, Feb. 22, 1996, at 1B.

309. *Citivest Constr. Corp. v. City of Tampa*, 662 So. 2d 937 (Fla. 2d Dist. Ct. App. 1995).

310. *See, e.g., Martin County v. Yusem*, No. 93-3025, 1995 Fla. ENV LEXIS 78, at \*1 (4th Dist. Ct. App. 1995).

## VI. SO HOW IS IT WORKING?

Growth management in Florida was meant to be an integrated program which effectively and efficiently combined and coordinated the various environmental and land use processes that exist at the different various levels of government in Florida. Growth management has successfully raised the minimum standards of practice in Florida, instituting the most rudimentary planning practices in Florida's rural and small communities, and providing a mechanism to improve enforcement of planning requirements in older, more sophisticated jurisdictions. However, growth management clearly has not reached its full potential. Some of the problems are simple glitches in the procedural aspects of the statute. The resolution of others may require fundamental changes to current enforcement mechanisms. In addition, a number of important substantive changes should be made to the Act. Changes to other state laws may be necessary so that Florida truly has an integrated growth management program where the relative roles of planning and permitting are clearly delineated and understood. Only in this way will all private and public players be playing by the same rules. Finally, Florida's implementation of growth management has suffered from a significant information gap about the true costs and benefits of land use controls. These issues are discussed below.

### A. *Procedural Issues: Planning*

#### 1. Coordination of Chapters 163 and 380 of the *Florida Statutes*

The proper relationship between chapters 163 and 380 of the *Florida Statutes* was not analyzed or determined with the adoption of chapter 163. While the Act expresses the appropriate intent for close coordination, certain specific statutory provisions prevent this from happening.

A significant problem concerns the comprehensive plans for local governments which have all or part of an Area of Critical State Concern ("ACSC") within their jurisdiction. ACSCs are those parts of the state which have been determined to be the most sensitive to development and require the highest level of protection and state oversight of planning. However, a perhaps unintended consequence of chapter 163 is that it takes significantly longer to put into place a chapter 163 comprehensive plan in these areas. This is because the Act states that a plan for an ACSC cannot



become effective until the Administration Commission formally adopts a rule which approves of the plan.<sup>311</sup>

Given the liberal opportunities for rule challenges provided in Florida's Administrative Procedures Act and the fact that proposed rules cannot proceed to final adoption until the completion of the rule challenges,<sup>312</sup> the very areas which are most in need of improved comprehensive plans have experienced delays in the effectiveness of their plans. Monroe County, the Florida Keys,<sup>313</sup> has clearly provided the best example of this paradox. The Monroe County Board of County Commissioners adopted a plan in an attempt to comply with the Act in 1990, when it was due. The county did not contest the subsequent "not in compliance" determination and entered into a settlement agreement which contemplated a complete rewrite. Finally, a plan was adopted on April 13, 1993, but again was found not in compliance. While other local plans became effective upon adoption, even though their full compliance with the Act was subsequently challenged, Monroe County's plan did not become effective then and is still not effective as of this writing due to unresolved challenges to the Administration Commission's proposed rule which approved of the plan with changes. While every party to the combined chapters 163 and 380 of the *Florida Statutes* litigation, except the county, agreed that the plan was not fully in compliance, there is little question that the plan improves the county's ability to protect its natural resources and otherwise manage its growth. Thus, it is with some frustration to all parties, including the county, the DCA, and the environmental intervenors that this improved plan cannot become effective until the chapter 380 rule challenge process has been completed. The implementation of improvements to the Polk County comprehensive plan, as it relates to the Green Swamp ACSC, has suffered from similar delays. Seemingly adopted to prevent a local government in an ACSC from adopting and enforcing a plan amendment which weakens environmental protections without the safeguard of state oversight, this provision has instead delayed the effectiveness of required improvements to such plans.

Chapter 163 of the *Florida Statutes* should be amended so that the plan amendments adopted by local governments to bring their plans into compliance which chapter 163 are effective upon the issuance of a final order of the DCA or Administration Commission finding them to be in

311. See FLA. STAT. § 380.05 (1995).

312. See FLA. STAT. §§ 120.54(4), .56 (1995).

313. Pursuant to § 380.0552 of the *Florida Statutes*, Monroe County is a designated "Area of Critical State Concern."

compliance. The ability to preclude the effectiveness of a plan amendment that would weaken the protections in an ACSC plan is now accomplished by the stay on the effectiveness of plan amendments until a final order finding them in compliance. Additionally, the Administration Commission would retain its authority under chapter 380 of the *Florida Statutes* to adopt its own amendments to a comprehensive plan in an ACSC.

The DCA has jurisdiction over both chapter 163, comprehensive planning activities, chapter 380,<sup>314</sup> DRI and ACSC activities. These statutes evince a legislative intent that they be viewed and implemented together as two stages of one orderly planning and development process. For instance:

*In conformity with, and in furtherance of, the purpose of the Florida Environmental Land and Water Management Act of 1972, chapter 380, it is the purpose of this act to utilize and strengthen the existing role, processes, and powers of local governments in the establishment and implementation of comprehensive planning programs to guide and control future development.*<sup>315</sup>

The legislature contemplated a high level of coordination between the comprehensive planning and DRI processes. Chapter 380 also suggests a direct connection between the DRI and comprehensive plan processes. Section 380.06(6)(b) prohibits “favorable consideration” of a plan amendment solely because it is “related” to the DRI, which suggests that the reviewers of the comprehensive plan amendment know of the DRI application and what it contains. The statute’s use of “related” means that the legislature intended, or wanted to allow, the two plans to be considered together. In section 380.06 (6)(b)(2) of the *Florida Statutes*, the fact that a DRI would “necessitate” a comprehensive plan amendment could only indicate that the two plans are intended to work together. Because the DRI necessitates the amendment, reviewers of the amendment would need to know why, and they would have to look to the DRI to find those answers.

The legislative intent of chapter 163 is also furthered by a high level of coordination between these two programs. For comprehensive plan amendments intended to accommodate DRI’s, the “best available” and “appropriate” data would, in most cases, be the DRI information. The DRI contains the most specific and reliable information available at the time

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314. This chapter is known as the Florida Environmental Land and Water Management Act of 1972. See FLA. STAT. § 380.012 (1995).

315. *Id.* § 163.3161(2) (emphasis added).

about the projected impact of the plan amendment, and therefore constitutes the “best available” and “appropriate” data.

Both Acts require the government to deal “effectively”<sup>316</sup> with future problems which could result from the use and development of the land. Governmental decisions must be based upon the most specific and reliable available data. Because the information contained in an application for DRI development approval contains the most specific information about the developer’s actual intentions, its use will allow the government to deal most effectively with future problems. When an amendment to a comprehensive plan is proposed for the purpose of accommodating a proposed DRI, the plan of development in the Application for Development Approval and the DRI information must be considered the best available data as to the future land use for the subject area. The plan of development in the ADA and the DRI information are the best information available about how the amendment, in reality, will impact the operation of the plan.

More importantly, future problems concerning the development of land are likely to be ineffectively dealt with, or avoided. This occurs when a plan amendment is approved based on an assumption or conclusion drawn from the face of the amendment, which is refuted by more specific information disclosed by the related DRI application or development order. If the amendment is approved based on one set of “facts,” but the DRI review proceeds on a different set of “facts,” the two processes are not working together. This creates an inexcusable and avoidable inconsistency that can have different results.

First, the DRI application could be denied because it is inconsistent with the comprehensive plan, thus wasting the time and resources of all public and private entities involved. Alternatively, the amendment could be approved because the basis of the “facts” showed it met the terms of chapter 163, and the DRI application also could be approved because the basis of the “facts” showed it met the terms of chapter 380. Since the “facts” from the DRI Development Order really determine what will happen in the affected area, the chapter 163 review was meaningless and the substantive requirements of that Act would not have been met. Neither of these scenarios, one wasteful and one bordering on fraudulent, can be viewed as acceptable or consistent with the law.

Despite these considerations, a final order from the DCA ruled that when a plan amendment and DRI application are submitted concurrently, the plan amendment is judged solely upon the information contained in the

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316. *Id.* § 163.3161(3).

application, and the data and analysis and the DRI information is not relevant or admissible in the plan compliance proceeding.<sup>317</sup> While this order remains the DCA's only actual ruling on the issue, a recent reorganization has the potential to significantly increase the level of coordination between the comprehensive planning and DRI programs.

It would be consistent with Florida's new emphasis on streamlining governmental processes and would simply make common sense to require, when DRI applications and a related plan amendment are pending before the DCA at the same time, that the more specific information in the DRI application be considered as the "data and analysis" for the comprehensive plan amendment. This would prevent a scenario where the plan amendment is approved, or denied, based on a set of assumptions that is belied by the reality of the DRI plans.

An even better response to the disconnect between the comprehensive planning and DRI programs would be to accelerate the complete phase out of the DRI program and replace its essential functions with an increase in the requirements for comprehensive plan amendments. Such an approach would require the same type of data analysis and substantive conditions for plan amendments as are currently required for DRIs. While it might be appropriate to have some threshold for very small plan amendments, it would be important to review sub-DRI-threshold plan amendments for inter-jurisdictional impacts.

## 2. Applicability of Chapter 9J-5 of the *Florida Administrative Code* to Plan Amendments

Chapter 163 of the *Florida Statutes* and rule 9J-5 of the *Florida Administrative Code* were written for the purpose of determining whether adopted provisions included everything that needed to be included in a plan. They were not written in a manner which emphasizes the adoption or denial of discreet plan amendments as an individual planning decision. Although it will always be necessary to maintain a set of requirements which preclude, or more accurately, strongly discourage, local governments from deleting important and necessary parts of their plans, the Act and the rule should be rewritten to more appropriately govern the act of amending an existing plan. Legislation adopted in 1995 has directed the DCA to analyze this issue and make a set of recommended changes on or before December 15, 1995.<sup>318</sup>

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317. 1000 Friends of Fla. v. Department of Community Affairs, No. 93-4863GM, 1994 Fla. ENV LEXIS 67, at \*9 (Dep't of Community Affairs June 16, 1994).

318. Act of June 15, 1995, ch. 95-322, 1995 Fla. Laws 2867.

The author recommends that changes be made to rule 9J-5 which require more detailed, including original, data gathering an analysis and which insert into the compliance review process the same essential substantive requirements that now apply to DRIs.

### B. *Substantive Issue*

The consistency requirement does not apply to state agencies. Thus, an agency may issue a permit under a program it administers which is inconsistent with the relevant local government comprehensive plan. Indeed the case law prohibits an agency from considering a local plan unless the statutory authority it is implementing specifically makes the local plan a relevant consideration.<sup>319</sup> This is a major omission which significantly reduces the impact of an adopted local plan and which creates some resentment that the state requires local governments to adopt plans that they are not required to comply with.

Just as problematic is the ability of a state agency to develop a project that is inconsistent with a local comprehensive plan or beneficial growth management practices. The Board of Regents decision to site Florida's tenth state university in the far reaches of rural southwest Lee County, is perhaps the best or worst example. The Department of Transportation has "plenary" authority to site and build new or expanded roadways and its decisions do not have to be consistent with local comprehensive plans.<sup>320</sup> Also, the DCA itself may find it difficult to explain the importance of discouraging urban sprawl from its future new home in the southeast reaches of Leon County. Given the significant growth-related impacts of public infrastructure planning decisions, the lack of a state consistency requirement makes it difficult to justify strict applications of growth management policies to single-family home developments, and undercuts public confidence in the fairness of the process. The state must lead by example. When it acts either as developer or regulator, it must be consistent with the plans it has required local governments to adopt.

### C. *Procedural Issues: LDRs and Development Orders*

The implementation of plans, through land development regulations and development orders, raises the most current issues surrounding growth

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319. *Council of the Lower Keys v. Charlie Toppino & Sons, Inc.*, 429 So. 2d 67, 68 (Fla. 3d Dist. Ct. App. 1983).

320. *See Department of Transp. v. Lopez-Torres*, 526 So. 2d 674, 677 (Fla. 1988).

management. There are several very important conflicts and holes in the existing processes which should be corrected. First, the statutory "consistency" cause of action expressly applies only to consistency with comprehensive plans and it is not clear that violations of LDRs which are more specific interpretations of the terms of the plan, can also be raised in a section 163.3215 consistency challenge. In order to promote cohesiveness and clarity in the enforcement of a local government's adopted growth management policies, it should be clear that violations of either the plan or the LDRs can be enjoined under the consistency requirement. It makes no sense whatsoever for an affected person to have to challenge an inconsistent development order in an original action to enjoin a violation of the plan, and by way of certiorari to enjoin a violation of the LDRs. The legislature should amend the Act to establish the statutory cause of action in section 163.3125 as the exclusive mechanism for challenging the issuance or denial of a development order on any basis.

The second issue to be discussed is the distinction which the Florida Supreme Court has found to exist in the "consistency" cause of action which creates a separate process for challenging inconsistent development orders for applicants and "third parties."<sup>321</sup> As it is currently being interpreted and practiced, the following scenario has unfolded. When a local government is considering a quasi-judicial decision, there will typically be an applicant and a third party who opposes the request. Where either party is going to challenge the decision on the basis that it is not supported by competent substantive evidence on the record, it departs from the essential elements of applicable law, or suffers from a procedural flaw, judicial review is by petition for writ of certiorari in the circuit court. The process and standards, which are well known, are the same for each party.

However, if either party wants to challenge the decision on the basis that it is inconsistent with the plan, they must follow divergent paths. According to the supreme court's *Parker* decision, the disappointed applicant's remedy is also a certiorari action except that they may also raise the theory that the development order is inconsistent with the comprehensive plan. The third party, however, must follow the statutory procedure and file a verified complaint with the local government. If that does not result in an appropriate action, the third party must then bring an original action in the circuit court with the sole issue being consistency with the plan. Other issues must be raised in a petition for certiorari which must be filed within the same time frame as the verified complaint. While a certiorari proceed-

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321. *Parker v. Leon County*, 627 So. 2d 476, 479 (Fla. 1993).

ing is appellate in nature, and is based exclusively on the record that had been previously established, the third party's consistency challenge is an original action. The Act is silent on how or even whether the record below can be used in this original proceeding.

The first issue this raises is why there should be one process for the applicant's consistency challenge and another for that brought by a third party. The second issue is whether there should be one process to challenge a development order on some theories and another to challenge on the theory of consistency. In the author's view, Florida should combine the common law and statutory processes and theories for challenging development order decisions into a single cause of action. Given the recent emphasis on alternative dispute resolution, it is probably best to use the statutory cause of action's verified complaint process as an initial step and then allow the subsequent initiation of formal proceedings. The issue then becomes whether the judicial review should be *de novo* or on the record.

Given that most local governments have now instituted procedures to implement *Snyder*, complete and reviewable records are typically being made at the local level despite *Snyder's* failure to require local governments to include findings of fact in their development orders. However, third parties are increasingly disadvantaged at the local hearing level as the complexity of the procedural and substantive requirements increases. Without attorneys and experts to represent them at the public hearing, it is difficult for affected persons to make an adequate record. Under the existing process, they can wait and see what happens at the public hearing. If their position wins, they will have saved the money that might otherwise have been spent on experts and attorneys. If their position loses, they can then hire experts and lawyers for purposes of the consistency challenge. If they do not have the ability to make a record at a subsequent *de novo* hearing, they will always need to make one at the public hearing, when the decision of the local government is still in doubt.

Of course, as a practical matter, it is still important to make a case at the public hearing in an attempt to persuade the local commission of the correctness of one's position, and public policy would seem to encourage putting all relevant information and argument into the record prior to the initiation of litigation. Notions of administrative and judicial economy would suggest that judicial review be based on the record below and that there not be a second opportunity to make a record. On the other hand, those same considerations might suggest discouraging a process that increases the time and financial resources required to conduct a local government public hearing.

Among the options is to create a land use board of appeals to which local government decisions are appealable *de novo*, but where the record below is entered into the record and can support findings of fact. This would relieve local governments from having to institute strict quasi-judicial procedures but would not penalize those who do so. The incentive to do so would still exist in the opportunity to set a clear and compelling record which might discourage a lawsuit. The lack of a requirement to use quasi-judicial procedures would not invite arbitrary decisions given the clear consistency requirement and the availability of other landowner remedies like the property rights law. Third parties, although able to make a record at the administrative challenge level, should have to appear and submit objections at the local level in order to have standing to bring such a challenge. Further, although the *Snyder* opinion specifically declined to require local governments to include findings of fact, state law should require this as a means of providing an articulated basis for the decision. This would give both potential litigants and reviewing bodies a much better idea of the merits of the local government's decision.

#### D. *The Quasi-Judicial Issue*

Appeals from a decision of a land use board of appeals would be, to the relevant district court, another way in which enforcement of plans could be more meaningful. This method would increase the specificity of comprehensive plans and plan amendments. The clearer the plans are, the less question there can be about the consistency of development orders. The substantive requirements for plan amendments discussed above, if implemented, would lend important structure to development order decisions, and narrow the issues to be resolved. Better planning would lead to better development order decisions and fewer legal challenges.

As discussed above, a number of courts have begun to take a view of site-specific comprehensive plan amendments which likens them to quasi-judicial rezonings under the *Snyder* case.<sup>322</sup> This has added an extremely interesting and generally confusing twist to the plan amendment process, and has blurred the distinction between the planning and zoning processes. The procedural and substantive requirements for adopting and amending comprehensive plans are specifically laid out in the Act. Despite this fact and despite the "exclusivity" clause in the Act, some litigants and courts

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322. See *Florida Inst. of Technology, Inc. v. Martin County*, 641 So. 2d 898, 899 (Fla. 4th Dist. Ct. App. 1994); see also *Section 28 Partnership, Ltd. v. Martin County*, 642 So. 2d 609, 612 (Fla. 4th Dist. Ct. App. 1994).



have argued that the process is also governed by the quasi-judicial principles established in the *Snyder* case for rezoning decisions. While the *Snyder* opinion is largely based on the understanding that planning and zoning are separate acts, the quasi-judicial approach emphasizes the site-specific nature of either decision to argue for a higher level of judicial review.

This author maintains that *Snyder* held site specific rezonings to be quasi-judicial because the legislative decision is now made at the planning stage. Thus, extending *Snyder* to plan amendment decisions would mean that, since the jurisdiction-wide plans have now all been adopted, local governments no longer have the ability to act in a legislative capacity relative to specific areas. Also, the quasi-judicial view, if it holds, would ignore the specific set of procedural and substantive standards for the plan amendment process which has been established by the legislature, grafting on top of that a requirement to adhere to the procedures and standards which are required of a quasi-judicial decision. The *Snyder* approach is simply not a good fit for plan amendments as they are currently constituted. For instance, how can a court strictly scrutinize a decision declining to adopt a plan amendment for whether the decision is consistent with the comprehensive plan? Under the terms of Florida's Growth Management Act, these decisions are required to be consistent with chapter 163, of the *Florida Statutes*. There is no entitlement anywhere in statutory or common law for a landowner to receive a plan amendment. Thus, there is no basis to "strictly scrutinize" a decision declining to approve such an amendment. As long as a plan amendment decision is consistent with chapter 163, of the *Florida Statutes*, it should be upheld.

The push to view plan amendment decisions as quasi-judicial has resulted in a number of consequences which run counter to the understood concepts and procedures which were intended to guide growth management in Florida. First, this approach greatly inhibits the ability to implement the Act's emphasis on public participation and intergovernmental coordination. Prohibiting a county commissioner from speaking to a representative of a state or regional agency with expertise relative to a pending plan amendment proposal precludes just the sort of information sharing which is necessary and encouraged to make comprehensive planning work.

Next, because the very concept of comprehensive planning recognizes that a decision on a single parcel of land has jurisdiction-wide implications, it does not lend itself to a standard of judicial review which focuses primarily on the rights of particular individuals. For instance, as a local government attempts to maintain a relationship between land supply and demand for purposes of directing growth to and away from specific areas,

a decision granting a plan amendment for one parcel is a decision not to grant it to another. The decision to grant or deny a plan amendment may actually be a decision about whether to set a precedent or to open an entire area up to urban level development, which will then require commitments of public resources to provide necessary services and facilities. This is why the Act's standing provision is as broad as it is. This is a legislative decision. It affects the entire community. It should be treated by the courts as such.

The quasi-judicial debate forces us to examine the changing roles and relationships between the map amendment and the rezoning processes. The classic and doctrinally correct view of making a generalized plan followed by the distinct act of rezoning specific parcels applies best as a jurisdiction-wide plan. One consideration which supports this view is that most FLUM amendments are decided on the basis of fairly site-specific data and analysis. Indeed, it is often the case that an application for a plan amendment is accompanied by an application for rezoning and other quasi-judicial approval, such as a site plan approval. When viewed in the context of the legal requirements for data and analysis support and full compliance review for plan amendments, an argument can be made that FLUM amendments serve essentially the same purpose as rezonings used to serve. Of course not all FLUM amendments are the same. For instance, the process used by Dade County is probably not going to be the same as in Glades County. However, it is tempting to want plan amendments to be treated as rezonings have been treated in the past. However, while it is possible for FLUM amendments to serve this function, some changes are needed to Florida's current substantive requirements for plan amendments.

First, while the law allows a site-specific analysis of parcels for which a plan amendment is proposed, it expressly does not require a local government to collect or consider any data which does not already exist. This should change, or the Act should be amended to state clearly that in the absence of supporting data, an amendment may not be approved. FLUM amendments, and other related amendments should be required to analyze and be based upon the extrajudicial impacts, the projected financial costs and benefits to the public, and the effect on the local government's ability to meet all of its adopted planning goals, objectives, and policies.

Second, changes should be made to require more specificity in terms of analysis and application of existing or generated data for plan amendments. This is particularly important concerning the mapping of development and preserve areas. The approval of FLUM amendments should include up front commitments by the developer related to these issues. As the *Snyder* line of cases continues to move in the direction of "if the plan

says it, you get it," the need for more certainty and commitments at the amendment stage increases dramatically. Moreover, the state-level review of plan amendments provides the best opportunity for each governmental agency which would have jurisdiction over some phase of a development project to coordinate their information and substantive requirements to facilitate the adoption of a "plan" which anticipates and avoids regulatory problems and which maximizes the benefits of coordinated governmental input.

One way to increase the quality and specificity of data and analysis for plan amendments, as well as for the resulting decision, is to significantly improve intergovernmental coordination. While the Act currently provides for such coordination, in practice, the potential of intergovernmental coordination has never been achieved. Local governments and the DCA continue to over-rely on the expediency of negotiated plan amendments which have not been critically analyzed by third parties and other agencies with expertise. If local governments and the DCA increased the use of planning and design meetings at which all relevant agencies and persons are at the table, potential development order and permitting problems could be more easily anticipated and avoided. A true commitment to planning still does not exist in Florida even though the legal framework and judicial precedent clearly exist to plan effectively. What is needed now is for local governments to be more willing to make more specific decisions earlier in the process. For their part, state agencies must significantly increase the amount of information they make available to local governments and to commit resources and actions to the local planning process without completely deferring to their narrow regulatory programs.

## VII. CONCLUSION

South Florida, in particular, requires comprehensive planning solutions to critical problems which threaten major consequences such as the restoration of the Everglades, a secure future water supply, the loss of its agricultural lands, the overwhelming cost of providing services to development at the western fringe, and the restoration of the environmental systems in the Florida Keys. Recently, decisions have been made to allow residential development in the Agricultural Reserve in Palm Beach County, to intensify residential densities in an area of western Broward County that is being studied for Everglades restoration options, and to widen Highway US 1 into the Keys from two lanes to four. The failure of the state, in the form of the DCA, to seek the reversal of these decisions, each of which will have profound growth management implications, calls into serious question the

long term usefulness of growth management to this region. The burden increasingly falls upon citizens to enforce the Act and turn growth management into a reality. The complex processes, burdens of proof, and political and financial realities do not portend well for the prospects. Some of the changes recommended in this article are intended to make the process simpler and more effective.

Growth management continues to suffer from the compartmentalization that it was intended to remedy. Until it is viewed and practiced as a continual process from the initial planning concept to the final development order, it will be more costly and less effective than it should be. We have in so many ways come so far in this state. We cannot measure success, however, by how far we have come, but instead we must always focus on getting to where we need to be.

# Waiting for the Go: Concurrency, Takings, and the Property Rights Act

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## I. INTRODUCTION

Florida faces ongoing growth pressures that burden available infrastructure. In 1972, the Florida Legislature developed comprehensive land use planning laws to address these problems.<sup>1</sup> In 1975, the legislature passed the Local Government Comprehensive Planning Act of 1975,<sup>2</sup> which required comprehensive land use plans. The 1985 legislature substantially amended the 1975 comprehensive planning act and renamed it the Florida Local Government Comprehensive Planning and Land Development Regulation Act ("Growth Management Act").<sup>3</sup> Among other things, the 1985 Growth Management Act requires local comprehensive plans to require adequate infrastructure to accommodate development.<sup>4</sup> This requirement is called "concurrency."

This article addresses the development of infrastructure concurrency requirements. Particularly, this article examines whether delays of, or bars to, property development due to concurrency requirements constitute a compensable taking of private property rights. The Bert J. Harris, Jr., Private Property Rights Protection Act ("Harris Act"),<sup>5</sup> adopted by the legislature in 1995, might substantially expand local government exposure for those acts which fall short of a taking of all rights in a property. This article concludes by considering the potential impacts of the Harris Act.

## II. CONCURRENCY

The Growth Management Act sets general, statewide, regional, and local requirements for land use planning. A key component of the Growth Management Act mandates sufficient, concurrent infrastructure before development is authorized.<sup>6</sup>

The Growth Management Act states in pertinent part that "[i]t is the intent of the Legislature that public facilities and services needed to support development shall be available concurrent with the impacts of such development."<sup>7</sup> According to the *Florida Administrative Code*, public facilities and

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1. Florida State Comprehensive Planning Act of 1972, 1972 Fla. Laws ch. 72-295.

2. 1975 Fla. Laws ch. 75-205 (current version at FLA. STAT. §§ 163.3161-.3211 (1995)).

3. State Comprehensive Plan, 1985 Fla. Laws ch. 85-57 (current version at FLA. STAT. §§ 163.3161-.3243 (1995)).

4. See FLA. STAT. §§ 163.3177-.3178, .3180, .3202 (1995).

5. 1995 Fla. Laws ch. 95-181 (codified at FLA. STAT. § 70.001 (1995)).

6. FLA. STAT. § 163.3202(2)(g).

7. *Id.* § 163.3177(10)(h).

services include: roads; sanitary sewer; solid waste; drainage; potable water; parks and recreation; mass transit, if applicable; and public transit.<sup>8</sup>

In addition, any local government may extend the concurrency requirement so that it applies to other public facilities within its jurisdiction, such as schools.<sup>9</sup> Each local government also must adopt a Concurrency Management System ("CMS"),<sup>10</sup> which must include a monitoring system and provide that concurrency be determined for a project by the time a permit for containing a specific plan of development is applied for.

Concurrency timing is set out for each public facility. The most restrictive timing is for sanitary sewer, solid waste, drainage, and potable water facilities. To obtain a permit for these facilities, the local government is required to make the necessary facilities and services available to the new development at the time of issuance of a certificate of occupancy or its equivalent.<sup>11</sup> Another way the local government may obtain a permit is by showing, at the time the permit is issued, that the necessary facilities and services are guaranteed, through an enforceable development agreement, to be in place at the time of the certificate of occupancy.<sup>12</sup> The least restrictive timing requirement is for parks and recreation facilities. These facilities may be unavailable for as long as five years after the issuance of a permit.<sup>13</sup>

The timing requirement for roads is between the first two standards.<sup>14</sup> Many exceptions, however, may apply.<sup>15</sup> Generally, the required timing is: 1) at the time the permit is issued, the roads are in place or under construction; 2) the permit is issued subject to the condition that the roads are scheduled to be in place or under actual construction not more than three

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8. FLA. ADMIN. CODE ANN. r. 9J-5.0055(2)(a) (1995).

9. *Id.* at r. 9J-5.0055(2)(b).

10. *Id.* at r. 9J-5.0055.

11. *Id.* at r. 9J-5.0055(3)(a)1.

12. *Id.* at r. 9J-5.0055(3)(a)2.

13. FLA. STAT. § 163.3180(2)(b). The *Florida Administrative Code* states:

A development order or permit is issued subject to the conditions that the necessary facilities and services needed to serve the new development are scheduled to be in place or under actual construction not more than one year after issuance of a certificate of occupancy or its functional equivalent as provided in the adopted local government 5-year schedule of capital improvements.

FLA. ADMIN. CODE ANN. r. 9J-5.0055(3)(b)2.a. (1995). This section of the *Florida Administrative Code* is derived from § 163.3180(2)(b) of the *Florida Statutes*.

14. FLA. STAT. § 163.3180(2)(c).

15. *See id.* § 163.3180(5).

years after issuance of a certificate of occupancy, as provided in the five-year schedule of capital improvements;<sup>16</sup> or 3) at the time of issuance of a permit, the roads are the subject of a binding agreement which requires the roads to be in place or under actual construction after no more than three years.<sup>17</sup>

There are numerous exceptions. A major statewide growth management policy promotes compact urban development.<sup>18</sup> Concurrency, as applied to roads, works against this policy. The more the population is spread out, the less congestion exists. Legislation in 1993 created formal roadway concurrency exceptions to try to solve this problem.<sup>19</sup> These exceptions are either area-specific or project-specific<sup>20</sup> and are as follows.

*Exception One: Urban Redevelopment Project.* A proposed urban redevelopment project located within an "Existing Urban Service Area," as established in the local comprehensive land use plan, is not subject to the concurrency requirements for up to 110% of the roadway impacts generated by prior development.<sup>21</sup> These projects are approved even if the redevelopment reduces the level of service below the adopted standard.<sup>22</sup>

*Exception Two: De Minimis Project.* A proposed development may be deemed to have de minimis impact and may not be subject to concurrency, so long as the additional impacts do not significantly degrade the existing level of service and the project is not very dense or intense.<sup>23</sup> The cumulative impact of all de minimis development must be monitored and can exceed no more than three percent of the maximum service volume at the adopted level of service if the road is over capacity.<sup>24</sup>

*Exception Three: Long-term Transportation CMS.* This exception formalizes a ten-year to fifteen-year plan.<sup>25</sup> The Florida Department of Community Affairs ("DCA") approved such a plan for Pasco County, where roads are severely overloaded. To correct existing deficiencies on roads and to set priorities for reducing the backlog on roads, local governments are

16. FLA. ADMIN. CODE ANN. r. 9J-5.0055(3)(c)2. (1995).

17. *Id.*

18. FLA. STAT. § 163.3180(8).

19. Local Government Comprehensive Planning and Land Development Regulation Act Amendments, 1993 Fla. Laws ch. 93-206 (codified as amended in scattered sections of FLA. STAT. ch. 163 (1995)).

20. FLA. STAT. § 163.3180(5)(b).

21. *Id.* § 163.3180(8)(b).

22. *Id.* § 163.3180(5)(b).

23. *Id.* § 163.3180(6).

24. *Id.*

25. FLA. STAT. § 163.3180(9).



authorized to adopt a long-term CMS with a planning period of up to ten years.<sup>26</sup> The comprehensive plan must: 1) designate specific areas where significant backlogs presently exist; 2) provide a financially feasible system to ensure that existing deficiencies are corrected within the ten-year period; and 3) demonstrate the roads required to correct existing deficiencies, as well as to accommodate new development.<sup>27</sup> The comprehensive plan also must state that a plan amendment shall be required to eliminate, defer, or delay construction of any road which is needed to maintain the adopted level-of-service standard, and which is listed in the long-term schedule of capital improvements, if established.<sup>28</sup> Local governments with a severe backlog may request DCA approval for a planning period of up to fifteen years for establishing a long-term CMS.<sup>29</sup>

*Exception Four: Transportation Concurrency Management Area ("TCMA").* This provision promotes infill development or redevelopment within selected urban areas and it allows the level of service to be averaged within a TCMA.<sup>30</sup> A TCMA is a compact geographic area with existing or proposed multiple, viable alternative travel paths or modes for common trips.<sup>31</sup> A local government must justify the level of service chosen, show how urban infill or redevelopment would be promoted by the TCMA, and demonstrate how mobility will be accomplished.<sup>32</sup>

*Exception Five: Transportation Concurrency Exception Areas ("TCEA").* There are three types of TCEAs. The first type is intended to promote urban infill development in built-up areas which already have roads in place.<sup>33</sup> In this type of TCEA, no more than ten percent of the land within an infill TCEA may be developable vacant land.<sup>34</sup> Specific development density and intensity thresholds also must be met.<sup>35</sup> The second type of TCEA promotes urban redevelopment and may be located only in an area which contains no more than forty percent developable vacant land.<sup>36</sup> The third type of TCEA is intended to promote develop-

26. *Id.* § 163.3180(9)(a).

27. *Id.*

28. *Id.* § 163.3180(10).

29. *Id.* § 163.3180(9)(b).

30. FLA. STAT. § 163.3180(7).

31. *Id.*

32. *Id.*

33. *Id.* § 163.3180(5)(b); FLA. ADMIN. CODE ANN. r. 9J-5.0055(6)(a)1. (1995).

34. FLA. ADMIN. CODE ANN. r. 9J-5.0055(6)(a)1.a. (1995).

35. *Id.* at r. 9J-5.0055(6)(a)1.b.

36. FLA. STAT. § 163.3180(5)(b); FLA. ADMIN. CODE ANN. r. 9J-5.0055(6)(a)2. (1995).

ment in central business districts designated for downtown revitalization.<sup>37</sup> There must be data and analysis supporting the creation of these exception areas, where fairly dense and intense development may be allowed.<sup>38</sup> Dade and Broward Counties are trying to designate TCEAs.

*Exception Six: Projects that Promote Public Transportation.*<sup>39</sup> This is a project-specific exception. To reduce the adverse impact of transportation concurrency, local governments may exempt projects that promote public transportation by establishing policies in the comprehensive plan for granting such exceptions.<sup>40</sup> Examples of such projects are office buildings that incorporate transit terminals or fixed rail stations. To receive the benefit of this exception, local comprehensive plans also must demonstrate supporting data and analysis showing consideration of the project impact on limited access highways and establish how a project will qualify.<sup>41</sup>

*Exception Seven: Part-time Projects.* Another project-specific exception is for part-time projects.<sup>42</sup> This section excepts developments located within urban infill, urban redevelopment, existing urban service, or downtown revitalization areas which pose only special part-time demands on roads.<sup>43</sup> Examples of these types of developments include stadiums, performing arts centers, racetracks, and fairgrounds.

*Exception Eight: Private Contributions.* The comprehensive planning statute also entitles a local government to allow a landowner to proceed with development of a specific parcel of land notwithstanding a failure of the development to satisfy transportation concurrency.<sup>44</sup> This provision seeks to limit local government liability for temporary takings due to development delays. The local government must have an adopted comprehensive plan in compliance with DCA standards.<sup>45</sup> The local government also must provide a means by which the landowner will be assessed a fair share of the cost of providing the transportation facilities necessary to serve the proposed development.<sup>46</sup> On the other hand, the landowner must make a binding

37. FLA. STAT. § 163.3180(5)(b); FLA. ADMIN. CODE ANN. r. 9J-5.0055(6)(a)3. (1995).

38. FLA. ADMIN. CODE ANN. r. 9J-5.0055(6)(b)2. (1995).

39. FLA. STAT. § 163.3164(28); FLA. ADMIN. CODE ANN. r. 9J-5.0055(7) (1995).

40. FLA. STAT. § 163.3180(5)(b).

41. FLA. ADMIN. CODE ANN. r. 9J-5.0055(7) (1995).

42. FLA. STAT. § 163.3180(5)(c).

43. *Id.*

44. *Id.* § 163.3180(11).

45. *Id.* § 163.3180(11)(a).

46. *Id.* § 163.3180(11)(d).

commitment to the local government to pay the fair share of the cost of providing the transportation facilities to serve the proposed development.<sup>47</sup>

Concurrency standards authorize local governments to condition or bar development. The local government may allow growth only when sufficient infrastructure exists. The following section addresses when a development moratorium, based on a lack of concurrency, may be a compensable taking.

### III. THE TAKING BACKGROUND

In the early 1900s, courts began to struggle with the tension between the desire of local governments to regulate the use of land and the constitutional property rights of landowners. Few localities previously adopted zoning regulations. Such regulations tend to reduce the value of at least some property. There was much uncertainty as to whether they were constitutional. In response, the United States Department of Commerce encouraged the adoption of zoning codes through its promulgation in 1921 of the Standard State Zoning Enabling Act, which provided a method for states to adopt statutes empowering local governments to enact zoning regulations.<sup>48</sup>

The Fifth and Fourteenth Amendments to the *United States Constitution* provide the bases for these issues. The Fifth Amendment guarantees that citizens' private property shall not be taken for public use without just compensation.<sup>49</sup> The Fifth Amendment is applicable to the states through the Fourteenth Amendment, which provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."<sup>50</sup>

The *Florida Constitution* also guarantees all natural persons the right to "acquire, possess and protect property" and further provides that no person will be deprived of property without due process of law.<sup>51</sup> Article X, section six of the *Florida Constitution* is complementary to the Fifth and Fourteenth Amendments to the *United States Constitution*. It provides that "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner . . . ."<sup>52</sup>

47. FLA. STAT. § 163.3180(11)(e).

48. See Kenneth Hart, Note, *Comprehensive Land Use Plans and the Consistency Requirement*, 2 FLA. ST. U. L. REV. 766, 768 n.6 (1974).

49. U.S. CONST. amend. V.

50. *Id.* amend. XIV.

51. FLA. CONST. art. I, § 2.

52. *Id.* art. X, § 6.

A review of the key cases in this area is instructive. In *Pennsylvania Coal Co. v. Mahon*,<sup>53</sup> a Pennsylvania statute prohibited coal mining that caused the subsidence of any structure used for human habitation. The statute admittedly destroyed previously existing property and contract rights of the coal mining companies. The court stated that

The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.<sup>54</sup>

The Court held that the statute caused an unconstitutional taking and that the coal mining companies should be compensated.<sup>55</sup>

The next key case in this area addressed a zoning ordinance. The Court in *Village of Euclid v. Ambler Realty Co.*<sup>56</sup> held that zoning regulations which reduced the potential value of property do not constitute an impermissible taking of property.<sup>57</sup> In 1922, Euclid adopted a zoning ordinance.<sup>58</sup> A portion of the plaintiff's property was zoned residential and the plaintiff wanted to develop the entire property for industrial use.<sup>59</sup> The evidence showed that the property was worth \$10,000 per acre as industrial, but only \$2500 per acre as residential.<sup>60</sup> The Court found that the zoning restrictions were permitted under the police power of the state to protect the health, safety, and welfare of its citizens.<sup>61</sup>

A seminal New York case involved a situation similar to a concurrency moratorium. In *Golden v. Planning Board of Town of Ramapo*,<sup>62</sup> a local ordinance which prohibited development until essential services of public sanitary sewers, drainage facilities, parks and recreation facilities, roads, and firehouses were available, was deemed not to be a taking.<sup>63</sup> The court

53. 260 U.S. 393 (1922).

54. *Id.* at 415-16 (citations omitted).

55. *Id.* at 416.

56. 272 U.S. 365 (1926).

57. *Id.* at 397.

58. *Id.* at 379.

59. *Id.* at 383.

60. *Id.* at 384.

61. *Village of Euclid*, 272 U.S. at 397.

62. 285 N.E.2d 291 (N.Y. 1972).

63. *Id.* at 305.

found that the purpose of the ordinance was not exclusionary, but to provide for orderly growth.<sup>64</sup> Even though the concurrency regulations might have the effect of restricting development of up to eighteen years, the ordinance was not found to have caused a taking because the restriction was temporary and served the public good.<sup>65</sup>

Subsequent United States Supreme Court cases undermine *Ramapo*. The Court in *Penn Central Transportation Co. v. City of New York*,<sup>66</sup> held that an historic preservation ordinance, which prohibited development in a manner requested by the developer, as applied to Penn Station, did not constitute a taking, since all use of the property was not denied because the statute made air rights transferrable.<sup>67</sup> The Court closely examined whether the landowner would receive a reasonable return on its investment, using the phrase "investment backed expectations."<sup>68</sup>

Temporary takings, which are most applicable to cases dealing with concurrency, were considered in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*.<sup>69</sup> In 1957, the church purchased land on which it operated a campground called "Lutherglen" and a retreat for handicapped children.<sup>70</sup> The land is located in a canyon along the banks of a creek which operates as a natural drainage channel.<sup>71</sup> In 1978, a flood destroyed the buildings on the property.<sup>72</sup> As a result of the flood, Los Angeles County adopted an interim ordinance prohibiting the construction of any building in an interim flood protection area, including the church's property.<sup>73</sup> The church immediately filed suit seeking damages.<sup>74</sup> The Court held that landowners were entitled to damages for the temporary taking.<sup>75</sup> The substantive holding of the Court was that when the government's activities deprive a landowner of all use of property, no subsequent action can relieve it of the duty to provide compensation for the period during which the regulation was effective.<sup>76</sup>

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64. *Id.* at 297.

65. *Id.* at 301-02.

66. 438 U.S. 104 (1978).

67. *Id.* at 138.

68. *Id.* at 136.

69. 482 U.S. 304 (1987).

70. *Id.* at 307.

71. *Id.*

72. *Id.*

73. *Id.*

74. *First Evangelical Lutheran Church of Glendale*, 482 U.S. at 308.

75. *Id.* at 322.

76. *Id.* at 321.

Contrast this holding to the holding in *Ramapo*, in which the court held that a “temporary” moratorium of up to eighteen years was not a compensable taking.<sup>77</sup> The *First Evangelical Church of Glendale* Court would have found that ordinance to cause a temporary taking.

Another landmark Supreme Court case is the decision in *Lucas v. South Carolina Coastal Council*.<sup>78</sup> In 1986, developer David Lucas purchased two residential lots on the Isle of Palms, a barrier island near Charleston, South Carolina.<sup>79</sup> Lucas intended to construct single family residences on the lots.<sup>80</sup> Two years later, in reaction to the devastation caused by Hurricane Hugo, the South Carolina Legislature enacted the Beachfront Management Act (“BMA”),<sup>81</sup> which prohibited construction of homes on Lucas’ lots.<sup>82</sup>

Lucas’ suit claimed that although the BMA was a lawful exercise of South Carolina’s police power, the legislation effectively extinguished his property’s value, entitling him to compensation irrespective of whether the legislature had acted in furtherance of legitimate police power objectives.<sup>83</sup> The trial court agreed and ordered that Lucas be compensated in the amount of \$1,232,287.50.<sup>84</sup> The South Carolina Supreme Court reversed and found “that the [BMA was] properly and validly designed to preserve . . . South Carolina’s beaches,” a threatened public resource.<sup>85</sup> Since the regulation was designed to prevent serious public harm, the state court reasoned that no compensation was due the landowner under the state’s takings clause.<sup>86</sup>

The Supreme Court of the United States granted certiorari in the case. With respect to the merits of the regulatory taking claim, the Court noted that there are at least two categories of regulatory actions which are compensable without any inquiry into the public interest advanced in support of the restraint.<sup>87</sup> The first category of permissible regulatory takings occurs when a property owner suffers a physical invasion of her property.<sup>88</sup>

77. *Id.*

78. 505 U.S. 1003 (1992).

79. *Id.* at 1006-07.

80. *Id.* at 1007.

81. S.C. CODE ANN. § 48-39-250-360 (Law. Co-op. Supp. 1995).

82. *Lucas*, 505 U.S. at 1007.

83. *Id.* at 1009.

84. *Id.*

85. *Id.* at 1009-10 (alteration in original) (quoting *Lucas v. S.C. Coastal Council*, 404 S.E.2d 895, 896 (S.C. 1991), *rev’d*, 505 U.S. 1003 (1992)).

86. *Id.*

87. *Lucas*, 505 U.S. at 1015.

88. *Id.*

The second occurs when a regulation denies all economically beneficial use of land.<sup>89</sup> The Court stated that the only exception to the second category is when the regulatorily-proscribed use would amount to a nuisance at common law.<sup>90</sup> The Court also noted that it was highly unlikely that common law principles would have prevented the erection of any habitable or productive improvements on Lucas' land.<sup>91</sup> Accordingly, the Court reversed and remanded for further proceedings consistent with its decision.<sup>92</sup>

The most recent Supreme Court case in this area is *Dolan v. City of Tigard*.<sup>93</sup> In *Dolan*, an operator of an electric and plumbing supply business wished to raze an existing building and replace it with a larger structure.<sup>94</sup> The city imposed conditions requiring that the landowner dedicate ten percent of the property for flood plain and improvement of storm drainage, and dedicate a fifteen-foot strip for a pedestrian and bike pathway.<sup>95</sup> The Supreme Court held that this action constituted a taking because there must be a "rough proportionality" between dedication requirements and the impact of the development.<sup>96</sup> The Supreme Court refused to hold that rough proportionality did not exist in this case, but rather, that it had not been proven.<sup>97</sup> To prove "rough proportionality," a local government must show some sort of individualized determination that any required dedication is related both in nature and extent to the impact of the proposed development.<sup>98</sup> The burden of persuasion on this issue rests on the government.<sup>99</sup>

Recent Supreme Court of Florida cases on this issue also are instructive. In *Joint Ventures, Inc. v. Department of Transportation*,<sup>100</sup> the court stated that government must pay for property under two circumstances:

[W]hen it confiscates private property for common use under its power of eminent domain[, and] . . . when it regulates private property under

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89. *Id.*

90. *Id.* at 1022.

91. *Id.* at 1024.

92. *Lucas*, 505 U.S. at 1032.

93. 114 S. Ct. 2309 (1994).

94. *Id.* at 2313.

95. *Id.* at 2314.

96. *Id.* at 2319, 2321.

97. *Id.* at 2321.

98. *Dolan*, 114 S. Ct. at 2322.

99. *Id.* at 2319.

100. 563 So. 2d 622 (Fla. 1990).

its police power in such a manner that the regulation effectively deprives the owner of the economically viable use of the property, thereby unfairly imposing the burden of providing for the public welfare upon the affected owner.<sup>101</sup>

The court noted that “[a]lthough regulation under the police power will always interfere to some degree with property use, compensation must be paid . . . when that interference deprives the owner of the substantial economic use of his or her property.”<sup>102</sup> “[W]hen compensation is claimed due to governmental regulation of property, the appropriate inquiry is directed to the extent of the interference or deprivation of economic use.”<sup>103</sup>

Joint Ventures owned over eight acres of vacant land adjacent to Dale Mabry Highway in Tampa.<sup>104</sup> The owner agreed to sell the property contingent upon the buyer’s ability to obtain the necessary development permits.<sup>105</sup> The Florida Department of Transportation (“FDOT”) then determined that six-and-a-half acres of this vacant tract was needed for stormwater drainage associated with a planned highway widening.<sup>106</sup> In November 1985, the FDOT recorded a map of reservation, which precluded the issuance of development permits for the property.<sup>107</sup> At an administrative hearing, Joint Ventures contested the FDOT’s reservation and the hearing officer found in favor of the FDOT.<sup>108</sup>

On appeal, “Joint Ventures argued that the moratorium imposed by [the applicable *Florida Statute*] amounted to a taking because the statute deprived [Joint Ventures] of substantial beneficial use of its property.”<sup>109</sup> In opposition, the FDOT contended that the statute was not a taking, but a mere regulation and valid exercise of its police power.<sup>110</sup> The court made short work of the FDOT’s claims, stating:

If landowners were permitted to build in a transportation corridor during the period of DOT’s preacquisition planning, the cost of acquisition

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101. *Id.* at 624.

102. *Id.* at 625.

103. *Id.*; accord *Palm Beach County v. Tessler*, 538 So. 2d 846 (Fla. 1986).

104. *Joint Ventures*, 563 So. 2d at 623.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 623-24.

109. *Joint Ventures*, 563 So. 2d at 624.

110. *Id.*



might be increased. Rather than supporting a “regulatory” characterization, these circumstances expose the statutory scheme as a thinly veiled attempt to “acquire” land by avoiding the legislatively mandated procedural and substantive protections of chapters 73 and 74.<sup>111</sup>

The court further stated, “[w]e perceive no valid distinction between ‘freezing’ property in this fashion and deliberately attempting to depress land values in anticipation of eminent domain proceedings. Such action has been consistently prohibited.”<sup>112</sup>

*Joint Ventures* generated a plethora of subsequent cases in which the Fifth and First District Courts of Appeal conflicted as to whether maps of reservation create presumptive takings.<sup>113</sup> The Supreme Court of Florida resolved this question in *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*<sup>114</sup> In *A.G.W.S.*, the Expressway Authority filed a map of reservation over vacant land while *Joint Ventures* was pending.<sup>115</sup> The property owners claimed that this action amounted to a temporary taking.<sup>116</sup> The circuit court agreed, granting the landowners’ motion for summary judgment on liability.<sup>117</sup>

In a sharply divided opinion, the Second District Court of Appeal affirmed the decision of the trial court.<sup>118</sup> The appellate court also certified to the Supreme Court of Florida the question of whether all owners of lands affected by reservation maps are entitled to per se takings judgments.<sup>119</sup> In answering the certified question, the supreme court held that *Joint Ventures* did not create a per se taking standard.<sup>120</sup> It further held that a landowner must show that the map of reservation deprived substantially all economically beneficial or productive use of land before a taking has occurred.<sup>121</sup>

111. *Id.* at 625.

112. *Id.* at 626.

113. See *Department of Transp. v. Miccosukee Village Shopping Ctr.*, 621 So. 2d 516 (Fla. 1st Dist. Ct. App. 1993); *Department of Transp. v. Lake Beulah*, 617 So. 2d 1089 (Fla. 5th Dist. Ct. App. 1993).

114. 640 So. 2d 54 (Fla. 1994).

115. *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 608 So. 2d 52, 54 (Fla. 2d Dist. Ct. App. 1992), *quashed*, 640 So. 2d 54 (Fla. 1994).

116. *Id.*

117. *Id.*

118. *Id.* at 52.

119. *Id.*

120. *A.G.W.S.*, 640 So. 2d at 58.

121. *Id.*

The Supreme Court of Florida's subsequent decision in *Palm Beach County v. Wright*<sup>122</sup> followed *A.G.W.S.* The trial court and the Fourth District Court of Appeal struck down a bar of land use activities under a comprehensive plan that would impede roadway construction in designated transportation corridors.<sup>123</sup> Both lower courts held that *Joint Ventures* supported a finding of a temporary taking.<sup>124</sup>

The state supreme court, however, reversed, holding that the case was distinguishable from *Joint Ventures* on several points.<sup>125</sup> Principally, the court held that the thoroughfare map conditioned development, but did not completely bar it.<sup>126</sup> Additionally, the reservation map was considered only a flexible guidance tool.<sup>127</sup>

A seminal Eleventh Circuit Court of Appeals decision provides a good checklist for determining whether all economically viable use of property has been taken under Florida Law. *Reahard v. Lee County*<sup>128</sup> suggests that a taking claim requires one to analyze the economic impact on the owner and the extent to which the regulation interferes with the owner's investment backed expectations. Factors to consider are: 1) the history of the property; 2) the history of development; 3) the history of zoning and regulation; 4) whether the development changed when title passed; 5) the present nature and extent of the property; 6) whether the expectations of the landowner are reasonable under state common law; 7) reasonable expectations of neighbors; and 8) the amount of diminution of investment-backed expectations of the landowner.<sup>129</sup>

#### IV. ANALYSIS OF WHETHER CONCURRENCY'S PROHIBITION ON DEVELOPMENT OF PROPERTY REPRESENTS A TAKING

When property cannot be developed because of concurrency regulations, the following "takings" issues should be considered:

1. Analyze whether the concurrency ordinance provides for at least some development. Some concurrency ordinances allow for minimal development, such as single family homes, even though concurrency levels

122. 641 So. 2d 50 (Fla. 1994).

123. *Id.* at 51.

124. *Id.* at 51-52.

125. *Id.* at 54.

126. *Id.* at 53.

127. *Wright*, 641 So. 2d at 53.

128. 968 F.2d 1131 (11th Cir. 1992).

129. *Id.* at 1136.

of service may be exceeded. If the development allowed is reasonable, it is less likely that a taking has occurred.

2. Analyze the reduction in value of the property and the investment backed expectations of the owner. If the value of the property analyzed is tremendously reduced and the investment backed expectations of the owner are reasonable, it is more likely that a taking has occurred.

3. Determine how long the development will be prohibited by the concurrency regulations. The longer the prohibition, the more likely that a taking has occurred.

4. Consider whether the concurrency problem is related solely to the owner's project or to the government's failure to provide for growth. The greater the impact that the individual owner's project has on the services, the less likely it is that a taking has occurred.

5. Analyze whether the unavailable services are closely related to health, such as availability of water and sewer, or "softer services" such as recreation. The more closely the unavailable services are related to health, the less likely it is that a taking has occurred.

## V. THE HARRIS ACT

In 1995, the Florida Legislature passed, and Governor Lawton Chiles signed into law, the Bert J. Harris, Jr., Private Property Rights Protection Act.<sup>130</sup> The Harris Act might benefit landowners when imposition of concurrency regulations creates less than a complete taking of property.<sup>131</sup> The Harris Act creates rights for property owners for those governmental actions which "inordinately burden" property.<sup>132</sup> A cause of action under the Harris Act does not require a taking of all compensable rights in the property.<sup>133</sup>

The Harris Act operates prospectively to those government actions occurring after the end of the 1995 legislative session, or after May 11, 1995.<sup>134</sup> No law, rule, or ordinance that exists, or has been previously noticed for adoption, is covered.<sup>135</sup> Later amendments to existing laws,

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130. 1995 Fla. Laws ch. 95-181 (codified at FLA. STAT. § 70.001 (1995)).

131. *Id.*

132. Ch. 95-181, § 1(2), 1995 Fla. Laws at 1652.

133. *See, e.g., Reahard*, 968 F.2d at 1136 (stating Florida's prior standard that compensation is due only where governmental action "takes" all or substantially all property rights).

134. Ch. 95-181, § 1(12), 1995 Fla. Laws at 1657.

135. *Id.*

rules, and ordinances, however, fall under the Harris Act.<sup>136</sup> The Harris Act also covers actions by all local, state, and regional governments,<sup>137</sup> but it does not affect federal acts or those actions delegated from the federal government.<sup>138</sup> In addition, the Harris Act does not cover actions that abate nuisances, temporary impacts, or impacts caused by Harris Act relief issued to other landowners.

The first two limitations are products of taking jurisprudence. Takings generally are compensable when they effect a public good, but not when they prevent a harm. Conversely, the temporary impact bar differs from the common law entitlement to compensation for temporary takings.<sup>139</sup> This should substantially limit the effect of the Harris Act on moratoria. Transportation-based development bars are lifted once the infrastructure is available.

The Harris Act also exempts maintenance and expansion of transportation facilities.<sup>140</sup> This also should limit the Harris Act's impact on concurrency moratoria. As stated above, property owner claims under traffic corridor expansions constitute a major portion of Florida's taking law. Recent case law regarding development exactions indicates issues that might otherwise arise.

In *Dolan v. City of Tigard*,<sup>141</sup> the United States Supreme Court held that a city could not require a developer to provide a public greenway and bike path. The Court held that the dedications far exceeded the degree of public infrastructure impact shown for the proposed development.<sup>142</sup> The Court also held that the local government must demonstrate both an "essential nexus" and "rough proportionality" between the development and the exaction.<sup>143</sup> Failing that, the government might be liable for a taking.

Florida's Fourth District Court of Appeal, in *Department of Transportation v. Heckman*,<sup>144</sup> reviewed *Dolan* in considering the FDOT's appeal of an inverse condemnation judgment. The trial court held FDOT liable for the City of Oakland Park's requirement that the appellee property owners grant a seven-foot wide right of way across their property in return for a waiver

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136. *Id.*

137. *Id.* § 1(3)(c), 1995 Fla. Laws at 1652.

138. *Id.*

139. See *First Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987) (holding temporary taking of all rights can give rise to compensation).

140. Ch. 95-181, § 1(10), 1995 Fla. Laws at 1656.

141. 114 S. Ct. 2309 (1994).

142. *Id.* at 2322.

143. *Id.* at 2319, 2321.

144. 644 So. 2d 527 (Fla. 4th Dist. Ct. App. 1994).

of development and platting requirements. The city then conveyed the parcel to FDOT for the expansion of U.S. Highway 1. The appellate court cited to *Dolan*, but did not find any agency between FDOT and the city.<sup>145</sup> Its reversal was, therefore, wholly unrelated to the merits.

Florida's Second District Court of Appeal considered another inverse condemnation case in *Sarasota County v. Ex.*<sup>146</sup> The Exs claimed that the county had no authority to require a right of way grant in exchange for a permit. The *Ex* court did not reach the merits either. Instead, it held that the action was barred by the statute of limitations.<sup>147</sup>

Roadway expansions are prevalent causes of development exactions. One can reasonably expect concurrency moratoria where already overburdened roadway corridors are subjects of further development requests. Without the exception, limitations based on traffic concurrency would be a ripe area for litigation.

### A. *Protected Rights*

The Harris Act protects the "existing use" of property.<sup>148</sup> An "existing use" is "an actual, present use or activity on the real property,"<sup>149</sup> or

such reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property [that is] greater than the fair market value of the actual, present use or activity on the real property.<sup>150</sup>

The first definition is relatively simple to determine. The second definition, however, merges several criteria to create a new standard. There is no direct authority on which to base a determination of when property use is reasonably foreseeable and non-speculative. Former Florida Department of Community Affairs Secretary Tom Pelham suggests that local governments should draft guidelines for determining such uses under the pertinent comprehensive land use plan or zoning code.<sup>151</sup>

145. *Id.* at 530-31.

146. 645 So. 2d 7 (Fla. 2d Dist. Ct. App. 1994).

147. *Id.* at 10 (citing FLA. STAT. § 95.14 (1995)).

148. Ch. 95-181, § 1(3)(b), 1995 Fla. Laws at 1652.

149. *Id.*

150. *Id.*

151. Thomas Pelham, *Coping with the Private Property Rights Protection Act*, FLA. PLANNING (Fla. Chapter Am. Planning Ass'n), July-Aug. 1995, at 1, 15.

Pelham also notes that the second prong of the "existing use" definition requires appraisers to speculate.<sup>152</sup> The Harris Act fails to answer the question of how one determines whether the reasonably foreseeable, non-speculative land use has a higher fair market value than does a current use.

## B. *Vested Rights*

The Harris Act contains three standards to determine a vested right to a specific use.<sup>153</sup> A right may vest under common law equitable estoppel, substantive due process, or a state vested rights statute.<sup>154</sup>

Florida courts have stated that equitable estoppel bars the government from rescinding a vested right held by a property owner who has: "(1) in good faith (2) upon some act or omission of the government (3) . . . made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable . . . to destroy the right . . . ."<sup>155</sup>

The Growth Management Act, most likely to apply to local concurrency issues, contains the following vested rights provision:

Nothing in this act shall limit or modify the rights of any person to complete any development that has been authorized as a development of regional impact pursuant to chapter 380 or who has been issued a final local development order and development has commenced and is continuing in good faith.<sup>156</sup>

One article on the Harris Act notes that substantive due process allows courts to develop a standard that goes beyond traditional estoppel.<sup>157</sup> These commentators cite an Eleventh Circuit Court of Appeals decision in support of this proposition.<sup>158</sup>

Thomas Pelham recommends that local governments draft ordinances defining "vested rights."<sup>159</sup> He also suggests that doing so may provide

152. *Id.* at 15.

153. Ch. 95-181, § 1(3)(a), 1995 Fla. Laws at 1652.

154. *Id.*

155. *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So. 2d 10, 15 (Fla. 1976) (quoting *Sakolsky v. City of Coral Gables*, 151 So. 2d 433 (Fla. 1963)).

156. FLA. STAT. § 163.3167(8).

157. David L. Powell et al., *Florida's New Law to Protect Private Property Rights*, 69 FLA. B.J. 12, 14 (Oct. 1995).

158. *Id.* at 14, 17 n.17 (citing *Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1544 (11th Cir. 1994), *vacated*, 42 F.3d 626 (11th Cir. 1994)).

159. Pelham, *supra* note 151, at 15.

a reasonable analysis of the property rights impacts of the new regulation.<sup>160</sup> Local vested rights ordinance standards do not create vested rights under the Harris Act.<sup>161</sup> Most local government codes already contain vested rights provisions. Those which do not, should. The Harris Act requires examination of vested rights.<sup>162</sup> The local definition might better allow a court to analyze whether regulation is compensable. This would be so regardless of the definition's direct applicability.

### C. *Inordinate Burdens*

The Harris Act contains two alternative standards to determine inordinate burdens. Under the first standard, the landowner must show: 1) the government action so restricted existing uses or a vested use that the property owner cannot realize its use or vested use of the property; 2) the loss is permanent; and 3) the loss must affect the entire property.<sup>163</sup>

The second test requires a landowner to show that the government action caused the property to bear a disproportionate share of regulatory burden. A governmental action can result in a claim because the landowner bears too great a share of a burden that the government imposed for the good of the general public.<sup>164</sup>

### D. *Implementing The Harris Act*

The Harris Act requires the injured property owner to notify the offending governmental entity within one year.<sup>165</sup> The government then has 180 days to issue a good faith settlement offer.<sup>166</sup>

One commentator notes that appropriate settlement offers fall into one of two categories: 1) compensation for the lost value or 2) enactment of an exception to the governmental action that devalued the property.<sup>167</sup>

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160. *Id.*

161. Ch. 95-181, § 1(3)(a), 1995 Fla. Laws at 1652.

162. *Id.*

163. *Id.* § 1(3)(e), 1995 Fla. Laws at 1653.

164. *Id.*

165. *Id.* § 1(11), 1995 Fla. Laws at 1656-57.

166. Ch. 95-181, § 1(4)(c), 1995 Fla. Laws at 1653.

167. Robert C. Downie, *Property Rights: Will Exceptions Become the Rule?*, 69 FLA. B.J. 69, 70 (Nov. 1995) (explaining Ch. 95-181, § 1(4)(c), 1995 Fla. Laws at 1653).

A property owner may sue in circuit court if no settlement is reached.<sup>168</sup> The procedure is parallel to a takings case.<sup>169</sup> The court first determines if an inordinate burden occurred.<sup>170</sup> If so, then a jury determines compensation.<sup>171</sup>

Attorney's fees awards' standards differ from those applicable in takings litigation. Condemnation statutes<sup>172</sup> generally entitle landowners to reasonable legal fees.<sup>173</sup> The government almost never is entitled to recover fees.<sup>174</sup> The Harris Act entitles a landowner to fees if the local government did not issue a good faith offer.<sup>175</sup> The government is entitled to fees if the landowner rejected a good faith offer.<sup>176</sup>

### E. *The Attorney General's Opinion*

As of January 1996, no reported court decisions have expressly addressed the Harris Act. Nonetheless, the Florida Attorney General issued an instructive opinion regarding the Act's scope.<sup>177</sup>

St. Johns County asked the Attorney General whether the Harris Act confers rights on owners of property that is indirectly affected by a governmental action or regulation.<sup>178</sup> The answer was that the Act does not.<sup>179</sup> The opinion focused on the Harris Act's definition of "inordinate burden."<sup>180</sup> The term refers to actions that "*directly* restricted or limited the use of real property . . . ."<sup>181</sup>

The opinion also contends that courts should narrowly construe the Harris Act.<sup>182</sup> The Harris Act constitutes a waiver of sovereign immuni-

168. Ch. 95-181, § 1(5)(b), 1995 Fla. Laws at 1654.

169. FLA. STAT. § 73.071 (1995).

170. Ch. 95-181, § 1(6)(a), 1995 Fla. Laws at 1655.

171. *Id.* § 1(6)(b).

172. FLA. STAT. chs. 73, 74 (1995).

173. FLA. STAT. §§ 73.091-.092 (1995).

174. A local government is limited to rights under § 57.105(1) to seek attorney's fees for defending a frivolous claim. *See* FLA. STAT. § 57.105(1) (1995).

175. Ch. 95-181, § 1(6)(c)2., 1995 Fla. Laws at 1655.

176. *Id.* § 1(6)(c)1., 1995 Fla. Laws at 1655.

177. 95-78 Op. Att'y Gen. (Dec. 7, 1995), *available in* WL, FL-AG Directory, 1995 WL 750474.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* (emphasis added) (quoting Ch. 95-181, § 1(3)(e), 1995 Fla. Laws at 1652).

182. 95-78 Op. Att'y Gen. (Dec. 7, 1995), *available in* WL, FL-AG Directory, 1995 WL 750474.



ty.<sup>183</sup> The opinion states “like a waiver of sovereign immunity, any ambiguity in the provisions of the act should be construed against an award of damages and such damages should be awarded only when an award appears consistent with the Legislature’s intent.”<sup>184</sup>

## VI. CONCLUSION

The Supreme Court of Florida in *Palm Beach County v. Wright*<sup>185</sup> limited property owners’ ability to prove that transportation related development limitations constitute compensable takings.<sup>186</sup> A property owner may demonstrate entitlement to compensation. The owner must meet an exacting factual burden of proof to do so.

The Harris Act, on the other hand, likely will have limited impact on private property rights under concurrency. The Harris Act only applies to applications of statutes, rules, and ordinances enacted after May 11, 1995. Concurrency requirements date from the 1985 growth management legislation. A concurrency moratorium probably would not fall under the Harris Act.

Nonetheless, if one can demonstrate that a concurrency moratorium is of general application, one might argue that the Harris Act applies. In *Board of County Commissioners of Brevard County v. Snyder*,<sup>187</sup> the Supreme Court of Florida held that quasi-legislative rezonings are of a generalized nature—applying to a substantial number of properties.<sup>188</sup> Quasi-judicial rezonings apply only to a small number of parcels or landowners.<sup>189</sup>

The Harris Act does not define the term “application.” The state supreme court’s use of the word in *Snyder* might help:

[R]ezoning actions which have an impact on a limited number of persons or property owners, on identifiable parties and interests, where the decision is contingent on a fact or facts arrived at from distinct alternatives presented at a hearing, *and where the decision can be*

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183. *Id.*

184. *Id.* (citing *Arnold v. Shumpert*, 217 So. 2d 116 (Fla. 1968)).

185. 641 So. 2d 50 (Fla. 1994).

186. *Id.* at 54.

187. 627 So. 2d 469 (Fla. 1993).

188. *Id.* at 474.

189. *Id.*

*functionally viewed as policy application, rather than policy setting, are in the nature of . . . quasi-judicial action . . .*<sup>190</sup>

Accordingly, one might allege that a general concurrency moratorium is quasi-legislative. It does not “apply” generalized law as might a quasi-judicial action. Therefore, the Harris Act arguably would apply.

The Attorney General’s opinion interpreting the Harris Act indicates that this view might not prevail. Attorney General Butterworth noted that the Harris Act is a limited waiver of sovereign immunity.<sup>191</sup> He concluded that any ambiguity must be interpreted in favor of sovereign immunity.<sup>192</sup>

Another exemption that might apply relates to maintenance and expansion of transportation facilities.<sup>193</sup> Concurrency moratoria address the opposite issue. One might claim that the exemption excludes concurrency moratoria because it only expressly addresses growth and maintenance.

The Harris Act might lessen the burden of proof that property owners must meet to obtain compensation for concurrency moratoria. Court interpretations will control the degree of impact. Florida’s continued population growth puts increased burdens on extant infrastructure. Thus, the scope of the Harris Act implementation or concurrency might be sweeping.

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190. *Id.* (emphasis added) (quoting *Snyder v. Board of County Comm’rs*, 595 So. 2d 65, 78 (Fla. 5th Dist. Ct. App. 1991), *quashed*, 627 So. 2d 469 (Fla. 1993)).

191. 95-78 Op. Att’y Gen. (Dec. 7, 1995), *available in* WL, FL-AG Directory, 1995 WL 750474.

192. *Id.*

193. Ch. 95-81, § 1(10), 1995 Fla. Laws at 1656.

# Florida's Private Property Rights Act—What Will It Mean for Florida's Future?

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Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.<sup>1</sup>

We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.<sup>2</sup>

Although seemingly contradictory, these two quotations from Justice Oliver Wendell Holmes in the classic taking case of *Pennsylvania Coal Co. v. Mahon*<sup>3</sup> demonstrate the dynamic tension that exists between the need for government regulation of the use of land to protect the rights of the general public and the need to protect the rights of individual property owners from government regulations.

## I. INTRODUCTION

The Bert J. Harris Jr. Private Property Rights Protection Act ("Act")<sup>4</sup> was enacted by the Florida Legislature during its 1995 legislative session and signed into law by the governor. The Act reflects a strong national trend in many states, as well as in Congress, towards a search for statutory and constitutional definitions to create a bright line between valid government regulations and takings that neither Justice Holmes nor any court has yet been able to definitively articulate.<sup>5</sup>

The Act creates a new statutory cause of action and remedy that allows for private property owners to be compensated by a governmental agency that inordinately burdens, restricts, or limits an existing or vested use of real property. If the court determines that such an inordinate burden has occurred, the remedy is compensation for the fair market value of the property due to the loss created by the government action. The jury determines the fair market value of the property. The express intent of the

1. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

2. *Id.* at 416.

3. 260 U.S. 393 (1922).

4. 1995 Fla. Laws ch. 95-181 (codified at FLA. STAT. § 70.001 (1995)). House Bill 863 was passed by a vote of 111 to 0 in the House and 38 to 1 in the Senate. This enactment also contains the "Florida Land Use and Environmental Dispute Resolution Act," which is apparently an attempt to avoid the very litigation which the authors believe the Private Property Rights Act will foster. See Ch. 95-181, §2, 1995 Fla. Laws 1651, 1657 (codified at FLA. STAT. § 70.51 (1995)).

5. See generally John Martinez, *Statutes and Enacting Takings Law: Flying in the Face of Uncertainty*, in 1995 ZONING AND PLANNING HANDBOOK 129 (Alan M. Forrest ed. 1995).

legislature was to create “a separate and distinct cause of action from the law of takings”<sup>6</sup> and to provide “for relief, or payment of compensation, when a new law, rule, regulation, or ordinance . . . as applied, unfairly affects real property.”<sup>7</sup>

There have been numerous articles, seminars, conferences, and presentations regarding the true meaning and legislative intent of the Act. There were many participants in its drafting. Legislators themselves rarely “write” legislation, but rather, they rely on their staff and other experts (often lobbyists) to reflect their intent. The analogy between sausage making and law making is not inappropriate.<sup>8</sup>

The purpose of this article is not to look back at how the Act was written, but rather to look ahead to the consequences of its implementation. The authors of this article were close observers of, but not participants in, the legislative process that brought forth the Act. They cannot claim special knowledge of the actual intent of those involved in creating the Act. Moreover, the most fundamental maxim of statutory interpretation is that one must first read the words of a law as enacted by the legislature to find their meaning before resorting to explanations of the drafters or other collateral sources.<sup>9</sup> Thus, this article will analyze how the words of the new legislation might be interpreted and applied to the delicate balance between private rights and legitimate public purposes.

Although the Act has been described by some of its authors as not being a radical departure from prior law and “an attempt to provide new and measured relief for landowners without undermining Florida’s landmark environmental and growth management laws,”<sup>10</sup> its impact on local government is likely to be quite severe. The severity of the impact, however, will not be measured by case law as much as by the unmeasurable, but real chilling effect the Act will have on governmental regulation of land

6. Ch. 95-181, § 1(1), 1995 Fla. Laws at 1652.

7. *Id.*

8. This oft quoted, and unflattering, comparison has been attributed to Otto von Bismarck. Thomas F. Gustafson, former Speaker of the Florida House of Representatives, described the Act as “the king sausage of all time” at a Florida Institute of Government Conference on Florida’s New Property Rights Law, December 1, 1995.

9. *See, e.g.*, *St. Petersburg Bank & Trust Co. v. Hamm*, 414 So. 2d 1071 (Fla. 1982); *S.R.G. Corp. v. Department of Revenue*, 365 So. 2d 687 (Fla. 1978); *Tropical Coach Line, Inc. v. Carter*, 121 So. 2d 779 (Fla. 1960).

10. David L. Powell, et al., *Florida’s New Law to Protect Private Property Rights*, 69 FLA. B.J. 12, 17 (Oct. 1995)

use.<sup>11</sup> In addition, the broad scope of the Act, the discretion left to the courts under vaguely defined concepts, and the prospect of significant monetary consequences, create a strong incentive for government to compromise its regulatory authority for case by case settlements with complaining property owners.

There is little doubt that complaining property owners, through this Act, have greater potential to achieve monetary and nonmonetary benefits related to the use of their property not heretofore available. The public-at-large also will pay for those benefits in many forms, including perhaps less environmental protection, fewer restrictions on land use and in some instances, the payment of increased taxes to pay for compensation to the private property owners.

## II. CRITICAL ISSUES IN THE ACT

### A. *Property Rights Protected: The Future is Now*

Many of the statutory definitions in this legislation are unique to this Act. The definitions are a mix of common law principles and new, broadly described concepts which promise to be the subject of litigation before their meanings can be more accurately determined.<sup>12</sup> However, a careful reading and analysis of these critical definitions lead to the conclusion that, contrary to Florida common law, "existing uses" equal future uses and "vested rights" equal new rights.

The unique definitions are the key to opening the door to an understanding of how the Act will be implemented. Although it is up to the courts to decide, interpret, and expand upon the Act's meaning,<sup>13</sup> attorneys, planners, elected officials, and landowners will be making decisions without

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11. Christopher Wren, City of Fort Lauderdale Planning and Zoning Manager, has expressed his reluctance in endorsing certain neighborhood association requests to restrict commercial development. His concern is that the city will be vulnerable to increasing litigation as a result of landowners' claims for compensation that will result from regulations that restrict the use of their property. As Mr. Wren has stated: the Act has "handcuffed me from doing what I consider proper planning." Peter Mitchell, *New Property-Rights Law Sends City Planners Scrambling for Cover*, WALL ST. J., Oct. 25, 1995, at F1.

12. One commentator describes these definitions as "a grab bag of takings jargon." Charles Siemon, Remarks at the Meeting of Government Attorneys of Broward County (Oct. 23, 1995).

13. Robert M. Rhodes, Balancing Private Property Rights with Local Government Regulations, Teleconference Remarks at Florida Institute of Government Conference (Oct. 6, 1995) [hereinafter Teleconference Remarks].

the luxury of court interpretations of what will surely be fact-based decisions. As in takings cases, it will be difficult to draw broad generalizations from these decisions.<sup>14</sup>

## B. Critical Definitions

### 1. Existing Use

The Act defines “existing use” as comprising of two types. The first type is that of “an actual, present use or activity on the real property.”<sup>15</sup> This includes “periods of inactivity which are normally associated with, or are incidental to, the nature or type of use or activity.”<sup>16</sup> The second type includes land uses which are: 1) reasonably foreseeable; 2) nonspeculative; 3) suitable for the subject real property; 4) compatible with adjacent land uses; and 5) which have created an existing fair market value in the property greater than the fair market value of the actual present use or activity.<sup>17</sup>

For decades, it has been apparent in Florida that the local government comprehensive plan would become the dominant force in land development permitting decisions. The Local Government Comprehensive Planning Act of 1975<sup>18</sup> mandated the adoption of plans that would be financially feasible, internally consistent, and implemented by land development regulations, and ensured that the comprehensive plan would set policy to be followed by specific development permitting activities.

Because the second type of “existing use” specifically omits “actual, present use or activity on the real property” and instead focuses on “foreseeable” or potential future use, the Act raises the possibility that the comprehensive plan’s future land use plan element will define the second type of existing use. The one purpose of the future land use plan element is to reflect the nature or type of use or activity that is, in the future, suitable for the land and compatible with adjacent land uses. It certainly will be argued that investment decisions can and should be made based upon

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14. *See* *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 495 (1987). The Court held that takings cases are decided by “engaging in essentially ad hoc, factual inquiries.” *Id.*

15. FLA. STAT. § 70.001(3)(b). For a discussion of the drafting history of the term “existing use,” see Thomas G. Pelham, *Florida Legislature Enacts Private Property Rights Protection Act*, FLA. PLANNING (Fla. Chapter Am. Planning Ass’n), May-June 1995, at 1.

16. FLA. STAT. § 70.001(3)(b).

17. *Id.*

18. 1975 Fla. Laws ch. 75-257 (current version at FLA. STAT. §§ 163.3161-.3243 (1995)).

a reasonable expectation that the comprehensive plan will be implemented and that this expectation directly affects the present day valuation of land through consideration of its future use.<sup>19</sup>

Therefore, what may be permitted in the *future* land use plan element of an adopted comprehensive plan may be transformed to an *existing* use in terms of the Property Rights Act. One consequence of the Act is to accelerate the applicability of the Future Land Use Plan Element, which could undermine its effectiveness as a timing tool and thus as a planning tool.

A participant in the Act's drafting has referred to the definition of "existing use"<sup>20</sup> as the "When Harry Met Sally" or the "I'll have what he's having" provision, in that it is intended to give a property owner the rights to the same use of property as that of his neighbor, despite what the plans or regulations may provide. The impact of this definition goes far beyond the common law in Florida. For example, Florida common law does not recognize property rights to existing zoning uses unless those uses have been determined to be vested under principles of equitable estoppel.<sup>21</sup> In so ruling, the courts have indicated a reluctance to interfere with the local government power to change zoning to either enlarge or reduce development potential to meet the needs of the community.<sup>22</sup> Furthermore, the well-accepted zoning concept of nonconforming uses assumes that government may change regulations so as to make existing uses unauthorized except to continue in their existing state, with the expectation that such uses will gradually be eliminated over time for a more suitable pattern of uses in the community.<sup>23</sup> The courts have balanced this principle by holding that government must have a sufficient reason to justify the zoning change or it will be found to be either "arbitrary and capricious," or a denial of substantive due process and equal protection under the Constitution.<sup>24</sup>

19. See William G. Earle, et al., *Compensation, in FLORIDA EMINENT DOMAIN PRACTICE AND PROCEDURE* 175 (4th ed. 1988) (discussing effect of zoning restrictions on analysis of highest and best use under eminent domain practice).

20. Rhodes, Teleconference Remarks, *supra* note 13.

21. See generally *City of Miami Beach v. 8701 Collins Ave., Inc.*, 77 So. 2d 428 (Fla. 1954).

22. See, e.g., *Edelstein v. Dade County*, 171 So. 2d 611 (Fla. 3d Dist. Ct. App. 1965); *Sarasota County v. Walker*, 144 So. 2d 345 (Fla. 2d Dist. Ct. App. 1962).

23. See, e.g., *3M Nat'l Advertising Co. v. City of Tampa Code Enforcement Bd.*, 587 So. 2d 640 (Fla. 2d Dist. Ct. App. 1991); *Lewis v. City of Atlantic Beach*, 467 So. 2d 751, 755 (Fla. 1st Dist. Ct. App. 1985).

24. See *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1212 (11th Cir. 1995); *Lee County v. Sunbelt Equities*, 619 So. 2d 996, 1006 (Fla. 2d Dist. Ct. App. 1993).



The Act, in contrast, requires compensation for not only actual existing uses that may be changed, but also for those future uses that are foreseeable, nonspeculative, suitable and compatible under the Act's unique definition. Additionally, the weighing of the public good against the burden to the individual property owners is left to the court, with no statutory presumption that the government action is valid.<sup>25</sup>

Local governments, through their planning and zoning efforts, are familiar with such terms as "suitability" and "compatibility" and have developed their own land use definitions for such terms, as incorporated into comprehensive plans and land development codes.<sup>26</sup> These existing definitions may become even more important in assisting a court in reviewing a claim under the Act. However, the definitions of "reasonably foreseeable" and "nonspeculative" uses are more problematic. The intent of the Act's drafters in this regard was apparently to incorporate concepts from eminent domain valuation law.<sup>27</sup> In eminent domain law, courts have accepted appraisal testimony regarding highest and best use based in part on the testifying appraiser's evaluation of whether zoning changes or other land use changes were reasonably foreseeable.<sup>28</sup> Inclusion of a land use in the future land use plan element of the adopted comprehensive plan may be sufficient now to demonstrate that the planned use is reasonably foreseeable and not speculative. The landowner will argue that zoning and other development permits for that use, although procedurally necessary, would be expected to be obtained to remain consistent with the comprehensive plan and to comply with the Act. Therefore, the planned future use would be worthy of consideration by the appraiser. The Act may thus effectively allow uses that under a zoning regulation are either prohibited or permitted

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25. The presumption of validity for governmental actions under the state arbitrary and capricious standard has already been significantly narrowed by the decision of Board of County Comm'rs v. Snyder, 627 So. 2d 469, 474 (Fla. 1993). The "specific" actions that form claims under the Act apply the law to specific real property and can be expected to be considered quasi-judicial actions under *Snyder*. *Id.* at 474-75.

26. Pelham, *supra* note 15.

27. Powell, *supra* note 10, at 14 n.13.

28. See Broward County v. Patel, 641 So. 2d 40, 42-43 (Fla. 1994) (citing 4 JULIUS L. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 12C-03(2), 12C-88-90 (rev. 3d ed. 1994)); Board of Comm'rs of State Insts. v. Tallahassee Bank & Trust Co., 108 So. 2d 74 (Fla. 1st Dist. Ct. App. 1958), *cert. quashed*, 116 So. 2d 762 (Fla. 1959). The testimony as to "reasonable probability" that rezoning may be changed in the future cannot be based merely on speculation, but may include an evaluation of the degree of probability that reasonably exists. *Tallahassee Bank & Trust Co.*, 108 So. 2d at 82-83.

only under conditional use approval to obtain the status of a compensable property right, simply by their inclusion in the comprehensive plan.

This change in the law can be expected to create particular development pressure on the urban fringe of communities where development is in transition and undeveloped property is located next to developed or developing property.<sup>29</sup> Generally, the Act now makes the creation of zoning districts, or regulatory boundaries and districts, more difficult than in the past, when the courts gave considerable deference to local government line-drawing.<sup>30</sup> As early as the first zoning cases, such as *Euclid v. Ambler*,<sup>31</sup> reasonable classifications which are essential to the creation of zoning districts were upheld as not violative of the rights of substantive due process or equal protection. More than ever, attention must be given to the comprehensive plan to provide a defensible foundation for drawing district boundaries.

The definition also must give pause to local governments seeking to provide for higher densities or intensities of development for the future such as in redevelopment areas. This is because the granting of these future development rights will have taken on the status of an "existing use," should the future not unfold as planned or hoped, and the government wishes to redesign the uses. Finally, because a claim under the Act must be supported by an appraisal demonstrating that the reasonably foreseeable use has a greater market value than the present use, there will be a reasonably foreseeable increase in the market for appraisals and appraisal testimony.

## 2. Vested Rights

Property rights that are considered "vested" are also expansively defined under the Act. Vested rights are to be determined not only by applying the common law principles of equitable estoppel<sup>32</sup> and by

29. Pelham, *supra* note 15.

30. *See, e.g.*, *Orange County v. Butler Estates Corp.*, 328 So. 2d 864, 866 (Fla. 4th Dist. Ct. App. 1976) (holding that court is not permitted to substitute its judgment for that of legislative body if issue meets "fairly debatable" standard); *Town of Surfside v. Skyline Terrace Corp.*, 120 So. 2d 20, 22 (Fla. 3d Dist. Ct. App.) (holding that town's ordinance did not require commercial uses if ordinance can be sustained under "fairly debatable" rule where adjacent municipality permits commercial operations across street from owner's property), *cert. denied*, 123 So. 2d 675 (Fla. 1960).

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

32. FLA. STAT. § 70.001(3)(a); *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So. 2d 10, 15-16 (Fla. 1976). For a general discussion of Florida vested rights law, see Robert M. Rhodes & Cathy M. Sellers, *Equitable Estoppel and Vested Rights in Land Use*,

applying statutory law which explicitly creates vested rights,<sup>33</sup> but may also be determined by applying “substantive due process under the common law.”<sup>34</sup> To the extent that a substantive due process right relies on the proscription against “deprivation of due process” under the Fifth and Fourteenth Amendments of the Constitution, a “specific action” found to be constitutionally invalid is now by statutory definition a deprivation of a “vested right.” Thus, a private property owner who has experienced a substantive due process violation under the state or federal constitutions appears to also have a claim under the Act and may be awarded compensation under its provisions.

Some of the participants in the drafting of the law go further to suggest that the Act “enables the judiciary to craft a constitutionally based vesting test separate from takings theories or remedies, and distinct from equitable estoppel. This standard could focus on whether an owner has acquired a constitutionally protected property interest that should not be diminished or frustrated by governmental action.”<sup>35</sup> Although this suggestion seems to be an invitation for the courts to expand both the common law concepts of substantive due process and vested rights, it should be noted that the treatment of substantive due process under the Act can be distinguished from its treatment of inverse condemnation. In the case of inverse condemnation or “takings,” the Act states specifically that the intent of the legislature was to create a separate and distinct cause of action from the law of takings and that a claim under the Act need not rise to the level of a constitutional taking.<sup>36</sup> No such separate or distinct cause of action from the law of substantive due process is created by the Act.

Nevertheless, the application of substantive due process under the common law is a dynamic, not a static, concept. Some might argue that

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in 2 FLORIDA ENVTL. & LAND USE LAW 8-1 (2d ed. 1994).

33. See, e.g., FLA. STAT. § 163.3167(8) (providing vesting under Comprehensive Plans); FLA. STAT. § 373.414(11)-(16) (1995) (providing vesting for Surface Water Management Permits); FLA. STAT. § 380.05(18) (1995) (providing vesting under Areas of Critical State Concern); FLA. STAT. § 380.06(20) (1995) (providing vesting under Developments of Regional Impact). Local government ordinances that implement state statutory vesting provisions may also grant property rights under the statute. See Powell, *supra* note 10, at 14.

34. FLA. STAT. § 70.001(3)(a); see generally *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208 (11th Cir. 1995).

35. Powell, *supra* note 10, at 14.

36. FLA. STAT. § 70.001(1)(a).

Florida courts have been inclined not to find such deprivations.<sup>37</sup> Certainly the federal courts have indicated a reluctance to find constitutional violations based on vested rights.<sup>38</sup> The Act's new provision adds one more dynamic factor to the mix.<sup>39</sup>

The Act's compensable remedy for vested rights expands beyond the injunctive relief traditionally available to successful litigants. While owners whose rights have been violated under the state constitutional substantive due process guarantee are theoretically eligible for compensation as a remedy, the Florida courts, in practice, look further for a constitutional taking violation before awarding such compensation.<sup>40</sup> Thus, compensation becomes a more realistic remedy under the Act for substantive due process violations.

Local governments have increasingly made use of administrative vested rights proceedings as a method of resolving vested rights issues short of trial. Claims asserted under the Act, however, may circumvent these local vested rights remedies by the Act's provision that administrative remedies are not required to be exhausted after the 180-day statutory period has lapsed.<sup>41</sup> To the extent that local government may require an applicant to proceed under a vested rights determination before any specific action is taken by the government, the administrative vested rights remedy may continue to be applicable and require exhaustion. However, a local government vesting determination itself may be the specific action under which a property owner brings a claim.

37. *See, e.g., City of Key West v. R.L.J.S. Corp.*, 537 So. 2d 641 (Fla. 3d Dist. Ct. App.), *review denied sub nom.* 1800 Atlantic Developers, Inc. v. City of Key West, 545 So. 2d 1367 (Fla. 1989).

38. *See, e.g., Restigouche*, 59 F.3d at 1208; *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1374 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 1400 (1994). *Contra* *A.A. Profiles v. City of Ft. Lauderdale*, 850 F.2d 1483 (11th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989). The federal court's state of flux on this matter is illustrated by the vacation of the case of *Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536 (11th Cir.), *vacated*, 42 F.3d 626 (11th Cir. 1994).

39. To what extent does the inclusion of the right to substantive due process also include the right to equal protection of the laws under the Fourteenth Amendment? Unless a fundamental right or suspect classification is involved, generally the courts will review equal protection claims under the same standards as substantive due process claims. *See* *Executive 100, Inc. v. Martin County*, 922 F.2d 1536 (11th Cir.), *cert. denied*, 502 U.S. 810 (1991). However, for that more narrow class of persons protected by equal protection guarantees, the Act apparently provides no additional protection.

40. *See, e.g., Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54 (Fla. 1994).

41. FLA. STAT. § 70.001(5)(a).

### 3. Inordinate Burden

The definition of “inordinate burden” requires the court, without statutory standards or guidance, to make the equitable decision on the proper balance of public and private interests. As explained by some of the Act’s drafters, the legislature expected and intended that the court would be left to interpret the meaning of such terms.<sup>42</sup> The extent to which the Act leaves this matter to court interpretation has been suggested to be a violation of the separation of powers doctrine.<sup>43</sup>

There are two classifications of “inordinate burdens” defined in the Act. The first is an action which: 1) directly restricts or limits the use of real property; 2) such that the owner is permanently restricted; 3) from attaining the reasonable investment-backed expectation for; and 4) his existing use or vested right to a specific use of the property as a whole. The second inordinate burden occurs if the owner is left with unreasonable uses such that he bears permanently a disproportionate share of the burden imposed for the good of the public, “which, in all fairness and justice should be borne by the public as a whole.”<sup>44</sup>

The definition of “inordinate burden” invites the court to review the property owner’s reasonable investment-backed expectations for the use of the property. This investigation into investment-backed expectations is a well-recognized, but ill-defined, part of the takings law equation.<sup>45</sup> Under takings law, courts have looked to the regulation at the time of the land purchase, the owner’s ability to obtain financing, and other such criteria. However, the Act specifically indicates that its claims need not be construed under the takings law.<sup>46</sup>

42. Robert M. Rhodes & Dean Saunders, Teleconference Remarks, *supra* note 13.

43. Hamilton Rice, Teleconference Remarks, *supra* note 13. *See, e.g.*, *City of Auburndale v. Adams Packing Ass’n*, 171 So. 2d 161 (Fla. 1965). *See generally* *B.H. v. State*, 645 So. 2d 987 (Fla. 1994), *cert. denied*, 115 S. Ct. 2559 (1995) (discussing strict separation of powers rule in *Florida Constitution*).

44. This language comes directly from *Armstrong v. United States*, 364 U.S. 40, 49 (1960), and is cited in *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994). *See also* *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 835 n.4 (1987).

45. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Reahard v. Lee County*, 968 F.2d 1131, 1136 (11th Cir. 1992) (setting forth factors to be analyzed in resolving federal “takings” disputes), *cert. denied*, 115 S. Ct. 1693 (1995); *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1382 (Fla.), *cert. denied sub nom.* *Taylor v. Graham*, 454 U.S. 1083 (1981) (discussing “reasonableness” factor of taking regulation).

46. FLA. STAT. § 70.001(9).

This section provides a cause of action for governmental actions that may not rise to the level of a taking under the State Constitution or the United States

Under the Act, it is intended that the threshold level of an owner's reasonable investment-backed expectation for the Act's purposes may be lower than that required to find a taking. There is no nexus required by the Act between the time of land purchase, or the specific action creating the burden, and the time of fulfillment of the expectation. Economic expectations continually evolve and their reasonableness cannot be easily judged at a fixed point in time. In the case of takings, this difficulty is mitigated somewhat by the requirement that the result of government action is that no substantial use of the property can be made,<sup>47</sup> thereby applying to the extraordinary case. However, the Act does not establish any specific threshold of property value loss, so that theoretically, an inordinate burden can apply to any property value loss. Thus, under the Act, the question of economic expectations will arise more frequently and its importance has become more significant.

An important aspect of the inordinate burden definition is that the property owner must be "permanently" unable to attain the reasonable investment-backed expectation for the use of the property.<sup>48</sup> However, what constitutes a "permanent" restriction is very problematic. For example, a property which is classified for more liberal uses under the future land use element of the comprehensive plan than what is permitted by existing zoning regulations may not be "permanently" restricted because the future land use plan projects a more liberal classification for the future. The Supreme Court of Florida has recognized that comprehensive planning under the state's growth management laws reasonably incorporates such a timing aspect.<sup>49</sup> Indeed, comprehensive plans are required to be periodically updated and land use regulations must be updated to be consistent with the plans under

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Constitution. This section may not necessarily be construed under the case law regarding takings if the governmental action does not rise to the level of a taking.

*Id.*

47. *Graham*, 399 So. 2d at 1383 (citing *Zabel v. Pinellas County Water & Navigation Control Auth.*, 171 So. 2d 376 (Fla. 1965); *Askew v. Gables-By-The-Sea, Inc.*, 333 So. 2d 56 (Fla. 1st Dist. Ct. App. 1976), *cert. denied*, 345 So. 2d 420 (Fla. 1977)).

48. FLA. STAT. § 70.001(3)(e).

49. *See Board of County Comm'rs v. Snyder*, 627 So. 2d 469, 475 (Fla. 1993). "A comprehensive plan only establishes a long-range maximum limit on the possible intensity of land use . . . . The present use of land may, by zoning ordinance, continue to be more limited than the future use contemplated by the comprehensive plan." *Id.* (citing *City of Jacksonville Beach v. Grubbs*, 461 So. 2d 160, 163 (Fla. 1st Dist. Ct. App. 1984), *rev. denied*, 469 So. 2d 749 (Fla. 1985)).

the state's growth management laws.<sup>50</sup> As a result of the permanent restriction criterion, "rate of growth" regulations, focusing on the timing of development, may become the development management tool of choice for local governments.<sup>51</sup> For similar reasons, concurrency programs which should not be adversely affected by the Act if they are properly incorporated in the comprehensive plan, include achievable and maintainable level of service standards based on a financially feasible capital improvements element, and are implemented in accordance with adopted land development regulations.

#### 4. Specific Action

The trigger for a claim under the Act is when a governmental agency takes "specific action" which affects real property. The governmental agency may be a state, regional, or local government (including special districts).<sup>52</sup> A specific action includes an action on an application or permit.<sup>53</sup> The Act does not create a cause of action as to the mere adoption of a law, regulation, rule, or ordinance but only as to specific action that is applied to real property.

The Private Property Rights Act provides that it is to have a prospective effect; that is, no cause of action exists under the statute as to the application of a law, rule, regulation or ordinance adopted prior to May 11, 1995 or noticed for adoption or enactment prior to that date. If these grandfathered laws, regulations, rules and ordinances are amended, the Act applies only to the extent that the application of the amendatory language imposes an inordinate burden apart from the grandfathered law.<sup>54</sup> However, it can be expected that the courts will be asked to apply the Act to governmental actions on permit applications that take place after that date. Property

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50. See FLA. STAT. § 163.3191(1)-(4).

51. See, e.g., DANIEL R. MANDELKER & ROGER A. CUNNINGHAM, *PLANNING AND CONTROL OF LAND DEVELOPMENT* 565 (2d ed. 1984); Barbara Childs, *Constitutionality of Phased Growth Zoning Ordinances*, 8 URB. LAW. 512 (1976); Note, *Phased Zoning: Regulation of the Tempo and Sequence of Land Development*, 26 STAN. L. REV. 585 (1976).

52. FLA. STAT. § 70.001(3)(c). The definition specifically excludes actions of the United States or any of its agencies or any state, regional, or local agency exercising its powers through a formal delegation of federal authority.

53. *Id.* § 70.001(3)(d). Section 70.001(3)(e) excludes from the definition of "inordinate burden" temporary impacts; the abatement, prohibition, prevention or remediation of a public nuisance or noxious use; or governmental actions taken to grant relief to a property owner under the Act. *Id.* § 70.001(3)(e).

54. *Id.* § 70.001(12).

owners will argue that an inordinate burden created by the improper or unauthorized application of a prior-enacted or noticed law, regulation, rule, or ordinance should trigger a claim under the Act, lest government attempt to explain all such subsequent actions as simply implementation of prior law.

For example, a permit application may be denied or delayed at times or conditions and exactions may be imposed for which there is no clear authority or legal justification. Applicants suspect that a government entity has little to lose by stretching the envelope of demands, when at worst the unauthorized denial, delay, exaction or condition would be invalidated by the courts. However, under the Act, if this activity is found to be a specific action creating an inordinate burden under the Act, an injured property owner has a cause of action for compensatory damages.

### 5. Real Property

The Act's definition of "real property" focuses exclusively on property's physical attributes, including land, its appurtenances and improvements thereto, and other relevant real property in which the property owner has a relevant interest.<sup>55</sup> This simplified and narrow focus on the tangible interests in real property, to the exclusion of the intangible interests, ignores the remainder of the "bundle of rights" which constitutes property.<sup>56</sup> It is thus unclear to what extent the Act would protect such intangible interests as the "right to exclude" the public from use of private property. In recent United States Supreme Court taking cases, this right has been the bedrock upon which the Court has based its decisions to find a taking for public use without compensation.<sup>57</sup>

## III. ADMINISTRATIVE AND JUDICIAL PROCESSES UNDER THE ACT

### A. Claims

The Act establishes a 180-day process for resolution of a claim prior to the time that the owner may bring that claim to a circuit court. Within a year of the government action complained of, the landowner must file a written claim with each governmental agency which was either involved in

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55. *Id.* § 70.001(3)(g).

56. *Hodel v. Irving*, 481 U.S. 704 (1987); *Andrus v. Allard*, 444 U.S. 51 (1979); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

57. *See Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994) (citing *Kaiser Aetna*, 444 U.S. at 176); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987).



the action or whose participation is necessary for a complete resolution of all the relevant issues.<sup>58</sup> The claim must be accompanied by an appraisal. Within fifteen days, the governmental entity must report the claim and information regarding a government contact person to the Florida Department of Legal Affairs. The governmental entity must also provide written notice of the claim to adjacent property owners and to "all parties to any administrative action that gave rise to the claim," although no specific time frame is required for such notice.<sup>59</sup>

## B. Settlement Offers

During this statutory 180-day period,<sup>60</sup> the governmental entity must make a written settlement offer to the owner. The settlement offer may provide for adjustment of the regulations that apply to the use, for mitigation of the regulatory effect, such as transfers of development rights, or for attachment of conditions to the use. The settlement offer may require that the use be addressed on a more comprehensive basis. It may also provide for "no changes to the action of the governmental entity."<sup>61</sup>

The settlement offer will be considered by the court in determining if the government has inordinately burdened the real property.<sup>62</sup> A jury must be impaneled to determine compensation in the event of a valid claim. The jury must also consider the settlement offer. For this reason, a generous offer can be an opportunity for the government to reduce potential damages in the event of liability.<sup>63</sup> Finally, the settlement offer will be considered by the court in any award of attorney's fees to the prevailing party, as

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58. FLA. STAT. § 70.001(4)(a). The section states:

If the action of government is the culmination of a process that involves more than one governmental entity, or if a complete resolution of all relevant issues, in the view of the property owner or in the view of a governmental entity to whom a claim is presented, requires the active participation of more than one governmental entity, the property owner shall present the claim as provided in this section to each of the governmental entities.

*Id.*

59. *Id.* § 70.001(4)(b). Presumably, at the same time, the governmental entity will also provide notice to those other governmental entities which, in its view, must actively participate for a complete resolution of all relevant issues. See *id.* § 70.001(4)(a).

60. The period may be extended by the parties. FLA. STAT. § 70.001(4)(c).

61. *Id.* § 70.001(4)(c)11.

62. *Id.* § 70.001(6)(a).

63. *Id.* § 70.001(6)(b).

mitigated by the knowledge available to the governmental entity and the property owner during the 180-day notice period.<sup>64</sup>

It is reasonable to expect a prudent government, therefore, to make a settlement offer, backed up by its appraiser's valuation of the property. It can be further expected that the settlement offer will extend compensation beyond what the government believes its liability might actually be to reduce the risk in the event liability is found. The owner's risk in not accepting such a settlement offer is that it will not prevail and the court will award higher attorney's fees to the government, based on the owner's unreasonableness in not accepting an offer.<sup>65</sup> In either event, the parties are encouraged to settle, rather than proceed to court, by incentives not applicable in common law actions. This is precisely why there may not be a wealth of case law resulting from claims filed under the Act and why there is likely to be a considerable number of claims filed and resolved in settlement.<sup>66</sup>

The Act builds in extraordinary flexibility for the governmental entity to effectuate a settlement. In addition to issuing a variance, special exception, or other extraordinary relief, the governmental entity in the settlement of a claim under the Act may agree to actions which otherwise would have the effect of contravening applicable statutes.<sup>67</sup> However, in this instance the parties must obtain court approval under a standard which requires the court to find that such relief "protects the public interest served by the statute at issue and is the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property."<sup>68</sup> By permitting a court to effectuate a settlement agreement that overrides state law, the Act may be permitting an unlawful delegation of legislative authority to the courts.

This provision may also engender unnecessary litigation to create court jurisdiction over the settlement agreement. The Act provides that "the governmental entity and the property owner shall jointly file an action . . . for approval of the settlement agreement by the court . . . ."<sup>69</sup> Parties with

64. *Id.* § 70.001(6)(c)1.-2.

65. FLA. STAT. § 70.001(6)(c)2.

66. See Robert C. Downie II, *Property Rights: Will Exceptions Become the Rule?*, 69 FLA. B.J. 69 (Nov. 1995).

67. The contravention of local ordinance, however, may not be allowed, as the Act only specifically allows "contravening the application of a *statute* as it would otherwise apply to the subject real property . . . ." FLA. STAT. § 70.001(4)(d)2. (emphasis added).

68. *Id.*

69. *Id.* § 70.001(4)(d)2.

conflicting interests may contest the validity of an agreement under existing law. Will parties who have entered into an agreement which purports to have resolved their conflicts, have the necessary controversy or standing to file such an action without an opposing party?<sup>70</sup> To avoid a collusive or “friendly” lawsuit, the parties could only enter into a settlement agreement contravening a statute after waiting out the 180-day notice period, while at the same time remaining in an adversarial posture. The parties could then institute a lawsuit under the Act and bring it to issue so that the court could have jurisdiction to consider the jointly filed action for approval of the settlement agreement.

### C. *Ripeness Decisions*

If the property owner rejects the settlement offer, then the governmental entities with whom a claim has been filed must issue a “ripeness decision” which identifies allowable uses to which the subject property may be put. Once the ripeness decision has been issued, and at the expiration of the 180 days, the owner need not exhaust administrative remedies but may file the claim in circuit court.<sup>71</sup> Commentators have heralded this provision as among its most significant,<sup>72</sup> arguing that remedies under takings law have proven inadequate in large part because of the stringency of court requirements that an action be ripe for adjudication.<sup>73</sup> The ripeness decision, like the settlement offer, will be considered by the court in determining whether the government has inordinately burdened real property, and in determining attorney’s fees that may be awarded to the prevailing party. Likewise, the jury may consider the ripeness decision in awarding compensation for a successful claim.<sup>74</sup>

### D. *Court Proceedings*

The owner must file the claim in the circuit court in the county where the real property is located. The claim must be filed on each of the governmental entities that made a settlement offer and a ripeness decision

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70. *See* *Muskrat v. United States*, 219 U.S. 346 (1911).

71. FLA. STAT. § 70.001(5)(a)-(b). The parties may agree to an extension of time.

72. Richard Grosso, *Analysis of CS/HB 863 (1995): Florida’s New Property Rights Legislation*, Remarks at the Annual Environmental Land Use Law Update (Aug. 17-19, 1995).

73. Wade L. Hopping, *Address at the Annual Environmental and Land Use Law Update* (Aug. 18, 1995).

74. FLA. STAT. § 70.001(6)(b).

which were rejected by the owner.<sup>75</sup> It is the court's responsibility to determine if a property right exists, as defined under the statute, and whether the government has inordinately burdened the property, apportioning the responsibility as necessary between each governmental entity involved.<sup>76</sup> An opportunity is provided for an interlocutory appeal of the court's finding that there is an inordinate burden, but a government which does not prevail in the interlocutory appeal is subject to costs and the reasonable attorney's fees incurred by the property owner.<sup>77</sup>

If an inordinate burden has been found, the court must impanel a jury to determine the compensation due to the owner. Compensation is determined by calculating the difference in fair market value of the property that is due to the inordinate burden placed on the property at the time of the governmental action at issue. The jury must also consider the government's settlement offer and ripeness decision in determining the loss in market value.<sup>78</sup>

The Act provides that "[t]his section does not affect the sovereign immunity of government."<sup>79</sup> It has been argued that, as a later enacted statute, the Act supersedes sovereign immunity limitations.<sup>80</sup> However, the plain meaning of this sentence would appear to be that whatever sovereign immunity is available to government is not changed by the Act. Sovereign immunity for damages in tort is limited by the *Florida Statutes*.<sup>81</sup> Statutes are to be construed *pari mater*i, and the Act does not specifically conflict with the sovereign immunity statute.<sup>82</sup> Furthermore, the compensatory relief available from the Act arguably is for a new form of statutory "tort,"<sup>83</sup> and thus only limited compensation is available under the Act.

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75. *Id.* § 70.001(5)(b).

76. *Id.* § 70.001(6)(a).

77. *Id.*

78. *Id.* § 70.001(6)(b).

79. FLA. STAT. § 70.001(13)

80. Rhodes, Teleconference Remarks, *supra* note 13. See *State v. Dunmann*, 427 So. 2d 166, 168 (Fla. 1983) (holding that last expression of legislature will prevail in case of conflict).

81. See FLA. STAT. § 768.28 (1995).

82. *Singleton v. State*, 554 So. 2d 1162 (Fla. 1990). For further discussion on state sovereign immunity in tort actions, see *District Sch. Bd. v. Talmadge*, 381 So. 2d 698 (Fla. 1980).

83. Constitutional takings have been described as "constitutional torts" for many years, with the courts applying statutes of limitations applicable to tort actions as a result. See, e.g., *Wilson v. Garcia*, 471 U.S. 261 (1985); *Monroe v. Pape*, 365 U.S. 167 (1961). This analogy would also be applicable to the Act, as it so apparently mimics takings law and specifically includes constitutional due process violations in its coverage.

### E. *Further Impacts to Government and Landowners*

The processes under the Act are cumbersome for both the government and the property owner, but most particularly for the government. The Act anticipates that multiple parties will be involved to resolve disputes under the Act. Not only must each government agency involved in a challenged action participate in the Act's processes, but if either the property owner or one of the named governmental entities believes another governmental agency's participation is necessary for "complete resolution of all relevant issues,"<sup>84</sup> then those other governmental entities may be brought into the process. Given the complex nature of development permits, one might expect that the majority of property rights claims would involve the Department of Environmental Protection, the Department of Community Affairs, a regional water management district, a local government, and perhaps several special districts. Adjacent property owners must also be notified, as well as all parties to an administrative action that gives rise to the claim. "Parties" to administrative actions may include not only governmental agencies, but also citizen interest groups, banks or mortgage companies, development companies, and generally all persons who are defined as parties under the state Administrative Procedure Act.<sup>85</sup> Although the Act does not provide these administrative parties the full status of a party under its provisions, the Act's participants will necessarily consider their interests as well.

Assuming that the process for arriving at a settlement offer is confidential and privileged,<sup>86</sup> the process for achieving a meaningful settlement offer places a significant burden on the local government. Unlike the typical situation where litigation is in process, the government may be acting without full knowledge of the relevant facts regarding the property and the property owner's expectations for his land. Because a suit will not

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84. FLA. STAT. § 70.001(4)(a).

85. FLA. STAT. § 120.52(12)(a)-(d) (1995).

86. The Public Records Act exempts disclosure of work product prepared in anticipation of imminent litigation or proceedings until the conclusion of the litigation or proceedings. See FLA. STAT. § 119.07 (1995). It is reasonable to assume that once a landowner files a written claim with the government agency under § 1(4)(a) of the Act, imminent litigation or proceedings can legitimately be anticipated. However, the records must have been prepared by the government attorney, or at his express direction, and must reflect a "mental impression, conclusion, litigation strategy or legal theory of the attorney or the agency." *Id.* § 119.07(1); see also *City of Orlando v. Desjardins*, 493 So. 2d 1027, 1029 (Fla. 1986); *Smith & Williams, P.A. v. West Coast Regional Water Supply Auth.*, 640 So. 2d. 216, 217 (Fla. 2d Dist. Ct. App. 1994).

have yet been filed in circuit court, it is doubtful that discovery under the *Florida Rules of Civil Procedure* will be available to assist the government in determining the pertinent facts. At a minimum, the government is well advised to immediately hire an appraiser to review the appraisal submitted with the written claim. It must investigate the history of the property's use and to the extent it is possible, the expenditures made by a property owner so as to determine any reliance expenditures for vested rights purposes, and to determine which expectations were "investment-backed."

Unlike settlements made during the course of litigation, the Act does not provide for counter offers and continuing negotiations for settlement. Thus, if the parties continue to negotiate, it is unclear if further settlement offers will be considered either by the court or the jury during court proceedings.

In addition to making a settlement offer, the government entity or entities must issue a ripeness decision which identifies allowable uses to which the subject property may be put. The advantage of a ripeness decision to the property owner appears to be more procedural than substantive. The ripeness decision ostensibly allows the property owner to know how his property may be used under the governmental regulations, but in reality it is more likely to act simply as the property owner's ticket to the courthouse. Governmental regulation, as a practical matter, more often describes what a property owner cannot do rather than what he can do. Obviously, this is of great frustration to the property owner. However, it reflects the reality that government regulation is to prevent public harm, and not to be responsible to specify the details of development of private property, which is an entrepreneurial activity involving more complex decisions than merely regulatory ones. Moreover, in making allowances for specific proposals that may be permitted under the proper circumstances, the government may provide for a great range of conditional uses. Rather than describing developments which may be appropriate under specific conditions, which would require the government agency to plan in some detail for the property, it is likely that the government may only realistically be able to repeat back to the property owner the regulation itself.

In the face of numerous parties with differing legal responsibilities and authorities, the ability to arrive at a settlement offer or ripeness decision within 180 days will be a considerable task for each of the governmental entities involved. Arriving at an agreed upon settlement offer or ripeness decision involving numerous parties will challenge even the most astute, best intentioned, and best managed governmental entities.

At the same time, the 180-day time period presents its own difficulties to the landowners. From the landowner's perspective, the time frames in the

Act are *not* realistic or conducive to resolving the situation without litigation. A delay of 180 days to initiate litigation and then more delay to bring it to a conclusion can be the death knell of any development project. Such a delay may result in a proposed development missing the market, losing financing, and losing the value of the money invested in the land or project. In addition, these costs as reflected in an appraisal, if ultimately considered by the jury in an award, may involve compensation that could cripple many governmental budgets.<sup>87</sup> The potential gain could encourage marginally successful development projects to be shelved by some land owners, in the hope of achieving a compensatory payoff higher than market risks might justify by proceeding with the project.

The new cause of action and remedy created by the Act is not exclusive. The property owner will be able to bring a collateral action on a claim under the Act, for example, to invalidate an exaction condition to a permit. If a specific action is found to be a violation of substantive due process and creates an inordinate burden under the Act, even though not at the level of a *Nollan* or *Dolan* taking, then the property owner would nonetheless be eligible to bring an action for both compensation and invalidation of the improper condition, with the ability to elect the most favorable remedy.

At present, the incentive has been for a developer to move forward with the project, even if questionable conditions or exactions were required as a condition of approval. Often the marginal project either did not advance to completion, or if it did, it survived at the edge of profitability. Now a new business decision will come into play: whether to continue the quest for the necessary development permits and proceed with the project, or put it in mothballs, play the compensation game, and seek compensation with a property appraisal based on rose colored sales projections without incurring the risk of up front development or marketing costs.

The administrative and judicial processes set out in the Act will severely disadvantage third parties. Although the government must give notice to "contiguous" property owners when a claim is filed,<sup>88</sup> these

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87. Current value based on potential profit from a venture is a legitimate method of appraisal. The appraisal will be of more than the mere dirt (land), but also includes the value of the right to use the land and the potential to make a profit from its development, which increases its present value. For a detailed discussion on evaluating the proper interests of parties along with the proper determination of fair market value in condemnation proceedings, see *Board of Comm'rs of State Insts. v. Tallahassee Bank & Trust Co.*, 100 So. 2d 67, 69-70 (Fla. 1st Dist. Ct. App. 1958) (per curiam).

88. FLA. STAT. § 70.001(4)(b).

owners or other affected parties who are not government entities have no formal role in the process. Indeed, property owners whose properties may be negatively affected by a settlement under the Act are specifically prohibited from bringing their own claims under the Act. The Act precludes claims based on "impacts to real property caused by an action of a governmental entity taken to grant relief to a property owner under this section."<sup>89</sup> Presumably, settlement offers made under the Act must be approved by local governments at public meetings. However, the extent to which affected parties will be able to influence decisions made at that late date is questionable. For other governmental agencies' actions which are not formalized at public meetings, such as certain state governmental actions, affected parties do not have a point of entry under the Act.

The consequences of a successful claim under the Act based on an unlawful denial, condition, or delay, jeopardizing the success of a viable development project, may go far beyond what has been contemplated. The following example illustrates such consequences. With a residential real estate project, between 20%-30% of the total sales value can be attributed to the land. If 25% of the total sales price of a dwelling unit were to be attributed to land, a 100-acre five dwelling unit per acre project with a \$200,000 per dwelling unit sales price would yield \$100,000,000 with \$25 million attributable to land or \$50,000 per dwelling unit. If the land owner paid \$100,000 an acre for land, but could recoup \$250,000 an acre at sale after incurring the costs of land development necessary to allow for the construction of dwelling units, then the theoretical increase in the value of the land at sale would be \$15,000,000.

A property owner could make a compensation demand for the difference between value as inordinately burdened and the value of the land as enhanced by its theoretical land value at retail sale, the reasonable investment-backed expectation. A jury will determine the total amount of compensation for the loss in value due to the inordinate burden and will by necessity rely heavily on appraisal testimony to set an award within a broad range of values. The property appraiser could use the "development approach," a long accepted method of valuation of vacant acreage which, by definition, is not speculative. Instead, it is a method which demonstrates how present value has been enhanced by what could have been achieved but for the governmental action creating the alleged inordinate burden.<sup>90</sup>

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89. *Id.* § 70.001(3)(e).

90. *See, e.g., Yoder v. Sarasota County*, 81 So. 2d. 219 (Fla. 1955); *Boynton v. Canal Auth.*, 265 So. 2d. 722 (Fla. 1st Dist. Ct. App. 1972); *see also Earle, supra* note 19, § 9.32 at 223. The development method of valuation would avoid the "business damage" exception



If compensation is awarded to a property owner under the Act, the government entity which pays compensation then obtains the title and rights of use in the property interest. The court will determine the form of the right which is to be transferred and the recipient of that right.<sup>91</sup> The consequences of this provision are very uncertain. For example, will the rights to build to a certain height limit be able to be effectively used by a governmental agency? In accruing a number of partial interests in land, will the government become entangled in various real property and title disputes as time marches on? Title insurers and county record clerks are sure to have their duties complicated by such disparate interests.

#### IV. CONCLUSION: WHAT WILL THE PRIVATE PROPERTY RIGHTS ACT MEAN FOR FLORIDA'S FUTURE?

Doctors are taught that in their medical practice they must "first do no harm." The legislative process involves more experimentation and risk taking than would be condoned if practiced by a physician, and it is not uncommon for the legislative cure to be worse than the disease, or for a faulty diagnosis to result in a legislative cure for the wrong disease.

Will a new cause of action and remedy, creating new legal rights and legal procedures which force judicial activism, move Florida forward to a better system of government planning and land development regulation that protects both the public interest and private property owners' constitutional rights? The following will consider what could happen.

Landowners with viable development projects that are funded and designed to meet near term market conditions will gain no direct benefit from a new opportunity under the Act to go to court and collect compensation, which at best would be a break-even proposition. However, a landowner who is ready to proceed with a development project that meets the market, is consistent with the applicable comprehensive plan, and is able to meet applicable land development regulations, could gain a greater degree of certainty if the Act causes local governments and agencies to more closely adhere to their adopted plans and regulations.

Government agencies will be, and should be, wary of straying from their adopted plans and regulations, especially when tempted to deviate for political or other reasons not related to the plans and regulations. As local governments go through the statutorily mandated evaluation and review process, increased attention will be paid to the potential for the plan to

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in the Act. FLA. STAT. § 70.001(6)(b).

91. FLA. STAT. § 70.001(7)(b).

create present rights, not simply future rights. The plan will thus take on increased importance as a regulatory tool, not simply a planning tool.

There is a danger that government entities will “freeze at the stick” and avoid making decisions out of fear of violating the Act. Certainly, government agencies have more incentive now to avoid making tough land use decisions that might attract litigation under the Act. Unjustified delay, however, may subject a local government to a mandamus action to force a decision. If an unlawful delay is construed to be a specific action, then the governmental agency may also run the risk of being required to pay compensation to cover the loss of property values caused by the delayed developer that has missed a market opportunity. However, if the Act causes a greater recognition of the risk of deviating from adopted law, then it may have the beneficial effect of causing greater respect for the rule of law by both landowners and government.

As a result of the Act, litigation over the nature of regulation and property rights will now be more, rather than less, complex. Property owners now already faced with a menu of causes of action, including federal, state and administrative claims, petitions for writs of mandamus, certiorari review, de novo actions, and claims involving jury issues and non-jury issues, will find litigation management to be more challenging than ever. For reasons explained above, settlement negotiations will be more complicated, more legally oriented, more adversarial, and less productive.

It is common in the Florida Legislature for landmark legislation to be followed by a “glitch bill” to revise it, often before there has been sufficient time and experience invested in finding meaning and practical application of the original legislation. The legislature will be in session at the time of publication of this article. Attempts to tinker at the edges of this Act before it is understood and implemented could cause more harm than good. The authors believe that any action on the Act should be limited to its repeal. Otherwise, the outcome will consist of further confusion and uncertainty.

Both government and landowners must struggle to reconcile their planning needs and the need to balance property rights with public protection. It may be many years before the full effect of the Act can be truly ascertained. The authors hope that reasonable people may meet on common ground and work together to develop a fair and effective system of planning and regulation that will make the Act’s provisions moot.

# Judicial Review of Local Government Decisions: “Midnight in the Garden of Good and Evil”

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## I. INTRODUCTION

*The concept of property is fundamental to our society, probably to any workable society. Operationally, it is understood by every child above the age of three. Intellectually, it is understood by no one.*

—D. Friedman, *The Machinery of Freedom*

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In the United States, the concept of property exists, not as an abstraction, but as the "yield" of a tension between the individual freedom to own and use property and the inherent power of the government to regulate for the public health, safety, and welfare. Unfortunately, the constitutional framework for the tension between public and private interests in the use of private property is anything but coherent (what then Justice Rehnquist once described as "judicial clangor"),<sup>1</sup> leaving most observers, including the courts, frustrated and confused as to what are property rights. This jurisprudential environment of uncertainty is debilitating for responsible public and private resource planning and management,<sup>2</sup> as well as for property owners and developers who are affected by such programs in many ways.

The environment of uncertainty breeds confusion, polarization, and conflict. During the last two decades, the "legal defensibility" of land use regulations has predominated the dialogue of public planning in America to the exclusion of what planning is most appropriate.<sup>3</sup> The public, concerned about environmental degradation, sprawl, and congestion, has pressed to expand public control over the private use of property. Property owners, while accepting the need for public control, have complained of regulatory abuses and have pressed the courts to rein in government regulations which have gone too far. The tension found most of its voice in the so-called "taking issue" where property rights "hawks," or "taking mavens," argued for just compensation when regulations went "too far." The underlying objective of the hawks was not, however, to obtain compensation, but rather

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1. In his dissent in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, *cert. denied*, 453 U.S. 922 (1981), Justice Rehnquist wrote:

I agree substantially with the views expressed in the dissenting opinions of THE CHIEF JUSTICE and JUSTICE STEVENS and make only these two additional observations: (1) In a case where city planning commissions and zoning boards must regularly confront constitutional claims of this sort, it is a genuine misfortune to have the Court's treatment of the subject be a virtual Tower of Babel, from which no definitive principles can be clearly drawn; and (2) I regret even more keenly my contribution to this judicial clangor . . . .

*Id.* at 569-70 (Rehnquist, J., dissenting).

2. The term "resource planning and management" is intended to refer to the full range of planning and management initiatives including land use, air, water, wildlife and other public efforts to plan for the future and to regulate to achieve that future. Some observers call this "change management." The term resource planning and management is intended to avoid the pejorative anti-development implications of the phrase "growth management."

3. The planning and legal literature is literally awash with commentary on the subject and virtually every planning seminar has at least one program which focuses on "how far can you go?"

to create a deterrent against regulatory excesses. If a local government faces the possibility of paying just compensation far exceeding its boundaries, the theory was, then the government will be more cautious and may not go as far as it might otherwise be inclined to go.<sup>4</sup> Ultimately, the taking issue was resolved in favor of compensation. However, the Supreme Court's holdings in *First English Evangelical Church v. County of Los Angeles*,<sup>5</sup> *Nollan v. California Coastal Commission*,<sup>6</sup> *Lucas v. South Carolina Coastal Council*,<sup>7</sup> and *Dolan v. City of Tigard*<sup>8</sup> have ignored the real weakness in the system, the lack of effective and efficient judicial review. The possibility of having to pay compensation for property rights does not act as a deterrent in the absence of meaningful review of government actions. Simply put, contemporary planning jurisprudence makes the question of remedy all but moot.

It should be self-evident that the compact between the government and the governed, on which this nation is founded, depends on the effectiveness of constitutional adjudication. Rights do not exist in a vacuum and the history of civil rights in this nation shows beyond peradventure that rights which cannot be enforced in court are no rights at all. In the land use field, property rights have become practically non-existent to the extent that, as of May, 1995, fifteen state legislatures had given up on the courts as the guardians of property rights, and have enacted laws which address the issue of property rights by limiting the power of government.<sup>9</sup> The culprits in this sad story are the so-called "ripeness doctrine,"<sup>10</sup> whereby justice delayed is justice denied, and the practical effect of the "fairly debatable rule." Both of these judicial standards which are applied to local government property regulation have contributed to the lack of effective judicial

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4. In his highly influential dissent in *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981), Justice Brennan observed: "After all, if a policeman must know the Constitution, then why not a planner? In any event, one may wonder as an empirical matter whether the threat of just compensation will greatly impede the efforts of planners."

*Id.* at 661 n.26 (Brennan, J., dissenting).

5. 482 U.S. 304 (1987), *cert. denied*, 493 U.S. 1056 (1990).

6. 483 U.S. 825 (1987).

7. 505 U.S. 1003 (1992).

8. 114 S. Ct. 2309 (1994).

9. Jane C. Hayman & Nancy Stuparich, *Private Property Rights: Regulating the Regulators*, 70 FLA. B.J. 55 (Jan. 1996).

10. The ripeness doctrine is derived from the decision of the Supreme Court of the United States in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), and *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986).

review of such regulation. In *Pennsylvania Coal Co. v. Mahon*,<sup>11</sup> Justice Holmes observed that there is a tension between public and private interests in private property and that there must be limits. Justice Holmes wrote, “[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone.”<sup>12</sup>

The trouble is, limits are meaningful only if they are easily enforceable in court, the missing ingredient in contemporary planning law. The legal fiction that local planning and zoning decisions involving individual parcels of land, in the context of a particular development proposal, are legislative acts entitled to a presumption of validity, has compounded the problems with the practical effect of the “fairly debatable rule.” Indeed, the “anything goes,”<sup>13</sup> fairly debatable rule so badly imbalanced public and private interests in regard to the use of land that it is practically impossible to redress even outrageous abuses of the zoning power.<sup>14</sup>

Worse still, the lack of a judicial enforcement of constitutional rights ensures that there is no “incentive” for local governments to do a “good” job of planning and regulating because it does not matter. Doing a “good” job is simply not required to win in court; thus, legal defensibility is “all that matters.” The result is that public planning is under funded and does not

11. 260 U.S. 393 (1922).

12. *Id.* at 413.

13. The “anything goes” epithet was originally coined by Judge Goldberg of the Fifth Circuit Court of Appeals in response to a series of Equal Protection cases following the Supreme Court of the United States’ opinion in *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), in which Judge Goldberg’s invalidation of the city of New Orleans’ hot dog vendor regulation was overturned. The *Dukes* case is a classic illustration of the limited scope of review available to ensure that local government does not abuse constitutionally protected rights. After the Supreme Court of the United States overturned Judge Goldberg’s decision for the circuit court, Judge Goldberg commented: “With its holding in *Dukes* the Supreme Court has made it clear that in a case such as this, we must apply the test of ‘minimum rationality’ and that this test means little more than ‘anything goes.’” *Arceneaux v. Treen*, 671 F.2d 128, 136 (5th Cir. 1982) (Goldberg, J., specially concurring) (citing *Dukes*, 427 U.S. at 305). Further, Judge Goldberg stated: “[t]he Supreme Court chose to uphold this officially sanctioned wiener cartel, opining that ‘[t]he city could reasonably decide’ that the exempted vendors ‘had themselves become part of the distinctive character and charm that distinguished the Vieux Carre.’” *Id.* at 136 n.2.

14. A town recently argued, with a straight face, that a police power regulation should be sustained if the town could establish a “hypothetical” justification for its actions because it did not matter whether the justification was real or not. See Trial Memorandum of the Town of Sunnyvale, *Mayhew v. Town of Sunnyvale*, No. 87-3704-K (Tex. 192d Dist. Ct., Nov. 12, 1991).

have the political support needed to ensure that the growth and development of our cities is balanced and beneficial. American planning has not lived up to its capability, not because planners were unable to anticipate the terrible social and economic cost of mindless sprawl, but because planning was made irrelevant in a society that takes its cues from its legal institutions. The courts said "anything goes"; and local governments, which were delegated the state's police power, took the courts at their word, ignored planning, and embraced "anything goes," literally and figuratively. Indeed, even though the zoning enabling acts of most states required that zoning be "in accordance with a comprehensive plan," few if any communities had adopted comprehensive plans by the 1970s.

There are, however, three lines of cases, two from the Supreme Court of Florida, and one from the Supreme Court of the United States which could, if rationally and coherently applied to the realities of contemporary resource planning and management, establish a more certain and predictable environment for planners and developers alike. The first line of cases arises out of the Supreme Court of Florida's decisions in *City of Miami Beach v. Lachman*<sup>15</sup> and *Burritt v. Harris*.<sup>16</sup> The second line of cases is derived from the same court's more recent landmark holding in *Board of County Commissioners v. Snyder*,<sup>17</sup> where the court employed a functional analysis to hold that individual rezoning actions are not legislative acts. The third line of cases relates to the Supreme Court of the United States' recognition of a substantive limitation on the police power within the Just Compensation Clause of the *Constitution of the United States*, starting with *Agins v. City of Tiburon*.<sup>18</sup> Together, these three lines of cases, if rationally and fairly implemented, offer an alternative solution to the property rights debate, which would preserve for local governments the power and authority to go as far as necessary to protect the public health, safety, and welfare, but no further. This article discusses the law of planning and zoning as it exists under the auspices of the "fairly debatable rule" and analyzes how the previously mentioned three lines of cases can be effectively implemented.

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15. 71 So. 2d 148 (Fla. 1953), *appeal dismissed*, 348 U.S. 906 (1955).

16. 172 So. 2d 820 (Fla. 1965).

17. 627 So. 2d 469 (Fla. 1993).

18. 447 U.S. 255 (1980).

## II. SUPREME COURT LINE OF CASES

A. *The Fairly Debatable Rule*

*[D]eference does not mean abdication.*

—Justice Thurgood Marshall<sup>19</sup>

In its landmark decision in *Village of Euclid v. Ambler Realty Co.*,<sup>20</sup> the Supreme Court of the United States validated the concept of zoning as a proper exercise of the state's police power and established the constitutional standard for the substantive validity of local government planning and zoning actions.<sup>21</sup> The Court stated: "it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having *no substantial relation to the public health, safety, morals, or general welfare.*"<sup>22</sup> Two years later, the Court reaffirmed that "a substantial relationship to the public health, safety, and welfare" was the substantive *raison d'être* of a valid zoning action:

The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, *such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.*<sup>23</sup>

The application of this standard to particular zoning actions has, unfortunately, been complicated and obscured in part by two forces—the legal fiction that a rezoning is a legislative act, and the so-called "fairly debatable rule." In *Euclid*, the Court, after establishing the constitutional standard for determining the substantive validity of a zoning regulation, noted that: "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."<sup>24</sup> There are very few statements which have been so widely

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19. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 14 (1974) (Marshall, J., dissenting).

20. 272 U.S. 365 (1926).

21. *Id.* at 395.

22. *Id.* (emphasis added).

23. *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928) (quoting *Village of Euclid v. Ambler Realty Corp.*, 272 U.S. 365, 395 (1926)) (emphasis added).

24. *Euclid*, 272 U.S. at 388.



misunderstood and misapplied.<sup>25</sup> Some have construed the fairly debatable standard to mean that all a local government need do is hold a hearing where there is a debate to sustain the substantive validity of an action.<sup>26</sup> Others claim that the fairly debatable rule is an irrebuttable presumption of validity, requiring that all a local government need do is mouth words of rationality to sustain even the most extreme regulatory actions.<sup>27</sup>

In either case, judicial review under the so-called fairly debatable rule is neither “swift nor just” and too often is little more than a test of whether the local government staff is smart enough to invoke the correct mantra of rationality. The “anything goes” character of the fairly debatable rule has undermined the integrity of planning and zoning and has promoted increasing polarization and division between the public and private sectors, ultimately contributing to the erosion of planning and zoning powers in the guise of property rights legislation. Worse still, the “anything goes” mentality has created a lack of judicial “incentive” to do a “good” job of

25. As one commentator stated:

Just what does “*fairly debatable*” mean? As Justice Frederick Hall of New Jersey said in the *Vickers* dissent, it can mean whatever you want it to and really provides no guide whatever since virtually any action can be considered fairly debatable. Given typically wide and liberal interpretations of the law, it allows precious few limitations on the average municipality. If it was not debatable, it probably would not be in the courts in the first place; at least, certainly the city thinks it is debatable, at a minimum. Localities are likely too smart in this day and age to act clearly and openly arbitrarily and unreasonably.

DON ALLENSWORTH, *LAND PLANNING LAW* 47 (1981) (footnote omitted).

26. As one judge stated in his concurring opinion:

I am not prepared to say, then, that a denial of a zoning application, or similar governmental permission, can never rise to the level of a substantive-due-process claim. Such claims should, however, be limited to the truly irrational—for example, a zoning board’s decision made by flipping a coin, certainly an efficient method of decision making, but one bearing no relationship whatever to the merits of the pending matter.

*Lemke v. Cass County*, 846 F.2d 469, 472 (8th Cir. 1987) (Arnold, J., concurring) (emphasis omitted).

27. This is the practical import of the court’s embrace of the “debate” in *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 1400 (1994), stating the now dubious proposition that:

Where . . . citizens consistently come before their city council in public meetings on a number of occasions and present their individual, fact-based concerns that are rationally related to legitimate general welfare concerns, it is not arbitrary and capricious for a city council to decide without a more formal investigation that those concerns are valid and that the proposed development should not be permitted.

*Id.* at 1387.

planning and regulating, which has deprived public planning of the funding and political support needed to ensure that growth and development is well-planned.

The problematic character of the fairly debatable rule is particularly perplexing because the supreme courts of both the United States and Florida have made it clear that the courts have an obligation to ensure that private property rights are not destroyed by regulatory excesses. Indeed, the Supreme Court of the United States' decision in *Nectow v. City of Cambridge*,<sup>28</sup> decided just two years after *Euclid*, makes it clear that the Supreme Court did not intend the fairly debatable rule to mean "anything goes." In *Nectow*, a property owner challenged a municipal decision to draw a zoning district boundary along the edge of his property instead of along the road on which the property fronted. As a result, the property, located in one corner of an urban block, was zoned differently from the balance of the block. After a hearing on the merits in front of a master, the Supreme Judicial Court of Massachusetts held:

If there is to be zoning at all, the dividing line must be drawn somewhere. There cannot be a twilight zone. If residence districts are to exist, they must be bounded. In the nature of things, the location of the precise limits of the several districts demands the exercise of judgment and sagacity. There can be no standard susceptible of mathematical exactness in its application. Opinions of the wise and good may well differ as to the place to put the separation between different districts.

. . . .

Courts cannot set aside the decision of public officers in such a matter unless compelled to the conclusion that it has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety, or the public welfare in its proper sense. These considerations cannot be weighed with exactness. That they demand the placing of the boundary of a zone one hundred feet one way or the other in land having similar material features would be hard to say as [a] matter of law.

. . . .

The case at bar is close to the line. But we do not feel justified in holding that the zoning line established is whimsical, without foundation in reason. In our opinion it is not violative of the rights secured to the

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28. 277 U.S. 183 (1928).

plaintiff by the Constitution, either of this commonwealth or by the Fourteenth Amendment to the Constitution of the United States.<sup>29</sup>

The Supreme Court of the United States, the source of the “fairly debatable rule,” reversed and invalidated the municipal zoning action making it clear that the Court did not intend an “anything goes” standard for judicial review of local zoning decisions.<sup>30</sup> First, the Court paid deference to the lower court’s decision and affirmed the constitutional standard established in *Euclid*:

We quite agree with the opinion expressed below that a court should not set aside the determination of public officers in such a matter unless it is clear that their action “has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.”<sup>31</sup>

Then the Court carefully, and in detail, reviewed what it saw as the controlling facts of the case:

An inspection of a plat of the city upon which the zoning districts are outlined, taken in connection with the master’s findings, shows with reasonable certainty that the inclusion of the locus in question is not indispensable to the general plan. The boundary line of the residential district before reaching the locus runs for some distance along the streets, and to exclude the locus from the residential district requires only that such line shall be continued 100 feet further along Henry [S]treet and thence south along Brookline [S]treet. There does not appear to be any reason why this should not be done. Nevertheless, if that were all, we should not be warranted in substituting our judgment for that of the zoning authorities primarily charged with the duty and responsibility of determining the question.<sup>32</sup>

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29. *City of Cambridge v. Nectow*, 157 N.E. 618, 620 (Mass. 1927), *rev’d*, 277 U.S. 183 (1928).

30. *Nectow*, 277 U.S. at 189.

31. *Id.* at 187-88 (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. at 365, 395 (1926)).

32. *Id.* at 188 (quoting *Zahn v. Board of Public Works*, 274 U.S. 325, 328 (1927)). The master’s findings were:

that no practical use can be made of the land in question for residential purposes, because among other reasons herein related, there would not be adequate return on the amount of any investment for the development of the property . . . . I am satisfied that the districting of the plaintiff’s land in a residence district would not

Finally, the Court applied the substantial relationship test and found the challenged actions wanting:

The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restrictions cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare. Here, the express findings of the master, already quoted, confirmed by the court below, is that the health, safety, convenience and general welfare of the inhabitants of the part of the city affected will not be promoted by the disposition made by the ordinance of the locus in question. This finding of the master, after a hearing and an inspection of the entire area affected, supported, as we think it is, by other findings of fact, is determinative of the case. That the invasion of the property of plaintiff in error was serious and highly injurious is clearly established; and, since a necessary basis for the support of that invasion is wanting, the action of the zoning authorities comes within the ban of the Fourteenth Amendment and cannot be sustained.<sup>33</sup>

In the context of the state court decision, it is plain that Justice Sutherland, the author of both the *Nectow* and *Euclid* decisions, did not intend the fairly debatable rule to mean “anything goes.”

#### B. *The “Substantially Advances” Rule*

*History would be a wonderful thing—if it were only true.*

—Leo Tolstoy

In *Agins v. City of Tiburon*<sup>34</sup> the Supreme Court of the United States observed that:

*The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state*

promote the health, safety, convenience and general welfare of the inhabitants of that part of the defendant City, taking into account the natural development thereof and the character of the district and the resulting benefit to accrue to the whole City and I so find.

*Nectow*, 277 U.S. at 187.

33. *Id.* at 188-89 (citations omitted).

34. 447 U.S. 255 (1980).

*interests . . . or denies an owner economically viable use of his land. . . . The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest.*<sup>35</sup>

On its face, the Court's statement suggested the existence of a substantive limitation on the police power. The suggestion was either ignored, dismissed as a misnomer reference to the due process requirement that a regulation bear some substantial relationship to the public health, safety, and welfare, or explained as a contemporary use of the word "taking" as a metaphor for invalidity.<sup>36</sup> *Nectow* was, after all, a substantive due process case, not a taking case.

In 1986, however, the Court restated in *Agins* the proposition first recognized in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,<sup>37</sup> and then in *Nollan v. California Coastal Commission*.<sup>38</sup> *Nollan* involved more than a recitation of established principle because it was clear that the Court was not referring to a due process requirement when it spoke of a "failure to substantially advance" a violation of the Fifth Amendment. Justice Scalia wrote:

Contrary to Justice BRENNAN's claim, our opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that "the State 'could rationally have decided' that the measure adopted might achieve the State's objective."<sup>39</sup>

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35. *Id.* at 260 (citations omitted).

36. *See, e.g.*, Daniel R. Mandelker & Michael M. Berger, *A Plea to Allow the Federal Courts to Clarify the Law of Regulatory Takings*, 42 LAND USE L. & ZONING DIG., Jan. 1990, at 3, 5 (lamenting the Supreme Court's ad hoc, fact-based taking decisions, and their ripeness doctrine, as preventing the development of a clear body of constitutional law for the states to follow).

37. 480 U.S. 470, 485 (1987). "We have held that land use regulation can effect a taking if it 'does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land.'" *Id.* (quoting *Agins*, 447 U.S. at 260).

38. 483 U.S. 825 (1987).

39. *Id.* at 834 n.3 (citations omitted).

Further, any doubt as to whether the Supreme Court reads the Just Compensation Clause to be a substantive limitation on exercises of the police power (that is, to be valid, a regulation must substantially advance a legitimate public purpose) was resolved in the Court's decision in *Lucas v. South Carolina Coastal Council*.<sup>40</sup> The Court stated: "As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.'"<sup>41</sup> Additional confirmation of the vitality of the substantially advances standard is found in *A.A. Profiles, Inc. v. City of Fort Lauderdale*,<sup>42</sup> which held that an exercise of the police power was a taking in violation of the just compensation clause because it failed to "substantially advance a legitimate public purpose."<sup>43</sup> The court went on to state:

The Supreme Court has recognized that a taking may occur where a governmental entity exercises its power of eminent domain through formal condemnation proceedings, . . . or where a governmental entity exercises its police power through regulation which restricts the use of property. . . . *In the latter situation the government regulation must "substantially advance" a "legitimate state interest" or deprive an owner of an economically viable use of the land.*<sup>44</sup>

The emergence of a Fifth Amendment substantive limitation on the police power may well be the most significant event in contemporary planning law. Indeed, a constitutional requirement that a regulatory action actually advance (substantially or otherwise) a legitimate public purpose implicates a scope of judicial review far more exacting than either the Florida "bounds of necessity" standard, or the rational justification standard discussed above, and could relegate substantive due process challenges to the annals of history.

Undoubtedly, local governments will take the position that the Supreme Court of the United States does not mean what it says and that a "substantially advances" standard would destroy growth management as we know it. If the "substantially advances" requirement, under the taking clause, becomes the nominal vehicle for challenges to local zoning decisions, growth management will change dramatically. But that does not mean that

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40. 505 U.S. 1003 (1992).

41. *Id.* at 1016 (citing *Agins*, 447 U.S. at 260) (citations omitted) (first emphasis added).

42. 850 F.2d 1483 (11th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989).

43. *Id.* at 1486.

44. *Id.* (emphasis added) (citations omitted).

local governments will be helpless to ensure that growth and development "proceeds in an orderly manner."<sup>45</sup> To the contrary, a more exacting standard of review would motivate local governments to do a better job of planning, to go beyond the minimums that to a large extent have defined the quality and character of planning in Florida.

### III. THE *MIAMI BEACH* AND *BURRITT* LINE OF CASES

That judicial deference does not mean abdication is also clear from the precedents of the Supreme Court of Florida. In one of its earliest zoning cases, the Supreme Court of Florida, in *City of Miami Beach v. Lachman*,<sup>46</sup> made it clear that judicial review was more than a *pro forma* exercise. The court held that:

While Village of Euclid, Ohio v. Ambler Realty Company approved the zoning and segregation of private property into residential, business, and industrial districts, it was as *equally emphatic that if such zoning did not have some substantial relation to the public health, safety, morals, and general welfare, it would be held to be arbitrary, unreasonable, and unconstitutional*. There is no warrant whatever in this, or any other, case to support the thesis that zoning boards are infallible and that any kind of zoning proposition [that] they promulgate will be upheld. In other words, zoning boards are in the same category as all other administrative boards. *Their ordinances and regulations will be given serious consideration and their judgments great weight, but where it is conclusively shown that they deprive one of his property without due process or otherwise infringe on State or Federal constitutional guarantees unreasonably, such ordinances and regulations cannot be said to be reasonably debatable and will be stricken down.*

We understand the doctrine of *Marbury v. Madison* to be applicable. "When it is clear that a statute transgresses the authority vested in the legislature by the constitution, it is the duty of the courts to declare the act unconstitutional because they cannot shrink from it without violating their oaths of office. *This duty of the courts to maintain the constitution as the fundamental law of the state is imperative and unceasing*" and applies as imperatively when properly

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45. Board of County Comm'rs v. Snyder, 627 So. 2d 469 (Fla. 1993).

46. 71 So. 2d 148 (Fla. 1953), appeal dismissed, 348 U.S. 906 (1955).

*invoked against a zoning ordinance as it does against an act of the legislature.*<sup>47</sup>

There is, in fact, a substantial body of law that suggests that the standard of review in Florida has been and is more exacting than the “anything goes” deferential, fairly debatable standard.<sup>48</sup> While the fairly debatable rule is frequently invoked by the Florida courts, sometimes in its “anything goes” garb, there is a clear line of cases which invokes a very different, more rigorous standard.

In *Burritt v. Harris*,<sup>49</sup> the Supreme Court of Florida expanded on *Lachman* and held that:

The constitutional right of the owner of property to make legitimate use of his lands may not be curtailed by unreasonable restrictions under the guise of police power. *The owner will not be required to sacrifice his rights absent a substantial need for restrictions in the interest of public health, morals, safety or welfare. If the zoning restriction exceeds the bounds of necessity . . . they must be stricken as an unconstitutional invasion of property rights.*<sup>50</sup>

The difference between the standard enunciated in *Burritt* and the “anything goes” standard of the fairly debatable mantra is palpable. A plain reading of the court’s holding makes it clear that when property rights are affected, the standard of justifiable regulation is one of necessity, not choice, which is the sine qua non of the constitutional imperative for a substantial relationship to the public health, safety, and welfare. It would be difficult for the court to have been more explicit when it stated: “[i]f the zoning restriction exceeds the bounds of necessity . . . they must be stricken as an unconstitutional invasion of property rights.”<sup>51</sup>

On its face, *Burritt* stands for the proposition in Florida that the Supreme Court of the United States’ statement, “bears some substantial

47. *Id.* at 150 (emphasis added) (citations omitted). This case involved a suit by 10 property owners based on the refusal of the City of Miami Beach to rezone their ocean front property to allow multifamily homes. The court ultimately found the ordinance “fairly debatable” and ruled in favor of the City. *Id.* at 153.

48. See *Davis v. Sails*, 318 So. 2d 214 (Fla. 1st Dist. Ct. App. 1975).

49. 172 So. 2d 820 (Fla. 1965).

50. *Id.* at 823 (emphasis added) (footnotes omitted). *Burritt* involved a denial of a rezoning request by a property owner whose property was zoned residential, but due to its proximity to an airport, was incontrovertibly unsuitable for residential use. The court found that the county failed to show that its denial was fairly debatable. *Id.*

51. *Id.*



relationship to the public health, safety, and welfare,” means that an “owner will not be required to sacrifice his rights absent a substantial need for restrictions in the interest of the public health, morals, safety or welfare.”<sup>52</sup> Some commentators have tried to avoid the holding of *Burritt v. Harris* by claiming that the holding was overruled in *City of St. Petersburg v. Aikin*.<sup>53</sup> However, it is clear that *Aikin* did not affect the substantive holding in *Burritt*.

The issue in *Aikin* was simply whether the burden was “upon the zoning authority to prove the reasonableness and necessity of a zoning classification” or “upon the petitioner [property owner] to show that the application for rezoning raised a matter which was not a fairly debatable issue before the legislative authority.”<sup>54</sup> The court held:

We conclude that the opinion last above cited [that the burden is on the petitioner] correctly states the *procedural* point, and that the opinion of this Court in *Burritt v. Harris* has been erroneously construed as creating “an innovation in the zoning law of Florida.” Other recent cases recognize no such departure, and continue to apply the well established body of law in this field.<sup>55</sup>

Any doubt that the *Aikin* court was receding from its “necessity” holding in *Burritt* is disposed of by the court’s citation of *Smith v. City of Miami Beach*.<sup>56</sup> There, the court, far from disavowing the *Burritt* court’s necessity holding, noted:

It is fundamental that one may not be deprived of his property without due process of law, but is also well established that he may be restricted in the use of it when that is *necessary* to the common good. So in this case we must weigh against the public weal plaintiff’s rights to enjoy unhampered property acquired since the enactment of the

52. *Id.* at 823 (citing *Tollius v. City of Miami*, 96 So. 2d 122, 125 (Fla. 1957)).

53. 217 So. 2d 315 (Fla. 1968).

54. *Id.* at 316 (footnotes omitted).

55. *Id.* (emphasis added) (footnotes omitted). By this holding, the Supreme Court has created an “innovation in the zoning law of Florida,” *see id.*, by casting on the zoning authority the burden of establishing by a preponderance of evidence that the zoning restrictions under attack “bear[] substantially on the public health, morals, safety or welfare of the community,” *Burritt v. Harris*, 172 So. 2d 820, 822 (Fla. 1965), if the ordinance is to be sustained. *See Lawley v. Town of Golfview*, 174 So. 2d 767, 770 (Fla. 2d Dist. Ct. App. 1965). *But see Aikin*, 217 So. 2d at 316 (disclaiming that the *Burritt* decision created an “innovation on the zoning law of Florida”).

56. 213 So. 2d 281 (Fla. 3d Dist. Ct. App. 1968).

ordinance. Such restrictions must find their basis in the safety, health, morals or general welfare of the community.<sup>57</sup>

*Burrirt* is not alone. In fact, outside of the zoning area, there has never been any question in Florida that property rights are well-protected from overzealous regulation. For example, in *State v. Leone*,<sup>58</sup> decided just five years before *Burrirt*, the Supreme Court of Florida held that: "While it is true that the constitutional guarantee of individual rights does not prevent the exercise of the police power so as to interfere with such rights, it does operate to limit the exercise of that power."<sup>59</sup> The court further stated that:

[T]he police power may be used only against those individual rights which are reasonably related to the accomplishment of the desired end which will serve the public interest. This means that the interference with or sacrifice of the private rights must be necessary, i.e. must be essential, to the reasonable accomplishment of the desired goal. Such interference or sacrifice of private rights can never be justified nor sanctioned merely to make it more convenient or easier for the State to achieve the desired end. This is so because one, if not the principal, reason for the existence of a democratic form of government is to guarantee to the individual freedom of action in those pursuits which do not harm his neighbors. *If there is a choice of ways in which government can reasonably attain a valid goal necessary to the public interest, it must elect that course which will infringe the least on the rights of the individual.*<sup>60</sup>

Further, contrary to the fairly debatable mantra mavens, the court's narrow view of the balance between public and private rights is not "ancient" law, but rather, good law. As the Supreme Court of Florida stated in *In re Forfeiture of 1969 Piper Navajo*:<sup>61</sup>

In this case the method chosen by the legislature . . . is not sufficiently narrowly tailored to the objective . . . to survive constitutional scrutiny. This is particularly so because *property rights* are protected by a number of provisions in the Florida Constitution. Article I, section 2 provides that "[a]ll natural persons are equal before the law and have inalienable rights, among which are the right . . . to acquire,

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57. *Id.* at 283-84 (emphasis added).

58. 118 So. 2d 781 (Fla. 1960).

59. *Id.* at 784 (emphasis added).

60. *Id.* at 784-85.

61. 592 So. 2d 233 (Fla. 1992).

possess and protect property . . . .” Article I, section 9 provides that “[n]o person shall be deprived of life, liberty or property without due process of law . . . .” Article I, section 23 provides that “[e]very natural person has the right to be let alone and free from governmental intrusion into his private life . . . .” As we have previously noted, “[t]hese property rights are woven into the fabric of Florida history.” The main thrust of these protections is that, so long as the public welfare is protected, every person in Florida enjoys the right to possess property free from unreasonable government interference.<sup>62</sup>

Nor can these clear precedents be dismissed by suggesting that the property rights principles in cases like *Leone* (regulation of drug stores) and *Piper Navajo* (forfeiture) have no application in the planning and zoning arena. Property is property. Nowhere in the federal or state constitutions is there a footnote that diminishes the fundamental character of real property or its use.

What this all means is that the fairly debatable rule is nothing more than a *jurisprudential rule of procedure* by which the courts judge the evidence in a substantive due process case to determine whether a challenged action bears some substantial relationship to the public health, safety, and welfare.<sup>63</sup> Under this regime, a plaintiff has an “extraordinary burden of proof,”<sup>64</sup> not because it is hard for a plaintiff to win, but because the burden is on the plaintiff to initially prove a negative; to succeed, the plaintiff must show that the regulation does not bear a substantial relationship to the public health, safety, and welfare. It is always difficult to prove a negative; in some cases, however, it is possible.<sup>65</sup> In the absence of a

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62. *Id.* at 236 (quoting *Shriners Hosp. v. Zrillic*, 563 So. 2d 64, 67 (Fla. 1990)) (emphasis added).

63. It is important to keep in mind that *Euclid* was a facial challenge and that the Court’s homily to legislative deference was made in that context. Given the Court’s holding in *Nectow*, an “as applied” case just two years later, it is surely open to question as to whether the fairly debatable rule should have ever been employed in an “as applied” challenge regardless of the legal fiction that rezonings were legislative acts.

64. “One who assails zoning legislation has an extraordinary burden of proving that a municipal enactment is invalid.” *S.A. Healy Co. v. Town of Highland Beach*, 355 So. 2d 813, 815 (Fla. 4th Dist. Ct. App. 1978); see also *City of Miami Beach v. Weisen*, 86 So. 2d 442 (Fla. 1956); *Dade County v. Beauchamp*, 348 So. 2d 53 (Fla. 3d Dist. Ct. App. 1977), *cert. denied*, 355 So. 2d 512 (Fla. 1978); *Neubauer v. Town of Surfside*, 181 So. 2d 707 (Fla. 3d Dist. Ct. App.), *cert. denied*, 192 So. 2d 488 (Fla. 1966).

65. For example, a local government’s decision to designate a parcel of land as a rural services area on fiscal grounds could be shown to not bear the requisite relationship to the public health, safety, and welfare where a plaintiff demonstrates that all required urban

prima facie showing of invalidity, a court has an obligation to sustain the governmental action. However, once the plaintiff makes a prima facie showing, the burden should shift to the local government to demonstrate that the challenged actions do in fact bear a substantial relationship to the public health, safety, and welfare. If after hearing the local government's evidence, the court finds that the evidence is such that reasonable men could arrive at different conclusions, i.e., the record is not determinative and admits to more than one conclusion, then the fairly debatable rule dictates that the court should favor the local government.<sup>66</sup> On the other hand, if the manifest weight of the evidence favors the plaintiff or the defendant, then the fairly debatable rule has no application, and the court should rule according to its determination.

#### IV. BOARD OF COUNTY COMMISSIONERS V. SNYDER

##### A. Zoning as a Legislative Act

As indicated above, one of the more unfortunate elements in zoning law has been the legal fiction, apparently derived from *Euclid*, that zoning constitutes a legislative act and is therefore entitled to a presumption of validity. In truth, rezoning which involves an individual parcel of land and a particular plan of development is not an exercise of legislative power. Nevertheless, until 1972, courts throughout the United States treated individual rezonings as if they were an exercise of legislative power at the highest level, establishing public policies of general application entitled to abject judicial deference.

Prior to the Civil War, local land use controls were limited in nature and generally related to fire and building standards.<sup>67</sup> Late in the Nineteenth century, local government concern about the compatibility of land uses began to sharpen and expand.<sup>68</sup> By 1920, local governments were

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services are already available to serve the property.

66. This aspect of the fairly debatable rule is not easy to understand. Traditionally, ambiguities of every kind between the government and the governed are resolved in favor of the governed in respect for the principle of reserved powers.

67. See *Dainese v. Cooke*, 91 U.S. 580 (1875); *City of Buffalo v. Chadeayne*, 7 N.Y.S. 501 (Sup. Ct. 1889), *aff'd*, 31 N.E. 443 (N.Y. 1892).

68. Most early regulations focused on excluding nuisances and particularly noxious uses from residential neighborhoods.

enacting zoning ordinances directed at excluding anything and everything likely to be an undesirable use.<sup>69</sup> As one commentator notes:

[U]rban America was in something of a crisis in the early 1920's. Like a patient who could endure his fever until he suddenly learned that there was now a new remedy for it and who was then impatient to be cured, urban America was now sure that it would perish if it did not have zoning . . . . Zoning was the heaven-sent nostrum for sick cities, the wonder drug of the planners, the balm sought by lending institutions and householders alike. City after city worked itself into a state of acute apprehension until it could adopt a zoning ordinance.<sup>70</sup>

The validity of zoning, however, no matter how popular, was not immediately apparent to some courts. For example, the Supreme Court of Texas announced:

The ordinance is clearly not a regulation for the protection of the public health or the public safety. *It is idle to talk about the lawful business of an ordinary retail store threatening the public health or endangering the public safety.* It is equally idle in our opinion to speak of its impairing the public comfort or as being injurious to the public welfare of a community.<sup>71</sup>

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69. See generally *Hadacheck v. Sebastian*, 239 U.S. 394, 413-14 (1915) (upholding a prohibition on manufacture of bricks in select districts in the city of Los Angeles in spite of fact that use began prior to time that property was annexed into city and prior to adoption of regulation, and despite fact that manufacture of bricks was physically connected to particular property due to presence of specific clay and that relocation of clay would make manufacture of bricks fiscally prohibitive); *Reinman v. Little Rock*, 237 U.S. 171, 176-77 (1915) (upholding prohibition of livery stables; and finding that although livery stables are not nuisances per se, in particular circumstances and particular localities they may be deemed nuisances in fact and in law, limited only by condition that such police power not be used arbitrarily or discriminatorily).

70. Charles L. Siemon, *The Paradox of "In Accordance With a Comprehensive Plan" and Post Hoc Rationalizations: The Need for Efficient and Effective Judicial Review of Land Use Regulations*, 16 STETSON L. REV. 607, 608 (1987) (citations omitted).

71. *Spann v. City of Dallas*, 235 S.W. 513, 516 (Tex. 1921) (emphasis added). The Supreme Court of Kansas similarly held:

Under the welfare provision of the statute, a city may exercise broad police power in protecting the public health, safety, and comfort, but to prohibit an owner of property from using it for ordinary business purposes, or for any use not in itself a nuisance, where there is no express legislative authority, is not within municipal power.

*Julian v. Golden Rule Oil Co.*, 212 P. 884, 885 (Kan. 1923).

To other courts, such as the Supreme Court of Illinois, the logic of zoning was inescapable:

The state imposes restraints upon individual conduct. Likewise its interests justify restraints upon the uses to which private property may be devoted. By the protection of individual rights the state is not deprived of the power to protect itself or to promote the general welfare. Uses of private property detrimental to the community's welfare may be regulated or even prohibited. The harmless may sometimes be brought within the regulation or prohibition in order to abate or destroy the harmful. The segregation of industries, commercial pursuits, and dwellings to particular districts in a city, when exercised reasonably, may bear a rational relation to the health, morals, safety, and general welfare of the community. The establishment of such districts or zones may, among other things, prevent congestion of population, secure quiet residence districts, expedite local transportation, and facilitate the suppression of disorder, the extinguishment of fires, and the enforcement of traffic and sanitary regulations. The danger of fire and the risk of contagion are often lessened by the exclusion of stores and factories from areas devoted to residences, and, in consequence, the safety and health of the community may be promoted. These objects, among others, are attained by the exercise of the police power.<sup>72</sup>

In 1926, the Supreme Court of the United States resolved the validity of zoning in favor of rezoning in *Village of Euclid v. Ambler Realty Co.*<sup>73</sup>

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72. *City of Aurora v. Burns*, 149 N.E. 784, 788 (Ill. 1925) (citation omitted). The court cited with favor a host of pro-zoning decisions from around the country. *Id.*; see *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Zahn v. Board of Public Works*, 234 P. 388 (Cal. 1925), *aff'd*, 274 U.S. 325 (1927); *Miller v. Board of Public Works*, 234 P. 381 (Cal. 1925); *Brown v. City of Los Angeles*, 192 P. 716 (Cal. 1920); *City of Des Moines v. Manhattan Oil Co.*, 184 N.W. 823 (Iowa 1921); *West v. City of Wichita*, 234 P. 978 (Kan. 1925); *Ware v. City of Wichita*, 214 P. 99 (Kan. 1923); *State ex rel. Civello v. City of New Orleans*, 97 So. 440 (La. 1923); *Bamel v. Building Comm'r*, 145 N.E. 272 (Mass. 1924); *Brett v. Building Comm'r*, 145 N.E. 269 (Mass. 1924); *Spector v. Building Inspector*, 145 N.E. 265 (Mass. 1924); *Building Inspector v. Stocklosa*, 145 N.E. 262 (Mass. 1924); *In re Opinion of the Justices*, 127 N.E. 525 (Mass. 1920); *State v. Houghton*, 204 N.W. 569 (Minn. 1925), *aff'd*, 273 U.S. 671 (1927); *In re Cherry*, 193 N.Y.S. 57 (App. Div.), *aff'd*, 138 N.E. 465 (N.Y. 1922); *Lincoln Trust Co. v. Williams Bldg. Corp.*, 128 N.E. 209 (N.Y. 1920); *Pritz v. Messer*, 149 N.E. 30 (Ohio 1925); *Salt Lake City v. Western Foundry & Store Repair Works*, 187 P. 829 (Utah 1920); *Holzbauer v. Ritter*, 198 N.W. 852 (Wis. 1924); *State ex rel. Carter*, 196 N.W. 451 (Wis. 1923).

73. 272 U.S. 365 (1926).

In *Euclid*, a property owner challenged a zoning ordinance, on its face, on the grounds that the ordinance violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the *Constitution of the United States* and similar provisions of the *Constitution of the State of Ohio*.<sup>74</sup> The issue, from the landowner's perspective, was not the authority of the Village to regulate the use of land,<sup>75</sup> but the inherent "arbitrariness" of the regulations at issue. The district court ruled in favor of the plaintiff, but the Supreme Court reversed.<sup>76</sup> The Court held:

We believe it, however, to be the law that these powers must be reasonably exercised, and that a municipality may not, under the guise of the police power, arbitrarily divert property from its appropriate and most economical uses, or diminish its value, by imposing restrictions which have no other basis than the momentary taste of public authorities. Nor can police regulations be used to effect the arbitrary desire to have a municipality resist the operation of economic laws and remain rural, exclusive and aesthetic, when its land is needed to be otherwise developed by that larger public good and public welfare, which takes into consideration the extent to which the prosperity of the country depends upon the economic development of its business and industrial enterprises.<sup>77</sup>

On its face, the *Euclid* Court's holding—coming as it did in a facial challenge to zoning—was consistent with established balance of powers principles.<sup>78</sup> Unfortunately, two years later, the same court appeared to

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74. *Id.* at 384. The plaintiff requested an injunction restraining the Village from enforcing the ordinance and from attempting to impose any of the ordinance restrictions on the subject property. *Id.*

75. Indeed, counsel for the landowner stated in his argument:

That municipalities have power to regulate the height of buildings, area of occupation . . . and density of use, in the interest of the public safety, health, morals, and welfare, are propositions long since established; that a rational use of this power may be made by dividing a municipality into districts or zones, and varying the requirements according to the characteristics of the districts, is, of course, equally well established.

*Id.* at 373.

76. *Id.* at 397.

77. *Euclid*, 272 U.S. at 373-74.

78. See, e.g., *City of Miami Beach v. Lachman*, 71 So. 2d 148, 150 (Fla. 1953), *appeal dismissed*, 348 U.S. 906 (1955) (citations omitted) (describing the doctrine of *Marbury v. Madison* as: "When it is clear that a statute transgresses the authority vested in the legislature by the constitution, it is the duty of the courts to declare the act unconstitutional because they cannot shrink from it without violating their oaths of office").

invoke the same standard of review in an “as applied” challenge.<sup>79</sup> In so doing, the *Euclid/Nectow* Court emasculated planning as a logical and rational predicate to land use regulation, and in the bargain exalted what noted zoning expert Richard F. Babcock would describe forty years later as “trial by neighborism.”<sup>80</sup> That was so because the legal fiction on which the *Euclid/Nectow* court relied—that zoning was a legislative act entitled to judicial deference—distanced zoning from rational thought (planning) and merit-based decision making.

It is not clear how the legal fiction that zoning was a legislative act came into being. However, there can be no doubt that the Supreme Court’s prescription for deference in the context of a facial challenge to a zoning ordinance, which was established in *Euclid*, was somehow transmogrified into the proposition that zoning is a legislative power and individual rezonings are legislative acts. This transmogrification is particularly mysterious because the Supreme Court itself, in *Nectow*, clearly went beyond abject deference when it invalidated zoning as applied to a particular parcel of land.<sup>81</sup>

Once recognized as a legislative act, zoning was freed from the due process strictures of fundamental fairness and was subject to great deference in the event that a property owner was so bold as to question a local government zoning decision. In the 1950s and 60s, many commentators pointed to the legislative act fiction as the key problem with zoning jurisprudence and argued that the fiction should be abandoned. One commentator noted:

The freedom from accountability of the municipal governing body may be tolerable in those cases where the legislature is engaged in legislating but it makes no sense where the legislature is dispensing or refusing to dispense special grants. When the local legislature acts to pass general laws applicable generally it is performing its traditional role and it is entitled to be free from those strictures we place upon an agency that is charged with granting or denying special privileges to particular persons. When the municipal legislature crosses over into the role of hearing and passing on individual petitions in adversary proceedings it should be required to meet the same procedural standards we expect from a traditional administrative agency.<sup>82</sup>

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79. See *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

80. See RICHARD F. BABCOCK, *THE ZONING GAME* 141 (1966).

81. *Nectow*, 277 U.S. at 188-89 (holding residential use classification invalid as applied to a portion of a large tract which was unsuitable for residential development).

82. BABCOCK, *supra* note 80, at 158.



## B. Zoning Reform

In 1975, the Supreme Court of Oregon decided *Baker v. City of Milwaukie*<sup>83</sup> and set in motion a “movement” that, at least while it had breath, invited substantial and meaningful zoning reform. In *Baker*, the court accepted the Haar/Babcock planning-regulation construct,<sup>84</sup> which accords legal significance to the comprehensive plan as an instrument of public policy.<sup>85</sup> Zoning without the predicate of a plan lacked coherence.<sup>86</sup> In this regard, *Baker* was no more significant than *Udell v. Haas*<sup>87</sup> and other “comprehensive plan” cases of the times. However, *Baker* turned out to be notable because the logical extension of the comprehensive plan theorem was that if planning is a legal prerequisite to zoning—the establishment of official policy—then zoning in accordance with the plan was nothing more than an implementation tool and not an exercise of policy-making power.

## C. Zoning as a Quasi-Judicial Act

The 1973 decision of the Supreme Court of Oregon in *Fasano v. Board of County Commissioners*<sup>88</sup> was a true landmark decision which pierced through the fiction that rezonings were legislative acts.<sup>89</sup> Eventually,

83. 533 P.2d 772 (Or. 1975).

84. See Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1175 (1955).

85. *Baker*, 533 P.2d at 778.

86. Haar, *supra* note 84, at 1175.

87. 235 N.E.2d 897 (N.Y. 1968). “Rather, the comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use. It is the insurance that the public welfare is being served and that zoning does not become nothing more than just a Gallup poll.” *Id.* at 900-01.

88. 507 P.2d 23 (Or. 1973), *disapproved by* *Neuberger v. City of Portland*, 607 P.2d 722 (Or. 1980). See discussion *infra* note 98.

89. The quasi-judicial approach to rezonings was actually embraced earlier, in the 1972 Supreme Court of Washington decision in *Fleming v. City of Tacoma*, 502 P.2d 327 (Wash. 1972). In *Fleming*, the court stated:

Generally, when a municipal legislative body enacts a comprehensive plan and zoning code it acts in a policy making capacity. But in amending a zoning code, or reclassifying land thereunder, the same body, in effect, makes an adjudication between the rights sought by the proponents and those claimed by the opponents of the zoning change. The parties whose interests are affected are readily identifiable. Although important questions of public policy may permeate a zoning amendment, the decision has a far greater impact on one group of citizens than on the public generally.

between ten and fifteen states embraced the *Fasano* rule<sup>90</sup> before events and time overtook the idea and reversed the tide of reform. The issue in *Fasano* was the role of the courts in zoning cases. Building on the planning construct of *Baker*, the *Fasano* court dismissed the fiction of zoning as an exercise of legislative power. The court stated:

At this juncture we feel we would be ignoring reality to rigidly view all zoning decisions by local governing bodies as legislative acts to be accorded a full presumption of validity and shielded from less than constitutional scrutiny by the theory of separation of powers. Local and small decision groups are simply not the equivalent in all respects of state and national legislatures. There is growing judicial recognition of this fact of life:

It is not a part of the legislative function to grant permits, make special exceptions, or decide particular cases. Such activities are not legislative but administrative, quasi-judicial, or judicial in character. To place them in the hands of

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*Id.* at 331; *see Snyder v. City of Lakewood*, 542 P.2d 371, 373-74 (Colo. 1975) (following *Fleming*). Other courts have also classified rezoning as quasi-judicial, but have not directly addressed the issue. *See, e.g., Kelley v. John*, 75 N.W.2d 713 (Neb. 1956) (making zoning from changes from residential to business use an administrative act not subject to referendum); *City of Sand Springs v. Colliver*, 434 P.2d 186 (Okla. 1967) (affirming mandatory injunction requiring approval of application to change zoning); *Bird v. Sorenson*, 394 P.2d 808 (Utah 1964) (upholding change in zoning from residential to commercial as administrative act not subject to referendum).

The *Fasano* decision was also influenced by a student comment which had appeared in the *Ohio State Law Journal*. *See* Michael S. Holman, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130 (1972).

90. *Margolis v. District Court*, 638 P.2d 297 (Colo. 1981); *Cooper v. Board of County Comm'rs*, 614 P.2d 947 (Idaho 1980); *Golden v. City of Overland Park*, 584 P.2d 130 (Kan. 1978); *Dufau v. Parish of Jefferson*, 200 So. 2d 335 (La. App. 4th Cir. 1967) (establishing a "change of mistake" rule for evaluating zoning decisions, but was not uniformly followed); *Northwest Merchants Terminal v. O'Rourke*, 60 A.2d 743 (Md. 1948) (following change-mistake rule for rezoning which suggests stricter standard than traditional "fairly debatable" rule); *State ex rel. McNary v. Hais*, 670 S.W.2d 494 (Mo. 1984) (en banc); *Lowe v. City of Missoula*, 525 P.2d 551 (Mont. 1974), *overruled sub nom. Greens at Fort Missoula v. City of Missoula*, 897 P.2d 1078 (Mont. 1995); *Winslow v. Town of Holderness Planning Bd.*, 480 A.2d 114 (N.H. 1984); *Cherney v. Matawan Borough Zoning Bd.*, 534 A.2d 41 (N.J. Super. Ct. App. Div. 1987); *Young Men & Women's Hebrew Ass'n v. Borough Council*, 240 A.2d 469, 429 (Pa. 1968); *Chioffi v. Winooski Zoning Bd.*, 556 A.2d 103 (Vt. 1989); *Kentview Properties, Inc. v. City of Kent*, 795 P.2d 732 (Wash. App. 1990); *Kaufman v. Planning & Zoning Comm'n*, 298 S.E.2d 148 (W. Va. 1982); *Holding's Little Am. v. Board of County Comm'rs*, 670 P.2d 699 (Wyo. 1983) (following *Fasano* in spirit if not explicitly).

legislative bodies, whose acts as such are not judicially reviewable, is to open the door completely to arbitrary government.<sup>91</sup>

Importantly, the *Fasano* court explicitly recognized the distinction between legislative acts to establish policy and the application of established policy to specific circumstances. The court noted:

Ordinances laying down general policies without regard to a specific piece of property are usually an exercise of *legislative authority, are subject to limited review, and may only be attacked upon constitutional grounds for an arbitrary abuse of authority.* On the other hand, a determination whether the permissible use of a specific piece of property should be changed is usually an exercise of *judicial authority and its propriety is subject to an altogether different test . . . .*

“Basically, this test involves the determination of whether action produces a general rule or policy which is applicable to an open class of individuals, interest, or situations, or whether it entails the application of a general rule or policy to specific individuals, interests, or situations. If the former determination is satisfied, there is legislative action; if the latter determination is satisfied, the action is judicial.”<sup>92</sup>

According to the *Fasano* court, only the former act should be accorded a presumption of validity where the burden is on the party challenging the action of the legislative body to establish the invalidity of the action.<sup>93</sup> On the other hand, if the zoning was not legislative, then the proceedings should be attended by the rudiments of procedure and be subject to a more searching review by the courts. The court stated:

Because the action of the commission in this instance is an exercise of judicial authority, the burden of proof should be placed, as is usual in judicial proceedings, upon the one seeking change. The more drastic the change, the greater will be the burden of showing that it is in conformance with the comprehensive plan as implemented by the ordinance, that there is a public need for the kind of change in question,

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91. *Fasano*, 507 P.2d at 26 (quoting *Ward v. Village of Skokie*, 186 N.E.2d 529, 533 (Ill. 1962) (Klingbiel, J., specially concurring)). Richard Babcock, of course, takes full credit for having spread the gospel; credit that is, in fact, due.

92. *Id.* at 26-27 (quoting *Holman*, *supra* note 89, at 137) (emphasis added).

93. *Id.* at 29.

and that the need is best met by the proposal under consideration. As the degree of change increases, the burden of showing that the potential impact upon the area in question was carefully considered and weighed will also increase.<sup>94</sup>

The principal thrust of the *Fasano* opinion was to recharacterize the nature of a rezoning decision and to redefine the scope and character of judicial review of such decisions. However, implicit in the court's decision that land use decisions involving individual parcels of land were "judicial" in character was a requirement for due process. This can be gleaned from the court's statement that:

With future cases in mind, it is appropriate to add some brief remarks on questions of procedure. Parties at the hearing before the county governing body are entitled to an opportunity to be heard, to an opportunity to present and rebut evidence, to a tribunal which is impartial in the matter—i.e., having had no pre-hearing or ex parte contacts concerning the question at issue—and to a record made and adequate findings executed.<sup>95</sup>

#### D. *The Turn of the Judicial Tide*

For Babcock and other reformers, the promised land was at hand as *Fasano* swept across the land and more than a dozen states embraced its apparent logic. Florida was not among the *Fasano* adherents, and in *Florida Land Co. v. City of Winter Springs*,<sup>96</sup> the Supreme Court of Florida rejected the argument that an exercise of the police power focused on an individual parcel of land was not a legislative act.<sup>97</sup> Unfortunately, events conspired against the movement and ultimately, the "revolution," engendered by *Baker* and its most famous progeny, *Fasano*,<sup>98</sup> lost its momentum. With that loss came the demise of the promise of immediate and meaningful zoning reform.

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94. *Id.*

95. *Id.* at 30.

96. 427 So. 2d 170 (Fla. 1983).

97. *Id.* at 174.

98. *Fasano* was disapproved by *Neuberger v. City of Portland*, 607 P.2d 722 (Or. 1980), in which the Oregon Supreme Court held that the substantive criteria for zone changes set forth in the *Fasano* opinion "could only apply in addition to, not instead of, other standards imposed by law." *Id.* at 727.

There are almost as many explanations for why the *Fasano* doctrine lost its momentum as there are explanations for why the sky is blue. Some argue that the concept was too threatening to political prerogatives and was forcibly destroyed by the forces of "evil." Others conclude that the distinct character of state enabling acts posed an insurmountable obstacle to the reform movement in many states. Still others believe that the Supreme Court of the United States' opinion in *City of Eastlake v. Forest City Enterprises, Inc.*,<sup>99</sup> was misunderstood and misapplied as a rejection of the *Fasano* doctrine.

In *Eastlake*, a developer challenged a referendum provision which allowed the zoning of a particular parcel of land to be changed by popular vote, without regard to procedural niceties or consideration of the merits.<sup>100</sup> The developer argued that the lack of procedural safeguards and substantive standards to guide the application of the zoning power to a particular parcel of land violated the property owner's due process rights under the *Constitution of the United States*.<sup>101</sup> The Supreme Court rejected the developer's claim, holding that the State of Ohio considered zoning to be a legislative act<sup>102</sup> and that due process does not attach to legislative acts.<sup>103</sup> According to the Court, no federally protected rights were trammled by the referendum process.<sup>104</sup>

Another popular explanation is that the transformation of local zoning hearings into formal adjudications was problematic. Local government officials were not comfortable serving as "trial judges" and wished to avoid the obvious adversarial nature of formal adjudicatory proceedings. Local officials were also hesitant to subjugate their political prerogative to respond to constituent demands by confining their decisions to admissible evidence.

Still others have concluded that the doctrine simply had a bad sense of timing and was interdicted by another "reform" movement—*Monell v. Department of Social Services*.<sup>105</sup> What happened, or at least what makes sense, is that the liability for "improvident land use decisions" movement<sup>106</sup> represented by *Monell*, and the repeated attempts in the 1980s by the real estate and development industries (the presumed beneficiaries of

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99. 426 U.S. 668 (1976).

100. *Id.* at 671.

101. *Id.* at 676.

102. *Id.* at 673-74.

103. *Id.* at 679.

104. *Eastlake*, 426 U.S. at 678-79.

105. 436 U.S. 658 (1978).

106. The "taking mavens" and their ilk.

zoning reform) to induce the Supreme Court of the United States to reach the so-called "taking issue" had the perverse effect of thrashing zoning reform. City attorney after city attorney argued that it does not make sense to accede to the notion that zoning is not a legislative act when the consequence of that cognition is to expose decision-makers to potential liability.

Whatever the cause, *Fasano* lost its momentum and property rights mavens turned their attention to the so-called taking issue in search of a balance between public and private interests in the use of private property. Pointing to Justice Oliver Wendell Holmes' ode to property rights in *Pennsylvania Coal Co. v. Mahon*,<sup>107</sup> property rights advocates argued that when a government goes too far in the exercise of its regulatory power, the government must pay compensation. The advocates' theory was that a compensation remedy for regulatory excesses would deter governments from treading on private property rights and realign the balance between public and private interests in the use of private property. The "police power hawks" argued, on the other hand, that Justice Holmes' oft-quoted statement<sup>108</sup> was mere metaphorical dictum and that governmental action which went too far was invalid and did not constitute a taking for public use. The results of the debate, played out in a series of cases considered by the Court,<sup>109</sup> ultimately favored the compensation advocates. History, however, does not confirm that the threat of compensation constitutes an effective governor for regulatory zeal. Indeed, in retrospect, it is possible to argue that by and large the entire taking issue debate was much ado about nothing because, as discussed previously, the deferential standard of judicial review applied to local government zoning decisions renders the question of available remedies all but a matter of academic curiosity.

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107. 260 U.S. 393 (1922).

108. "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415.

109. *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Gorieb v. Fox*, 274 U.S. 603 (1927); *Village of Euclid v. Ambler Realty Corp.*, 272 U.S. 365 (1926).

### E. *Florida Joins the Movement*

More than a decade after *Fasano* lost its momentum, and almost twenty years after Richard F. Babcock's *The Zoning Game* challenged the legal fiction of zoning as a legislative act, the Supreme Court of Florida joined the movement in *Board of County Commissioners v. Snyder*.<sup>110</sup> In *Snyder*, the court noted: "It is the character of the hearing that determines whether or not board action is legislative or quasi-judicial. Generally speaking, legislative action results in the *formulation* of a general rule of policy, whereas judicial action results in the *application* of a general rule of policy."<sup>111</sup> In addition, the supreme court agreed with the court below, which it quoted as stating:

[R]ezoning actions which have an impact on a limited number of persons or property owners, on identifiable parties and interests, where the decision is contingent on a fact or facts arrived at from distinct alternatives presented at a hearing, and where the decision can be functionally viewed as policy application, rather than policy setting, are in the nature of . . . quasi-judicial action . . . .<sup>112</sup>

The Snyders owned a one-half acre parcel of property in unincorporated Brevard County.<sup>113</sup> The parcel was designated for residential use under the 1988 Brevard County Comprehensive Plan Future Land Use Map. The property was zoned for general use, allowing the construction of a single family home. The Snyders filed an application to rezone the property to a zoning classification which allowed a maximum of fifteen units per acre. At the time, both the current and the requested zoning classifications were consistent with the residential comprehensive plan designation. The County staff initially suggested that the application be denied because the property was located in the one-hundred-year flood plain. The comprehensive plan allowed only two units per acre to be built in areas within the flood plain, and thus, the Snyders' requested zoning was inconsistent with the plan. However, the county director of planning and zoning pointed out that the property, when developed, would no longer be within the flood plain. The

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110. 627 So. 2d 469 (Fla. 1993).

111. *Id.* at 474 (emphasis added) (citations omitted).

112. *Id.* (quoting *Snyder v. Board of County Comm'rs*, 595 So. 2d 65, 78 (Fla. 5th Dist. Ct. App. 1991)).

113. *Id.* at 471.

staff then recommended approval of the rezoning and the Snyders' request was approved by the planning and zoning board.<sup>114</sup>

The Snyders' request then went before the Board of County Commissioners for approval. Many citizens opposed the project at the commission meeting, for the most part, due to the increase in traffic which would be caused by the development. The county commissioners voted to deny the requested rezoning, stating no reasons for their denial.<sup>115</sup>

The Snyders filed a petition for writ of certiorari in the circuit court, which was denied.<sup>116</sup> They then filed a petition for writ of certiorari in the district court of appeal to review the circuit court's denial of relief, claiming that the circuit court departed from the essential requirements of law in failing to require the county commission to make findings of fact.<sup>117</sup> The Fifth District Court of Appeal granted the petition for certiorari, quashed the denial of the petition in the circuit court, and remanded the case for proceedings consistent with its opinion.<sup>118</sup>

The County appealed the Fifth District's decision to the Supreme Court of Florida.<sup>119</sup> The first issue addressed by the court was whether the nature of the County's action was legislative or quasi-judicial. The nature of the action determines the level of scrutiny by the court. The court described the levels of scrutiny as follows:

A board's legislative action is subject to attack in circuit court. However, in deference to the policy-making function of a board when acting in a legislative capacity, its actions will be sustained as long as they are fairly debatable. On the other hand, the rulings of a board acting in its quasi-judicial capacity are subject to review by certiorari

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114. *Id.*

115. *Snyder*, 627 So. 2d at 471.

116. *Id.*

117. *Id.*

118. *Id.* at 472.

119. The Supreme Court of Florida accepted review of *Snyder* based on conflict with *Schauer v. City of Miami Beach*, 112 So. 2d 838 (Fla. 1959); *Palm Beach County v. Tinnerman*, 517 So. 2d 699 (Fla. 4th Dist. Ct. App. 1987), *review denied*, 528 So. 2d 1183 (Fla. 1988); and *City of Jacksonville Beach v. Grubbs*, 461 So. 2d 160 (Fla. 1st Dist. Ct. App. 1984), *review denied*, 469 So. 2d 749 (Fla. 1985). *See Snyder*, 627 So. 2d at 470. The court stated that *Schauer* found that the amendment of a zoning ordinance which affected a large number of persons was an act legislative in nature and that the district courts of appeal had gone further in *Tinnerman* and *Grubbs*, holding that board action on specific rezoning applications of individual property owners was also legislative. *Id.* at 474.



and will be upheld only if they are supported by substantial competent evidence.<sup>120</sup>

It appears that the court recognized a problem with the current standard of review for zoning amendments but, rather than modify the existing "fairly debatable" standard of review, the court chose to reach a standard of review for individual zoning decisions by analyzing the nature of those decisions. Citing to *West Flagler Amusement Co. v. State Racing Commission*,<sup>121</sup> the court explained:

A judicial or quasi-judicial act determines the rules of law applicable, and the rights affected by them, in relation to past transactions. On the other hand, a quasi-legislative or administrative order prescribes what the rule or requirement of administratively determined duty shall be with respect to transactions to be executed in the future, in order that same shall be considered lawful. But even so, quasi-legislative and quasi-executive orders, after they have already been entered, may have a quasi-judicial attribute if capable of being arrived at and provided by law to be declared by the administrative agency only after express statutory notice, hearing and consideration of evidence to be adduced as a basis for the making thereof.<sup>122</sup>

In describing the difference between a quasi-judicial and legislative act, the court focused on the relation of the governmental decision in time to the property owners activity and the procedural due process requirements necessary for the governmental decision.<sup>123</sup> Applying this criterion, the court determined that comprehensive rezonings affecting a large portion of the public are legislative in nature and held that the Board of County Commissioners' action on the Snyders' petition was a quasi-judicial action properly reviewable by certiorari.<sup>124</sup>

#### F. *The Problem with Snyder*

The difficulty with the Supreme Court of Florida's decision in *Snyder* is that the court, after arriving at the important way station of recognizing that individual rezonings are functionally not legislative acts, apparently lost

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120. *Snyder*, 627 So. 2d at 474 (citations omitted).

121. 165 So. 64 (Fla. 1935).

122. *Snyder*, 627 So. 2d at 474 (quoting *West Flagler*, 165 So. at 65).

123. *Id.* at 474.

124. *Id.* at 474-75.

its way in concluding that such actions are in the “nature of a quasi-judicial [action].”<sup>125</sup> The court’s language, “in the nature of,” does not actually hold that individual rezonings are quasi-judicial. However, if a distinction was intended, it has been lost in the maelstrom which has followed *Snyder*.

In truth, individual rezonings have never been “quasi-judicial” actions. A quasi-judicial proceeding is one in which a decision is based on discrete standards. In the zoning universe, the variance is a classic example of a quasi-judicial proceeding where a property owner seeks relief from zoning requirements on the basis of specific standards such as “undue hardship.” In contrast, rezonings, even individual rezonings, are based on general standards, such as the goals, policies, and objectives of a comprehensive plan.

Nor should individual rezonings be quasi-judicial. The reality, however, is that land use planning is not a precise science which can be reduced to specific standards because the key factor in land use—compatibility—is governed by the eye of the beholder, the collective judgment of a democratically elected governing body.<sup>126</sup> Zoning decisions, even individual zoning decisions are by their nature inherently “political,” that is, infused with collective values and directions which are politically derived. Nonetheless, that is the way it should be, because planning and zoning are essential political issues at the local government level and go to the very essence of community.

A fundamental flaw in the leap of faith to “quasi-judicial” is that the very object of the zoning reformers and the principal value of discarding the legal fiction that zoning is a legislative act is destroyed. This is so because quasi-judicial proceedings are apparently deemed reviewable only by certiorari, a judicial review which is every bit as deferential to local

125. *Id.* at 474.

126. That “compatibility” is often mere perception is easily illustrated. Consider a 500-acre parcel of land slated for development. The developer lays out a network of local streets and residential lots with a traditional neighborhood shopping area in the center of the project. The neighborhood shopping center is opened at the same time that the first phase of residential lots are available for sale and the project builds out quickly. The residents extol the virtues of their “neighborhood” telling anyone who will listen that the convenience and safety of “their” neighborhood shopping center is the element which makes their neighborhood a “community of place.” Then take the same parcel of land, the same development plan and make one small change, build the neighborhood shopping center after all of the homes have been built and sold. Same shopping center, same homes, same neighbors, and same compatibility, but with a very different result. In this later scenario, the shopping center is viewed as an alien which will destroy the fabric of their neighborhood and the residents will fight the development of the center to the finish.

decision-makers' prerogatives as is the fairly debatable review.<sup>127</sup> After all, the standard for certiorari review substitutes a search for any justification (denominated competent substantial evidence)<sup>128</sup> for a search for the truth.<sup>129</sup> Under the certiorari standard, all a local government need do is pack the record with unauthenticated documents and "words of rationality" to survive the limited amount of scrutiny afforded by the competent substantial evidence standard. The fact is that under the certiorari standard, the weight of the evidence is irrelevant, leaving local governments just as free to be arbitrary and capricious as under the fairly debatable rule.

Worse still, certiorari review forces local government officials into a bizarre netherworld where they serve, at the same time in the same proceedings, as judges (ruling on questions of evidence and objections), parties (elected representatives of the people), and jury (impartial decision-makers), all under the watchful eye of their political constituencies.<sup>130</sup> Under the quasi-judicial paradigm, the city faces a difficult "Catch twenty-two." When an application for a rezoning is submitted, city staff is faced with the Hobson's choice of taking a position in regard to the zoning—for or against one of the parties in the adjudication—or running the risk that the ultimate decision will not be supported by competent substantial evidence. The only way to resolve the choice without taking sides is for the staff to remain neutral and ensure that there is sufficient evidence for and against the proposition to support whatever decision is made.

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127. See *City of Deerfield Beach v. Vaillant*, 399 So. 2d 1045, 1046-47 (Fla. 4th Dist. Ct. App. 1981).

128. The Supreme Court of Florida has commented on the scope of certiorari review, saying:

The circuit court, therefore, transcended the scope of its certiorari review by substituting its judgment for that of the local zoning authority. Because zoning or rezoning is the function of the appropriate zoning authority and not the courts, the circuit court was not empowered to disapprove the finding of the Board unless the record was *devoid* of substantial competent evidence to support the Board's decision.

*Skaggs-Albertson's v. ABC Liquors, Inc.*, 363 So. 2d 1082, 1091 (Fla. 1978) (footnote omitted) (emphasis added).

129. The very idea that judicial review should be based on a record composed mostly of unsubstantiated, lay opinion and large doses of political science which was compiled in front of elected officials with only the faintest attention to the rules of evidence, is remarkable on its face and ludicrous in practice.

130. The political implications and influences of zoning decisions cannot be overstated, particularly in communities where local elections are held every two years and public hearings are available on local access television.

The simple fact is that the zoning reformers, while advocating more regular proceedings at the local level, were not seeking to transform the zoning process into formal adjudicatory proceedings. Rather, they were advocating that the courts, when reviewing the actions of local government, should discard the legal fiction that rezonings were “legislative acts” and afford a more exacting judicial review than the “anything goes” presumption of legislative validity. In other words, individual rezonings should be reviewed in the courts, *de novo*. They should not be reviewed under the “anything goes,” fairly debatable standard, but rather, under a more exacting standard which could be called something like the “rational justification rule.”

Under the “rational justification rule,” a court would hold a *de novo* proceeding, attended by the rules of evidence, to determine whether a particular rezoning action “bears a substantial relationship to the public health, safety, and welfare.” In the absence of any evidence that the action is not sufficiently related to the public welfare, the court would defer to the local government. In other words, a plaintiff would have the burden of proof to demonstrate that the challenged action did not bear the requisite relationship to the public health, safety, and welfare; or to put it another way, that the regulation exceeds the bounds of necessity.<sup>131</sup> If the plaintiff makes this initial showing, the burden of proof would shift to the local government to demonstrate that the action at issue does in fact bear some substantial relationship to the public health, safety, and welfare. After hearing all of the evidence, the court would then rule based on the manifest weight of the evidence. If the local government succeeds in demonstrating by the manifest weight of the evidence that the action in fact bears “some substantial relationship to the public health, safety, and welfare,” then the local government’s action would be sustained.

## V. CONCLUSION

Effective judicial review is the foundation of any civilized system of rights. For too many years, planning and zoning regulations have been immunized from judicial scrutiny. As a result, local government planning and zoning has become adversarial and divisive. Worse still, property owners and developers have turned to the legislature to limit the planning and zoning powers of the government. In Florida, the legislature has acted by creating a law which is very likely to further muddy the already dark

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131. See *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Burritt v. Harris*, 172 So. 2d 820 (Fla. 1965).

waters of planning jurisprudence. More laws and more standards are not needed. What is needed is an effective means of enforcing those laws that already exist. When, and if, the traditional substantive due process standard in Florida—the “bounds of necessity” standard, as articulated in *Burritt v. Harris*—is freed from the “anything goes” application of the fairly debatable rule, the “rational justification” standard or the “substantially advances taking” standard can become the norm of judicial review in Florida. Then the power and resources needed for effective planning and zoning will be secure and available. In contrast, if effective and meaningful judicial relief continues to be illusory in Florida, the march of property rights legislation will continue, and ultimately, the system will fail. Two decades of planning preoccupation with “legal defensibility” has set the “default switch” against enlightened resource planning and management. Something has to give or there will be more Bert K. Harris<sup>132</sup> acts and more decisions in the vein of *First English*, *Nollan*, *Lucas*, and *Dolan*.

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132. See FLA. STAT. § 70.001 (1995).

# Ecosystem Management in Florida—A Case Study

**Mike Batts\***

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In March of 1994, the Department of Environmental Protection (“DEP”) embarked on an ambitious initiative to demonstrate how ecosystem management could work in Florida. There were six geographic areas selected for implementation of the ecosystem management concept: Apalachicola River and Bay, the Lower St. Johns River Basin, the Florida Bay, the Wekiva River, the Hillsborough River, and the Suwannee River.<sup>1</sup> This paper is a case study of a project located in the Florida Bay Ecosystem Management (East Everglades) area that incorporated an ecosystem management approach in environmental permitting.

Florida Rock and Sand Co., Inc. (“FRS”) is a limestone rock mining and processing company located in south Dade County, Florida. FRS originally held lands south of its existing operations for future expansion but was advised in 1985, by the U.S. Army Corps of Engineers, to divest this land and make provisions to expand future mining efforts to the north. This recommendation was based primarily on the quality of the wetlands. To the south of the existing operations, a high quality wetland community existed while north of the operations the wetlands were invaded by nuisance and exotic vegetation. FRS divested its southern-most land holdings and began to acquire parcels north of its existing operations for future expansion.

FRS began its mine expansion permitting efforts in 1987 with the Lake D project, which was proposed for approximately 167 acres of mining located just north of its current operations. The project was complex, primarily because of a proposed mitigation plan that contained several components, some of which were considered questionable by the regulatory agencies. The agencies questioned whether or not proposed impacts to environmentally sensitive areas would be adequately off-set by the proposed mitigation. At that time, ecosystem management was not an initiative by the DEP and the agency approached the permitting of Lake D more in its

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1. See OFFICE OF ECOSYSTEM MANAGEMENT, FLORIDA DEP’T OF EVRTL. PROTECTION, TOWARD ECOSYSTEM MANAGEMENT, FIRST INTERIM REPORT 1, 6-8 (1994).

traditional manner of site specificity. As a result of these concerns, the DEP took the position that the area of impact would be limited to approximately fifty acres and additional mitigation may be required. Economically, this was unacceptable to FRS.

Accordingly, FRS redirected its efforts and totally redesigned the Lake D project in order to accomplish its corporate objectives for minable resources as well as adequately off-set wetland impacts. FRS purchased additional land in an area that would later become integral to the South Florida Water Management District ("SFWMD") and Dade County's environmentally sensitive land acquisition program, the South Dade Wetlands Project. The South Dade Wetlands Project includes approximately 48,000 acres in the areas known as the North C-111 Basin and Model Land Basin.<sup>2</sup> In FRS' redirected efforts for Lake D, those wetlands within FRS ownership and within the South Dade Wetlands Project would be enhanced and donated to the SFWMD in order to off-set impacts from mining.

FRS re-submitted its permit application to the DEP to construct Lake D in September, 1994. Since FRS was in the permitting process for almost eight years, availability of minable resources was becoming critical. The redesigned project included preserving approximately 2000 acres of enhanced wetlands, created wetlands, and open water in exchange for permits for 306 acres of mining under a life of the mine concept (a twenty-five year permit). The DEP, realizing the importance of the enhanced, created, and preserved 2000 acres of wetlands and open water to Florida's ecosystem management initiative and the South Dade Wetlands Project, permitted Lake D in July, 1995 after thorough review.<sup>3</sup>

FRS developed a fully integrated mitigation plan incorporating wetland creation, enhancement, and preservation of environmentally sensitive lands designed to off-set mining impacts. The mitigation component of the project complemented the DEP's ecosystem management initiative and provided donated land to the South Dade Wetlands Project.

The DEP and other environmental regulatory agencies incorporated the ecosystem management initiative in permitting the Lake D project. By forming a public/private partnership in the early phases of the redesigned Lake D project, the DEP and FRS were able to amicably coordinate objectives of protecting and enhancing south Florida's fragile natural resources and providing minable resources critical to projects with public

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2. OFFICE OF THE COUNTY MANAGER, METROPOLITAN DADE COUNTY, FLA., SOUTH DADE WETLANDS PROJECT (1995).

3. *See In re* Application for Permit by Florida Rock & Sand Co., DEP Permit No. 132586929, MS132589199 (Fla. Dep't of Env'tl. Protection July 17, 1995).

interests (prison construction, transportation infrastructure, and canal restoration). The Lake D project is one of several private projects that has combined permitting efforts with ecosystem management (others include Disney's Wildlife Wilderness Preserve and White Springs Agricultural Chemicals'—formerly OxyChem—off-site mitigation agreement). The ecosystem management initiative provides Florida with an excellent tool for managing environmentally sensitive lands while recognizing the economic importance of the State's industries.



*Babbit v. Sweet Home Chapter of Communities for a Great Oregon*: Preserving the “Critical Link” Between Habitat Modification and the “Taking” of an Endangered Species

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## I. INTRODUCTION

Section 9(a)(1) of the Endangered Species Act of 1973<sup>1</sup> makes it unlawful for any person to "take" an endangered or threatened species of wildlife.<sup>2</sup> Since its adoption, the Endangered Species Act ("ESA") has embroiled judges, environmentalists, and the development community in bitter controversy. Industry and development interests have continually attacked the ESA, charging that it favors plants and animals over jobs and people. Environmentalists and conservationists embrace the Act as the last

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1. Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended in scattered sections of 16 U.S.C.).

2. *Id.* § 9(a)(1), 87 Stat. at 893 (current version at 16 U.S.C. § 1538(a)(1)(B) (1994)).

hope for a significant number of species pushed to the brink of extinction by the adverse activities of mankind.<sup>3</sup>

Nowhere in the ESA has the legal battle been more critically focused than in section 9 and what it means to “take” an endangered species. As analytically discussed in this article, the term “take” clearly encompasses the actual killing, injury, collection, or capture of an individual member of a protected species through the direct application of physical force.<sup>4</sup> These, however, are the limits that the development and land use community has been willing to concede are section 9’s prohibitions. Conservationists and others opposed to some particular human impacts, on the other hand, have sought to extend section 9’s protections to encompass activities that, while not resulting in the direct or immediate application of physical force to the animal, nevertheless results in harm, injury, or death through the adverse modification, degradation or destruction of habitat. This is where the agreement that has existed dissolves and where the hard-fought battle has been waged in earnest. In the summer of 1995, a case dispositive of the definition of “harm” as used in section 9’s prohibition against “taking” an endangered species was decided.

On June 29, 1995, the United States Supreme Court handed down its long awaited decision in *Babbitt v. Sweet Home Chapter of Communities For A Great Oregon (Sweet Home V)*.<sup>5</sup> The decision is significant in several contemporary respects. First, in *Sweet Home V*, the Court has apparently concluded, by a 6-3 majority, a colloquial dispute that has persisted for over two decades regarding the proper scope of section 9’s protections. Second, the decision was rendered at a time when the ESA was under increasingly vigorous attack from political, legislative, and popular interests; at a time

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3. In promulgating the ESA, Congress recognized the serious nature of the rising number of plant and animal extinctions worldwide:

It has become increasingly apparent that some sort of protective measures must be taken to prevent the further extinction of many of the world’s animal species. The number of animals on the Secretary of Interior’s list of domestic species that are currently threatened with extinction is now 109. On the foreign list there are over 300 species. Further, the rate of extinction has increased to where on the average, one species disappears per year.

S. REP. NO. 307, 93d Cong., 1st Sess. 1 (1973), reprinted in 1973 U.S.C.C.A.N. 2989, 2990. This so-called “Extinction Crises” is more fully discussed in DANIEL J. ROHLF, THE ENDANGERED SPECIES ACT, A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION 7-17 (1989).

4. Pub. L. No. 93-205, § 3(14), 87 Stat. at 885 (1978) (redesignated as § 3(19) by Pub. L. No. 95-632, § 2, 92 Stat. 3751, 3752 (1978); current version at 16 U.S.C. § 1532(19) (1994)).

5. 115 S. Ct. 2407 (1995).

when the ESA's future was, and indeed remains, uncertain. Thus, *Sweet Home V* arguably signals an emerging view in the federal courts calling for a logical, common sense construction of our nation's environmental laws.

This article examines the existing regulatory scheme associated with section 9 of the ESA as it developed and exists before and after *Sweet Home V*. The dispute over the incorporation of significant habitat protection under this section is summarized, and this article culminates with a detailed analysis of the *Sweet Home V* opinion itself. The effects of the *Sweet Home V* opinion upon section 9, as well as other provisions of the ESA, are examined, and conclusions are drawn regarding the long-term impact of this case.

## II. PROHIBITING THE "TAKE" OF AN ENDANGERED SPECIES UNDER SECTION 9 OF THE ACT

Section 9(a)(1)(B) of the ESA forbids conduct by any person that will "take" a species protected under the Act:

(1) Except as provided in sections 6(g)(2) and 10 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 4 of this title it is unlawful for any person subject to the jurisdiction of the United States to:

(B) take any such species within the United States or the territorial sea of the United States . . . .<sup>6</sup>

This prohibition differs from other major provisions of the ESA in several particular respects. Initially, section 9 distinguishes between those species which are endangered<sup>7</sup> and those which are threatened.<sup>8</sup> By its

6. Pub L. No. 93-205, § 9(a)(1)(B), 87 Stat. at 893 (current version at 16 U.S.C. § 1538(a)(1)(B)).

7. The term "endangered species" is defined by the Act to mean: any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man.

*Id.* § 3(4), 87 Stat. at 885 (redesignated as § 3(6) by Pub. L. No. 95-632, § 2, 92 Stat. at 3751; current version at 16 U.S.C. § 1532(6)).

8. The Act also defines "threatened species" as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 3(15), 87 Stat. at 835 (redesignated as § 3(20) by Pub. L. No. 95-632, § 2, 92 Stat. at 3752; current version at 16 U.S.C. § 1532(20)).

very terms, the statute applies “with respect to any *endangered* species of fish or wildlife . . .”<sup>9</sup> “throughout all or a significant portion of its range.”<sup>10</sup> Thus, only those species qualifying for endangered status are expressly included under section 9. By contrast, those species listed as threatened enjoy section 9 protection only by virtue of regulations promulgated by the Secretary of the Interior (“Secretary”).<sup>11</sup> Even then, extension of section 9 protection to threatened species does not appear to be a mandatory obligation imposed upon the Secretary.<sup>12</sup> Instead, section 9(a)(1) protection is provided at the discretion of the Secretary who must deem such action to be “necessary and advisable.”<sup>13</sup>

Unlike other provisions of the ESA which apply to federal agencies, section 9 prohibits acts by “any person.” Section 3, in turn, defines “person” very broadly, including individuals, business entities, and all levels

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9. *Id.* § 9, 87 Stat. at 893 (current version at 16 U.S.C. § 1538(a)(1)) (emphasis added); see also ROHLF, *supra* note 3, at 59, 73. This language also excludes plants from § 9 protection. Pub. L. No. 93-205, § 9, 87 Stat. at 893 (current version at 16 U.S.C. § 1538(a)(1)).

10. *Id.* § 3(4), (15), 87 Stat. at 885.

11. 50 C.F.R. §§ 17.31-48 (1994). In this regulation, the Secretary, with a few noted exceptions, declares that the provisions and protections (including the prohibition against “taking” under § 9) found in § 17.21 for endangered species, shall now be applicable for species listed as threatened under the Act. These regulations are issued pursuant to regulatory power identified under § 4(d) of the ESA:

Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1) of this title . . . .

Pub. L. No. 93-205, § 4, 87 Stat. at 888 (current version at 16 U.S.C. § 1533(d) (1994)) (emphasis added).

12. ROHLF, *supra* note 3, at 74-75. The issue of whether the Secretary *must* prevent the taking of a threatened species has not been directly litigated. *Id.*

13. For a more thorough discussion of this issue see ROHLF, *supra* note 3, at 73-75. It should be noted that § 4(d) of the ESA which grants the Secretary this regulatory power does seem to provide a significant degree of discretion. Pub. L. No. 93-205, § 4, 87 Stat. at 886 (current version at 16 U.S.C. § 1533(d)). Note that the Secretary must issue regulations for threatened species only upon deeming such action to be “necessary and advisable to provide for the conservation of such species.” *Id.* Therefore, the Secretary must make some kind of finding as to the necessity of such regulations for that species’ conservation. Additionally, § 4(d) provides that “[t]he Secretary may by regulation” prohibit a taking under § 9(a)(1). *Id.* (emphasis added). This is a significant departure from the use of “shall” only one sentence earlier.

of government within the reach of section 9.<sup>14</sup> The scope of this regulation is far more extensive and encompasses every conceivable actor down to the individual.<sup>15</sup>

Section 9 of the ESA defines the term "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."<sup>16</sup> This definition clearly contemplates the more traditionally understood activities that "take" wildlife by hunting, killing, and collecting of individual animals. But in defining the ESA's true intent and scope around the "take" concept (within the purposes of the ESA) the focus has been on the terms "harm" and "harass." The term "harm" has been defined in regulations promulgated by the Department: "*Harm* in the definition of take in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."<sup>17</sup>

Similarly, the Department has defined "harass" as used in section 9:

Harass in the definition of "take" in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding and sheltering.<sup>18</sup>

Substantial controversy has been fomented over the use of these two terms by the Department of Interior as well as by the courts.<sup>19</sup> The salient issue

14. Section 3(13) of the ESA defines "person" to include:

[A]n individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.

Pub. L. No. 100-478, § 1001(a)(13), 102 Stat. 2306 (1988) (original version at Pub. L. No. 95-205, § 3(8), 87 Stat. at 885; current version at 16 U.S.C. § 1532(13)).

15. See ROHLF, *supra* note 3, at 73-75.

16. Pub. L. No. 93-205, § 3, 87 Stat. at 885 (redesignated as § 3(19) by Pub. L. No. 95-632, § 2(7), 92 Stat. at 3751; current version at 16 U.S.C. § 1532(19)).

17. 50 C.F.R. § 17.3 (1994) (emphasis added).

18. *Id.*

19. See generally Federico Cheever, *An Introduction to the Prohibition Against Takings in Section 9 of the Endangered Species Act of 1973: Learning to Live with a Powerful Species Preservation Law*, 62 U. COLO. L. REV. 109 (1991).

was always: can a person “take” an endangered species by altering or destroying its habitat?

### III. FROM *PALILA* TO *SWEET HOME*—RECOGNIZING THE CRITICAL LINK BETWEEN HABITAT DESTRUCTION AND “HARM”

From its origin, the ESA was intently focused on habitat preservation.<sup>20</sup> Congress identified the two most significant causes of species extinction as habitat loss and hunting.<sup>21</sup> Given the ESA’s clear focus on habitat, it seemed logical, and Congress understood, that a species could be “taken” through the destruction of its habitat. Yet this link between habitat loss and the “taking” of an endangered species was frequently litigated and initially eluded the courts.

#### A. *The Early Cases*—Froehlke, Coleman, and Hill

In *Sierra Club v. Froehlke*, the Sierra Club initiated a lawsuit to halt the construction of Missouri’s Meramec Park Dam and Reservoir.<sup>22</sup> Brought under the National Environmental Policy Act (“NEPA”),<sup>23</sup> Sierra

20. The legislative history underlying the ESA acknowledged habitat loss as “the major cause for the extinction of species worldwide.” H.R. REP. NO. 1625, 95th Cong., 2d Sess. 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9455. During the floor debates on the 1973 House draft of the ESA, Representative Sullivan proclaimed that:

For the most part, the principal threat to animals stems from the destruction of their habitat. The destruction may be intentional, as would be the case in clearing of fields and forests for development or resource extraction, or it may be unintentional, as in the case of the spread of pesticides beyond their target area. Whether it is intentional or not, however, the result is unfortunate for the species of animals that depend on that habitat, most of whom are already living on the edge of survival.

119 CONG. REC. H30,162 (1973). This overriding concern for habitat is reflected in Congress’ declaration of purpose found in § 2 of the ESA:

The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

Pub. L. No. 93-205, § 2(b), 87 Stat. at 885 (current version at 16 U.S.C. § 1531(b) (1994)). The primacy of habitat protection in the scheme of the ESA is more fully discussed in Katherine S. Yagerman, *Protecting Critical Habitat Under the Federal Endangered Species Act*, 20 ENVTL. L. 811, 827-47 (1990).

21. S. REP. NO. 307, *supra* note 3, at 1, *reprinted in* 1973 U.S.C.C.A.N. at 2990.

22. 392 F. Supp. 130 (E.D. Mo. 1975), *aff’d*, 534 F.2d 1289 (8th Cir. 1976).

23. 42 U.S.C. § 4321 (1988 & Supp. V 1993).

Club's complaint was amended, adding a claim under section 7(a)(2) of the then newly-enacted ESA.<sup>24</sup> The Sierra Club asserted that completion of the reservoir would flood a series of subterranean caverns which were home to the endangered Indiana bat, thereby violating the ESA because this flooding would jeopardize the continued existence of this listed species.<sup>25</sup>

The district court was not persuaded by the Sierra Club's arguments. Pointing to a dearth of knowledge concerning the bat, the court concluded that the project did not violate section 7 of the Act.<sup>26</sup> Section 9 was not even addressed in the district court ruling which allowed the development to proceed.<sup>27</sup>

On appeal, the Eight Circuit Court of Appeals examined Sierra Club's ESA claims under both section 7 and section 9 of the ESA,<sup>28</sup> upholding the lower court's dismissal of the section 7 claim.<sup>29</sup> The court also rejected Sierra Club's section 9 claim noting that the section 9 claim rested upon Sierra Club's assertion that the dam's construction was an attempt to harm the bat.<sup>30</sup> The *Froehlke* opinion tied section 9 claims to a scienter

24. *Sierra Club*, 392 F. Supp. at 143.

25. *See id.*

26. *Id.* at 144. While not the focus of this article, § 7(a)(2) remains the centerpiece of endangered species preservation efforts. Section 7(a)(2) of the ESA provides in relevant part: Each federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical . . . .

Pub. L. No. 96-159, § 4, 93 Stat. 1225, 1226 (1979) (current version at 16 U.S.C. § 1536(a)(2) (1994)). For a thorough analysis of § 7(a)(2) and the issues surrounding its implementation, see Oliver A. Houck, *The Endangered Species Act and its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277 (1993). For a more focused discussion of the "critical habitat" provision of § 7, see Yagerman, *supra* note 20; see also James Salzman, *Evolution and Application of Critical Habitat Under the Endangered Species Act*, 14 HARV. ENVTL. L. REV. 311 (1990).

27. *See Cheever, supra* note 19, at 130 n.132 (pointing out that at the conclusion of the district court stage of the *Froehlke* litigation, the Service had not yet adopted a regulation defining "harass" as used defining a "taking").

28. *Sierra Club v. Froehlke*, 534 F.2d 1289, 1301-02 (8th Cir. 1976) (noting claims under both § 7 and § 9 of the ESA).

29. *Id.* at 1303-04.

30. *Id.* at 1304. In rejecting Sierra Club's § 9 claim, the Eighth Circuit found that:

The allegation as to violation of Section 9, as we have noted, rests upon the asserted ground that the erection of the dam is a "clear attempt to harass or harm" the Indiana bat. We are cited to no portion of the record so stating nor



requirement somewhat akin to specific intent.<sup>31</sup> Under *Froehlke*, a violation of section 9 would be predicated by a specific intent to “harass” or “harm” through the proposed activity. While this mental requirement is easily established in the traditional context of a “taking” by hunting, trapping, or collecting, this requirement would be insurmountable in cases where the “taking” indirectly or allegedly resulted only from habitat degradation. Development is rarely conducted with the specific goal of harming a listed species. The *Froehlke* opinion illustrates an initial reluctance by the federal courts to recognize incidental habitat protection as being included within the concept of “taking” wildlife under section 9.

The continued vitality of this portion of the *Froehlke* opinion is in doubt. Such a stringent intent requirement is inconsistent with the plain meaning of the Act.<sup>32</sup> A violation of section 9 requires only a showing of general intent.<sup>33</sup> A successful section 9(a)(1) cause of action need only show that: 1) the defendant knowingly took an animal within the United States; 2) the animal taken was actually an endangered or threatened species protected under section 9(a)(1) of the ESA; and 3) that the defendant did not have a permit from the Department of the Interior to “take” the animal.<sup>34</sup>

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do we believe that from a fair reading thereof any such attempt may be found. The purposes of the dam’s construction have heretofore been discussed in some detail and need not be elaborated upon at this point. An attempt to harass may not reasonably be found therein. This Act, as any other, must have reasonable construction.

*Id.*

31. Indeed, the *Froehlke* court required that the drowning of Indiana bats be a specific goal of the project before it would find a “taking” under § 9. The court may have assumed that the bats could simply relocate to avoid the rising water. *Sierra Club v. Froehlke*, 392 F. Supp. 130 (E.D. Mo. 1975), *aff’d*, 534 F.2d 1289 (8th Cir. 1976). *Sierra Club* apparently offered no discussion or evidence of the availability or scarcity of other suitable caves. *See id.*

32. The legislative history of the ESA contains plain congressional intent. Congress expressed its desire that criminal violations of the ESA be general rather than specific intent crimes. H.R. REP. NO. 1625, *supra* note 20, at 5, *reprinted in* 1978 U.S.C.C.A.N. at 9476.

33. *United States v. St. Onge*, 676 F. Supp. 1044, 1045 (D. Mont. 1988); *United States v. Billie*, 667 F. Supp. 1485, 1493 (S.D. Fla. 1987). In *United States v. St. Onge*, the defendant, a hunter, mistook a protected grizzly bear for an elk. That he neither knew he was shooting at a grizzly bear, nor intended any harm to the species, was no defense to a prosecution for violating § 9. 676 F. Supp. at 1045. Similarly, in *United States v. Billie*, the defendant was unsuccessful in his claim that the Government was required to prove that he knew that the animal he was shooting at was an endangered Florida panther. 667 F. Supp. at 1493.

34. *St. Onge*, 676 F. Supp. at 1045.

Harm to the species need not be a specific goal of the violator, only the factual result of his activity.

*National Wildlife Federation v. Coleman*<sup>35</sup> also dealt with the ESA shortly after its adoption. *Coleman* focused exclusively on section 7. Section 9 was not addressed in its holding.<sup>36</sup> At issue was the proposed extension of Interstate 10 through portions of Mississippi that would disturb and destroy habitat vital to the Mississippi sandhill crane.<sup>37</sup> The district court concluded that the proposed Interstate 10 extension would not violate ESA section 7(a)(2).<sup>38</sup> The National Wildlife Federation appealed to the Fifth Circuit Court of Appeals and, in the interim, the Department of the Interior designated the subject area as "critical habitat" of the sandhill crane.<sup>39</sup> The Fifth Circuit Court of Appeals found this designation compelling. The appellate court reversed the lower court, concluding that the project violated section 7 and threatened the crane with extinction because critical habitat would be lost, actually resulting in ultimate impacts prohibited under the ESA.<sup>40</sup>

In 1979, the Supreme Court of the United States decided *Tennessee Valley Authority v. Hill*,<sup>41</sup> its first case directly involved with interpreting the ESA. Faced with a multi-million dollar dam and reservoir project which, upon completion, promised to eradicate the tiny snail darter, a species of endangered fish,<sup>42</sup> the Court concluded that it "would be hard pressed to find a statutory provision whose terms were any plainer" than those found in the ESA.<sup>43</sup> Section 7(a)(2) of the ESA commanded federal agencies to "insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence" of an endangered species.<sup>44</sup>

35. 400 F. Supp. 705 (S.D. Miss. 1975), *rev'd*, 529 F.2d 359 (5th Cir. 1976), *cert. denied sub nom.* Boteler v. National Wildlife Fed'n, 429 U.S. 979 (1976).

36. *Id.* at 711-12. The true significance of *Coleman* lies in the fact that § 7(a)(2) was selected and used in the National Wildlife Federation's efforts to preserve sandhill crane habitat, while § 9 was not. See Cheever, *supra* note 19, at 133-34.

37. *Coleman*, 407 F. Supp. at 707.

38. *Id.*

39. National Wildlife Fed'n v. Coleman, 529 F.2d 359, 367 (5th Cir.), *cert. denied sub nom.* Boteler v. National Wildlife Fed'n, 429 U.S. 979 (1976).

40. *Id.* at 374-75.

41. 437 U.S. 153 (1978).

42. The Tennessee Valley Authority constructed the Tellico dam and reservoir on the Little Tennessee River for the express purpose of generating electricity, providing recreation, and encouraging shoreline development. The dam, once completed, would impound 16,500 acres of land, including the habitat of the tiny endangered snail darter fish. See *id.* at 156-58.

43. *Id.* at 173.

44. Pub. L. No. 93-205, § 7, 87 Stat. at 892 (codified at 16 U.S.C. § 1536(a)(2) (1978)).

Dam or no dam, the *Hill* Court concluded that ESA section 7 demanded halting the project's completion to preserve the snail darter.<sup>45</sup> Throughout the *Hill* opinion, the Court noted the comprehensive nature of the protections created for listed species under the Act, measuring the ESA's protective mechanisms against the backdrop of strong congressional intent directed at preserving the habitat of such species.<sup>46</sup> While not directly concerning section 9, the "take" provision did receive some attention by the *Hill* court:

We do not understand how TVA intends to operate Tellico Dam without "harming" the snail darter. The Secretary of the Interior has defined the term "harm" to mean "an act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavior patterns, which include, but are not limited to, breeding, feeding or sheltering; *significant environmental modification or degradation which has such effects is included within the meaning of 'harm.'*"<sup>47</sup>

These early cases illustrate the use of sections 9 and 7 to protect the habitat of endangered species. Under *Froehlke* and *Coleman*, habitat protection had arguably been assigned to section 7(a)(2), while section 9 was interpreted according to the more traditional notions of "taking" by hunting, trapping, and collecting. Even *Hill*, while recognizing section 9's habitat protection functions, nevertheless focused most of its analysis on section 7. However, a small bird in Hawaii would advance what a rare fish in Tennessee had started.

45. *Hill*, 437 U.S. at 194. On the nature of Congress' stated intent, the *Hill* Court observed that "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.'" *Id.*

46. In reviewing the ESA, the court acknowledged the Act's strong emphasis on habitat:

The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute. All persons, including federal agencies, are specifically instructed not to "take" endangered species, meaning that no one is "to harass, harm, pursue, hunt, shoot, wound, kill, capture, or collect" such life forms. Agencies in particular are [to] . . . "use . . . *all methods* and procedures which are necessary" to preserve endangered species . . . . The pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the "primary missions" of federal agencies.

*Id.* at 184-85 (citation and footnote omitted).

47. *Id.* at 184-85 n.30 (citing 50 C.F.R. § 17.3 (1976)).

## B. Section 9 is Linked to Habitat Destruction—Palila

The rigid bifurcation of protection for the animal and protection for the animal's habitat under ESA analysis came to an abrupt end in 1978 when the District Court of Hawaii handed down its decision in *Palila v. Hawaii Department of Land & Natural Resources (Palila I)*.<sup>48</sup> The decision, in addition to saving a tiny endangered bird, polarized and sparked a controversy ultimately resolved by the Supreme Court of the United States in its *Sweet Home V* decision. An analysis of the *Palila* cases is necessary to fully comprehend this landmark *Sweet Home V* decision.

The palila (*Loxiodes bailleui*) is a six-inch long, finch-billed bird in the Hawaiian honeycreeper family, a group originally consisting of twenty-three species and subspecies indigenous only to Hawaii.<sup>49</sup> Once common in the higher altitudes along the slopes of Mauna Kea,<sup>50</sup> the palila's range has been drastically reduced to a narrow fringe of tropical mamane forest habitat encircling the mountain.<sup>51</sup> The scientific community attributed the palila's precipitous decline<sup>52</sup> to the deforestation of the island's groves of mamane (*Sophora chysophylla*) and naio (*Myoporum sandwicense*) trees upon which the bird relies for its food and nesting sites.<sup>53</sup> The destruction of the mamane forests, in turn, was blamed on feral sheep grazing on the

48. 471 F. Supp. 985 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981).

49. *Id.* at 988; Jonathan Durrett & Christopher Yuen, *Palila v. Department of Land and Natural Resources: "Taking" Under Section Nine of the Endangered Species Act of 1973*, 4 U. HAW. L. REV. 181, 183-84 (1982) (citing SHERWIN CARLQUIST, ISLAND BIOLOGY 158 (1974)).

50. Mauna Kea is a dormant volcano located on the island of Hawaii. Durrett & Yuen, *supra* note 49, at 183 n.9.

51. *Palila I*, 471 F. Supp. at 988-89.

52. The palila was listed as an endangered species by the Secretary of the Interior in 1967. Burton E. Dezendorf, Jr., *Palila v. Hawaii Department of Land and Natural Resources: A New Interpretation of "Taking" Under the Endangered Species Act of 1973*, 19 IDAHO L. REV. 157, 158 (1983).

53. Durrett & Yuen, *supra* note 49, at 183-84. In 1977, the U.S. Fish and Wildlife Service, upon recommendation by the Palila Recovery Team, designated the remaining mamane-naio forest as the "critical habitat" of the palila. 50 C.F.R. § 17.95 (1977); 42 Fed. Reg. 40,687 (1977); *see generally* Dezendorf, *supra* note 52. Indeed, the scientific evidence leads to the conclusion that the palila's survival is inseparably linked to the preservation of the mamane-naio ecosystem in which it has evolved and adapted to survive. *Palila I*, 471 F. Supp. at 989 (citing PALILA RECOVERY TEAM, PALILA RECOVERY PLAN 1 (1977)).

mamane.<sup>54</sup> When the suit was originally filed, the palila, mamane, and sheep all resided almost exclusively on state-owned land.<sup>55</sup>

In efforts to preserve the mamane ecosystem and the palila, the Hawaiian government embarked on a campaign to eradicate the human-introduced herds of feral sheep and goats, only to be halted by recreational hunting interests.<sup>56</sup> When this conservation effort was stalled by sports hunters targeting the sheep for recreational hunting purposes, the Audobon Society, the Sierra Club, and one individual brought suit on the palila's behalf because the bird itself cannot sue.<sup>57</sup> The court held that the Hawaiian Department of Land and Natural Resources ("Hawaiian DLNR") was compelled to remove these herds of sheep from the palila's critical habitat, agreeing with the position taken by the plaintiffs on behalf of the endangered bird.<sup>58</sup>

The plaintiffs claimed that the Hawaiian DLNR's continued maintenance of population of feral sheep and goats, albeit a limited one, amounted to a "taking" of the palila through the pervasive and continuing degradation and destruction of its critical habitat. To this end, the plaintiffs sought the removal of the animals from state-owned palila habitat.<sup>59</sup> This removal would ameliorate the critical habitat degradation attributed to the sheep.

The district court in *Palila I* developed an extensive factual record and then made several important findings of fact. First, the court found that the survival of the palila depended upon the preservation of the mamane-naio ecosystem.<sup>60</sup> Second, the continued presence of feral sheep and goats in

54. *Palila I*, 471 F. Supp. at 990. The mamane leaves, stems, seedlings, and sprouts served as an important source of food for the browsing sheep. By consuming the mamane leaves, stems, seedlings and sprouts, the sheep prevented the regeneration of the mamane forest and, therefore, contributed to its continued decline. *Id.*

55. Durrett & Yuen, *supra* note 49, at 184.

56. *Palila I*, 471 F. Supp. at 989 n.9. Recreational hunters pressured the Hawaiian DLNR to maintain some population of feral animals on Mauna Kea as game animals.

57. *Id.* at 987. *Palila I* began the modern trend in ESA litigation of naming the aggrieved species itself as a plaintiff.

58. *Id.* at 999.

59. *Id.* at 987.

60. *Id.* at 989 (finding that the mamane-naio forest is essential for the palila's survival); see also Dezendorf, *supra* note 52, at 159. The defendants took issue with this finding, pointing out that no one can state for certain whether this is true, since no attempts have been made to breed and keep palila in captivity or in an environment lacking mamane or naio trees. *Palila I*, 471 F. Supp. at 989 n.7. The district court summarily dismissed this contention finding that all available evidence pointed to the conclusion that the palila's survival is inseparably linked to the mamane-naio forest. *Id.* (citing 42 Fed. Reg. 40,687 (1977); PALILA RECOVERY TEAM, *supra* note 53, at 32).

the mamane-naio forest was found to be the primary cause of the destruction of the palila's critical habitat.<sup>61</sup> The court also found that DLNR's efforts to preserve the mamane-naio forest, the palila, and a limited stock of feral sheep through intensive management efforts was an ineffective solution to regeneration of the mamane-naio forest.<sup>62</sup> As long as the feral sheep and goats remained, so too would the pressure from hunting interests to increase that population.<sup>63</sup> Indeed, the court pointed to the destructive effect that even a small population of the animals may have on the ecosystem.<sup>64</sup> Finally, the district court found the complete removal of the feral sheep and goats from the palila's critical habitat to be feasible.<sup>65</sup> Sport hunters could hunt these animals elsewhere, and they could still hunt other species in the mamane-naio forest.<sup>66</sup> Moreover, the complete removal of these animals from the palila's critical habitat could be accomplished with relatively minor expense to the state.<sup>67</sup>

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61. *Palila I*, 471 F. Supp. at 991. The court engaged in an extensive inquiry into the effect that these feral sheep and goats have had on the ecosystem. *Id.* at 990. Relying on this data, the *Palila I* court concluded that:

The Mauna Kea Plan [proposed by the Hawaii DLNR] also proposes that any game animals be eliminated only after further studies have been made; but no further studies need be done. Plaintiffs have shown (and defendants have produced no substantial evidence to the contrary) that the Palila requires all of its designated critical habitat in order to survive as a species and that the feral sheep and goats maintained by defendants are the major cause of that habitat's degradation.

*Id.* at 991. Indeed, the *Palila I* court, relying on a study conducted by a DLNR biologist, pointed to a direct correlation between the ability of the mamane to regenerate and the presence of browsing sheep and goats in the area under study. *Id.* at 990 n.11. The district court further observed that:

There are doubtless other factors, such as disease, drought, insects, frost, or competition from exotic grasses and weeds, which prevent the regeneration of the mamane forest. Feral pigs and Mouflon sheep (a study on the latter by the State is due for completion in 1980) may also contribute to the forest's decline. However, the Palila Recovery Team is convinced that stopping destruction of the forest by feral sheep and goats would solve 90 percent of the problem.

*Id.* at 990 n.13.

62. *Palila I*, 471 F. Supp. at 990 n.13.

63. *Id.* at 990.

64. *Id.*

65. *Id.*

66. *Id.* at 990-91.

67. *Palila I*, 471 F. Supp. at 991.

In light of these facts, the district court in *Palila I* briefly considered the section 9 “taking” claim before concluding:

“Take” is defined in the Act to include “harm” which in turn is defined in the regulations propounded by the Secretary of the Interior to include “significant environmental modification or degradation” which actually injures or kills wildlife. The undisputed facts bring the acts and omissions of the defendants clearly within these definitions. I conclude that there is an unlawful “taking” of the Palila.<sup>68</sup>

As a result, the plaintiff’s motion for summary judgment and their request for declaratory and injunctive relief were granted.<sup>69</sup>

An appeal soon followed, and little more than a year later, *Palila I* was before the Ninth Circuit Court of Appeals (*Palila I Appeal*).<sup>70</sup> The sole issue on appeal was whether the term “harm” as used in defining “take” encompassed significant habitat modification.<sup>71</sup> The Ninth Circuit Court of Appeals affirmed summary judgment for the plaintiffs.<sup>72</sup> In upholding the district court’s interpretation of the term “take” as it relates to habitat modification, the circuit court relied on the 1978 definitions of both “harm” and “harass” found in contemporary Department of the Interior regulations.<sup>73</sup>

68. *Id.* at 995 (citations omitted).

69. *See Palila v. Hawaii Dep’t of Land and Natural Resources (Palila I Appeal)*, 639 F.2d 495 (9th Cir. 1981).

70. *Id.*

71. The district court in *Palila I* actually resolved a number of legal disputes concerning the ESA. The district court held as a matter of law that jurisdiction and venue were proper under the ESA, and that the plaintiffs had standing to sue on this matter. *Palila I*, 471 F. Supp. at 991-92. The court also addressed the effect of the Tenth and Eleventh Amendments upon the enforcement of the ESA against the states. *Id.* at 992-99. The district court concluded, as a matter of law, that neither the Tenth nor the Eleventh Amendments bar the enforcement of the ESA against a state government violating the prohibitions of § 9(a)(1). *Id.* at 995, 999. For analysis of the Tenth and Eleventh Amendment issues addressed in the district court’s *Palila* decision, see Jack R. Nelson, *Palila v. Hawaii Department of Land and Natural Resources: State Governments Fall Prey to the Endangered Species Act of 1973*, 10 *ECOLOGY L.Q.* 281 (1982).

72. *Palila I Appeal*, 639 F.2d at 496.

73. Following the first *Palila* litigation, the Department of Interior revised its definitions of “harm” and “harass” to accommodate the district court’s decision. *See infra* Part III.C. However, in 1979, at the time of the first *Palila* litigation, “harm” was defined as:

“Harm” in the definition of “take” in the Act means an act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavioral patterns, which include, but

The court observed that a successful *Palila I*-type section 9 claim necessitated demonstrating some prohibited impact on the species resulting from the alleged activity.<sup>74</sup> To this end, the Ninth Circuit concluded that:

The defendant's action in maintaining feral sheep and goats in the critical habitat is a violation of the Act since it was shown that the *Palila* was endangered by the activity. Defendants have not shown us how the district court erred in determining that the acts and omissions of the state were prohibited by the Act. The district court's conclusion is consistent with the Act's legislative history showing that Congress was informed that the greatest threat to endangered species is the destruction of their natural habitat. It was supported by all of the expert opinions.<sup>75</sup>

The Ninth Circuit's decision in *Palila I Appeal* must be assessed with recognition of the extremely supportive fact-finding on the part of the district court for its conclusions. The court of appeals found a "taking" of the bird in a relatively conclusory manner, pointing to the district court's findings of fact and the failure of the State of Hawaii to show where the district court erred.<sup>76</sup>

This procedural affirmance may be attributed to the methodology used by the district court in deciding the case. The science-driven approach taken by Chief District Judge Samuel King in the *Palila I Appeal* decision provided the model for future habitat-based "taking" cases. Judge King's fact finding regarding the correlation between the effects of the browsing sheep and the *palila*'s decline was extensive. With extensive fact finding, the attendant legal analysis was necessarily brief and conclusory.<sup>77</sup> The *Palila I*-type "taking" case became characterized by fact specific inquiry resulting in detailed fact finding at the district court level. Then, given the strong presumption of correctness accorded to the district court's findings of fact, review by the appellate court in *Palila I Appeal* was understandably and appropriately brief.

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are not limited to, breeding, feeding, or sheltering; significant environmental modification or degradation which has such effects is included within the meaning of "harm" . . . .

50 C.F.R. § 17.3 (1978) (amended by 46 Fed. Reg. 54,748 (1981)).

74. *Palila I Appeal*, 639 F.2d at 497 (citing *Barcelo v. Brown*, 478 F. Supp. 646 (D.P.R. 1979)).

75. *Id.* at 497-98 (citing *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 179 (1978)).

76. *Id.*

77. See *Palila I*, 471 F. Supp. at 995.



The findings by the district court make *Palila I Appeal* a thoroughly grounded case. Empirical inquiry established that the species' decline was directly and almost exclusively linked to habitat degradation. Sometimes scientific evidence cannot be clearly marshaled.<sup>78</sup> The decisions in both the district and circuit courts in *Palila* were fueled by an exhaustive body of unrefuted scientific data.<sup>79</sup> The "critical link" between habitat degradation and injury to the species is not always a clear one. Cases involving a species that is subject to a variety of threats, or a species threatened by a number of different parties (as opposed to just one party in *Palila*) multiply the burden for plaintiffs who must assemble the necessary science to support judicial conclusions that a *Palila*-type "taking" has been presented.

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78. *Morrill v. Lujan*, 802 F. Supp. 424 (S.D. Ala. 1992), is illustrative of what can happen to a *Palila I*-type "taking" claim lacking the persuasive scientific data that fueled the supportive fact finding in the *Palila I* district court case. *Morrill* concerned the effects of development of private property on the northeastern end of Perdido Key upon the highly endangered Perdido Key beach mouse. *Id.* at 425. The land immediately to the south of the parcel in question was state owned land that had been federally designated critical habitat of the beach mouse. Evidence indicated that the beach mouse had expanded its range outside of its designated critical habitat and into the private, undeveloped land to the north. *Id.* Development of the defendant's land was alleged to constitute a taking of the endangered mouse. *Id.* at 426. However, the Southern District Court of Alabama disagreed, concluding that the plaintiffs had failed to establish the critical link between destruction of the habitat on defendant's property and injury to the beach mouse. *Id.* at 431. Specifically, the evidence could not conclusively prove that the endangered beach mice were present on the parcel in question:

There must be some proof of "the critical link between habitat modification and injury to the species." Plaintiff's only proof as to the link between habitat modification and injury is dependent upon plaintiff's assertion that the beach mouse exists on DeWeese's property. For the reasons stated above, the Court finds that plaintiff's evidence is insufficient in this regard. Moreover, even if the beach mouse did exist on the relatively small area of suitable habitat found on DeWeese's property, there is no substantial evidence that the destruction of this habitat could threaten the species.

*Morrill*, 822 F. Supp. at 430 (citations omitted). The district court found plaintiff's scientific studies on the effects of the proposed development upon the beach mouse insufficient. *Morrill*, therefore, illustrates how a *Palila*-type claim can fail if the science is not present to drive supportive fact finding for concluding a "taking" under the Act. Conversely, *Sierra Club v. Lyng*, 694 F. Supp. 1260 (E.D. Tex. 1988), *aff'd in part and vacated in part on other grounds sub nom.* *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991), provides an example of a district court confronted with a formidable body of scientific evidence leading to very favorable conclusions of law for those trying to protect the red-cockaded woodpecker.

79. See *Palila I*, 471 F. Supp. at 988-91.

C. *The Federal Government Reacts—The Attempted Dilution of Palila and the Redefinition of Harm*

*Palila* elevated the use of section 9 from a little-known provision in a poorly understood statute to a formidable cause of action for the protection of endangered species and their habitat.<sup>80</sup> The reaction to the *Palila I Appeal* decision was swift and dramatic. In 1981, the United States Solicitor's Office in the incoming Reagan Administration and the U.S. Fish and Wildlife Service (a division of the Department of Interior) sought to undo *Palila I Appeal*.<sup>81</sup> The Solicitor's Office read section 9 and the Secretary's regulatory definition of "harm" as a prohibition against habitat destruction only when such destruction could be shown to actually kill or injure wildlife.<sup>82</sup> Accordingly, the Fish and Wildlife Service ("Service"), in a controversial effort to nullify the impact of the *Palila I Appeal*, revamped its regulations defining "harm."<sup>83</sup> The new definitions were codified into regulation by the Secretary in 1981, to prohibit only significant habitat modifications that actually kill or injure wildlife.<sup>84</sup> "Harm" rising to the level of a "taking" could not be shown by habitat modification alone; for this, the Service asserted, was unsupported by the legislative history of the Act and violative of the ESA.<sup>85</sup>

The major impacts of this redefinition were twofold. The first major change came in the form of a newly-emphasized restriction on the *Palila I Appeal*, requiring a demonstration that a habitat modification leading to a section 9 "taking" must actually kill or injure members of a protected species.<sup>86</sup> A showing of habitat degradation alone will not amount to

80. Cheever, *supra* note 19, at 146.

81. In fact, some critics who saw *Palila I* as being correctly decided, suggested that the Service, in an apparent attempt to reverse the case through regulation and avoid its results, was engaging in a constitutionally questionable course of conduct. 46 Fed. Reg. 54,749 (1981).

82. 46 Fed. Reg. 29,490-91 (1981). The Solicitor's Office, in the spirit of the times, attributed *Palila I* to a "fundamental confusion over the distinction between habitat modification and takings." *Id.* at 29,492.

83. 46 Fed. Reg. 54,748 (1981).

84. *Id.*

85. *Id.* While the legislative history behind § 9 indicates a congressional intent to read the term "take" broadly, the Service concluded that the history of § 9 did indeed support a broad reading of the term "take." However, the Service concluded that "take" cannot be read to prohibit habitat modification absent actual injury. *Id.*

86. *Id.* at 54,749. The Service points to the preamble of the original harm definition: "Harm" covers actions . . . which actually (as opposed to potentially) cause injury . . . . By moving the concept of environmental degradation to the

“harm,” rising to the level of a “taking” under the *Palila I Appeal*, unless actual injury or death to the species is also proven.<sup>87</sup> Thus, “[i]n the opinion of the Service, the final redefinition sufficiently clarifies the restraints of section 9 so as to avoid injury to protected wildlife due to significant habitat modification, while at the same time precluding a taking where no actual injury is shown.”<sup>88</sup> It is, therefore, significant to note that the Service’s actions, while clearly limiting the impact of the *Palila I Appeal*, never actually questioned the underlying principle that a “taking” may result from significant habitat alteration.<sup>89</sup> What the Service sought to accomplish through this redefinition of “harm,” was the addition of a formidable element of causation into the section 9 “taking” cause of action, along with the introduction of some notion that the actual modification of habitat must be more than de minimis. “To be subject to section 9, the modification or degradation must be significant, must significantly impair essential behavioral patterns, and must result in actual injury to a protected wildlife species.”<sup>90</sup>

However, while limiting the impact of the *Palila I Appeal*, the new definition of “harm” simultaneously conceded the most significant aspect of the *Palila I Appeal* opinion—the notion that a species could indeed be “taken” through the alteration of its habitat. Recognition of this very basic premise was far from universal in 1981.<sup>91</sup> Rather, the Service remained

definition of “harm,” potential restrictions on environmental modifications are expressly limited to those actions causing actual death or injury to a protected species of fish or wildlife. The actual consequence of such action upon a listed species is paramount.

46 Fed. Reg. 54,749 (1981) (citing 40 Fed. Reg. 44,412-13 (1975)). Thus, the requirement that habitat modification actually kill or injure in order to amount to a § 9 “taking” is nothing new. Rather, *Palila I Appeal* has apparently forced the Service to amend its regulations to better reflect this sentiment as intended in the original “harm” definition. *See id.*

87. *Id.*

88. *Id.*

89. *See id.*; *see also* Cheever, *supra* note 19, at 149.

90. 46 Fed. Reg. 54,749. The inclusion of “actually” (as in “actually kills or injures”) was intended by the Service to “bulwark the need for proven injury to a species due to a party’s actions.” This injury could occur through the significant impairment of essential behavioral patterns such as breeding, feeding, and sheltering. *Id.*

91. *See, e.g.,* North Slope Borough v. Andrus, 486 F. Supp. 332 (D.D.C. 1978), *aff’d in part, rev’d in part*, 642 F.2d 589 (D.C. Cir. 1980). The district court in *North Slope Borough* only gave a cursory glance at the § 9 claim, concluding that the possibility of a future taking through modification of the Bowhead whale’s habitat did not require the government to halt the oil exploration being challenged in that case. *Id.* at 362. Thus, *North Slope Borough* first raised the distinction between present harm and potential harm resolved

myopically confined to the narrow concern over the possibility of a flood of section 9 litigation claiming “takings” based solely on habitat modification, and without any showing of “actual” injury or “harm” to the species.<sup>92</sup>

Though arguably curtailing the overall effectiveness of the *Palila I Appeal* as a means of protecting the habitat of a protected species, the basic principle that a “taking” could result from habitat modification became more firmly established as a result of the Service’s actions. In fact, throughout its response to public comments on the proposed redefinition, the Service repeatedly declined the invitation by many to limit harm to direct physical injury to an individual member of a species:

Congress made its intent to protect species and their habitat very clear. It did not, however, express any intention to protect habitat under section 9 where there was no appurtenant showing of death or injury to a protected species. . . . Thus, to the extent that comments recommend further limitations, they misconstrued the intent of the rulemaking.<sup>93</sup>

The regulations, as amended in 1981, sought both the adoption and reversal of certain aspects of the *Palila I Appeal* decision.

#### D. Congress Reacts—Genesis of the “Incidental Taking” Exception

The *Palila I Appeal* also brought swift reaction from Congress. This reaction became manifest in the Endangered Species Act Amendments of 1982.<sup>94</sup> The most significant of these changes were the inclusion of so-called “incidental take” exceptions to the prohibitions of section 7 and section 9.<sup>95</sup>

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by the court in *Palila (Loxiodes bailleui) v. Hawaii Dep’t of Land and Natural Resources (Palila II)*, 649 F. Supp. 1070 (D. Haw. 1986), *aff’d*, 852 F.2d 1106 (9th Cir. 1988). On review in the District of Columbia Circuit Court, the court did not even address the § 9 claim.

92. 46 Fed. Reg. 54,749. Additionally, the Solicitor’s Office pointed to its own concerns that perhaps the district court in *Palila I* had misconstrued the biological evidence presented and had instead substituted its own judgment in finding “harm” to the palila bird in that case. *Id.*

93. *Id.*

94. Pub. L. No. 97-304, 96 Stat. 1411 (1982).

95. *See id.* §§ 3, 6, 96 Stat. at 1416, 1422 (current version at 16 U.S.C. §§ 1536(b)(4), (o)(2), 1539(a) (1994)).

(1) The Secretary may permit, under such terms and conditions as he shall prescribe—

(A) any act otherwise prohibited by [section 9] of this title for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j) of this section; or

(B) any taking otherwise prohibited by [section 9(a)(1)(B)] of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.<sup>96</sup>

Thus, newly-added section 10(a)(1) provides two means by which a person may avoid the consequences of section 9(a)(1). The first exception describes “takings” for “scientific purposes,” and for the enhancement of the propagation or survival of the affected species.<sup>97</sup> This technically intended exception typically encompasses recovery activities such as tagging, captive breeding, and establishment of experimental populations aimed at reintroduction of a species into its formerly occupied range.<sup>98</sup> However, section 10(a)(1)(B) permits any taking otherwise prohibited by section

96. *Id.* (current version at 16 U.S.C. §§ 1539(a)(1)(A), (B) (1994)).

97. *Id.* (current version at 16 U.S.C. § 1539(a)(1)(A)).

98. Department of Interior regulations detail the criteria considered in issuing or denying “scientific purpose” permits under § 10(a)(1)(A). *See* 50 C.F.R. § 17.22(a) (1994). In addition to general permit criteria found at 50 C.F.R. § 13.21(b) (1994), the Secretary, through the Director of the Fish and Wildlife Service, must also consider:

(i) Whether the purpose for which the permit is required is adequate to justify removing from the wild or otherwise changing the status of the wildlife sought to be covered by the permit;

(ii) The probable direct and indirect effect which issuing the permit would have on the wild populations of the wildlife sought to be covered by the permit;

(iii) Whether the permit, if issued, would in any way, directly or indirectly, conflict with any known program intended to enhance the survival probabilities of the population from which the wildlife sought to be covered by the permit was or would be removed;

(iv) Whether the purpose for which the permit is required would be likely to reduce the threat of extinction facing the species of wildlife sought to be covered by the permit;

(v) The opinions or views of scientists or other persons or organizations having expertise concerning the wildlife or other matters germane to the application; and

(vi) Whether the expertise, facilities, or other resources available to the applicant appear adequate to successfully accomplish the objectives stated in the application.

50 C.F.R. § 17.22(a)(2)(i)-(vi); *see generally* ROHLF, *supra* note 3, at 82-86.

9(a)(1), so long as the “taking” is incidental to an “otherwise lawful activity.”<sup>99</sup> That is, the activity may accidentally effect a “taking” under section 9, but may be exempt from prosecution under section 10 depending upon case by case circumstances.<sup>100</sup> In any case, no “incidental take” permit will be issued by the Secretary to any person without the submission of a satisfactory conservation plan including adequate safeguards to reduce the impact of the “incidental take.”<sup>101</sup>

The conservation plan required under section 10(a)(2)(A) must include and detail the anticipated impact of the activity on listed species in proximity of the proposed activity, the applicant’s efforts to mitigate those impacts, any alternatives to a “taking” available to the applicant, and any other necessary and appropriate measures required by the plan.<sup>102</sup>

Based upon the described activities in the permit application, and the submitted conservation plan, the Secretary must then make the following determination before an “incidental take” will be permitted under section 10(a): 1) that any “taking” will in fact be incidental; 2) that the applicant will minimize and mitigate the impacts of the “taking” to the maximum extent practicable; 3) that the applicant will ensure that the conservation plan’s implementation is adequately funded; 4) that “the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild”; 5) that any other necessary and appropriate measures required by the Secretary will also be met; and 6) that the Secretary is provided with other assurances that the plan will be implemented.<sup>103</sup> Congress’ reaction to the *Palila I Appeal* decision was observably more tempered than that of the Service. While section 10(a) provides an exception to the otherwise absolute and categorical ban in section 9, the standards for that exception are quite rigorous and protective of the species being impacted.<sup>104</sup>

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99. Pub. L. No. 97-304, § 6, 96 Stat. at 1422 (current version at 16 U.S.C. § 1539(a)(1)(B)).

100. *Id.*

101. *Id.* (current version at 16 U.S.C. § 1539(a)(2)(A)).

102. *Id.*

103. 50 C.F.R. § 17.22(b)(2). Department of Interior regulations also require the Secretary, through the Director of the Fish and Wildlife Service, to “consider the anticipated duration and geographic scope of the applicant’s planned activities, including the amount of listed species habitat that is involved and the degree to which listed species and their habitats are affected.” *Id.*

104. Pub. L. No. 97-304, § 6, 96 Stat. at 1422 (current version at 16 U.S.C. § 1539(a)(2)(B)).

### E. Palila II—Identifying the “Critical Link Between Habitat Modification and Injury to the Species”

The mamane and naio forests of Hawaii’s Mauna Kea and the tiny palila they harbored were again destined to rise to the forefront of the persistent controversy over the scope of section 9. *Palila v. Hawaii Department of Land and Natural Resources (Palila II)*<sup>105</sup> virtually duplicated the facts and issues litigated only five years earlier.<sup>106</sup> The palila’s critical habitat was still being grazed by non-indigenous animals, only this time the adverse impacts were caused by exotic mouflon sheep rather than the feral animals removed following *Palila I*.<sup>107</sup>

The district court in *Palila II* was presented with the Secretary’s revamped “harm” regulation. *Palila II*, reduced to its essence, examined whether the Service’s redefinition of “harm,” in the Secretary’s amended regulatory definition, embodied a substantial change from the previous definition.<sup>108</sup> The district court, in a cogent legal analysis, answered that question resoundingly in the negative.<sup>109</sup>

Throughout the trial, the Hawaiian DLNR emphasized the difference between “potential” harm and “actual” harm.<sup>110</sup> They argued that the plaintiffs could show no present pattern of decline in the palila’s numbers; thus, the Hawaiian DLNR insisted that any harm done to the palila due to

105. (*Palila II*), 649 F. Supp. 1070 (D. Haw. 1986), *aff’d*, 852 F.2d 1106 (9th Cir. 1988).

106. See Cheever, *supra* note 19, at 152-53.

107. The distinction between the two was described by the district court. “Feral” refers to animals that, while once domesticated, now roam wild. On the contrary, mouflon sheep are wild game animals that were taken from the wilds of Corsica and Sardinia and introduced onto slopes of Mauna Kea between 1962 and 1966. Like the feral sheep and goats, the mouflon were maintained in the palila’s habitat for sport hunting purposes. *Palila II*, 649 F. Supp. at 1074. During the initial *Palila I* litigation, a mouflon sheep study was still underway to determine the extent of the mouflon’s destructive effects upon the mamane. See *Palila I*, 471 F. Supp. at 990 n.13.

108. See ROHLF, *supra* note 3, at 63-64.

109. *Palila II*, 649 F. Supp. at 1075. The court in *Palila II* had already stated its position on this issue at the summary judgment stage of the proceeding. *Palila v. Hawaiian Dep’t of Land and Natural Resources*, 631 F. Supp. 787 (D. Haw. 1985). At that time, the defendants continuously argued that the amendments to the regulation had worked substantial changes upon the meaning of the term “harm,” but the court refused to adopt their interpretation. *Palila II*, 649 F. Supp. at 1075 n.18. Since the government had apparently failed to recognize the court’s position at this earlier proceeding, the district court in *Palila II* saw the need to elaborate on its conclusion that the amendments still prohibited destruction of habitat. *Id.*

110. *Id.* at 1075.

the mouflon sheep's destructive browsing habits was, at best, a potential one.<sup>111</sup> The DLNR also observed that the palila, whose population numbers remained constant throughout the controversy, had not been actually harmed as required under the Secretary's revised "harm" regulation.<sup>112</sup> Mere adverse impact to the habitat, they contended, did not amount to "harm" under the Act and the regulation.<sup>113</sup>

The district court emphatically rejected this "shortsighted and limited interpretation of 'harm'" concluding that:

A finding of "harm" does not require death to individual members of the species; nor does it require a finding that habitat degradation is presently driving the species further toward extinction. Habitat destruction that prevents the recovery of the species by affecting essential behavioral patterns causes actual injury to the species and effects a taking under section 9 of the Act.<sup>114</sup>

*Palila II* clearly and deliberately expanded the scope of section 9 beyond the bounds set only a few years earlier in *Palila I*. In evaluating the significance of the Service's redefinition of "harm," the district court held that the Service explicitly declined to limit "harm" to "direct physical injury to an individual member of a wildlife species."<sup>115</sup> In fact, the Service attributed the regulation's revision to the following purpose:

The purpose of the redefinition was to preclude claims of a Section 9 taking for habitat modification alone without any attendant death or

111. *Id.* Specifically, the Hawaiian Government argued that the mouflon sheep do not presently harm the palila because the sheep feed primarily on the shoots and sprouts of the mamane trees. The palila derives its sustenance from the seeds and seed pods of the mature trees. Therefore, the government argued that the browsing activities did not presently deny the palila of its food source. The government contended that any harm to the palila could only be indirect and in the future, as the browsing mouflon, at most, merely prevented regeneration of the mamane trees over the coming years. *Id.*

112. *Palila II*, 649 F. Supp. at 1075. This apparently was a distinct argument against the existence of any "actual injury." Since, as the Hawaiian DLNR reasoned, "harm" required actual death or injury, this showing would be substantially undermined by the fact that the palila population had remained static and may have even increased in spite of the continued grazing activity of the mouflon sheep.

113. The Hawaiian DLNR's argument was a linear one. Harm to the mamane and naio forest did not, in and of itself, equal "actual harm" to the palila. The population of the palila had not declined since *Palila I* and had even slightly increased. Preventing "harm" to the trees was beyond the protection intended under the ESA. *Id.*

114. *Id.*

115. *Id.* at 1077 (quoting 46 Fed. Reg. 54,748 (1981)).



injury of the protected wildlife. Death or injury, however, may be caused by impairment of essential behavioral patterns which can have significant and permanent effects on a listed species.<sup>116</sup>

Clearly, the Service declined to limit “harm” to direct applications of physical force or violence aimed at an individual animal.<sup>117</sup> Yet, the Hawaiian DLNR asserted that habitat modification prohibited under section 9 must be limited to occasions where direct physical injury or killing of individual palila birds was the direct and intended consequence of the modification—precisely what the Service declined to do in amending the regulation.

The district court’s focus on injury to the species as a whole is consistent with the revised “harm” regulation after *Palila II*.<sup>118</sup> What the Service accomplished through its redefined term is that “harm” via habitat modification requires two elements: significant habitat modification and

116. *Id.*

117. At this point in the district court’s decision, Judge King took an opportunity to answer criticisms of his *Palila I* opinion raised during the 1981 amendments to the “harm” regulation. Judge King concluded that the Service had misconstrued his earlier ruling in *Palila I*. *Palila II*, 649 F. Supp. at 1076 n.21.

Contrary to the assertions [of the DLNR, the court] did not find that habitat modification alone caused harm to the Palila. On the contrary, the evidence considered at the summary judgment hearing overwhelmingly showed that the feral animals had a drastic negative impact on the mamane forest, which in turn injured the Palila by significantly disrupting its essential behavioral habits.

*Id.* (citations omitted).

118. *See id.* at 1077. Judge King’s response to criticisms leveled at his *Palila I* decision by the Service suggests that, from the outset, his focus remained on the injury to the species as a whole and the purpose of the ESA—recovery of listed species:

By consuming the shoots and seedlings, the [feral sheep] prevented the regeneration of the forest and thus brought about the “relentless decline of the Palila’s habitat.”

....

The record was similarly clear that this loss of habitat was the single most important factor limiting the Palila population. Continued destruction of the forest would have driven the bird into extinction. As it was, the bird was, and still is, at the critical population level, that is, perched on the verge of extinction. The bird is thus highly susceptible to harm from other environmental factors, such as fire or drought. At the time then, the continued presence of feral sheep had a severe negative impact on the Palila by indirectly suppressing the population figures to a level which threatened extinction and by preventing the expansion or recovery of the population. These factors supported my decision to order removal of the feral sheep and goats in *Palila I*.

*Id.* at 1078 (citation omitted).

actual injury. If a “critical link between habitat modification and actual injury to the species” can be shown, the section 9 claim will succeed.<sup>119</sup> This “critical link” draws habitat modification into the folds of the “take” concept found in section 9. The presence of an actual injury or instances of habitat destruction likely to significantly and adversely affect a listed species now can amount to a prohibited “taking.”<sup>120</sup>

After *Palila II*, the “critical link between habitat modification and injury to the species” could be established in one of two ways: 1) by showing that the activity has an adverse impact on the species or 2) by showing that the activity prevents the recovery of a species.<sup>121</sup> The district court rejected the contention that the establishment of this “critical link” required either the proven death or injury of individual members of the species, or some demonstrated decline in population numbers.<sup>122</sup>

The Ninth Circuit Court of Appeals affirmed the district court’s ruling that the palila had indeed been “taken” within the meaning of the amendments to the Department of Interior’s regulation defining “harm.”<sup>123</sup> Significantly, the court of appeals limited its review to the district court’s focus on the harm to the species as a whole and the question of whether the district court erred in finding that “harm” included habitat modification that could drive the palila to extinction.<sup>124</sup> The court acknowledged the

119. *Id.* As the district court opined, “[t]he redefinition stresses the critical link between habitat modification and injury to the species. Obviously since the purpose of the Endangered Species Act is to protect endangered wildlife, there can be no finding of a taking unless habitat modification or degradation has an adverse impact on the protected species.” *Palila II*, 649 F. Supp. at 1077.

120. *Palila II* reduced the inquiry to a two-part analysis centered on the element of causation. A significant habitat modification must first be established. Then, this modification must be linked to the actual death or injury of wildlife. This element of connectedness distinguishes prohibited “takings” from other incidental activities affecting habitat without adversely affecting the species.

121. *Palila II*, 649 F. Supp. at 1077.

122. *Id.*

123. *Palila (Loxiodes bailleui) v. Hawaii Dep’t of Land and Natural Resources (Palila II Appeal)*, 852 F.2d 1106 (9th Cir. 1988).

124. *Id.* at 1108. The circuit court concluded that the district court’s inclusion within the definition of “harm” of habitat destruction that could drive the species to extinction fell within the Secretary of Interior’s construction of the term. However, the Ninth Circuit Court of Appeals declined to decide whether habitat modification not threatening the palila with extinction, but hindering recovery of the species, was also properly included within the Secretary’s definition. *Id.* at 1110-11.

deference given to the Secretary's interpretation of "harm," citing this standard of review as a principal reason for its holding.<sup>125</sup>

The Ninth Circuit Court of Appeals concurred with the district court's assessment that the inclusion of habitat destruction contributing to extinction was consistent with the Secretary's "harm" regulation.<sup>126</sup> Interpreting "harm" in this manner advanced the overall objectives of the ESA by "[providing] a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . ."<sup>127</sup> This interpretation, the court reasoned, also was entirely consistent with Congress' desire to provide an expansive reading of the term "take," as evidenced by the legislative history of the Act.<sup>128</sup> The *Palila II Appeal* both affirmed the district court's construction of "harm" to include habitat modification that threatens a species with extinction and upheld the Secretary of Interior's definition of "harm" as consistent with the ESA. But this ruling fell short of a complete answer to the controversy.

The Ninth Circuit Court of Appeals declined to reach the question of whether the regulation's "actual death or injury" requirement could be satisfied by a habitat modification that hampered a species' recovery as opposed to precipitating its extinction.<sup>129</sup> The precise scope of the issue left unaddressed by the court's declination remains unclear.<sup>130</sup> In the first instance, the opinion passed on the question of whether "harm" included "habitat degradation that *merely retards* recovery."<sup>131</sup> Yet, only a few sentences later, the court pronounced its decision to pass on the issue of

125. *Id.* at 1108 (citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985) (upholding the Secretary of the Army's regulations including hydrologically connected wetlands within the jurisdictional term "navigable waters," the dredging and filling of which requires a permit under § 404 of the Federal Water Pollution Control Act)).

126. *Id.*

127. *Palila II Appeal*, 852 F.2d at 1108 (citing 16 U.S.C. § 1531(b) (1988)).

128. *Id.* (relying on S. REP. NO. 307, *supra* note 3, reprinted in 1973 U.S.C.C.A.N. at 2989, 2995). In defining "take" in § 3(12) of the ESA, Congress has arguably made its intentions clear: "[t]ake" is defined in section 3(12) in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." S. REP. NO. 307, *supra* note 3, reprinted in 1973 U.S.C.C.A.N. at 2995.

129. *Palila II Appeal*, 852 F.2d at 1110.

130. *See id.* From the court's statements it is possible to draw two different conclusions. The circuit court may have only declined to address temporary setbacks to a species' recovery, while otherwise including habitat modifications presenting a permanent and total impediment to recovery efforts in its principal holding. Conversely, the court may have refused to reach the more general issue of whether hindrance to a species recovery can legally amount to "actual injury" to a species.

131. *Id.* at 1110 (emphasis added).

whether “harm” includes those activities that *prevent* recovery.<sup>132</sup> The first passage indicates the court’s inclusion within “harm” of those activities that prevent recovery, suggesting that the court hesitated to extend “harm” to activities that “merely” present a temporary or short term impairment to the species’ recovery. In light of this statement, the second pronouncement is enigmatic. It purports to cover “habitat degradation that *prevents* recovery.”<sup>133</sup> It is, therefore, unclear whether the variance between these two declarations is purposeful.

In reality, the distinction between threats to survival and the impairment of recovery is a significant one. The goal of the ESA is to “recover” endangered and threatened species, not merely to maintain these species in a continuing state of endangerment.<sup>134</sup> A large category of activities may hamper the achievement of this goal while still falling short of precipitating a species’ extinction. If such a distinction were acknowledged, a number of activities could be permitted that, while not threatening a species with extinction, will nevertheless ensure perpetual enrollment on the growing roster of endangered and threatened fauna.

#### F. *Post Palila II—Meeting the “Critical Link” Requirement*

*Palila II*, in practice, reduced the “taking” inquiry to a question of causation and what level of connectedness must be demonstrated by a preponderance of evidence to prove a violation of section 9. *American Bald Eagle v. Bhatti*<sup>135</sup> is illustrative on this point. *Bhatti* began as a suit to bar deer hunting on a state reservation to avoid alleged risks to bald eagles

132. *Id.* at 1111 (emphasis added).

133. *Id.* (emphasis added).

134. The stated purpose of the ESA is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved” and “to provide a program for the conservation of such endangered and threatened species.” Pub. L. No. 93-205, § 2, 87 Stat. at 884 (current version at 16 U.S.C. § 1531(b)). Conservation of endangered and threatened species is defined in the ESA as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.” *Id.* § 3, 87 Stat. at 885 (current version at 16 U.S.C. § 1532(3)).

Upon listing a species as endangered or threatened under the provisions of ESA § 4, the Secretary is directed to develop and implement “recovery plans” for the conservation and survival of the listed species unless he finds that the development of a recovery plan will not promote the species’ conservation. Pub. L. No. 95-632, § 11, 92 Stat. at 3766 (redesignated as § 4(f) by Pub. L. No. 97-304, § 2(a), 96 Stat. at 1411; current version at 16 U.S.C. § 1533(f)).

135. 9 F.3d 163 (1st Cir. 1993).

present on the site.<sup>136</sup> The alleged risk to the eagle came in the form of the ingestion of lead shot from the carrion of deer that have been shot, but not recovered by the hunter.<sup>137</sup> Analogizing to other environmental regulations, the plaintiffs asked the court to impose a human health-based numerical standard of “one in a million risk of harm” for determining when a “taking” has occurred.<sup>138</sup> The First Circuit Court of Appeals declined to do so, concluding that while such numeric standards are appropriate for EPA pollution control regulations, they were not proper for determining “harm” under the Secretary’s regulation.<sup>139</sup> Rather, the proper standard for determining a “taking” under the regulation is the presence of “actual harm,” which requires a greater degree of connectedness than a calculated possibility of harm under a numeric standard.<sup>140</sup> While bald eagles can be harmed by ingesting lead, the plaintiffs were unable to introduce evidence demonstrating that they had actually consumed harmful levels of lead.<sup>141</sup> Thus, the court acknowledged that the regulation requires a qualitative, rather than a bare quantitative standard for making decisions under the ESA.

G. Sweet Home Chapter of Communities for a Great Oregon v. Lujan—*Raising a Direct Challenge to Palila in the District Court*

In 1992, *Sweet Home Chapter of Communities for a Great Oregon v. Lujan (Sweet Home I)*<sup>142</sup> raised the controversy surrounding section 9 to the next level of analysis. While previous courts limited their consideration to the question of whether a particular habitat modification amounted to “harm” resulting in a “taking” under section 9, the United States District

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136. *Id.* at 164.

137. *Id.* The core of the plaintiffs’ case was that some of the deer shot at the reservation would not be recovered and would subsequently die of their wounds. These “cripple loss deer” would still carry the lead shot from the hunter’s gun and the bald eagles, among other animals, would ingest this lead while feeding on the carcasses. *Id.*

138. *Id.* at 165. Similar health-based standards are set by the Environmental Protection Agency in regulating discharges under the Clean Air Act and the Clean Water Act. These numeric standards set the amount of a pollutant to be tolerated based on the level of risk that the tolerated concentrations will pose to human health. *See, e.g.*, National Emission Standards for Hazardous Air Pollutants, 49 Fed. Reg. 23,521-27 (1984).

139. *American Bald Eagle v. Bhatti*, 9 F.3d 163, 165 (1st Cir. 1993).

140. *Id.* at 165-66.

141. *Id.* at 166. This case, like *Morrill v. Lujan*, presents a case where the plaintiffs were unable to establish sufficient scientific proof of “actual injury” resulting from the alleged habitat modification. *See Morrill v. Lujan*, 802 F. Supp. 424 (S.D. Ala. 1992).

142. 806 F. Supp. 279 (D.D.C. 1992).

Court for the District of Columbia was asked to consider whether habitat modification or degradation could be a taking at all. The suit was a direct attack on the very basis of the *Palila* line of cases and a direct challenge to the regulatory structure of section 9 as it had stood for more than a decade.

The case was brought by a number of small land owners, logging and timber companies, and individuals dependent in varying degrees upon the logging industry in the Pacific Northwest and in the southeastern United States.<sup>143</sup> The plaintiffs (the "Chapter") challenged restrictions placed upon logging activities on private property by the United States Fish and Wildlife Service in its efforts to avoid *Palila*-type "takings" of the endangered red-cockaded woodpecker<sup>144</sup> and the threatened northern spotted owl<sup>145</sup> in violation of section 9.<sup>146</sup> The restrictions allegedly resulted in a host of economic injuries to the plaintiffs and reached impermissibly beyond the scope of section 9 protections.<sup>147</sup>

The Chapter attacked two specific regulations promulgated by the Secretary of the Interior for the enforcement of section 9.<sup>148</sup> The primary focus remained on the Secretary's regulation defining "harm" under the Act. The Chapter insisted that this regulation was, on its face, both contrary to the ESA and fatally vague under the Fifth Amendment's guarantee of due process of law.<sup>149</sup> The Chapter also attacked the regulation extending section 9's protections to threatened species of wildlife.<sup>150</sup>

143. *Id.* at 282. The plaintiffs consisted of Sweet Home Chapter of Communities for a Great Oregon, Betty F. Orem, Erickson Busheling, Inc., Southeastern Lumber Manufacturers Association, Inc., Southern Timber Purchasers Council, Ridgetree Logging Company, Shotpouch Logging Company, Jean Reynolds, Emmy G. Birkenfield, and Pat McCollum. See Brief for Petitioners at ii, *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 115 S. Ct. 2407 (1995) (No. 94-859).

144. 50 C.F.R. § 17.11(h) (1994). The red-cockaded woodpecker was listed under the Endangered Species Conservation Act of 1969, the predecessor to the modern ESA. Pub. L. No. 91-135, §§ 1-12, 83 Stat. 275 (1969) (repealed by Pub. L. No. 93-205, § 14, 87 Stat. 903).

145. 50 C.F.R. § 17.11(h). "Taking" a threatened northern spotted owl is prohibited pursuant to Department of Interior regulations promulgated under § 4(d) of the ESA. 50 C.F.R. § 17.31(a).

146. *Sweet Home I*, 806 F. Supp. at 282.

147. *Id.* Specifically, the plaintiffs alleged that the restrictions forced them to lay off employees and down-size their operations. Moreover, the restrictions were purported to have limited their incomes, reduced the supply of timber and to have imposed substantial economic hardships upon a number of individuals and families. *Id.*

148. *Id.*

149. *Id.*

150. *Sweet Home I*, 806 F. Supp. at 282.

After agreeing on the absence of any genuine disputes of material fact, both parties moved for summary judgment on the legal issues presented.<sup>151</sup> Because the areas owned by, or of interest to, the plaintiffs contained habitat and/or populations of the listed wildlife, the plaintiffs were uncertain about disturbance or harvest in these areas for fear that a section 9 violation would be charged against them.<sup>152</sup> The suit was filed to avoid an enforcement action. In a carefully formulated response, the district court denied the plaintiffs' motion and granted summary judgment in favor of the defendant, the Department of Interior.<sup>153</sup> Regarding section 9 of the ESA, the court found Congress' intentions clear and unequivocal; the term "take" was to be read "in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife."<sup>154</sup> The ESA and its legislative history supported this conclusion.<sup>155</sup>

First and foremost, the Chapter argued that by including habitat modification and degradation as a form of "harm," the regulatory definition promulgated by the Secretary in the Code of Federal Regulations<sup>156</sup> exceeded the intentions of Congress.<sup>157</sup> This argument was soundly rejected by the district court through application of the principles espoused in *Chevron, U.S.A., Inc. v. Natural Resource Defense Council*.<sup>158</sup> Under

151. *Id.* at 281.

152. The plaintiffs generally alleged that the Service has placed restrictions on timber harvesting in the Pacific Northwest and in the Southeast in order to avoid a *Palila*-type "taking" of the owl and other endangered wildlife. *Id.* at 282. However, the plaintiffs made no claims or allegations of actual or threatened criminal enforcement of the regulation against them. *Id.* at 285. Instead, the Chapter asserted that "[t]he [Service] relies on the regulation to warn landowners that it considers certain land uses harmful to certain listed species (as by interfering with breeding or foraging patterns), and that engaging in such activities will subject the actor to agency enforcement." Brief for Respondents at 4, *Babbitt* (No. 94-859) (citations omitted). "These warnings put landowners on "notice," of course, and thus facilitate criminal enforcement for a "knowing" violation of the Act." *Id.* at 4 n.5. "As a practical matter, 'persons whose extended conduct might be found a 'take,' and who thus are exposed to criminal penalties . . . are under commanding pressure to comply' with the [Service's] view of 'harm,' either by foregoing such conduct or by applying for an incidental take permit." *Id.*

153. *Sweet Home I*, 806 F. Supp. at 281.

154. *Id.* at 283 (citing S. REP. NO. 307, *supra* note 3, reprinted in 1973 U.S.C.C.A.N. at 2995); see also H.R. REP. NO. 412, 93d Cong., 1st Sess. 11, 15 (1973), *microformed on* CIS 73-H563-9 (Congressional Info. Serv.).

155. *Sweet Home I*, 806 F. Supp. at 283.

156. 50 C.F.R. § 17.3.

157. *Sweet Home I*, 806 F. Supp. at 283.

158. *Id.* at 285 (citing *Chevron, U.S.A., Inc. v. Natural Resource Defense Council*, 467 U.S. 837, 842-43 (1984)).

the well-known *Chevron* two-step analysis, the clear intent of Congress must prevail.<sup>159</sup> In the absence of such clear intent, any permissible interpretation of a federal statute made by the agency charged with its administration will be upheld.<sup>160</sup>

The court rejected the Chapter's position based on the second prong of the *Chevron* test and supported the Secretary's interpretation.<sup>161</sup> The Chapter unsuccessfully raised a triumvirate of arguments for their position that Congress did not intend the term "take" to reach habitat modification and that the Secretary's interpretation was impermissible.<sup>162</sup> They argued that the origin of the definition counseled against this construction, that another section of the ESA provided a remedy if necessary, and that the Secretary's definition was impermissibly broad. In rejecting the Chapter's claims, the court explained why each of these arguments failed.

159. *Chevron*, 467 U.S. at 842-43.

160. *Id.* at 843. In *Chevron*, the United States Supreme Court reviewed challenges to Environmental Protection Agency regulations permitting states "to treat all pollution-emitting devices within the same industrial grouping as through they were encased within a single 'bubble'." *Id.* at 840. In the course of that review, the court pronounced the following two-step analysis guiding the judicial review of agency interpretations of federal statutes:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

*Id.* at 842-43. The *Chevron* analysis is premised upon the long-recognized view that considerable weight and deference must be paid to the executive department's interpretations of a statutory scheme it is entrusted to administer. *Id.* at 844.

161. *Sweet Home I*, 806 F. Supp. at 284. The district court initially examined the legislative history supporting the ESA, concluding that the Congress' intentions as stated in the Act and its history clearly support interpreting "take" in the broadest possible manner. *Id.* (construing S. REP. NO. 307, *supra* note 3, reprinted in 1973 U.S.C.C.A.N. at 2995). Thus armed, the district court was in a position to discard the plaintiffs' claim under the first step in the *Chevron* analysis. Having found a "clear congressional intent" the inquiry into the Secretary's interpretation should end at that point. However, the district court chose to bolster its opinion by demonstrating that the plaintiffs' claims fell equally short of the mark on the second prong of the *Chevron* test. *See id.* at 285.

162. *Id.* at 283-85.



First, the Chapter questioned the permissibility of the Secretary's interpretation of "harm" by pointing to the origins of the "take" definition.<sup>163</sup> The original ESA bill, Senate Bill 1983, broadly defined "take" to include "destruction, modification, or curtailment of its habitat or range."<sup>164</sup> However, when Senate Bill 1983 was reported out of the Senate Committee on Commerce, this provision was deleted.<sup>165</sup> The Chapter pointed to this omission as compelling evidence that Congress did not intend "take" to encompass habitat destruction.<sup>166</sup> The court disagreed.<sup>167</sup>

The district court noted that Senate Bill 1983 was one of two ESA bills considered by the Senate Committee on Commerce.<sup>168</sup> The other, Senate Bill 1592, defined "take" in its adopted form.<sup>169</sup> The court reasoned that this legislative history could stand for no more than the proposition that the Senate chose one definition over another.<sup>170</sup> As for any conscious decision to remove explicit references to habitat destruction from the "take" provision, the court found this characterization of the legislative history far too speculative.<sup>171</sup> The historical evidence supporting the Chapter's position was insufficient to overcome the traditional deference accorded the Secretary's interpretation under *Chevron*.

The Chapter also argued that the Secretary's interpretation of "harm" was impermissible in light of Congress' alleged desire to address habitat concerns exclusively through the federal land acquisition provisions found in section 4 of the ESA.<sup>172</sup> Pursuant to section 4, the Secretary is given the authority to utilize land acquisition and other measures to implement recovery programs for endangered and threatened species.<sup>173</sup> By including

163. *Id.* at 283.

164. *Sweet Home I*, 806 F. Supp. at 283.

165. *Id.*

166. *Id.* The premise underlying the plaintiffs' contention was that the reference was purposefully deleted by the Senate Committee expressing a desire to curtail the definition of "take" and exclude habitat modification as a course of conduct that may result in a "taking." *Id.*

167. *Id.*

168. *Sweet Home I*, 806 F. Supp. at 283.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. Pub. L. No. 93-205, § 5, 87 Stat. at 889 (current version at 16 U.S.C. § 1534(a)(1) (1994)). Section 5 provides, in relevant, part that to carry out a program to conserve endangered or threatened species, the appropriate Secretary:

this provision, the Chapter suggested that Congress had provided the Secretary with the means to protect habitat through public purchase of private property.<sup>174</sup> This protective measure, the Chapter reasoned, was intended to be the sole and exclusive means by which the problem of habitat destruction was to be addressed.<sup>175</sup> Any further protection under section 9 would, therefore, render section 5 a nullity.<sup>176</sup> This argument also was rejected by the district court.<sup>177</sup> While the ESA's legislative history revealed an intent that federal land acquisition play an important role in habitat preservation, the court was unable to find any indication that land acquisition was to be the "exclusive protective mechanism for listed species' habitat."<sup>178</sup>

The Act and its underlying legislative history instead lent credence to the notion that land acquisition was intended to be just one of several protective mechanisms at the Secretary's disposal.<sup>179</sup> The Act itself empowers the Secretary to "utilize the land acquisition *and other authority*" provided under a number of federal acts to carry out conservation programs.<sup>180</sup> Specific statements in the legislative history also countered the Chapter's position.<sup>181</sup>

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(1) shall utilize the land acquisition and other authority under the Fish and Wildlife Act of 1956, . . . the Fish and Wildlife Coordination Act, . . . and the Migratory Bird Conservation Act, as appropriate; and

(2) is authorized to acquire by purchase, donation, or otherwise, lands, waters, or interests therein, and such authority shall be in addition to any other land acquisition authority vested in him.

*Id.* (citations omitted).

174. *Sweet Home I*, 806 F. Supp. at 283.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Sweet Home I*, 806 F. Supp. at 283.

180. *Id.* (citing 16 U.S.C. § 1534(a)(1)) (emphasis added).

181. The district court points to two specific statements found in the legislative history leading to the passage of § 4 of the Act. In considering § 4, a House Conference Report provided, *inter alia*, that "[a]ny effective program for the conservation of endangered species demands that there be adequate authority vested in the program managers to acquire habitat which is critical to the survival of the species." *Id.* at 283 (quoting H.R. CONF. REP. NO. 740, 93d Cong., 1st Sess. 25 (1973), reprinted in 1973 U.S.C.C.A.N. 3001, 3004). The second statement relied upon by the district court is found in the Senate Committee on Commerce's Report on Senate Bill 1983, which recognized that protection of habitat was often the only means of protecting endangered animals occurring on private lands. *Id.* (construing S. REP. NO. 307, *supra* note 3, reprinted in 1973 U.S.C.C.A.N. at 2995). Clearly, these schemes are intended to be mutually supporting (not mutually exclusive) means

Finally, the Chapter questioned the permissibility of the Secretary's interpretation on the ground that "harm" was added to the definition of "take" via a technical amendment which was never debated by Congress. In light of this, the Chapter reasoned that the expansive interpretation ascribed to the term "harm" by the Secretary was inappropriate.<sup>182</sup>

In rejecting this claim, the district court's reasoning was two-fold. First, the court reiterated its conclusion that the Secretary's definition of the term "harm" was entirely compatible with Congress' definition of "take."<sup>183</sup> Although the Chapter suggested that the Secretary's regulation encompassing land use and habitat destruction stood at variance with every other component of the "take" definition, the court found the plaintiff's own argument flawed since it also relied on an overly-broad interpretation of the Secretary's regulation.<sup>184</sup> The district court found the term "harm" sufficiently similar to the terms hunt, harass, and pursue, since the interpretation of the term "harm" limited its application only to those habitat modifications that actually kill or injure wildlife.<sup>185</sup>

The Secretary correctly points out, however, that not all habitat modification actions constitute "harm" under the § 17.3 definition; rather, only an action which "actually kills or injures wildlife" falls into the category of "harm." The Secretary's definition thus requires proof of actual killing or injury to wildlife, consistent with the ESA's definition of "take."<sup>186</sup>

This statement is somewhat disingenuous in light of *Palila II* which held the "actual death or injury" requirement satisfied by injury to the species as a whole and not just injury to individual animals was required to show a

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to accomplish the species recovery purposes of the Act. *Id.* at 284.

182. *Sweet Home I*, 806 F. Supp. at 284.

183. *Id.*

184. *Id.* The Chapter argued that "harm," unlike every other component of the "take" definition, was expanded to include habitat destruction and land use, while the other terms such as "hunt," "pursue," and "shoot" are not provided with such an expansive definition. *See id.* (citing Plaintiffs' Mem. for Summary Judgment at 21, *Babbitt* (No. 94-859)). This argument, relying on the *nocitur a sociis* principle of statutory construction, played a much more prominent role in the several appellate opinions that followed. *See generally*, *Sweet Home Chapter of Communities for a Great Or. v. Babbitt* (*Sweet Home II*), 1 F.3d 1 (D.C. Cir. 1993).

185. *Sweet Home I*, 806 F. Supp. at 284.

186. *Id.*

“taking.”<sup>187</sup> In a relatively conclusory manner, the District of Columbia district court avoided much of the holding of the Hawaiian district court in *Palila II*.<sup>188</sup>

The district court ultimately resolved this argument on the grounds that Congress, when reauthorizing the ESA in 1982, was aware of the *Palila* decisions and, nevertheless, declined the opportunity to reverse these decisions through legislation.<sup>189</sup> The court observed that Congress’ reaction to *Palila II* was instead found in the amendments to section 10(a),<sup>190</sup> evidencing a congressional desire to accommodate the Secretary’s definition of “harm” and ratify the interpretation found in *Palila II*. The court concluded that the Chapter failed to meet its burden under the *Chevron* analysis.<sup>191</sup> In accordance with the Supreme Court’s *Chevron* analysis, the district court deferred to the discretion of the Secretary and upheld the regulation.<sup>192</sup>

The Chapter also advanced the theory that the “harm” definition was fatally vague and, therefore, in contravention of the Fifth Amendment’s Due Process Clause.<sup>193</sup> Under the “void for vagueness” doctrine, the Due Process Clause demands that criminal statutes define criminal offenses with a sufficient degree of definiteness so as to adequately inform ordinary people of the type of conduct being prohibited and to discourage the arbitrary and discriminatory enforcement of the statute.<sup>194</sup> In essence, a

187. *Palila (Loxiodes bailleui) v. Hawaii Dep’t of Land and Natural Resources (Palila II)*, 649 F. Supp. 1070, 1075 (D. Haw. 1986), *aff’d*, 852 F.2d 1106 (9th Cir. 1988).

188. The D.C. district court points out that the Secretary’s regulatory definition has been consistently upheld by the courts. *Sweet Home I*, 806 F. Supp. at 284. However, in supporting this statement, the D.C. district court cites both the district and circuit court opinions of *Palila I* and *Palila I Appeal*, while only citing the circuit court opinion of *Palila II*. *Id.* This would suggest that, when confronted with the Chapter’s *nocitur a sociis* argument, *infra* notes 258-61, this court was troubled by the dicta in the *Palila II* district court decision.

189. *Sweet Home I*, 806 F. Supp. at 284.

190. *Id.*

191. *Id.* at 285.

192. *Id.*

193. *Id.*

194. *Sweet Home I*, 806 F. Supp. at 285 (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). In *Kolender*, the United States Supreme Court described the so-called “void for vagueness” doctrine as requiring “that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender*, 461 U.S. at 357.

criminal statute must provide citizens with actual notice of prohibited conduct.<sup>195</sup> This claim by the Chapter was also unsuccessful.<sup>196</sup>

Understandably, the Chapter made no allegations that they were actually threatened with any criminal enforcement or prosecution pursuant to this regulation, instead raising a purely facial constitutional challenge to this regulation.<sup>197</sup> The Secretary successfully argued that the plaintiffs' facial challenge must fail because the regulation implicated no constitutionally protected conduct unless the Chapter could demonstrate that the regulatory definition was impermissibly vague in all of its applications.<sup>198</sup> The Chapter could prove neither, despite shopworn claims that their Fifth Amendment property rights amounted to such constitutionally protected conduct.<sup>199</sup>

Applying the regulation to the facts, the district court in *Sweet Home I* found the criminal conduct was defined with adequate certainty to pass constitutional muster.<sup>200</sup> The court observed that the definition of "harm" was limited to habitat degradation that "actually kills or injures wildlife."<sup>201</sup> Moreover, habitat modifications could only result in a chargeable "taking" if they were shown to be "significant."<sup>202</sup> "Significant habitat modification or degradation" was, in turn, defined as modifications that "actually kill or injure wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."<sup>203</sup> A determination of whether or not this regulation was violated necessitated an evaluation of three factors: the species involved, the nature and degree of the habitat degradation, and the needs of that particular species.<sup>204</sup> The court considered that these factors were readily ascertainable in determining

195. *Sweet Home I*, 806 F. Supp. at 285 (citing *Kolender*, 461 U.S. at 358).

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982)). The Chapter insisted that the Secretary's regulatory definition of "harm" implicated their private property rights under the Fifth Amendment, and, therefore, they need not prove the regulation impermissibly vague in all its applications under *Flipside*. However, the district court in *Sweet Home I* agreed with the defendants' argument that "constitutionally protected conduct" as used in *Flipside* denoted First Amendment rights—not Fifth Amendment property rights. *Sweet Home I*, 806 F. Supp. at 285. Accordingly, the plaintiffs' attempts to avoid the *Flipside* standard for facial challenges was rejected by the court. *Id.*

200. *Id.* at 286.

201. *Id.* (citing 50 C.F.R. § 17.3 (1992)).

202. *Id.*

203. *Sweet Home I*, 806 F. Supp. at 286 (citing 50 C.F.R. § 17.3 (1992)).

204. *Id.*

whether section 9 has been violated.<sup>205</sup> The court was convinced that the regulatory definition provided more than minimal guidelines and was adequate notice of unlawful conduct.<sup>206</sup>

Finally, the district court placed considerable reliance on the fact that section 9 violations must be knowingly committed.<sup>207</sup> The court opined that the government would be required to demonstrate the requisite mental state necessary before obtaining a conviction under this provision.<sup>208</sup> In this manner, the district court concluded that the Secretary's regulatory definition was not fatally vague.<sup>209</sup>

The Chapter also attacked the Secretary's blanket regulation which extended the "taking" prohibition to those species listed as "threatened" under the Act. As previously discussed, section 9 differentiates between threatened species and endangered species, explicitly affording protection only to the endangered species.<sup>210</sup> The extension of section 9 protection to threatened species is accomplished via regulations promulgated by the Secretary pursuant to authority granted under section 4(d) of the ESA:

Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may, by regulation prohibit with respect to any threatened species any act prohibited under [section 9(a)] . . . .<sup>211</sup>

Pursuant to this authority, the Secretary extended section 9(a)(1) protection to threatened species of wildlife by means of a single, blanket regulation.<sup>212</sup>

The Chapter opposed this blanket regulation, contending that section 4(d) mandated the adoption of regulations on a species-by-species basis.<sup>213</sup> Moreover, the Chapter insisted that rulemaking under this provision could

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205. *Id.*

206. *Id.* The Chapter also acknowledged the Service's common practice of informing landowners that their proposed activity would lead to a "taking," thus putting the individual on notice for the purposes of "knowing" violations of § 9. Brief for Respondents at 4 n.5, *Babbitt* (No. 94-859).

207. *Sweet Home I*, 806 F. Supp. at 286.

208. *Id.*; see *United States v. St. Onge*, 676 F. Supp. 1044, 1045 (D. Mont. 1988).

209. *Sweet Home I*, 806 F. Supp. at 286.

210. See *supra* note 11 and accompanying text.

211. 16 U.S.C. § 1538 (1994).

212. See *supra* notes 7-8 and accompanying text.

213. *Sweet Home I*, 806 F. Supp. at 286.

only proceed upon specific determinations by the Secretary that such regulations are “necessary and advisable.”<sup>214</sup> Since no such finding was evident, the Chapter argued that the Secretary’s regulation contravened section 4(d) of the ESA.<sup>215</sup>

The court rejected this interpretation as entirely inconsistent with the “clear and unequivocal” language of the statute.<sup>216</sup> Section 4(d) authorizes the Secretary to prohibit by regulation “with respect to any threatened species any act prohibited under [section 9(a)(1)].”<sup>217</sup> Congress’ use of the word “any” throughout section 4(d) provided this clear intent: “The word “any” encompasses the entire range of threatened species and prohibited acts which the Secretary might consider. It allows the Secretary to prohibit one act with respect to one threatened species or as many as *all* acts with respect to *all* threatened species.”<sup>218</sup> Nothing in the language or the legislative history of the ESA required the Secretary to promulgate these regulations on a species-by-species basis.<sup>219</sup> Section 4(d) admits of broad discretion permitting the Secretary to issue regulations whenever he deems it “necessary and advisable” to do so.<sup>220</sup>

The district court dismissed the Chapter’s theory that section 4(d) requires the Secretary to make findings that a particular regulation is “necessary and advisable.”<sup>221</sup> Section 4(d) of the Act, the court declared, requires the Secretary to issue regulations, not findings.<sup>222</sup> Thus, all three counts of the Chapter’s complaint were rejected by the district court in *Sweet Home I*, and summary judgment was issued in favor of the Secretary.<sup>223</sup>

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214. *Id.*

215. *Id.*

216. *Id.* The *Sweet Home I* court relies on *Gatewood v. Washington Healthcare Corp.*, 933 F.2d 1037, 1040 (D.C. Cir. 1976), for the proposition that a court’s decision may rest solely on the words of a statute where the statute is clear and unequivocal on its face. *Sweet Home I*, 806 F. Supp. at 286.

217. *Sweet Home I*, 806 F. Supp. at 286 (quoting Pub. L. No. 93-205, § 16, 87 Stat. at 903 (current version at 16 U.S.C. § 1533(d) (1994)) (emphasis added).

218. *Id.*

219. *Id.* at 286-87. As the court notes, the legislative intent, as evidenced by the Senate report, was for a more sweeping use of the Secretary’s regulatory power under § 4(d). *See id.* at 287 (construing S. REP. NO. 307, *supra* note 3, at 8, *reprinted in* 1973 U.S.C.C.A.N. at 2996).

220. *Id.* at 287.

221. *Sweet Home I*, 806 F. Supp. at 287.

222. *Id.*

223. *Id.*

#### H. Sweet Home Chapter of Communities for a Great Oregon v. Babbit—*The Tortuous Journey Through the Circuit Court*

An appeal was immediately taken by the Chapter, initiating the first of three appellate decisions issued in the *Sweet Home* litigation.<sup>224</sup> Since the issues appealed were allegations of legal error, the district court's judgment was scrutinized de novo.<sup>225</sup> In an opinion by Chief Circuit Judge Mikva, the District of Columbia Circuit Court of Appeals unanimously affirmed the district court's decisions regarding the constitutional "void for vagueness" challenge to the "harm" regulation and the statutory challenge to the Secretary's blanket regulation extending section 9 protection to threatened species.<sup>226</sup> As for the statutory attack on the "harm" regulation, the appellate court upheld the definition per curiam.<sup>227</sup>

First, the panel affirmed the district court's disposition of the "void for vagueness" attack on the "harm" regulation.<sup>228</sup> The Chapter urged the court to resolve the alleged vagueness problem in one of two ways: 1) by interpreting "harm" in a much more limiting manner, finding harm only upon proof of an intentionally inflicted physical injury to an individual member of a listed species of wildlife, or 2) by striking down the "harm" regulation in its entirety, should the limiting construction not be possible.<sup>229</sup>

The circuit court declined to grant either of the Chapter's requests on this matter.<sup>230</sup> Like the district court before it, the circuit court was unable to find the regulation impermissibly vague in all of its applications, as required by the United States Supreme Court's opinion in *Village of Hoffman Estates v. Flipside*.<sup>231</sup> This finding was necessary since the Chapter was asserting a facial "void for vagueness" challenge to the regulation.<sup>232</sup>

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224. Sweet Home Chapter of Communities for a Great Or. v. Babbit (*Sweet Home II*), 1 F.3d 1 (D.C. Cir. 1993). This is the first of no less than three opinions issued by the circuit court of appeals on the *Sweet Home* decision. See also Sweet Home Chapter of Communities for a Great Or. v. Babbit (*Sweet Home IV*), 30 F.3d 190 (D.C. Cir. 1994) (providing history of this litigation in circuit court).

225. *Sweet Home II*, 1 F.3d at 3.

226. *Id.* at 2.

227. *Id.* at 3.

228. *Id.*

229. See *id.* at 4.

230. *Sweet Home II*, 1 F.3d at 5.

231. See 455 U.S. 489, 497.

232. *Sweet Home II*, 1 F.3d at 4.



Arguing against the circuit court's application of the *Flipside* standard, the Chapter insisted that this regulation impinged upon "constitutionally protected conduct," again trying to assert their Fifth Amendment property rights.<sup>233</sup> The Chapter claimed that this "constitutionally protected conduct" fell under an exception to the *Flipside* rule and, consequently, they were not required to establish that the regulation was impermissibly vague in all of its applications.<sup>234</sup> The circuit court was unimpressed. While not stating precisely of what "constitutionally protected conduct" consisted, the panel was confident that the Supreme Court was referring to First Amendment freedoms, which have long received special protection under the "void for vagueness" doctrine.<sup>235</sup> Economic activity, such as that raised by the Chapter, has traditionally been given less protection under the vagueness doctrine.<sup>236</sup> The court dismissed the "void for vagueness" claim, holding the Chapter's showing that the regulation would be impermissibly vague in some hypothetical application was insufficient to meet the standard for pre-enforcement facial attacks under *Flipside*.<sup>237</sup>

Having disposed of the constitutional claim, the appellate court focused on the statutory challenge to the Secretary's rulemaking power under section 4(d).<sup>238</sup> Insisting that the Secretary interpreted this provision in reverse, the Chapter argued that in enacting section 4(d), Congress intended these protections to extend to threatened species only on a species-by-species basis and only upon an explicit finding that such rulemaking was "necessary and advisable."<sup>239</sup>

Consistent with the district court, the District of Columbia Circuit Court of Appeal applied the *Chevron* doctrine in reviewing the Secretary's interpretation of section 4(d).<sup>240</sup> Contrary to the district court, however, the appellate court found no "clear and unequivocal" intent in section 4(d); instead, it found great difficulty divining Congress' true intent from either

233. *Id.*

234. *Id.*

235. *Id.* (citing *Smith v. Goguen*, 415 U.S. 566, 573 (1974)).

236. *Id.* (citing *Flipside*, 455 U.S. at 497).

237. *Sweet Home II*, 1 F.3d at 4.

238. Pursuant to authority vested by Pub. L. No. 93-205, § 16, 87 Stat. at 903 (current version at 16 U.S.C. § 1533(d)), the Department of Interior and the Fish and Wildlife Service have erected a regulatory framework by which protections normally reserved for endangered species have been extended to include threatened species by a blanket rule. These protections, in turn, may only be withdrawn by special rule, and even then, only for particular species. See 50 C.F.R. § 17.31(c).

239. *Sweet Home II*, 1 F.3d at 5-6.

240. *Id.* at 6.

the statute or its legislative history.<sup>241</sup> The Chapter referred the court to specific language in the statute and its legislative history supporting its position.<sup>242</sup> However, the court found these passages in the legislative history conflicting, inconsistent, and generally unclear.<sup>243</sup>

241. *Id.* In applying *Chevron* to the Secretary's regulations in § 17.31(a), the District of Columbia Circuit reasoned:

As was the case with the "harm" regulation, there is no clear indication that § 17.31(a) violates the intent of the ESA. The statute does not unambiguously compel the agency to expand regulatory protection for threatened species only by promulgating regulations that are specific to individual species. In light of the substantial deference we thus owe the agency under the principles of *Chevron, USA, Inc. v. Natural Resource Defense Council, Inc.*, . . . we uphold the challenged regulation as a reasonable interpretation of the statute.

*Id.* (citation omitted).

242. *Id.* Both the Chapter and the Secretary directed the appellate court to specific passages found in the ESA's legislative history. The crux of the debate centered around the use of singular or plural language in referring to threatened wildlife within the context of the Secretary's regulatory power under § 4(e). First, the Chapter pointed to the Senate Report on the Act and its § 4(e) delegation of authority to the Secretary:

[The section] requires the Secretary, once he has listed *a species* of fish or wildlife as *a threatened species*, to issue regulations to protect *that species*. Among other protective measures available, he may make any or all of the acts and conduct defined as "prohibited acts" . . . as to "endangered species" also prohibited acts as to *the particular threatened species*.

*Sweet Home II*, 1 F.3d at 6 (citing S. REP. NO. 307, *supra* note 3, reprinted in 1973 U.S.C.A.N. at 2996). However, the government countered with legislative history of its own:

The Secretary is authorized to issue appropriate regulations to protect endangered or threatened species; he may also make specifically applicable any of the prohibitions with regard to *threatened species* that have been listed in section 9(a) as are prohibited with regard to endangered species. Once an animal is on the threatened list, the Secretary has almost an infinite number of options available to him with regard to the permitted activities for *those species*. He may, for example, permit taking, but not importation of *such species*, or he may choose to forbid both taking and importation by not allowing the transportation of *such species*.

*Id.* (quoting H.R. REP. NO. 412, *supra* note 154, at 12) (alteration in original).

243. *Id.* The District of Columbia Circuit Court of Appeals rejected the Chapter's argument, pointing out that the legislative history is simply too ambiguous to support its conclusions. Where the passage from the Senate report does indeed refer to the threatened species in the singular, the House of Representatives report offered by the Government uses plural language. Accordingly, the district court concluded that: "The possible conflict between the two reports, as well as the apparent inconsistency with the above-quoted paragraph itself as to singular and plural, shows the perils of attempting to use ambiguous legislative history to clarify ambiguous words within statutes." *Id.*

The inescapable fact recognized by the panel was that Congress, in drafting section 4(d), simply did not speak directly on this issue.<sup>244</sup> In the face of this ambiguity, the administrative agency tasked with implementing this provision is authorized to fill in the legislative scheme, formulating its own procedural strategy in lieu of clear legislative directives.<sup>245</sup> Since the Secretary's interpretation, extending section 9 to cover threatened species via a blanket rule, did not clearly contravene section 4(d), the deference afforded to the agency's interpretation under *Chevron* counseled upholding the regulation.<sup>246</sup>

The Chapter's claim that an explicit finding of "necessary and appropriate" was required prior to section 4(d) rulemaking was also rejected.<sup>247</sup> In opposition to this claim an alternate interpretation of section 4(d) was offered. Section 4(d), as construed by the Secretary, consists of two distinct grants of power.<sup>248</sup> The first authorizes the Secretary to issue regulations for the conservation of threatened species as she deems it "necessary and advisable" to do so.<sup>249</sup> The second grant of authority permits her to prohibit via regulation, with respect to any threatened species, any act prohibited under section 9(a)(1).<sup>250</sup> Under this construction, only the former grant of authority is conditioned upon any explicit "necessary and appropriate" finding by the Secretary. Recognizing the relative ambiguity of Congress' intent in section 4(d), the panel deferred to the Secretary's interpretation since it was not clearly in violation of this ambiguous provision.<sup>251</sup>

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In any event, the court concluded that the Chapter has imparted an inappropriate amount of significance to the use of the single as opposed to the plural. Even assuming the Chapter is correct, and the term "species" as found in § 4(d) is singular, the court reasoned that this still would not clearly forbid what the Secretary had done. Since *Chevron* calls for deference in such a circumstance, the Chapter's arguments fall short of the mark. *Sweet Home II*, 1 F.3d at 6.

244. *Id.* at 7. The court notes that "regardless of the use of the singular and plural terms in the statute, § 1533(d) simply does not speak directly to the question of whether the [Fish and Wildlife Service] must promulgate protections species-by-species or may extend such protection in a single rulemaking." *Id.*

245. *Id.*

246. *Id.* (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987)).

247. *Sweet Home II*, 1 F.3d at 7.

248. *Id.* at 7-8; see *supra* note 11 and accompanying text.

249. *Sweet Home II*, 1 F.3d at 8 (citing Pub. L. No. 93-205, § 16, 87 Stat. at 903 (current version at 16 U.S.C. § 1533(d) (1994))).

250. *Id.*

251. *Id.*

It was, however, the statutory challenge to the regulatory definition of “harm” that received the most attention by the court. As stated above, the district court’s findings on the propriety of this regulation were affirmed per curiam, and without comment on the matter.<sup>252</sup> Two separate concurrences and a single dissenting opinion were also filed, each examining the regulation in detail.<sup>253</sup>

Most significantly, the Chapter again deemed the expansive definition of “harm” improperly broad in light of the more narrow terms that accompany “harm” in the “take” definition.<sup>254</sup> None of the other terms found in the “take” definition extended to land use activities indirectly injuring wildlife. Rather, the other “take” terms like “harass,” “hunt,” “trap,” “kill,” or “pursue” all involved the direct application of physical force to the animal.<sup>255</sup> This principle of statutory construction, known as *nocitur a sociis*, demands that a general term appearing in a list not be given an overly expansive interpretation in light of the other terms that accompany it.<sup>256</sup> Thus, a term is properly defined by “the company it keeps.”<sup>257</sup>

In a separate concurring opinion, Chief Circuit Judge Mikva rejected the Chapter’s *nocitur a sociis* argument. The Chief Judge observed that other terms in the “take” definition, namely “harass,” may be expanded in a manner limiting the use of private property.<sup>258</sup> Judge Mikva also found

252. *See id.*

253. On the question of the Chapter’s statutory challenge to the regulatory definition of “harm,” the District of Columbia Circuit Court upheld the regulation per curiam with two concurrences by Chief Circuit Judge Mikva and Judge Williams, while Judge Sentelle dissented as to this portion of the opinion. *Id.* at 8-13.

254. *See Sweet Home II*, 1 F.3d at 10-11 (Mikva, C.J. and Williams, J., concurring separately).

255. *See id.* at 10.

256. *Id.* (citing *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)).

257. *Id.*

258. *Id.* In dismissing this argument, the Chief Judge reasoned that: “Despite appellants’ suggestions, however, the other prohibitions can limit a private landowner’s use of land in a rather broad manner. In particular, the prohibition against “harassment” can be used to suppress activities that are in no way intended to injure an endangered species.” *Sweet Home II*, 1 F.3d at 10.

Chief Judge Mikva bolstered his position by pointing to a House of Representatives Report considering the “take” definition which “includes harassment, whether intentional or not. This would allow, for example, the Secretary to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young.” *Id.* (quoting H.R. REP. NO. 412, *supra* note 154, at 11).

Indeed, Judge Mikva, in supporting his contention, points out that the definition of “harass” is nearly as broad as the definition of “harm,” and yet, this definition has not been

strong support for his position from Congress' inclusion of "incidental take" exceptions in the 1982 amendments.<sup>259</sup>

In a separate concurrence, Judge Williams focused exclusively on the *nocitur a sociis* doctrine, finding the Chapter's claim much more persuasive than did Judge Mikva.<sup>260</sup> Judge Williams, while nearly willing to concede to this argument, nevertheless upheld the regulation as valid solely on the basis of the 1982 amendments to the ESA.<sup>261</sup> By allowing permits for the "incidental taking" of endangered species, Congress was implicitly admitting that such indirect takings were otherwise prohibited under section 9. But for this amendment, Judge Williams was fully prepared to join in Judge Sentelle's dissenting opinion, accepting the Chapter's *nocitur a sociis* analysis.

In his dissent, Judge Sentelle did accept this theory and called for the invalidation of the "harm" regulation.<sup>262</sup> Judge Sentelle likened the Secretary's reading of "harm" to an overzealous enforcement of a "No Smoking" ordinance:

In my view, the fact that the farmer may be indirectly harming wildlife, and that the statutory definition includes "harm" helps the agency's cause but little. To analogize again to the smoking proposition, if Congress authorized the erection of "No Smoking" signs in public buildings and thereafter defined smoking to "include lighting, burning, puffing, inhaling, and otherwise harmfully employing the noxious nicotine-bearing tobacco products," some zealous bureau might well attempt to define smoking to include chewing and spitting under the rubric of "harmful use" in Congress' definition of smoking. . . . I do not think those creative regulators would be thinking reasonably if they should do so, nor do I think the regulators act reasonably in the present case.<sup>263</sup>

Judge Sentelle further based his decision on the notion that "harm" as defined violated the canon of statutory construction that directs a court to

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challenged. *Id.*

259. *Id.*

260. *Id.* at 11 (Williams, J., concurring).

261. *Sweet Home II*, 1 F.3d at 11. Judge Williams began his concurrence by stating: "I agree that the 'harm' regulation, 50 C.F.R. § 17.3, complies with the Endangered Species Act—but *only* because of the 1982 amendments to the ESA." *Id.*

262. *Id.* at 12 (Sentelle, J., dissenting).

263. *Id.*

presume the statute to read in a manner that avoids “surplusage.”<sup>264</sup> While “harm” may be defined to include any “act which actually kills wildlife,” including habitat modification, this definition, in Judge Sentelle’s opinion, renders the other terms found in the “take” definition mere surplusage, since they all cover acts which actually kill wildlife.<sup>265</sup>

In *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt* (*Sweet Home III*), the Chapter petitioned the District of Columbia Circuit Court of Appeal for rehearing on the validity of the regulatory “harm” definition.<sup>266</sup> Without the benefit of further oral argument or additional briefs, the circuit court per Judge Williams granted the Chapter’s petition for rehearing solely on the statutory challenge to the “harm” regulation.<sup>267</sup> Judge Sentelle’s opinion prevailed on rehearing, and the decision was partially modified, holding the regulation invalid.<sup>268</sup>

The Secretary repeatedly argued that the Act, as originally adopted, supported this expansive reading of “harm” within the context of the “take” definition. In the alternative, the government pointed to the 1982 Amendments to the ESA and the inclusion of “incidental take” permits as evidence of Congress’ implicit ratification of this definition. Neither contention was successful.<sup>269</sup>

Writing for the panel, Judge Williams immediately recognized as indisputable the inherent breadth of the term “harm.”<sup>270</sup> The United States Supreme Court’s opinion in *Lucas v. South Carolina Coastal Council* was cited as an illustration of the potential for an overly-broad reading of the term.<sup>271</sup> In *Lucas*, the Court, per Justice Scalia, engaged in a mental exercise attempting to discern the line between those regulations that actually prevent harm as opposed to merely conferring a benefit.<sup>272</sup> As a

264. *Id.* at 13.

265. *Sweet Home II*, 1 F.3d at 13.

266. 17 F.3d 1463-64 (D.C. Cir. 1994).

267. *Id.*

268. *Id.* However, Chief Judge Mikva criticized the majority for granting this rehearing and for its reversal without the benefit of additional briefs or oral argument tailored to this single issue. *Id.* at 1473.

269. *Id.* at 1464.

270. *Sweet Home III*, 17 F.3d at 1464.

271. *Id.* (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992)).

272. Too often, this “harm prevention” rationale is used to confer benefits upon the public at large in the guise of preventing use of private property that is noxious to adjacent property owners. Any given restraint may well be seen by some as mitigating a “harm” to the adjacent parcels or securing a benefit for them, depending on how the restraint is perceived and the importance of the use evaluated. *Lucas*, 505 U.S. at 1026-27 (citing

matter of pure linguistic possibility, Judge Williams pointed to *Lucas* for the proposition that the withholding of a benefit may easily be recast into the infliction of a harm:

In one sense of the word, we “harm” the people of Somalia to the extent that we refrain from providing humanitarian aid, and we harm the people of Bosnia to the extent that we fail to stop “ethnic cleansing.” By the same token, it is linguistically possible to read “harm” as referring to a landowner’s withholding of the benefits of a habitat that is beneficial to a species. A farmer who harvests crops or trees on which a species may depend harms it in the sense of withdrawing a benefit; if the benefit withdrawn be important, then the Service’s regulation sweeps up the farmer’s decision.<sup>273</sup>

The panel’s use of dicta extracted from Justice Scalia’s *Lucas* opinion to fashion an interpretation of “harm” under the ESA suffers from changing context. The distinction between “benefit conferring” and “harm preventing” is a reference to the proper scope of the state’s exercise of its inherent authority under the police power.<sup>274</sup> However, the case at bar involved the interpretation of a federal statute by an administrative agency. No police power concerns of the type dealt with in *Lucas* were implicated.

Notwithstanding the foregoing, Judge Williams perceived a need to limit the interpretation of “harm” and guard against its apparent propensity

Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 49 (1964).

273. *Sweet Home III*, 17 F.3d at 1464-65.

274. *Lucas*, 505 U.S. at 1024. The “prevention of harmful use” was merely an earlier statement of the police power justification necessary to sustain the regulation of the use of property in order to prevent the noxious use of private property: “One could say that imposing a servitude on Lucas’ land is necessary in order to prevent his use of it from ‘harming’ South Carolina’s ecological resources; or instead, in order to achieve the benefits of an ecological preserve.” *Id.* Judge Williams, in his analysis, has very likely seized upon language found in footnote 11 of the *Lucas* opinion:

In the present case, in fact, some of the “[South Carolina] legislature’s ‘findings’” to which the South Carolina Supreme Court purported to defer in characterizing the purpose of the Act as “harm preventing,” seem to us phrased in “benefit conferring” language instead. For example, they describe the importance of a construction ban in enhancing “South Carolina’s annual tourism industry revenue,” in “providing habitat for numerous species of plants and animals, several of which are threatened or endangered,” and in “providing a natural healthy environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well being . . . .”

*Id.* at 1024 n.11 (citations omitted) (alteration in original).

for misuse. This was accomplished by reading “harm” in light of the other terms that accompany it in the definition of “take” under section 9:

The immediate context of the word [“harm”], however, argues strongly against any such broad reading. With the single exception of the word “harm,” the words of the definition contemplate the perpetrator’s direct application of force against the animal taken: “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect.” The forbidden acts fit, in ordinary language, the basic model “A hit B.”<sup>275</sup>

Any term that extends “take” beyond the direct application of physical force to the animal taken, in the panel’s view, exceeds Congress’ intentions. This includes the words “harm” and “harass.”<sup>276</sup>

Judge Williams reasoned that all of the terms found in the “take” definition contemplate the direct application of physical force, though this force need not be exerted by a bullet or a blade.<sup>277</sup> Some of the terms like “pursue” do not actually result in injury, capture, or death, but are nevertheless included by reason of the definition’s reference to “attempted takings.”<sup>278</sup> Others, like “trap,” may occur through the planned release of physical force upon the animal at a future time, even in the absence of the perpetrator.<sup>279</sup> Still, all instances of “taking” a species involve the application of physical force under the panel’s view.

In the prior appellate decision, Judge Mikva had dismissed this argument relying on the term “harass.”<sup>280</sup> Since another term in the “take” definition could encompass activities lacking any direct application of physical force, Judge Mikva determined that “harm” was not drawn in

275. *Sweet Home III*, 17 F.3d at 1465.

276. *Id.*

277. *Id.*

278. *Id.* Recall that the definition of “take” includes “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” Pub. L. No. 93-205, § 16, 87 Stat. at 903 (current version at 16 U.S.C. § 1532(19)) (emphasis added).

279. *Sweet Home III*, 17 F.3d at 1465.

280. *Sweet Home II*, 1 F.3d at 10. In his concurring opinion, Chief Judge Mikva dismissed the Chapter’s *nocitur a sociis* claim noting that “[d]espite appellants’ suggestions, however, the other prohibitions can limit a private landowner’s use of his land in a rather broad manner. In particular, the prohibition against “harassment” can be used to suppress activities that are in no way intended to injure an endangered species.” *Id.* Judge Mikva went on to quote the Secretary’s definition of harass, illustrating the similarities between the definition of “harass” and that of “harm.” *Id.*



impermissibly broad terms.<sup>281</sup> This earlier statement was contradicted by Judge Williams who concluded that “harass” also involved physical force directed at the individual animal.<sup>282</sup> For example, aiming light or sound at an animal may constitute “harassment.” This, too, is a physical force under the panel’s analysis, as the particles and waves that comprise the light and sound constitute physical forces being propelled at the animal by the perpetrator.<sup>283</sup>

Judge Williams, in supporting his narrow construction of “harass,” also referred to the restrictive meaning of the term as used in the Marine Mammal Protection Act (“MMPA”).<sup>284</sup> In *United States v. Hayashi*,<sup>285</sup> the perpetrator was prosecuted and convicted for “taking” a marine mammal in violation of the MMPA.<sup>286</sup> Hayashi allegedly “harassed” a pod of porpoises by firing a rifle twice into the water behind the animals.<sup>287</sup> The Ninth Circuit Court of Appeals, using a *nocitur a sociis* argument, ascribed a much more restrictive meaning to “harass” under the MMPA’s prohibition against “takings”:

The statute groups “harass” with “hunt,” “capture,” and “kill” as forms of prohibited “taking[s].” The latter three each involve direct, sustained, and significant intrusions upon the normal, life-sustaining activities of a marine mammal; killing is a direct and permanent intrusion, while hunting and capturing cause significant disruptions of a marine

281. *Id.*

282. *Sweet Home III*, 17 F.3d at 1465.

283. *Id.*

284. *Id.* The MMPA includes an “anti-take” provision:

There shall be a moratorium on the taking and importation of marine mammals and marine mammal products, commencing on the effective date of this chapter, during which time no permit may be issued for the taking of any marine mammal and no marine mammal or marine mammal product may be imported into the United States . . . .

16 U.S.C. § 1371(a) (1994). The MMPA in turn states that “[t]he term ‘take’ means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture or kill any marine mammal.” *Id.* § 1362(13) (1994).

285. 5 F.3d 1278 (9th Cir. 1993).

286. *Id.* at 1279. An April 22, 1991 information charged Hayashi with knowingly taking a marine mammal in violation of the MMPA, and Hayashi was subsequently convicted by a district court judge in July of that same year. *See id.* (providing a recount of the proceedings below).

287. Hayashi and his son, commercial tuna fishermen in Hawaii, were retrieving their catch when a pod of porpoises began to eat the captured tuna before they could be landed. Hoping to frighten the porpoises away from their catch, Hayashi fired two rifle shots into the water behind the animals. The shots did not hit the porpoises. *Id.*

mammal's natural state. Consistent with these other terms, "harassment" to constitute a "taking" under the MMPA, must entail a similar level of direct and sustained intrusion.<sup>288</sup>

Like the term "harass" as used in the MMPA, the ESA's definition of "take" similarly aligns "harass" with other verbs lacking in the concept of habitat modification that all involve direct applications of force.<sup>289</sup>

The use of the MMPA in the panel's decision is problematic for two reasons. First, *Hayashi* was decided by the Ninth Circuit Court of Appeals—the very same court that decided the *Palila* cases. It would be logical to conclude that the appellate court saw something in the ESA that was not present in the MMPA. Nowhere in *Hayashi* was *Palila* ever questioned or reversed, *Hayashi* certainly cannot stand for that proposition.<sup>290</sup> Nevertheless, *Hayashi* has been used in precisely this manner by directly questioning the interpretation of the ESA in *Palila*.

More significantly, there is a substantial difference between the MMPA and the ESA. The MMPA is almost devoid of the congressional concerns for habitat loss that predominates the ESA.<sup>291</sup> The exigencies leading to the adoption of the two statutes are highly dissimilar. Congress, in enacting the ESA, ranked habitat loss or degradation as the primary cause of the extinction crisis.<sup>292</sup> Yet, the predominant threat to marine mammals

288. *Id.* at 1282 (relying on Third Nat'l Bank in Nashville v. Impac Ltd., 432 U.S. 312, 322 (1977)). The Ninth Circuit Court of Appeals applies the "familiar principle" that words grouped together in a list should be given related meaning. *Hayashi*, 5 F.3d at 1282.

289. See *Sweet Home III*, 17 F.3d at 1465.

290. Nowhere in either the majority opinion or the dissent in *Hayashi* does the *Palila* line of cases even earn mention. However, many of the same arguments found in *Sweet Home V* are presented in the *Hayashi* opinion. See generally *Babbitt v. Sweet Home Chapter of Communities for a Great Or. (Sweet Home V)*, 115 S. Ct. 2407 (1995).

291. In contrast to the prominent position occupied by habitat in Congress' findings in the ESA, 16 U.S.C. § 1531(b), the MMPA contains only the following broad congressional finding:

(2) such species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population. Further measures should be immediately taken to replenish any species or population stock which has already diminished below that population. In particular, efforts should be made to protect essential habitats including the rookeries, mating grounds, and areas of similar significance for each species of marine mammal from the adverse effect of man's actions. . . .

16 U.S.C. § 1361(2) (1994).

292. See *supra* note 20.

addressed by the MMPA was the hunting, capture, and commerce in those species.<sup>293</sup> Indeed, Congress, in enacting the MMPA, has arguably left habitat protection concerns to the states.<sup>294</sup>

In spite of these issues, Judge Williams was able to circumvent Judge Mikva's previous opinion, isolating "harm" from the rest of the terms defining "take."<sup>295</sup> Judge Williams concluded that the word is indeed drawn in impermissibly broad terms, deeming the application of *nocitur a sociis* necessary to avoid giving the term "harm" a breadth unintended by Congress.<sup>296</sup> Judge Williams, in turn, denounced the Secretary's construction of the "take" definition and its inclusion of habitat modification as a form of harm.<sup>297</sup> He also adopted the Chapter's previously rejected claim that Congress intended to address the habitat problem on private property through habitat acquisition and not through the prohibitions of section 9.<sup>298</sup> This construction of the Act, in his view, reflected Congress' desire to place the primary duty of conserving habitat with the federal government.<sup>299</sup> Thus, the Secretary's reading contravened this objective by assigning the duty to preserve habitat to private landowners.<sup>300</sup>

Regarding the effect of the 1982 Amendments to the ESA, Judge Williams repudiated his former concurring opinion, holding that the

293. The MMPA is replete with provisions regarding the harvest and commerce of marine mammals and marine mammal products, while otherwise remaining silent on habitat concerns. See generally 16 U.S.C. §§ 1361-1406 (1994).

294. In discussing the scope of the MMPA's federal preemption of state law, the House issued the following explanation:

[Subsection (b)] authorizes the Secretary [of Commerce] to develop effective working cooperative arrangements with state agencies and officials in order to carry out the purposes of this Act. *It is not the intention of this Committee to foreclose effective state programs and protective measures such as sanctuaries; it is rather our intention to allow development of a unified integrated system of management for the benefit of these animals and to encourage the states to take all actions which are consistent with this objective.*

H.R. REP. NO. 707, 92d Cong., 1st Sess. 28 (1971), microformed on CIS No. 71-H563-25 (Congressional Info. Serv.) (emphasis added).

295. Judge Mikva's disagreement with the Chapter's *nocitur a sociis* argument relies heavily on his conclusion that "harm" is not the only term in the "take" definition applying § 9 to habitat modification and other indirect impacts. *Sweet Home II*, 1 F.3d at 10.

296. *Sweet Home III*, 17 F.3d at 1465-66.

297. *Id.* at 1466.

298. *Id.* Judge Williams recognizes that the ESA addresses habitat preservation in two ways—through the federal land acquisition program of § 5 and through the § 7(a)(2) directive to federal agencies to avoid adverse impacts. *Id.*

299. *Id.* at 1466.

300. *Sweet Home III*, 17 F.3d at 1466.

inclusion of so-called "incidental take" permits, in amending section 10(a), could not stand for the proposition that Congress had ratified the broad reading of section 9, as advocated by *Palila* and by the Secretary's regulation.<sup>301</sup> Newly added section 10(a)(1)(B) of the ESA authorized the FWS to issue permits for "any taking otherwise prohibited" by section 9, if such taking is incidental to an otherwise lawful purpose.<sup>302</sup> It did not follow, Judge Williams reasoned, that such incidental takings included habitat modifications.<sup>303</sup>

An incensed Chief Circuit Judge Mikva denounced the panel's opinion, reasoning, and effect:

The majority decision in this case is unfortunate. It scuttles a carefully conceived Fish and Wildlife Service ("FWS") regulation and creates a split in the circuits on an important statutory question. . . . What was

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301. *Id.* at 1467. Judge Williams recognizes two possible implications resulting from the 1982 amendments and ultimately rejects both:

First, one might argue that one of the amendments so altered the context of the definition of "take" so as to render the Service's interpretation reasonable, or even, conceivable, to reflect express congressional adoption of that view. Second, one might argue that the process of amendment, which brought the Service's regulation and a judicial endorsement to the attention of a congressional subcommittee, constituted a ratification of the regulation. We reject both theories.

*Id.*

302. *Id.* (citing Pub. L. No. 93-205, § 16, 87 Stat. at 903 (current version at 16 U.S.C. § 1539(a)(1)(B)).

303. *Id.* Judge Williams rebuts previous claims that the 1982 amendments served as a ratification of *Palila* and the Secretary's regulation by focusing on the House Conference Reports relied upon by the Government in the principle case, and by the district court below:

This provision is modeled after a *habitat conservation plan* that has been developed by three Northern California cities, the County of San Mateo, and private landowners and developers to provide for the conservation of the habitat of three endangered species and other unlisted species of concern within the San Bruno Mountain area of San Mateo County.

This provision will measurably reduce conflicts under the Act and will provide the institutional framework to permit cooperation between the public and private sectors in the interest of endangered species and *habitat conservation*.

The terms of this provision require a unique partnership between the public and private sectors in the interest of species and *habitat conservation*. . . .

*Sweet Home III*, 17 F.3d at 1468 (quoting H.R. CONF. REP. NO. 835, 97th Cong., 2d Sess. 30-31 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2871-72). The focus in these reports, reasoned Judge Williams, is on the flexibility of the relief available under this new section. However, this alone, under his view, does not imply an assumption that "takings" under § 9 encompass habitat degradation. *Id.*

rightly considered good law in the opinion in this case issued last year, . . . is now “altered” on the basis of a confusing and misguided legal analysis that creates a needless conflict among the circuits. I dissent.<sup>304</sup>

In his detailed dissent, the Chief Judge’s most telling criticism of the majority opinion is what he deemed the majority’s apparent decision to “jettison” the *Chevron* standard.<sup>305</sup> Specifically, he charged that the majority opinion invalidated the Fish and Wildlife Services’ definition because it was neither “clearly authorized by Congress” nor a reasonable and permissible interpretation of the Act. By shifting to the agency the burden of defending the reasonableness of its interpretations, Judge Mikva insisted that the panel’s decision conflicted with *Chevron*, which defers to agency interpretations, unless proven unreasonable or contrary to clearly stated congressional intent. Indeed, as the Chief Judge recognized, deference is the whole point of the *Chevron* standard.<sup>306</sup> This position would ultimately prevail among the Justices of the United States Supreme Court.

In *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt* (*Sweet Home IV*), the Government quickly petitioned the appellate court for a rehearing, suggesting a rehearing en banc.<sup>307</sup> This petition was denied on August 12, 1994.<sup>308</sup> Over a dissent by Chief Judge Mikva and three other circuit judges, Judge Williams, writing for the panel, denied the petition.<sup>309</sup> Judge Williams concluded that the Secretary’s definition of “harm” created serious overlap problems between the various provisions of the statute.<sup>310</sup> Specifically, section 7’s prohibition against the adverse modification of critical habitat would be entirely superseded by the Secretary’s ability to bar habitat modification under section 9.<sup>311</sup> Judge

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304. *Id.* at 1473 (Mikva, C.J., dissenting) (citation omitted).

305. *Id.*

306. *Id.* at 1467.

307. 30 F.3d 190 (D.C. Cir. 1994).

308. *Id.* at 191.

309. Chief Judge Mikva was joined by Circuit Judges Wald, Silberman, and Rogers in dissenting from the majority’s denial of the hearing en banc. *Id.* at 191. Silberman filed a separate dissenting opinion. *Id.* at 194 (Silberman, J. dissenting).

310. *Id.* at 192.

311. *Sweet Home IV*, 30 F.3d at 192 (citing MICHAEL J. BEAN, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 397 (1977)).

Williams also leveled criticism at the regulation's apparent inclusion of omissions that actually kill or injure wildlife.<sup>312</sup>

### I. *The Circuits Split—Harsh Reactions to Sweet Home in the Ninth Circuit Court of Appeals*

Chief Circuit Judge Mikva's predictions proved correct.<sup>313</sup> *Sweet Home*, as decided on rehearing, created a sharp split in position between the District of Columbia Circuit and the Ninth Circuit Court of Appeals, with the latter remaining true to the *Palila* line of cases.

Less than a month after the final rehearing of *Sweet Home*, the Ninth Circuit Court of Appeals decided *National Wildlife Federation v. Burlington Northern Railroad*.<sup>314</sup> In that case, the Ninth Circuit restated its *Palila II* decision, citing to it for authority.<sup>315</sup> *Sweet Home* was not mentioned.

A few months later, still in the Ninth Circuit Court of Appeals, the District Court for the Western District of Washington was asked to follow *Sweet Home* in lieu of *Palila II*.<sup>316</sup> This request was emphatically denied:

The argument that *Sweet Home* is now binding in the Ninth Circuit, however, is incorrect. Differences among the circuits are common, and the District of Columbia Circuit has no power to overrule another circuit's decision. . . .

Here, a contrary conclusion has already been reached by the court of appeals whose rulings are binding on this court. The *Palila* case, upholding the FWS regulation, is the law of the Ninth Circuit until and unless changed by the Supreme Court or by the circuit itself.

It follows that the Secretaries did not act arbitrarily, or contrary to law, in concluding that *Sweet Home* requires no change in the [Record of Decision adopting the Management Plan]. If *Palila* ceases to be the law of the circuit, either because of Supreme Court review of *Sweet*

312. *Id.* at 191.

313. In dissenting to Judge Williams' reversal of the district court on rehearing, Chief Judge Mikva warned that the decision would create an unnecessary split in the circuits. See *Sweet Home III*, 17 F.3d at 1473 (Mikva, C.J., dissenting).

314. 23 F.3d 1508 (9th Cir. 1994). *Burlington Northern* involved several collisions between threatened grizzly bears and freight trains operated by the defendants. A series of accidental corn spills from railroad cars in northwestern Montana had attracted the bears to the tracks where seven grizzly bears were ultimately struck and killed by trains. *Id.* at 1509.

315. *Id.* at 1512-13.

316. *Seattle Audobon Soc'y v. Lyons*, 871 F. Supp. 1291, 1312 (W.D. Wash. 1994).

Home or otherwise, the administrative decision under review will have to be reconsidered.<sup>317</sup>

This reaction was echoed a few months later in the Northern District of California in *Marbled Murrelet (Brachyramphus marmoratus) v. Pacific Lumber Co.*<sup>318</sup> The division among the federal circuits would only deepen.

#### IV. THE SUPREME COURT STEPS IN—*BABBIT V. SWEET HOME* CHAPTER OF COMMUNITIES FOR A GREAT OREGON

The United States Supreme Court, recognizing a growing split between the federal circuits, granted the Secretary's petition for a writ of certiorari and agreed to hear *Babbit v. Sweet Home Chapter of Communities for a Great Oregon (Sweet Home V)*<sup>319</sup> on January 6, 1995.<sup>320</sup> The Supreme Court reversed the District of Columbia Circuit Court in a six-to-three vote.<sup>321</sup> Justice Stevens, joined by Justices Kennedy, Souter, O'Connor, Ginsberg, and Breyer, upheld the Secretary's regulatory definition of "harm."<sup>322</sup> Justice O'Connor filed a separate concurring opinion, and Justice Scalia, joined by Justice Thomas, and Chief Justice Rehnquist dissented.<sup>323</sup>

Writing for the majority, Justice Stevens deemed certain initial assumptions to be appropriate in sufficiently framing the legal issue for the Court.<sup>324</sup> First, he assumed that the members of the Chapter had no wish to harm either the red-cockaded woodpecker or the Northern spotted owl.<sup>325</sup> The various economic interests challenging this regulation only desired a continuation of their logging activities.<sup>326</sup> Justice Stevens similarly assumed *arguendo* that these logging activities would nevertheless have the unintended effect of injuring or killing some members of these

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317. *Id.* at 1313.

318. 880 F. Supp. 1343, 1345 n.2 (N.D. Cal. 1995).

319. 115 S. Ct. 2407 (1995).

320. *Id.* at 2409.

321. *Id.*

322. *Id.*

323. *Id.* at 2418, 2421.

324. *Sweet Home V*, 115 S. Ct. at 2412. Justice Stevens attributed the propriety of these assumptions to the fact that this case was originally decided on cross motions for summary judgment. *Id.*

325. *Id.*

326. *Id.*

listed species through the degradation of their habitat.<sup>327</sup> He then reduced the controversy to its essence:

Under [the Chapter's] view of the law, the Secretary's only means of forestalling that grave result [as described above]—even when the actor knows it is certain to occur—is to use his [section] 5 authority to purchase the lands on which the survival of the species depends. The Secretary, on the other hand, submits that the [section] 9 prohibition on takings, which Congress defined to include “harm,” places on respondents a duty to avoid harm that habitat alteration will cause the birds unless respondents first obtain a permit pursuant to [section] 10.<sup>328</sup>

In selecting the latter view and holding the Secretary's interpretation of the ESA to be a reasonable one, Justice Stevens offered three principal justifications: the ordinary understanding of the terms used in defining “take,” the ESA's broad objectives and purposes, and the 1982 Amendments all supported the Secretary's interpretation.<sup>329</sup>

#### A. *The Secretary's Interpretation is Supported by the Ordinary Usage of the Word “Harm”*

The *Sweet Home V* majority's first justification for upholding the Secretary's “harm” regulation was based on the “ordinary understanding” of the term. Both sides briefed the Court at length on the true meaning of “harm” as it appears in the ESA; the majority selected the interpretation that comported with the overall intent of the Act's purposes. The Chapter contended that the improper breadth of the Secretary's definition was owed in part to an abstract consideration of the term taken entirely out of context:

When read in its statutory context, “take” necessarily involves action directed at wildlife. It thus cannot be stretched to cover the types of ordinary land use activities of concern to Respondents, such as cutting trees, clearing brush, or constructing or maintaining roads. . . .

In so concluding, the court below recognized, and we concede, that the word “harm,” wrenched from its context and considered abstractly, is a word of extraordinary elasticity, arguably capable of the meaning FWS attributes to it.<sup>330</sup>

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327. *Id.*

328. *Sweet Home V*, 115 S. Ct. at 2412.

329. *Id.* at 2412-23.

330. Brief for Respondents at 9, *Babbitt* (No. 94-859).



The Chapter reasoned that, when read out of context from the rest of the ESA “take” definition, “harm” could and was being used to prohibit any action that might produce any type of negative impact on a listed animal.<sup>331</sup> This, the Chapter argued, permitted the Secretary to refer to acts or omissions that deprived wildlife of some environmental benefit, such as a suitable habitat, as “harm” to the species.<sup>332</sup> Moreover, the Secretary’s interpretation was not limited to activity or conduct purposefully directed at injuring in a manner to which the term “harm” normally implies.<sup>333</sup> Thus, by focusing exclusively on the ultimate effect on the animal, while simultaneously disregarding the character of the conduct prohibited under section 9, the Chapter concluded that the regulation easily encompassed many normal activities that are neither directed at wildlife nor cause any concrete injury to that wildlife.<sup>334</sup> This, the Chapter insisted, countermanded section 9 as written.<sup>335</sup>

Conversely, the Government argued that the Secretary’s interpretation did comport with “ordinary usage”:

In ordinary usage, the word “harm” in its verb form, means “to cause hurt or damage to: INJURE,” or “to do or cause harm to: injure; damage; hurt[.]” This common understanding of the word unquestionably encompasses an act that actually “kills or injures wildlife”—the

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331. In particular, the Chapter took issue with the fact that the regulation does not demand “actual physical injury” to an identifiable animal. *Id.* at 8. Rather, “harm” may consist of the impairment of essential behavioral patterns resulting from significant habitat modification. See 50 C.F.R. § 17.3. Given the uncertainty in evaluating whether a particular habitat modification will significantly impair essential behavioral patterns, the Chapter contended that the “harm” regulation as written and as enforced by the Secretary has resulted in an improperly pervasive land use control. See Brief for Respondents at 8 n.9, *Babbitt* (No. 94-859).

332. Brief for Respondents at 9, *Babbitt* (No. 94-859). This argument is, of course, the analysis used by Judge Williams in the court below. See *Sweet Home III*, 17 F.3d at 1464; see also text accompanying notes 253-57.

333. Brief for Respondents at 9, *Babbitt* (No. 94-859). The Chapter insisted that the term “harm” generally connotes a purposeful effort to injure:

The command, “Don’t harm that child!”, for example, would not naturally be thought of as a directive to restrict the child’s television-watching or candy intake, even though either in excess would cause the child “harm.” In active voice, or in a prohibitory sense—as in ESA [§§] 3(19) and 9(a)(1)—“harm” is commonly understood to convey a sense of purposeful effort and direct, concrete injury.

*Id.*

334. *Id.* at 7.

335. *Id.*

basic definition of "harm" in the first sentence of 50 C.F.R. [section] 17.3.<sup>336</sup>

Thus, the Government asserted that the basic definition of "harm," that is, conduct that "actually kills or injures wildlife," is a sound one supported by the word's ordinary usage.<sup>337</sup> This basic definition, the Government noted, was not what was attacked in the lower courts. Rather, the Chapter has challenged the validity of the second sentence of the regulation, which specifies that "harm" may include those activities that, while satisfying the original definition by actually killing or injuring wildlife, nevertheless occur through significant habitat modifications that impair essential behavioral patterns such as breeding, feeding, and sheltering.<sup>338</sup> This second sentence, in the Secretary's view "merely elaborates on the basic definition in the first sentence by explaining its application in one particular context."<sup>339</sup>

The Secretary's view ultimately prevailed on Justice Stevens and the majority in *Sweet Home V*. First, the majority adopted the Secretary's "ordinary usage" analysis in rejecting the Chapter's assertions that "harm" must be limited to "purposeful, direct" injury.<sup>340</sup> Justice Stevens could find no reference in the common definition of the word "harm" suggesting in any way that only direct and willful action leading to injury may constitute "harm."<sup>341</sup> Additionally, the holding pointed to the structure of the ESA's "take" definition in an apparent response to the Chapter's charge that the term's elastic definition is owed to the Secretary's attempt to read

336. Brief for Petitioners at 20-21, *Babbitt* (No. 94-859) (citations omitted) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1034 (1986); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 873 (2d ed. 1987)).

337. *Id.* at 21.

338. *Id.* (citing 50 C.F.R. § 17.3). The Government subdivided the "harm" regulation into two distinct components. The first component is the basic definition of "harm" as expressed in the initial sentence of the regulation: "Harm in the definition of 'take' in the Act means an act which actually kills or injures wildlife." 50 C.F.R. § 17.3 (1994). The second component of the regulation is the explanatory sentence which comprises the remainder of the Secretary's definition: "Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." *Id.* The Secretary contended that, given the soundness of the basic definition, this second sentence is also valid, since it includes only those significant habitat modifications that meet the basic definition—those that actually kill or injure wildlife. Brief for Petitioner at 21, *Babbitt* (No. 94-859).

339. Brief for Respondents at 21, *Babbitt* (No. 94-859).

340. *Sweet Home V*, 115 S. Ct. at 2413.

341. *Id.*

the term out of its context in the Act. To admit the Chapter's contentions and limit "harm" to direct injuries only would, in the majority's opinion, deprive the term of any independent meaning and reduce "harm" to little more than statutory surplusage.<sup>342</sup> The opinion concluded that a reluctance to reach such a result supported the reasonableness of the Secretary's interpretation.<sup>343</sup>

B. *The Broad Purpose of the ESA Supports the Reasonableness of the Secretary's Interpretation of "Harm"*

The second justification offered by the majority in upholding the Secretary's interpretation as reasonable was the broad objectives Congress apparently sought to realize through the ESA:

Second, the broad purpose of the ESA supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid. In *TVA v. Hill*, we described the Act as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."<sup>344</sup>

Thus, the Act and its legislative history are replete with references to habitat protection and the role played by the threat of habitat loss in the ongoing extinction crisis.<sup>345</sup>

These sentiments echoed the Secretary's position that a contrary interpretation of "harm," limiting the term to "physical blows to the body of individual animals," would defeat Congress' wishes.<sup>346</sup> Pointing to an oft-quoted passage from the legislative history of the Act, the Secretary pointed out that it was Congress' intent that "take" be "defined . . . in the broadest possible manner to include every conceivable way in which a person could 'take' or attempt to 'take' any fish or wildlife."<sup>347</sup>

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342. *Id.* Unless "harm" is read to encompass indirect as well as direct injury, Justice Stevens concluded that the word would have no meaning that is not mere duplication of the other terms used to define "take" in § 3(19). *Id.*

343. *Id.* (citing *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 n.11 (1988)).

344. *Sweet Home V.*, 115 S. Ct. at 2413 (citation omitted).

345. *See id.*

346. Brief for Petitioners at 27, *Babbitt* (No. 94-859).

347. *Id.* (citing S. REP. NO. 307, *supra* note 3, at 7, *reprinted in* 1973 U.S.C.C.A.N. at 2995).

By contrast, the Chapter insisted that the Secretary's reading of "harm" countermanded the plain intent of Congress:

If Congress had meant "harm" to have such significance, it would have made the operative term in the statute "harm" instead of "take"—or found some other way to highlight ESA [section] 9's intended breadth. Instead, Congress cast the section more narrowly, as a prohibition on "take," and quietly placed the word "harm" in a list alongside nine other terms in the definitional section.<sup>348</sup>

If Congress had wished to reach the use of private property through section 9's "take" provision, the Chapter vigorously asserted that "it would have addressed the matter forthrightly."<sup>349</sup> Given Congress' keen awareness of the threat of habitat loss, the absence of any explicit reference to habitat in section 9 was a significant fact for the Chapter, for it served only to emphasize Congress' conscious decision to address habitat loss elsewhere in the Act.<sup>350</sup>

The Secretary's view ultimately prevailed upon the majority in *Sweet Home V.*<sup>351</sup> Harkening back to the Court's 1978 opinion in *TVA v. Hill*, the majority underscored the comprehensive nature of the Act's protective goals:

Both our holding and the language in our opinion [in *TVA v. Hill*] stressed the importance of the statutory policy. "The plain intent of Congress in enacting this statute," we recognized, "was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute."<sup>352</sup>

Section 9 was no different. Although the Court in *TVA v. Hill* dealt primarily with the prohibitions of section 7, *Hill* took particular note of the Secretary's inclusion of habitat degradation in its definition of "harm" under section 9.<sup>353</sup>

The Chapter's arguments for the impermissibility of the Secretary's definition failed to persuade the Court. The majority was instead swayed

348. Brief for Respondents at 22, *Babbitt* (No. 94-859) (citation omitted).

349. *Id.*

350. *Id.* at 22-23.

351. *Sweet Home V.*, 115 S. Ct. at 2407.

352. *Id.* at 2413 (citing *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978)).

353. *Hill*, 437 U.S. at 184-85; see also *supra* text accompanying notes 41-47.

by the comprehensive protection provided under the ESA, finding the Secretary's interpretation permissible in light of this protection.

C. *The 1982 Amendments to the ESA Support the Reasonableness of the Secretary's Interpretation*

Finally, the Court examined the 1982 amendments to the ESA to bolster its reading of the Act.<sup>354</sup> Added to the ESA in 1982, section 10(a)(1)(B) authorized the Secretary to issue permits allowing "takings" otherwise prohibited under section 9 so long as "such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."<sup>355</sup> The majority stated that this additional exemption to section 9's prohibitions, "strongly suggests that Congress understood [section] 9(a)(1)(B) to prohibit indirect as well as deliberate takings."<sup>356</sup>

The Chapter contended that "incidental" take permits were designed with inadvertent or accidental takings in mind.<sup>357</sup> Absent such a provision, a trapper who intends to capture an unlisted species, but inadvertently traps and injures a listed one, would be guilty of violating section 9.<sup>358</sup> A commercial fisherman whose otherwise lawful trawl nets intended for shrimp inadvertently ensnares an endangered sea turtle would similarly violate section 9 without this provision.<sup>359</sup> "Incidental" takings, as understood by the Chapter, must only be those actions directed at unprotected wildlife, which accidentally "take" a listed species.<sup>360</sup>

The Secretary's view on the true effect of the "incidental" take permit stood at variance with the Chapter's position. As the House Merchant Marine and Fisheries Committee Report accompanying the amendments revealed:

[Section 10(a)] addresses the concerns of private landowners who are faced with having otherwise lawful actions not requiring federal permits prevented by the Section 9 prohibitions against taking.

Section 10(a), as amended, would allow the Secretary to permit any taking otherwise prohibited by Section 9(a)(1)(B) if the taking is

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354. *Sweet Home V*, 115 S. Ct. at 2414.

355. Pub. L. No. 97-304, § 2, 96 Stat. at 1411 (current version at 16 U.S.C. § 1539(a)(1)(B)). For a discussion in greater detail, see *supra* text accompanying notes 80-89.

356. *Sweet Home V*, 115 S. Ct. at 2414.

357. Brief for Respondents at 41-42, *Babbitt* (No. 94-859)

358. *Id.*

359. *Id.*

360. *Id.*

incidental to, and not the purpose of, an otherwise lawful activity. By use of the word “incidental” the Committee intends to cover situations in which it is known that a taking will occur if the other activity is engaged in but such a taking is incidental to, and not the purpose of, the activity.<sup>361</sup>

Thus, Congress’ intentions, as construed by the Secretary, were to encompass more than simply accidental or inadvertent violations of section 9. Instead, the Secretary was authorized to exempt certain lawful activities from section 9 in instances where an unlawful taking was expected ahead of time, and where such an effect could only be minimized rather than avoided.<sup>362</sup> Implicit in this scheme, however, is the notion that an incidental take, to every extent practical, will be minimized and remedied immediately.<sup>363</sup>

This position was echoed by the *Sweet Home V* majority. By requiring the applicant to prepare a “conservation plan” identifying how he plans to carry forward with his proposed activity while minimizing the impact on the affected species, Justice Stevens concluded that Congress had foreseeable and anticipated impacts in mind when passing this provision.<sup>364</sup>

The Chapter’s construction of section 10(a)(1)(B)’s “incidental” take permit is “logically” consistent with their highly limited reading of “harm” under section 9.<sup>365</sup> Yet, reading both constructions together, the Chapter’s position is seen as nothing more than a rationalization resting on a creative assumption. Once permits are obtained to alter a natural area, the Chapter insisted that no “taking” could occur so long as the activity permitted is in compliance with the permit. Their argument assumes that any particular pine tree in which a red-cockaded woodpecker is seen nesting, resting, feeding, or breeding, or any other of a host of biological gerunds, will be left undisturbed. The key point advanced was that the woodpecker was not the target of the logging activity, and no individual woodpecker nest or

361. H.R. REP. NO. 567, 97th Cong., 2d Sess. 31 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2831.

362. Brief for Petitioners at 34, *Babbitt* (No. 94-859) (quoting H.R. REP. NO. 567, *supra* note 361, at 31, *reprinted in* 1982 U.S.C.C.A.N. at 2831).

363. *See, e.g.*, 50 C.F.R. § 17.32(b).

364. *Sweet Home V*, 115 S. Ct. at 2414.

365. Succinctly put, the Chapter reads “harm” as limited to purposeful and deliberate actions directing physical force against a listed species. *See* Brief for Respondents at 9, *Babbitt* (No. 94-859). The Chapter’s reading of “harm” is reminiscent of the intent requirement imposed on § 9 by the *Froehlke* decision issued by the Eighth Circuit Court of Appeals in 1976. *Id.* at 18 n.21.

respite was deliberately targeted. Therefore, no individual birds were deliberately killed. This ignores reality. The incidental take permit, according to the Chapter's argument, is needed only in the event that an "accident" occurs—that a good faith observation failed to reveal a woodpecker which, consequently, was destroyed.

The majority, according to Justice Stevens, rejected this argument as "absurd."<sup>366</sup> The argument is nothing more than a rationalism based on a false premise. What the Chapter virtually willfully ignored is the known biology of the impacted species; the animal does not live out its life statically, sitting on just one limb, feeding in just one tree, or sheltering in a single roost, while its habitat is destroyed.<sup>367</sup> Populations are dynamic. The animal has been directly "harmed," in that when the logging activities have ended for the day, its ability to live has been directly hampered through the impairment of essential behavior.<sup>368</sup> The static argument fails in the dynamic reality of the system being impacted by the otherwise "permitted" or "lawful" activity.

Accordingly, the Chapter's insistence on narrowing section 9 to direct and purposeful actions taken against a member of a listed species was, in the Court's view, reduced to an "absurdity" by the inclusion of Section 10(a)(1)(B).<sup>369</sup> Under the Chapter's interpretation, an applicant could request an "incidental" take permit to skirt liability under section 9 for direct and deliberate action taken against a listed species. Yet, no one could seriously request a permit for this bizarre purpose.<sup>370</sup> Consequentially, the majority perceived the need to give "real and substantial effect" to Congress' amendments. The Chapter's reading of the 1982 amendments was, therefore, completely rejected.

#### D. *Flaws in the Appellate Court's Opinion*

Having found the Secretary's regulation consistent with the ESA, the Court identified three principal errors in the circuit court's opinion.<sup>371</sup>

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366. *Sweet Home V*, 115 S. Ct. at 2414.

367. This criticism was more clearly expressed by Justice O'Connor in her separate concurrence with the majority's decision. *Id.* at 2419 (O'Connor, J. concurring).

368. *Id.*

369. *Id.*

370. *Id.*

371. *Sweet Home V*, 115 S. Ct. at 2414-15. It should remain clear that the opinion to which the majority now refers is that issued by the District of Columbia Circuit Court of Appeals by Judge Williams upon rehearing. See *Sweet Home III*, 17 F.3d at 1463.

First, the holding rejects the circuit court's initial premise which construed the Secretary's definition of "harm" as exceeding the scope of every other term found in the "take" definition.<sup>372</sup> The majority concluded that "harass," "pursue," "wound," and "kill" all encompass conduct and impacts that do not necessitate the direct application of physical force to the animal.<sup>373</sup>

Elsewhere in the majority opinion, Stevens relied on the Act's legislative history in determining the intended breadth of the definition of "harass" was fairly expansive.<sup>374</sup> Accordingly, the circuit court's use of *United States v. Hayashi* was considered improper.<sup>375</sup>

The second error committed by the appellate court was the majority's effort to incorporate an intent requirement directly into the terms defining "take."<sup>376</sup> Indeed, the circuit court's interpretation of the "take" prohibition was somewhat reminiscent of the stringent intent requirement placed on section 9 in *Sierra Club v. Froehlke*.<sup>377</sup> Such a construction would stand in variance with ESA section 11, under which an act which is merely "knowing" will be enough to prove a violation.<sup>378</sup> Congress added

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372. *Sweet Home V*, 115 S. Ct. at 2415.

373. *Id.*

374. *Id.* at 2416.

375. *Id.* at 2415 n.16. Justice Stevens finds the appellate court's reliance on *Hayashi* misplaced. First, *Hayashi* dealt with a single application of the MMPA's "take" prohibition, whereas the present litigation had been presented as a facial challenge to the Secretary's regulation. Moreover, *Hayashi* construed the term "harass" under the MMPA's "take" definition, while *Sweet Home* dealt with "harm," a term that does not even appear in the MMPA's "take" provision. Finally, *Hayashi* was decided by the same court that decided the *Palila* line of cases. Yet, "neither the *Hayashi* majority nor the dissent saw any need to distinguish or even to cite *Palila II*." *Id.*

376. *Sweet Home V*, 115 S. Ct. at 2415.

377. *See supra* note 27. As discussed above, this specific intent requirement countermands the clear meaning of the Act. *United States v. St. Onge*, 676 F. Supp. 1044 (D. Mont. 1988). This is strikingly similar to the circuit court's conclusions in *Sweet Home*. Only deliberate activities directed at the animal will suffice under this reading. *See generally Sweet Home III*, 17 F.3d at 1463.

378. *Sweet Home V*, 115 S. Ct. at 2415 (relying on Pub. L. No. 93-205, § 11, 87 Stat. at 897-98 (current version at 16 U.S.C. § 1540(a), (b) (1994)). Section 11(a), regarding civil penalties, encompasses "[a]ny person who knowingly violates . . . any provision of this Act . . ." Pub. L. No. 93-205, § 11(a), 87 Stat. at 897 (current version at 16 U.S.C. § 1540(a) (1994)). Similarly, with reference to criminal penalties, § 11(b) also applies to anyone who "knowingly" violates the Act. *Id.* § 11(b), 87 Stat. at 898 (current version at 16 U.S.C. § 1540(b)).



“knowingly” in place of “willfully” to make criminal violations of the Act general rather than specific intent crimes.<sup>379</sup>

Finally, the Court concluded that the circuit court erred in applying the *nocitur a sociis* doctrine in such a manner as to reduce “harm” to mere surplusage, denying the term any independent meaning.<sup>380</sup>

The statutory context of “harm” suggests that Congress meant that term to serve a particular function in the ESA, consistent with but distinct from the functions of the other verbs used to define “take.” The Secretary’s interpretation of “harm” to include indirectly injuring endangered animals through habitat modifications permissibly interprets “harm” to have a “character of its own not to be submerged by its association.”<sup>381</sup>

This is a vindication of the views of Chief Circuit Judge Mikva who, on rehearing, found himself in the minority on this issue.

### E. *Addressing the Chapter’s Other Arguments*

The remainder of the majority’s opinion was devoted to refuting other arguments used by the Chapter and adopted by the District of Columbia Circuit. First, the Chapter asserted that such a broad reading of “take” created more than minor overlaps in the statute, as the Secretary claimed, and in fact threatened to subsume habitat protection measures found in section 7 and section 5 if given such an expansive reading.<sup>382</sup> The Government, now able to limit the use of private land under the auspices of section 9, would supposedly lack any incentive to purchase land under section 5.<sup>383</sup> Similarly, section 7, directing federal agencies to avoid “jeopardizing” the continued existence of a listed species, or adversely modifying its critical habitat would, in the Chapter’s view, be swallowed up by the prohibition against “takings” which applies to “any person,” including the federal government.<sup>384</sup> The Court found neither claim persuasive:

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379. *Sweet Home V*, 115 S. Ct. at 2412 n.9 (citing H.R. CONF. REP. NO. 1804, 95th Cong., 2d Sess. 5 (1978), reprinted in 1978 U.S.C.C.A.N. 9484, 9493).

380. *Id.* at 2415.

381. *Id.* (citing *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923)).

382. Brief for Respondents at 23-25, *Babbitt* (No. 94-859).

383. *Id.* at 24. Given the expansive application of § 9, the Chapter concluded that there would be no incentive for the Service to purchase valuable habitat on private land (or conservation easements), since the same goals could be more cheaply accomplished simply by limiting the activities conducted on that land. *Id.*

384. *Id.* at 25.

Purchasing habitat lands may well cost the Government less in many circumstances than pursuing civil or criminal penalties. In addition, the [section] 5 procedure allows for protection of habitat before the seller's activity has harmed any endangered animal, whereas the Government cannot enforce the [section] 9 prohibition until an animal has actually been killed or injured. The Secretary may also find the [section] 5 authority useful for preventing modification of land that is not yet but may in the future become habitat for an endangered or threatened species . . . . Section 7 imposes a broad, affirmative duty to avoid adverse habitat modifications that [section] 9 does not replicate, and [section] 7 does not limit its admonition to habitat modification that "actually kills or injures wildlife."<sup>385</sup>

Thus, any overlap between sections 5 and 7, and section 9 was deemed "unexceptional," and merely a reflection of the broad purposes of the Act as acknowledged in the *Hill* case.<sup>386</sup>

The Chapter's analysis of the Act's legislative history was refuted by the *Sweet Home* Court. The majority pointed to this history, including the 1982 amendments, as "further support" of the Secretary's permissible interpretation of the statute.<sup>387</sup> Congress intended "take" to be defined as broadly as possible, and this was soundly reflected in the ESA's legislative history. Adding the obviously broad term "harm" was a conscious decision by Congress to "help to achieve the purposes of the bill."<sup>388</sup> The 1982 amendments only bolstered this reading of the Act.<sup>389</sup>

Thus, the ESA delegated broad administrative authority to the Secretary to interpret and enforce the provisions of the Act, which received a significant amount of deference by the Court.<sup>390</sup> Accordingly, the regulation was upheld and the district court's decision reinstated.

385. *Sweet Home V*, 115 S. Ct. at 2415.

386. *Id.* at 2415-16.

387. *Id.* at 2416.

388. *Id.* at 2416-17. In examining the legislative history of the Act, Justice Stevens noted that a floor amendment in the Senate introducing "harm" to the bill was seen as a step to "help to achieve the purposes of the bill." *Id.* at 2417 (quoting 119 CONG. REC. 25,683 (1973)).

389. *Sweet Home V*, 115 S. Ct. at 2417. The Court pointed to statements by Congress indicating that § 10 was aimed toward the limited permitting of anticipated and foreseeable "takes" that could not be avoided even after implementation of a habitat conservation plan. *Id.*

390. *Id.* at 2418.

## F. Justice O'Connor's Concurrence

Justice O'Connor joined the *Sweet Home V* majority in holding the Secretary's "harm" regulation valid.<sup>391</sup> However, while concurring with the majority's basic decision, Justice O'Connor's agreement was qualified in two important respects. First, the regulation defining "harm" must be applied only to significant habitat modifications resulting in actual, rather than speculative or hypothetical, death or injury to identifiable endangered or threatened animals.<sup>392</sup> Second, the regulation must be applied in light of ordinary notions of proximate cause and foreseeability.<sup>393</sup> These two limitations were, in her view, clear on the face of the "harm" regulation, and contrary to the views of the dissent, she found the regulation inherently sound.<sup>394</sup> Both Justice O'Connor and the dissenters appeared to agree that the "harm" regulation has been improperly applied in the past.<sup>395</sup> The essential difference between the two is in the placement of the blame for these improper applications of section 9. The dissent, through Justice Scalia, ascribed these instances of section 9's improper use to flaws inherent in the Secretary's regulation itself. Justice O'Connor by contrast blamed a wrongly decided *Palila II* decision for those erroneous applications of section 9 ridiculed by the dissent.<sup>396</sup> Indeed, she acknowledged that many

391. *Id.* (O'Connor, J., concurring).

392. *Id.*

393. *Sweet Home V*, 115 S. Ct. at 2418.

394. *Id.* Justice O'Connor, unlike the dissenters, saw "no need to strike a regulation on a facial challenge out of concern that it is susceptible of erroneous application, however, and because there are many habitat-related circumstances in which the regulation might validly apply . . ." The essential difference between the concurrence and the dissent is that the dissent found the regulation fatally flawed, while Justice O'Connor found it poorly interpreted by the courts. *Id.*

395. *Id.*

396. *Id.* Justice O'Connor concluded that *Palila II* was wrongly decided because, in her opinion, the case failed to present any proximate cause between the grazing activities of the sheep and actual harm to the palila. *Sweet Home V*, 115 S. Ct. at 2420. However, as she noted:

This case, of course, [comes before the Court] as a facial challenge. [The Court is] charged with deciding whether the regulation on its face exceeds the agency's statutory mandate. I have identified at least one application of the regulation (*Palila II*) that is, in my view, inconsistent with the regulation's own limitations. That misapplication does not, however, call into question the validity of the regulation itself.

*Id.* at 2421.

circumstances of habitat degradation exist where the regulation may validly apply.<sup>397</sup>

Justice O'Connor's initial criticism rests on the *Palila II* decision's extension of the "harm" definition, which interpreted the actual death or injury requirement to encompass not just individual animals, but injury to the species as a whole.<sup>398</sup> On this point, she and the dissenters are in agreement. Admittedly, the death of an individual animal always "injures" a population to the extent that it has been reduced in size or numbers. Justice O'Connor opines that such an extension, as accomplished by *Palila II*, is inconsistent with the regulation's actual injury or death requirement.<sup>399</sup> The *Sweet Home V* dissent, on the other hand, attributed this extension to a defect inherent in the regulation itself. Seizing on the regulation's use of the word "breeding," Justice Scalia concluded that the regulation facially prohibits significant habitat modifications that actually kill or injure potential or hypothetical animals. He argues that impairment of breeding activity fails to injure any living animal; therefore, the regulation has been improperly written if the prevention of injuries to living populations was the Service's goal.<sup>400</sup>

However, Justice O'Connor was apparently unable to accept Justice Scalia's reasoning that an impairment of breeding activities harms no living animals. In her view, impairment is injury; impairment of essential physical functions such as breeding which renders the animal biologically obsolete amounts to actual injury under the regulation.<sup>401</sup> She concluded that

397. *Id.* at 2418.

398. *Id.*

399. Justice O'Connor observes that "the regulation is limited by its terms to actions that actually kill or injure individual animals." *Id.* This is in clear variance with the *Palila II* opinion which held that the regulation was properly interpreted to include habitat modification that could drive the palila into extinction. *Palila (Loxiodes bailleui) v. Hawaii Dep't of Land & Natural Resources (Palila II Appeal)*, 852 F.2d 1106, 1108 (9th Cir. 1988). This reading of the Act was deemed consistent with the overall purposes of the ESA "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . ." *Id.* (quoting Pub. L. No. 93-205, § 2(5)(b), 87 Stat. at 884 (current version at 16 U.S.C. § 1531(b)). The overall purposes of the Act were served, held the court, because the palila's threatened ecosystem was conserved. *Id.* No evidence of death to individual palila birds was produced. Moreover, the district court explicitly held that no such proof was required to satisfy the regulation. *Palila (Loxiodes bailleui) v. Hawaii Dep't of Land & Natural Resources (Palila II)*, 649 F. Supp. 1070, 1077 (D. Haw. 1986).

400. *See Sweet Home V*, 115 S. Ct. at 2422 (Scalia, J., dissenting).

401. *Id.* at 2419 (O'Connor, J., concurring).

interference with breeding and other essential behavioral patterns could result in a host of actual injuries:

The regulation has clear application, for example, to significant habitat modification that kills or physically injures animals which, because they are in a vulnerable breeding state, do not or cannot flee or defend themselves, or to environmental pollutants that cause an animal to suffer physical complications during gestation. Breeding, feeding, and sheltering are what animals do. If significant habitat modification, by interfering with these essential behaviors, actually kills or injures an animal protected by the Act, it causes "harm" within the meaning of the regulation.<sup>402</sup>

Justice O'Connor would require that a demonstrable injury to identifiable animals be shown, and this actual injury must be distinguished from the potential, the speculative and the hypothetical.<sup>403</sup> Activities degrading an endangered species' potential habitat would be insufficient.<sup>404</sup> Similarly, the inability to produce evidence of dead or injured animals would seem to fall short under this reading of the Secretary's regulation.<sup>405</sup> Yet, both circumstances satisfied the regulation under *Palila II*.

Justice O'Connor directly questioned the correctness of *Palila II* on this point. Injury to the species as a whole, as opposed to an individual member, and injury to the species' recovery, have both been called into doubt by her position on the regulation's actual death or injury requirement. Her strict reading of the actual death or injury requirement overlooks the plain goals of the ESA to conserve species and their ecosystems.<sup>406</sup> The *Palila II* court's focus on injuries to the collective species links section 9

402. *Id.*

403. *Id.* at 2418. Justice O'Connor's first qualification to the regulation was a showing of actual death to identifiable protected animals. *Id.*

404. On this point, Justice O'Connor observed:

That a protected animal could have eaten the leaves of a fallen tree, or could, perhaps, have fruitfully multiplied in its branches is not sufficient under the regulation. Instead, as the commentary [on revising the "harm" definition] reflects, the regulation requires demonstrable effect (*i.e.*, actual injury or death) on actual, individual members of the protected species.

*Sweet Home V*, 115 S. Ct. at 2419.

405. *Id.*

406. The ESA's stated purpose is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered *species* and threatened species . . . ." Pub. L. No. 93-205, § 2(5)(b), 87 Stat. at 884 (current version at 16 U.S.C. § 1531(b)).

with the stated overall purpose of the ESA.<sup>407</sup> A contrary interpretation would permit activities that frustrate this overall purpose.<sup>408</sup> The court in *Palila II* recognized this and properly placed the burden of demonstrating actual death or injury on the plaintiffs.<sup>409</sup> An extensive body of scientific data pointed to one, and only one cause for this—the browsing activities of the offending sheep. For the *Palila II* court, this well-founded body of unrefuted data obviated any need to produce actual dead or starving palila birds, but that is not to say that proof of dead animals will not suffice. The burden of demonstrating actual death or injury may be satisfied in any number of ways, and if empirical data is presented establishing an adverse impact to the species, the regulation's actual death or injury requirement is satisfied.<sup>410</sup> Actual injury to the palila as a species was the ultimate result

407. "The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). See ROHLF, *supra* note 3, at 65 (observing that *Palila II* links § 9 with the ESA's overall purpose).

408. See *Palila (Loxiodes bailleui) v. Hawaii Dep't of Land & Natural Resources (Palila II)*, 649 F. Supp. 1070, 1078 (D. Haw. 1986) (observing that continued destruction of the forest would have driven the bird into extinction).

409. *Id.* at 1075, 1077.

410. The Service's comments on the 1981 amendment to the "harm" regulation support this interpretation. Nowhere in the comments did the Service suggest that "actual death or injury" required proof of death or injury to individual animals. The Service contended that "[t]he final definition adds the word "actually" before the words "kills or injures" in response to comments requesting this addition to clarify that a standard of *actual, adverse effects* applies to section 9 takings." 45 Fed. Reg. 54,750 (1981) (emphasis added). Moreover, the Service responded to one comment arguing that habitat modification alone amounted to a "taking" by noting that the commenter's objection was unclear because the examples and discussion in the comment repeatedly referred to "*injury and harmful effects on the species* which can be caused by habitat modification." *Id.* (emphasis added). Justice O'Connor now asserts that the inclusion of "actually" has imposed a more stringent evidentiary requirement. On that point she is correct. However, the opinion places more emphasis on the word "actually" than the Service has intended. As the Service has noted:

The purpose of redefinition was to preclude claims of a Section 9 taking for habitat modification alone without any attendant death or injury to the protected wildlife. Death or injury, however, may be caused by impairment of essential behavioral patterns which can have significant and permanent effects on a listed species. *Many commenters suggested that the word "actually" be reinserted in the definition to bulwark the need for proven injury to a species due to a party's actions. This has been done.*

*Id.* at 54,748-49 (emphasis added). "Actually" was inserted to preserve a distinction between habitat modification alone (which is not a "taking") and habitat modification that has a real impact on the species. As *Palila II* observes, proven injury to identifiable animals is one of

of numerous impairments of essential behavioral characteristics of its constituent members. Similarly, that the palila were unable to increase their numbers was a direct result of increased casualties of individual birds. This fact frustrated the achievement of the stated goal of conserving and recovering the palila.<sup>411</sup>

Justice O'Connor also determined that liability under the "harm" regulation must be conditioned on a showing of proximate cause and notions of ordinary foreseeability.<sup>412</sup> The decision on whether sections 11 and 9 erect a strict liability regime, as the dissent argued, could wait for another time.<sup>413</sup> Liability, strict or not, does not dispense with ordinary principles of causation.<sup>414</sup> Justice O'Connor could not discern any intent by Congress, in describing the ESA's penalties in section 11, to do away with traditional principles of proximate causation.<sup>415</sup> In the absence of such an abrogation by Congress, she asserts that section 9 violations must be established using principles of proximate causation borrowed from common law tort.<sup>416</sup>

Imposition of proximate cause principles arguably does no violence to the "harm" regulation and, as Justice O'Connor claims, is required. Again, pointing to the Service's inclusion of "actually," she observes that specula-

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several ways in which this evidentiary burden may be accomplished. *Palila II*, 649 F. Supp. at 1075.

411. *Palila II*, 649 F. Supp. at 1077.

412. *Sweet Home V*, 115 S. Ct. at 2419-20.

413. *Id.* at 2420.

414. *Id.* Justice O'Connor observed that "[s]trict liability means liability without regard to fault; it does not normally mean liability for every consequence, however remote, of one's conduct." *Id.* (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 79, at 559-60 (5th ed. 1984) (noting the "practical necessity for the restriction of liability within some reasonable bounds" in the strict liability context)).

415. *Id.* at 2420. The penalties found in § 11(1) punish knowing violations of § 9. Pub. L. No. 93-205, § 11(a), 87 Stat. at 897 (current version at 16 U.S.C. § 1540(1)).

416. Justice O'Connor pointed to Congress' silence on this issue, noting that she "would not lightly assume that Congress, in enacting a strict liability statute that is silent on the causation question, has dispensed with this well-entrenched principle." *Sweet Home V*, 115 S. Ct. at 2420 (relying on *Benifiel v. Exxon Corp.*, 959 F.2d 805, 807-08 (9th Cir. 1992) (holding that Congress did not intend to abrogate common law principles of proximate cause to reach "remote and derivative" consequences under Trans-Alaska Pipeline Authorization Act)). Justice O'Connor also pointed to the Comprehensive Environmental Response Compensation & Liability Act ("CERCLA") as an example of a statute where Congress specifically abrogated a causation requirement. *Id.* (citing *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985)).

tive or conjectural effects on listed species were explicitly excluded under the regulation.<sup>417</sup>

Though proximate cause is not susceptible to a precise definition, O'Connor concludes that, at the very least, proximate cause "injects a foreseeability element into the statute."<sup>418</sup> In this manner, many of the erroneous applications of section 9 probed by the dissent could be avoided.<sup>419</sup> Moreover, Justice O'Connor asserts that this element was ignored by the Ninth Circuit Court of Appeals in *Palila II*, concluding that the case was wrongly decided on these grounds:

Pursuant to my interpretation, *Palila II*—under which the Court of Appeals held that a state agency committed a "taking" by permitting feral sheep to eat mamane-naio seedlings that, when full-grown, might have fed and sheltered endangered palila—was wrongly decided according to the regulation's own terms. Destruction of the seedlings did not proximately cause actual death or injury to identifiable birds; it merely prevented the regeneration of the forest land not currently inhabited by actual birds.<sup>420</sup>

However, section 9 does not deal with torts against the protected animal. Section 9 directs the Secretary to restrict certain uses of private or public property having an ascertainable impact on the listed species. To this end, "actually" clearly injects an element of causation into the "harm" regulation by stressing the critical link between habitat modification and injury to the species.<sup>421</sup> Nowhere has the Act suggested the use of

417. *Id.* Justice O'Connor concludes that "[t]he regulation, of course, does not contradict the presumption or notion that ordinary principles of causation apply here. Indeed, by use of the word, "actually," the regulation clearly rejects speculative or conjectural effects, and thus, itself invokes principles of proximate causation." *Id.*

418. *Id.*

419. See *Sweet Home V*, 115 S. Ct. at 2418.

420. *Id.* at 2420-21.

421. *Palila (Loxiodes bailleui) v. Hawaii Dep't of Land & Natural Resources (Palila II)*, 649 F. Supp. 1070, 1077 (D. Haw. 1986) (holding that the redefinition "stresses the critical link between habitat modification and injury to the species"). The causation element is found in the plaintiff's burden to establish this link between the habitat modification and the requisite injury to the species. The plaintiff must be able to prove the significant habitat modification leads to the prohibited result. See, e.g., *American Bald Eagle v. Bhatti*, 9 F.3d 163, 166 (1st Cir. 1993) (holding that no "taking" existed where the appellants "have not shown that the hunt caused actual harm") (emphasis added).

*Morrill v. Lujan*, 802 F. Supp. 424 (S.D. Ala. 1992), exemplifies this point. The district court found that no "taking" had occurred because the plaintiff could not meet its burden under the regulation and prove that the proposed development would lead to the



common law tort principles in establishing violations. Rather, the Secretary's regulation has imposed a cause-in-fact standard of causation which distinguishes between mere habitat modification and habitat modification resulting in a prohibited impact on the listed species.<sup>422</sup> This looser standard of causation again underscores the overall intent of Congress that the recovery of "endangered species be afforded the highest of priorities."<sup>423</sup>

### G. Justice Scalia's Dissent

Justice Scalia, joined by Justice Thomas and Chief Justice Rehnquist, dissented.<sup>424</sup> Considering the Secretary's regulation an unfair conscription of private property for national zoological use, he concluded that the regulation contradicts the "unmistakably clear" intent of Congress.<sup>425</sup> The opinion grudgingly concedes to the application of the *Chevron* doctrine, nevertheless reasoning that no amount of deference to the Secretary can save the regulation.

From the outset, the dissent mischaracterized the nature of the restrictions imposed on private landowners by the application of section 9.<sup>426</sup> The opinion makes no consideration that restrictions under the ESA are ordinarily not permanent. Once a species has progressed toward recovery, land use restrictions can be re-evaluated according to the purpose of the Act.<sup>427</sup> Where circumstances dictate, these restrictions may be

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destruction of habitat which in turn could threaten the listed species. *Id.* at 432. The court concluded that "[i]t is this lack of a causal link between the [proposed] project and the potential harm projected by the plaintiff's expert that distinguishes this case from those cases cited by plaintiff." *Id.*

422. Steven G. Davison, *Alteration of Wildlife Habitat as a Prohibited Taking Under the Endangered Species Act*, 10 J. LAND USE & ENVTL. L. 155, 190 (1995).

423. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978).

424. *Sweet Home V*, 115 S. Ct. at 2421 (Scalia J., dissenting).

425. *Id.*

426. From the opening passage of the opinion, the dissent's tone echoed in inverse condemnation. "The Court's holding that the hunting and killing prohibition [of § 9] incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use." *Id.*

427. The nature of § 9's restrictions on land use was recognized by the district court opinion in *Palila II*:

The mamane forest can be expected to recover slowly when released from the current browsing pressures. At some point in the future, the mamane on Mauna Kea may have recovered sufficiently to support Palila beyond its current

relaxed, and section 9 protection may be withdrawn partially or altogether pursuant to the Secretary's rulemaking power under section 4(d).<sup>428</sup>

The dissent places the responsibility for solving this problem entirely on the shoulders of the Secretary rather than on those parties who caused the particular species to be listed. If landowners better recognized the need for instituting sustainable use practices and concepts of responsible stewardship on their own lands, and had relaxed economic and political pressures to intensely harvest resources on public lands, the critical habitat problem would have been significantly ameliorated. The combination of preserved public lands and responsibly managed private property would probably have been sufficient to substantially reduce the number of species listed by the Secretary or would have reduced the degree of protection necessary to avert the extinction of these animals. This point is avoided by the minority in *Sweet Home V*. It can be argued that the interests which played the most significant role in adversely affecting habitat and creating this problem are those same interests which are now being asked to alter their practices to allow species to recover.

Justice Scalia pointed to what he perceived to be three major failings of the regulation.<sup>429</sup> First, the regulation must fail in his view because of its inadequate causation requirement. Read this way, habitat modifications falling under this regulation, need only be the cause-in-fact of actual death

endangered population. Likewise, at some future date, the forest and the bird population may be sufficiently stable to allow the coexistence of some mouflon sheep with Palila. At present, however, the Endangered Species Act mandates the protection of the Palila to the extent possible, in the hope that this bird does not join the many other indigenous species that have disappeared from these islands.

*Palila (Loxiodes bailleui) v. Hawaii Dep't of Land & Natural Resources (Palila II)*, 649 F. Supp. 1070, 1082 (D. Haw. 1986) (footnotes omitted).

428. For threatened wildlife, and for endangered wildlife downlisted to threatened status, § 9's "taking" prohibition is applied through a single blanket regulation. 50 C.F.R. § 17.31. This blanket regulation was upheld below. *Sweet Home Chapter of Communities for a Great Or. v. Babbitt (Sweet Home II)*, 1 F.3d 1, 5-8 (D.C. Cir. 1993). The Secretary can, when appropriate, withdraw part or all of these protections by special rule for particular species listed as threatened. See 50 C.F.R. §§ 17.40-.48 (Special Rules). Similarly, federally issued permits may be acquired allowing the limited take of endangered or threatened wildlife under appropriate circumstances. See Pub. L. No. 93-205, § 10, 87 Stat. at 896 (current version at 16 U.S.C. § 1539); 50 C.F.R. §§ 17.22-.23 (1994). The entire regulatory regime is designed to allow the Secretary to exercise common sense in tailoring restrictions so as to provide the best protection to the species in the least harsh manner, while always keeping in mind the goal of ultimately delisting the species through these decisions.

429. *Sweet Home V*, 115 S. Ct. at 2421 (Scalia, J., dissenting).

or injury to wildlife.<sup>430</sup> Any significant habitat modification producing this prohibited result by impairing essential behavioral patterns is unlawful, regardless of whether that result was foreseeable or intended, and regardless of how attenuated the causation between modification and injury may be.<sup>431</sup> On this point, Justice Scalia disapprovingly cited *Palila II* as an example of a “taking” claim resting on a highly attenuated chain of causation.<sup>432</sup>

Second, Justice Scalia objected to the fact that the regulation is satisfied by any act or omission resulting in actual death or injury.<sup>433</sup> This point

430. *Id.* (citing Davison, *supra* note 422, at 190). The proper standard of causation under the regulation has been the source of some confusion. The Service has remained silent on the issue. The regulation’s focus on the ultimate death or injury suggests a “but for” or “substantial factor” standard of causation borrowed from tort law:

If a specific protected animal was found dead on land that was not part of modified or degraded wildlife habitat, there would be a finding that the modification of the wildlife habitat was a “taking” if the dead animal had used the altered or modified habitat prior to its death and if, using the “but for” or substantial factor test, the habitat modification was the cause in fact of the animal’s death by forcing the animal to migrate to new habitat where it died or was killed.

Davison, *supra* note 423, at 191 (footnote omitted). A number of scenarios could fit this model. The unsuitability of the new habitat into which the relocated animal is forced to settle may precipitate its death or injury. Similarly, the introduction of foreign predators into the habitat (as was the case in the *Palila* cases) or the displacement of predators into new habitat bringing about conflict with the protected species, could also satisfy this standard. *See id.* at 191 n.182.

431. *Id.* The Chapter asserted that the regulation’s exclusive focus on the ultimate effect (the injury) while disregarding the character of the conduct sought to be prohibited, substantially contributed to the improperly broad interpretation of harm. Brief for Respondents at 7, *Babbitt* (No. 94-859). The narrow focus on the injury ignored the normal usage of the term which requires some form of purposeful effort to hurt or injure. *Sweet Home V*, 115 S. Ct. at 2421.

432. *Sweet Home V*, 115 S. Ct. at 2421. The dissenting opinion provides one other example of what it sees as the remote and tenuous chain of causation permitted under the regulation:

To define “harm” as an act or omission that, however remotely, “actually kills or injures” a population of wildlife through habitat modification, is to choose a meaning that makes nonsense of the word that “harm” defines—requiring us to accept that a farmer who tills his field and causes erosion that makes silt run into a nearby river which depletes oxygen and thereby “impairs [the] breeding” of protected fish, has “taken” or “attempted to take” the fish. It should take the strongest evidence to make us believe that Congress has defined a term in a manner repugnant to its ordinary and traditional sense.

*Id.* at 2423.

433. *Id.* at 2422.

was clear on the face of the original “harm” regulation, which covered any “act or omission which actually kills wildlife . . . .”<sup>434</sup> However, the mention of omissions was deleted from the regulation in the course of the Service’s 1981 redefinition of “harm.”<sup>435</sup> Despite this deletion, the Service’s comments indicate that “act” is inclusive of both affirmative action and omissions.<sup>436</sup> The dissent apparently disagrees with the propriety of including omissions under the regulation.<sup>437</sup>

Finally, the regulation’s third inherent flaw under the dissent’s analysis was its inclusion of injuries inflicted not just on individual animals, but on populations as well.<sup>438</sup> Habitat modifications resulting in “harm” through the impairment of breeding activity, he theorizes, fail to injure any living creature.<sup>439</sup> Only potential living animals may have been harmed by this conduct, and similarly, only the population at large has been injured since its future numbers may have been reduced.<sup>440</sup> The dissent, while properly understanding the regulation’s scope applying to populations, misapprehends the meaning in application within the context of the Act. Justice Scalia’s effort to limit section 9’s application to individual animals runs counter to the language and purpose of the Act.<sup>441</sup>

434. *Id.*

435. *Id.* at 2422 (relying on 46 Fed. Reg. § 54,750 (1981)).

436. *Sweet Home V*, 115 S. Ct. at 2422. On the deletion of “or omission” from the regulation in 1981, the Service attributed this change to their position that the term “act” is inclusive of either commissions or omissions which would be prohibited by § 9. *Id.*

437. The exact nature of Justice Scalia’s objection to this is unclear on the face of the opinion. While attacking the regulation on its face, this particular objection appears to be directed toward a specific interpretation of the regulation rather than the regulation itself.

438. *Id.* at 2422. In Justice O’Connor’s concurrence, she stated that the regulation, on its face, focused on individual animals, rather than on collective populations. *See supra* note 399. By contrast, Justice Scalia recognizes the appropriate scope of the regulation, but concludes that this focus on the species as a whole is impermissible under the Act. *Sweet Home V*, 115 S. Ct. at 2422.

439. Justice Scalia concludes that “[i]mpairment of breeding does not ‘injure’ living creatures; it prevents them from propagating, thus ‘injuring’ a population of animals which would otherwise have maintained or increased its numbers.” *Id.* The Secretary’s official pronouncements in the Final Redefinition of “Harm” accompanying the amendment to the regulation confirm this reading for the dissent. *See* Brief for Respondents at 25, *Babbitt* (No. 94-859).

440. *Sweet Home V*, 115 S. Ct. at 2422.

441. The stated purpose of the ESA is “to provide a means whereby the ecosystems upon which endangered *species* and threatened *species* depend may be conserved[, and] to provide a program for the conservation of such endangered *species* and threatened *species* . . . .” Pub. L. No. 93-205, § (2)(b), 87 Stat. at 884 (current version at 16 U.S.C. § 1531(b)) (emphasis added). Similarly, § 9(a)(1)(B) makes it unlawful for any person to “take any such

Unable to find any of these three criticized features of the “harm” regulation reflected in the language of the ESA, the dissent conducted a historical analysis of the term “take.”<sup>442</sup> Justice Scalia observed that “harm” lacks legal significance independent from “take”—the only operative term in section 9.<sup>443</sup> When applied to animals, the dissent holds that “take” has long since been understood to mean *only* the reduction of a wild animal to human control via death or capture. This meaning of “take,” the opinion noted, “is as old as the law itself.”<sup>444</sup> This use of the term “take” was also consistent with the term’s usage in other environmental statutes and treaties.<sup>445</sup> Justice Scalia considered his reading of “take” to be consistent with the structure of section 9, covering all aspects of commercial trafficking in endangered species and products made from such species; from the “taking” of such species to their sale, transport, and import or export.<sup>446</sup> Therefore, the dissent holds that the Secretary’s definition of “harm,” when read in conjunction with the term “take,” must be confined within the long-understood meaning of “take”:

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*species* within the United States . . . .” *Id.* § 9(a)(1)(b), 87 Stat. at 893 (current version at 16 U.S.C. § 1538(a)(1)(B)) (emphasis added). Nowhere in relevant part does the Act refer to the animal in any other sense than collectively.

442. *Sweet Home V*, 115 S. Ct. at 2422.

443. The dissent, rather than attempting to define harm as the Petitioners and Respondents have done, turns to the term “take,” as the only word having legal significance. One cannot be criminally charged with “harming” a listed species—only of “taking” one. *Id.*

444. *Id.*

445. See Migratory Bird Treaty Act, Pub. L. No. 101-233, § 15, 103 Stat. 1977 (1989) (current version at 16 U.S.C. § 703 (1988 & Supp. V 1993)); see also Agreement on the Conservation of Polar Bears, Nov. 15, 1973, art. I, 27 U.S.T. 3918, 3921.

446. *Sweet Home V*, 115 S. Ct. at 2422. Justice Scalia considers “take” in view of the overall structure of § 9(a)(1):

The taking prohibition, in other words, is only part of the regulatory plan of § 1538(a)(1), which covers all the stages of the process by which protected wildlife is reduced to man’s dominion and made the object of profit. It is obvious that “take” in this sense—a term of art deeply embedded in the statutory and common law concerning wildlife—describes a class of acts (not omissions) done directly and intentionally (not indirectly and by accident) to particular animals (not populations of animals).

*Id.* at 2422 (citations omitted).

However, while the dissent’s argument is logically consistent, this point still does not cure the basic flaw in its premise: the failure to recognize that the entire Act requires attention to populations as a whole. Section 9, as a whole, must be read in light of the statute in which it appears.

The tempting fallacy—which the Court commits with abandon—is to assume that once defined, “take” loses any significance and it is only the definition that matters. The Court treats the statute as though Congress had directly enacted the [section] 1532(19) definition as a self-executing prohibition, and had not enacted [section] 1538(a)(1)(B) at all. But [section] 1538(a)(1)(B) is there, and if the terms contained in the definitional section are susceptible of two readings, one of which comports with the standard meaning of “take” as used in application to wildlife, and one of which does not, an agency regulation that adopts the latter reading is necessarily unreasonable, for it reads the defined term “take”—the only operative term—out of the statute altogether.<sup>447</sup>

Justice Scalia then turned his focus to “harm,” read in light of the operative term “take.” Following a list of dictionary definitions of “harm,” he observed that the more common or preferred usage of the term incorporated some idea of direct and anticipated hurt or injury.<sup>448</sup> This, he concluded, was the common thread binding together all ten descriptors in the “take” definition found in the statute.<sup>449</sup> The application of force, as Circuit Judge Williams had concluded,<sup>450</sup> was not the point. Rather, in the view of the dissenters, it was this common sense of affirmative conduct intentionally directed against individual animals.<sup>451</sup>

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447. *Id.* at 2423.

448. *Id.*

449. *Id.*

450. *Sweet Home Chapter of Communities for a Great Or. v. Babbit (Sweet Home III)*, 17 F.3d 1463, 1464-65 (D.C. Cir. 1994).

451. The majority points out this apparent abandonment of the circuit court’s “direct application of force” argument. Recognizing the flaw in this interpretation, the dissent instead sought to impose a limitation on § 9 based on a requirement of “affirmative conduct directed against a particular animal or animals.” *Sweet Home V*, 115 S. Ct. at 2415 n.15. Under this reading of § 9, the majority observed that conduct clearly in violation of the Act would otherwise be permitted:

Under the dissent’s interpretation of the Act, a developer could drain a pond, knowing that the act would extinguish an endangered species of turtles, without even proposing a conservation plan or applying for a permit under § 9(a)(1)(B); unless the developer was motivated by a desire “to get at a turtle,” no statutory taking could occur. Because such conduct would not constitute a taking at common law, the dissent would shield it from § 9 liability, even though the words “kill” and “harm” in the statutory definition could apply to such deliberate conduct. We cannot accept that limitation. In any event, our reasons for rejecting the Court of Appeals’ interpretation apply as well to the dissent’s novel construction.

*Id.*

The opinion logically errs by removing “take” from its modern context within the ESA and reading it in light of Nineteenth Century common law regulations on hunting. If traditional common law is the subject of the inquiry, “take” is properly limited in this respect. However, under modern law, the definition, like the subject matter defined, must remain dynamic, and be interpreted in the context of the statute in which it appears.

Instead, the dissent read “take” in an outdated manner typified by the sources relied on for its position. A 1949 dictionary and a series of hunting regulations and cases offer the only support cited for this position.<sup>452</sup> The Migratory Bird Treaty Act, the Agreement on the Conservation of Polar Bears, and even the Marine Mammal Protection Act, relied on by the circuit court—these are all programs geared specifically toward prohibiting the hunting of particular species. None of these provisions share the ESA’s comprehensive focus toward wildlife and habitat protection, and none attest to the ESA’s very clear goal of recovering extremely depleted populations of wildlife.<sup>453</sup> Consequently, the term “take” means something very different in the context of these statutes.<sup>454</sup>

452. The dissent has drawn the term’s definition from the English common law definition, and relies on some older sources. *Geer v. Connecticut*, 161 U.S. 519, 523 (1896) (observing that “all the animals which can be taken upon the earth, in the sea, or in the air, that is to say, wild animals, belong to those who take them”); 17 OXFORD ENGLISH DICTIONARY 537 (1989); WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2331 (2d ed. 1949).

453. The species protected under the Act are signals of much greater ecological concern which foretell adverse impacts to human populations. On the need for the ESA legislation, the Report of the House Committee on Merchant Marine and Fishery observed:

As we homogenize the habitats in which these plants and animals evolved, and as we increase the pressure for products that they are in a position to supply (usually unwillingly) we threaten their—and our own—genetic heritage.

The value of this genetic heritage is, quite literally, incalculable. . . .

. . . .

From the most narrow possible point of view, it is in the best interest of mankind to minimize the losses of genetic variations. . . .

. . . .

Who knows, or who can say, what potential cure for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed? . . . Sheer self-interest impels us to be cautious. . . . The institutionalization of that caution lies at the heart of [the ESA].

H.R. REP. NO. 412, *supra* note 154, at 4-5. The value to be realized through recovery of a signal species is value to the general community, not just for some ideal view of nature.

454. “Take” must be interpreted within the context of the ESA—a comprehensive body of legislation directed toward halting the growing trend toward extinction in a holistic

Obviously, the dissent concurred with the Chapter's use of the *nocitur a sociis* principle in reading "harm" linking it to the other nine descriptive terms in the statute.<sup>455</sup> He rejected the majority's conclusion that the circuit court erred in applying *nocitur a sociis* in a manner depriving "harm" of any independent meaning. Under this reasoning the dissent pointed to the terms "trap" and "capture" as two arguably superfluous terms.<sup>456</sup>

"Harm" would, therefore, still add something even under this narrow definition. Poisoning an animal, spraying it with chemicals, or destroying its habitat to get at it, while not necessarily wounding or killing, would nevertheless "harm" the animal in the narrow sense defined by the dissent.<sup>457</sup>

Justice Scalia also found this interpretation supported by the ESA's penalty provisions. Section 11 of the Act prohibits "knowingly" committed violations of section 9.<sup>458</sup> Yet, "harm" as defined by the Secretary would subject numerous routine private activities to strict liability when they

manner. The problems to be corrected by the statutes cited by the dissent simply do not correlate with the findings of Congress in enacting the ESA:

The Congress finds and declares that—

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

Pub. L. No. 93-205, § 2(a)(1)-(3), 87 Stat. at 884 (current version at 16 U.S.C. § 1531(a)).  
455. *Sweet Home V*, 115 S. Ct. at 2424.

456. *Id.* The majority's reasoning would require the redefinition of these terms to avoid the surplusage rule relied upon in upholding the "harm" regulation: "If it were true, we ought to give the word 'trap' in the definition its rare meaning of 'to clothe' (whence 'trappings')—since otherwise it adds nothing to the word 'capture.'" *Id.* However, this analogy is not entirely consistent with the dictionary definitions of these terms. Contrary to Justice Scalia's reading, "trap" *does* have a distinct meaning from capture. *Webster's* defines the verb "trap" as "to catch in or take in as if in a trap; to provide or set (a place) with traps." WEBSTER'S NEW COLLEGIATE DICTIONARY 1234 (1981). The word also is defined as a synonym for "snare, entrap, ensnare, bag, lure," and "decoy." THE MERRIAM-WEBSTER DICTIONARY 727 (1974); *see also* THE AMERICAN HERITAGE DICTIONARY 1293 (rev. ed. 1982) (defining "trepan," as "to trap; ensnare"). However, the verb "capture" is defined to encompass the seizure of something by force or trickery, to take captive. THE MERRIAM-WEBSTER DICTIONARY 116 (1974).

457. *Sweet Home V*, 115 S. Ct. at 2424.

458. *Id.*



“fortuitously” injure or kill protected wildlife, regardless of how remote the chain of causation.<sup>459</sup> This, Justice Scalia concludes, could not have been Congress’ intent. A “knowing” violation requires that the defendant “know the facts that make the conduct illegal.”<sup>460</sup> Under the Secretary’s interpretation, a “taking” has occurred regardless of whether or not injury to the protected animal was foreseeable or anticipated. Under the Act, actual injury to the animal is the fact that makes the conduct illegal. The regulation, however, only requires that the conduct be the cause-in-fact of the injury or death.<sup>461</sup> No element of foreseeability has been explicitly required.<sup>462</sup> Therefore, the dissent, like Justice O’Connor, has attempted to inject some notion of tort law into the ESA, only to wonder aloud why the concept failed to fit comfortably in the legislative scheme.

Justice Scalia insisted that the Secretary’s interpretation runs counter to the general structure of the ESA.<sup>463</sup> First, he pointed to the explicit reference to habitat modification in section 7(a)(2), which prohibits the adverse modification of critical habitat by federal agencies.<sup>464</sup> “Critical habitat” is defined in section 3.<sup>465</sup> In spite of the explicit prohibition of critical habitat modification in section 7, the dissent observed that Congress remained silent on the issue of habitat in section 9. Congress’ decision to include habitat modification in one instance, while not mentioning it in another must, the dissent argues, be presumed intentional and purposeful.<sup>466</sup> Thus, Justice Scalia found it odd that Congress would carefully define “critical habitat” explicitly prohibiting its destruction or adverse modification in section 7, while leaving the Secretary free to evaluate adverse habitat modification under the guise of “harm” in section 9.<sup>467</sup> Justice Scalia questioned the majority’s attempt to divide these provisions into two discrete regulatory realms based on section 7’s limited applicability

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459. *Id.*

460. *Id.*

461. *See supra* note 416.

462. *Sweet Home V*, 115 S. Ct. at 2424.

463. *Id.* at 2425.

464. *Id.*

465. Pub. L. No. 95-632, § 2(2), (7), 92 Stat. at 3751 (current version at 16 U.S.C. § 1532(5)).

466. *Sweet Home V*, 115 S. Ct. at 2425 (citing *Keene Corp. v. United States*, 113 S. Ct. 2035 (1993) (“Where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”)).

467. *Id.*

to federal agencies.<sup>468</sup> Relying solely on the broad definition of “persons,” to whom section 9 is directed, Justice Scalia concludes that section 7’s prohibition against adverse modification of critical habitat has been rendered superfluous by the Secretary’s interpretation of section 9.<sup>469</sup> This contention was rejected by the majority which held such overlap between sections 7 and 9 reflective of the comprehensive regulatory scheme erected under the ESA.<sup>470</sup>

The remainder of the dissent focused on each of the four bases supporting the majority’s decision to uphold the regulation, attempting to reject each in turn.<sup>471</sup> The dissent points to previous holdings by this Court, in denouncing the “simplistic assumption that whatever furthers the statute’s primary objective must be the law.”<sup>472</sup> The ends reached by the Secretary’s regulation could not, therefore, per se justify the means selected.<sup>473</sup> However, contrary to the dissent’s suggestion, adherence to this rule cannot, by the same logic, counsel a reading that is counterproductive to the statute’s overall purposes.<sup>474</sup>

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468. Justice Scalia concluded that “[i]n fact however, [ §§ 7 and 9 ] do *not* operate in separate realms; federal agencies are subject to both, because ‘person[s]’ forbidden to take protected species under [ § 9 ] include agencies and departments of the Federal Government.” *Id.* at 2426.

469. However, this sense of overlap among various provisions of the ESA offered no problem for the Court in *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978). The project was held to violate § 7’s prohibitions. *Id.* at 185 n.30. The Court noted that the project would probably constitute a § 9 “taking” as well. *Id.*

470. *See supra* Part IV.E.

471. *Sweet Home V*, 115 S. Ct. at 2426.

472. On this point Justice Scalia declared, “I thought we had renounced the vice of ‘simplistically . . . assum[ing] that whatever furthers the statute’s primary objective must be the law.’” *Id.* (alteration in original) (quoting *Rodriguez v. United States*, 480 U.S. 522, 526 (1987)).

473. *Id.*

474. The dissent’s means/ends analysis is weakened by consideration of the *Chevron* doctrine. The Secretary is given considerable discretion to construe and administer the ESA. *Chevron* dictates that this discretion be given great deference to by courts reviewing the Secretary’s decisions. *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). However, the Secretary’s interpretation must advance the purposes of the Act, and no amount of deference accorded to the Secretary’s reading will save an interpretation that is counterproductive to the goals and purposes of the statute interpreted. *Id.*

## V. CONCLUSION

The immediate impact of the *Sweet Home V* decision was to restore the *Palila* cases and dissolve the split between the federal circuits. Since the case was a facial attack on the Secretary's "harm" regulation, the actual holding in *Sweet Home V* is not as significant as other aspects of the opinion. While the facial attack on this regulation was rejected, an amendment to the ESA deleting the term "harm" from the statutory definition of "take," or repeal of or significant amendment to the "harm" regulation it upholds, would nullify the decision.

Justice O'Connor's concurring opinion provides some insights as to where this area of the law may be headed. While upholding the regulation on its face, Justice O'Connor is one of at least four Supreme Court Justices who believe that *Palila* was wrongly decided. Her arguments regarding the regulation's causation requirement and its alleged focus on individual animals are best suited to legal challenges to specific applications of the regulation, and not facial attacks on the regulation itself. Indeed, she recognizes this point and cautions that such challenges must have well developed factual records to withstand scrutiny in accordance with the *Sweet Home V* decision.

The true impact of *Sweet Home V* lies as much in what was not settled by the court. The case demonstrates the soundness of the *Chevron* doctrine as a standard of review. The properly-exercised discretion of the Secretary ought to be upheld unless a clear incongruity with the Act can be distilled. In the instant case, the Secretary's decision reflected a proper understanding for the ESA and its comprehensive purposes. To conclude that a species cannot be "harmed" by destroying its habitat, leaving it inadequate shelter and food, defies common sense. Congress recognized this in enacting the ESA generally, and section 9 in particular. The Secretary recognized this too. Therefore, the *Chevron* doctrine emerges as an important mechanism for ensuring that our national environmental policy is administered in a rational manner and in the way expected by Congress. The remaining controversy over species recovery will diminish only when the *raison d'etre* of the ESA is fulfilled.

# Recent Developments in Condemnation Law

Gary S. Gaffney\*

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This article reviews the significant developments in Florida condemnation law during the period from July of 1994 through July of 1995.

### I. THE NEW LEGISLATION: AN OVERVIEW

Perhaps the most significant development in Florida condemnation law in the last year was the legislature's amendment of chapter 73 of the *Florida Statutes* and particularly those changes which affect the amount of fees and

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costs awarded under the statute.<sup>1</sup> The new law is now collectively embodied in sections 73.032, 73.091, and 73.092 of the *Florida Statutes*. It represents a complete departure from the law as it existed in 1976, when the statute actually *prohibited* fee allocations based solely on a percentage of the condemnation award.<sup>2</sup>

The new version calculates fees almost exclusively on this basis, stating “[e]xcept as otherwise provided in this section, the court, in eminent domain

1. 1994 Fla. Laws ch. 94-162. It should be noted that this article does not discuss the recently enacted Bert J. Harris, Jr., Private Property Rights Protection Act, 1995 Fla. Laws ch. 95-181 (codified at FLA. STAT. § 70.001 (1995)), as that topic is beyond its scope and treated comprehensively elsewhere.

2. FLA. STAT. § 73.092 (Supp. 1976). The preamendment “offer of judgment” portion of the statute, which acted as a limitation of fees and costs, was contained in § 73.032 of the 1993 statutes. Created in 1990, it is still operative with respect to actions filed prior to the effective date of the new statute. FLA. STAT. § 73.032 n.1 (1995).

The awarding of costs and fees in condemnation cases has a long history in Florida. In 1892, the applicable statute contained a precursor to today’s offer of judgment by providing that all costs were to be paid by the condemnor, except those where “the verdict . . . [was no] greater than the compensation awarded by the viewers.” FLA. REV. STAT. § 1558 (1892). Section 1551 of this version required a 12-man jury and a jury “view.” FLA. REV. STAT. § 1551 (1892).

In 1901, the statute still required a 12-man jury, but it began to allow business damages to businesses in existence for five years on adjoining land or within two miles of the acquisition. COMP. GEN. LAWS FLA. § 5017 (1901). In 1906, § 2020 specifically required the condemnor to pay all costs, including attorney’s fees, and in 1920, § 1649 required that the fee award be included in the verdict.

In 1941, § 73.16 of the *Florida Statutes* required that all of the condemnee’s costs, including attorney’s fees, be set by a jury (except for unsuccessful appeals). FLA. STAT. § 73.16 (1941). By 1963, however, that same section required attorney’s fees and costs to be assessed by the court. FLA. STAT. § 73.16 (1963).

In 1976, fees continued to be assessed by the court, but the judge was given specific factors to consider. FLA. STAT. § 73.092 (Supp. 1976). In addition, the court was prohibited from “bas[ing] [the fee] solely on a percentage of the award.” *Id.* In 1985, section 73.092 was amended to require the condemnee’s counsel to submit detailed statements of the services performed and the time spent performing them. Ch. 85-180, § 37, 1985 Fla. Laws 1300, 1323 (codified at FLA. STAT. § 73.092 (1985)).

In 1987, the legislature recreated the “offer of judgment.” FLA. STAT. § 73.092(6) (1987). Three years later, the 1990 version of § 73.092 required that the court give the greatest weight to any “benefit” achieved by the condemnee’s attorney, with the court to consider the remaining factors secondarily. *Id.* § 73.092 (Supp. 1990). The statute no longer prohibited fee awards based solely on a percentage of the condemnation award, and it placed the “offer of judgment” provision into a separate section. *Id.* § 73.092(6). The 1994 amendment is thus one more link in a long line of legislative tinkering.

proceedings, shall award attorney's fees based solely on the benefits achieved for the client."<sup>3</sup>

### A. Attorney's Fees

By far the most controversial amendment to the statute, and the one which has attracted the most attention, is the new attorney's fees provision contained in section 73.092 of the *Florida Statutes*.<sup>4</sup> Under this newly created section, the "benefit" to the defendant now becomes the sole factor in determining fee awards in virtually all condemnation cases.<sup>5</sup>

The new statute governs all actions in eminent domain filed after October 1, 1994. It requires courts to calculate fee awards based upon on a predetermined statutory schedule: 33% of any "benefit" received by the condemnee up to \$250,000; 25% of any "benefit" between \$275,000 and one million dollars; and 20% of any benefit over that amount.<sup>6</sup> The statute specifically mandates that fees be based *solely* upon these percentages, and as such, the circuit courts are prohibited<sup>7</sup> from looking to any other factors, including, for example, the number of hours reasonably expended by the condemnee's counsel in preparation of the case, the terms of any fee agreement, or any of the enumerated criteria contained in section 73.092(2), which now only applies in restricted settings.<sup>8</sup>

The statute defines the "benefit" to be the difference between the amount the final judgment<sup>9</sup> (excluding interest) and the last written offer

3. FLA. STAT. § 73.092(1) (Supp. 1994).

4. Ch. 94-162, § 3, 1994 Fla. Laws 955, 957 (current version at FLA. STAT. § 73.092 (1995)). The predecessor statute, FLA. STAT. § 73.092 (1993), still controls actions filed prior to Oct. 1, 1994, and is still to be used by the court to determine fees in some limited cases. *Id.* § 4, 1994 Fla. Laws at 959. See discussion *infra* note 8 and accompanying text.

5. FLA. STAT. § 73.092.

6. *Id.* § 73.092(1)(c)(1)-(3). The statute mandates that the court "shall" award fees in the manner it prescribes. *Id.* § 73.092(1).

7. See *Downtown Square Assoc. v. Department of Educ.*, 648 So. 2d 1265 (Fla. 4th Dist. Ct. App. 1995).

8. FLA. STAT. § 73.092(2)-(3). Sections 73.092(2) and (3) are still to be used, but only in very limited cases, such as when the condemnor has rejected an offer of judgment under the new statute, and the final judgment equals or exceeds that amount. FLA. STAT. § 73.032(6) (1995). The criteria of § 73.092(2)(a)-(g) and (3) are also to be used to calculate fees awarded in *defeating* a taking, or in proceedings considered "supplemental" to an action in eminent domain, such as apportionment. *Id.* § 73.092(2)-(3).

9. The statute actually reads, "between the final judgment or settlement." FLA. STAT. § 73.092(1)(a). At first glance, this terminology may seem a bit confusing (or at least redundant), because any "settlement" would necessarily be integrated into a final judgment, and thus the reference becomes surplusage. However, it must be noted that subsection

made before the condemnee hires an attorney.<sup>10</sup> If no offer is made before the condemnee retains counsel, the benefit is measured from the first offer made *after* an attorney is hired.<sup>11</sup> Generally, the amount of the benefit will include any award made for business damages. However, if the condemnor has made a written request for the condemnee's business records,<sup>12</sup> and the condemnee fails to provide those records, the court must exclude any award for business damages from the benefit calculation.<sup>13</sup>

Unlike the old statute, which merely required the production of the owner's "financial records," the newly worded statute requires "those financial and business records kept by the owner in the ordinary course of business."<sup>14</sup> It is not yet clear what effect, if any, this expanded terminology will have on the production requirement.

With respect to the *time* in which these records are to be produced—at least during *presuit* negotiations—the new statute makes no changes, and still does not require that the records be produced by any specific date.<sup>15</sup> But, if a suit is later filed, and the business owner has still not provided the records, any business-damage benefits are to be based on the first written offer the condemnor makes within 120 days *after* filing the action.<sup>16</sup>

In addition, a newly added portion of this section can be used by the court to extend that 120-day time period even longer.<sup>17</sup> Under the new statute, if the condemnor requests the owner's records through discovery, and does so within forty-five days of the condemnee's answer, the time to make an business damage offer is extended up to sixty days *after* the

(1)(a)1. specifically governs fees awarded "in prelitigation negotiations" and subsection (1)(a)2. refers to fees awarded *after* litigation. *Id.* § 73.092(1)(a)1.-2. This bifurcation obviously contemplates fee determinations for cases resolved without a judicial determination which would result in a "settlement" rather than a final judgment. *See also* FLA. STAT. § 337.271(6) (1993) (mandating use of criteria found in § 73.092 in fees awarded in *presuit* negotiations with Department of Transportation).

10. FLA. STAT. § 73.092(1)(a). The new section implements some curious housekeeping. The old statute referred to "the benefits resulting to the client from the services rendered." *Id.* § 73.092(1) (1993). The new statute substitutes in its place "the benefits achieved for the client." *Id.* § 73.092(1) (1995). It is too soon to tell what this editing will accomplish, if anything.

11. *Id.* § 73.092(1)(a).

12. *Id.* § 73.092(1)(a)1.-2. The statute refers to the discovery of "financial and business records kept . . . in the ordinary course of business." FLA. STAT. § 73.092(1)(a)1.

13. *Id.* § 73.092(1)(a)1.

14. *Id.*

15. *Id.* Of course, the records would have to be produced sometime prior to litigation.

16. *Id.* § 73.092(1)(a)2.

17. FLA. STAT. § 73.092(1)(a)2.

condemnor receives the records.<sup>18</sup> If the condemnor does not request these records within these allotted time frames, any benefits for business damage awards are based on the difference between the settlement or final judgment and the last written offer made before the condemnee hired an attorney.<sup>19</sup>

The new statute still allows the court to consider so-called “nonmonetary” benefits in calculating the fee award.<sup>20</sup> Such benefits, however, must be obtained “through the efforts of the attorney.”<sup>21</sup> In addition, the new statute requires that all nonmonetary benefits be capable of being “specifically identified” by the court, and reasonably quantifiable.<sup>22</sup>

Another amendment, and one which clearly favors the condemning authority, can be found in section 73.092(1)(a). This portion of the statute was amended so that “interest”—which is typically awarded in almost every civil action—is not to be considered when calculating fee awards to the condemnee’s attorney.<sup>23</sup>

### B. *Changes to the Rules Concerning Offers of Judgment*

The new statutory fee schedule can be modified, but only by way of a newly created “reverse” offer of judgment now available to the condemnee.<sup>24</sup> This new provision authorizes a condemnee to make an offer of judgment for a given amount (up to a limit of \$100,000).<sup>25</sup> If the condemnor then rejects the offer, and the final judgment equals or exceeds the offer (exclusive of interest), the statutory fee schedule is no longer applicable, and the trial court is granted the discretion to utilize the criteria found in sections 73.092(2) and (3) of the *Florida Statutes*.<sup>26</sup>

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18. *Id.* The new statute substantially increases the time frame in which a condemnor may make a business damage offer. The old statute required that such offers be made within 120 days of the *filing of the petition*. *Id.* § 73.092(1)(a)2. (1993). The new statute, on the other hand, could effectively increase that time up to 145 days after the answer is filed (i.e., a discovery request served 45 days after the answer; a response in 30 days; 60 more to make the offer; and 10 days mailing time). *Id.* § 73.092(1)(a) (1995).

19. *Id.*

20. FLA. STAT. § 73.092(1)(b).

21. *Id.* The predecessor statute read, “[t]he court may also consider nonmonetary benefits which the attorney *obtains for the client*.” *Id.* § 73.092(1)(b) (1993) (emphasis added).

22. *Id.* § 73.092(1)(b) (1995).

23. *Id.* § 73.092(1)(a). The amendment added the words “exclusive of interest.”

24. FLA. STAT. § 73.032 (Supp. 1994).

25. *Id.* § 73.032(3).

26. *Id.* § 73.032(6).



The new statute retains a portion of the predecessor provision, and thus now permits *both*<sup>27</sup> the condemnor and condemnee to make such offers.<sup>28</sup> However, while a *condemnee's* offer of judgment can impact the new statutory fee schedule, a *condemnor's* offer of judgment now only acts as a limitation on costs, not on attorney's fees (as it did under the previous statute).<sup>29</sup>

There are some similarities to both provisions. In either case, the offer must be in proper form,<sup>30</sup> and it must propose to settle all pending claims (exclusive of fees and costs).<sup>31</sup> If the offer is not accepted in writing within thirty days of filing, it is deemed rejected.<sup>32</sup> If there are less than thirty days before trial when the offer is made, it is deemed rejected if not accepted by the time of trial.<sup>33</sup> An offer may be withdrawn, in writing, before a written acceptance has been filed with the court.<sup>34</sup> The parties can apparently make as many offers as they want under the new statute, but each successive offer "voids" the previous one.<sup>35</sup>

The condemnor can not make its offer of judgment for at least 120 days after the condemnee has filed an answer, and no later than twenty days before trial.<sup>36</sup> If the condemnee rejects the offer, and the final judgment turns out to be equal, or less than, the offered amount, the court may not award any costs to the condemnee which were incurred after the date the offer was rejected.<sup>37</sup>

Similarly, a condemnee's offer of judgment also can not be made earlier than 120 days after the answer is filed, and no later than twenty days before trial.<sup>38</sup> And, as discussed, if the condemnor rejects the condemnee's

27. The predecessor statute only authorized the *condemnor* to make an offer of judgment. *Id.* § 73.032 (1993).

28. *Id.* § 73.032(2)-(3) (1995).

29. FLA. STAT. § 73.032.

30. *See id.* § 73.032(4)(a)1.-7. (1995) for the requirements as to the form and mandatory contents of the offer.

31. *Id.* § 73.032(4)(a)2.

32. *Id.* § 73.032(4)(c).

33. *Id.*

34. FLA. STAT. § 73.032(4)(d). Once withdrawn, the statute deems the offer "void." *Id.* § 73.032(4)(d). Under the old version of the statute, the condemnor (the only party who could make an offer of judgment), could withdraw the offer any time before being *served* with acceptance. *Id.* § 73.032(1)(d) (1993). Now, either party can withdraw its offer up until the time an acceptance is actually *filed* with the court. *Id.* § 73.032(4)(d) (1995).

35. *Id.* § 73.032(4)(c).

36. FLA. STAT. § 73.032(2).

37. *Id.* § 73.032(5).

38. *Id.* § 73.032(3).

offer, and the final judgment is at least equal to the offered amount, the statutory fee schedule is jettisoned, and the court is granted the discretion to award fees based on the criteria found in section 73.092 of the *Florida Statutes*.<sup>39</sup>

### C. The New "Costs" Provision

The legislature also rewrote the costs section of the statute in 1994.<sup>40</sup> The old provision was one sentence long, and merely provided that the petitioner pay "all" reasonable costs of the proceedings, including attorney's fees, appraisal fees, and in business damage cases, accountant's fees.<sup>41</sup>

The new cost provision is more elaborate, more detailed. It is segregated into five separate subsections. The first retains the language of the predecessor statute on "costs," but it now defers directly to the new attorney's fees provision on that issue.<sup>42</sup> A new subsection requires the condemnee to submit detailed time records for each expert witness (including the expert's costs), as well as a copy of any contract which exists between the expert and the condemnee (or the condemnee's attorney).<sup>43</sup> The records must be submitted at least thirty days prior to the cost hearing.<sup>44</sup>

In assessing the reasonableness of the costs, the court is permitted to consider any relevant factors, including those fees and costs which would typically be paid under comparable circumstances to similarly qualified persons.<sup>45</sup> The court is to make specific findings to justify each sum it awards as expert's witness fees.<sup>46</sup> In assessing costs to be paid by the condemnor the court is to be guided by the amount the condemnee would ordinarily be expected to pay if the condemnor was not being held responsible for the costs.<sup>47</sup>

39. *Id.* § 73.032(6).

40. Ch. 94-162, § 2, 1994 Fla. Laws 955, 957 (current version at FLA. STAT. § 73.091 (1995)).

41. FLA. STAT. § 73.091 (1993). An unjustified rejection of an offer of judgment could limit cost awards under the 1993 version of the statute. *Id.* § 73.092(6).

42. FLA. STAT. § 73.091 (1995).

43. *Id.* § 73.091(2).

44. *Id.*

45. *Id.* § 73.091(3).

46. *Id.* § 73.091(5).

47. FLA. STAT. § 73.091(4). This provision indicates that the "market value" of the services rendered would provide an adequate guide by which such amounts would be awarded.

### D. *The New Condominium Provision*

A newly created section 73.073 establishes the procedures to be followed with respect to the condemnation of common elements of a condominium.<sup>48</sup> The statute requires the condemning authority to identify and notify all of the unit owners in the condominium of any negotiated sale or eminent domain exercise.<sup>49</sup> It also provides minimum requirements for the notice, which must include: 1) the name of the condemning authority; 2) a description of the property; 3) a statement of the "public purpose" for which the property is intended; 4) an appraisal; 5) a "clear and concise" statement of the unit owner's right to object to the taking or the appraised value, detailing the procedures for objection; and 6) a clear and concise statement of the association's right to convey in the absence of an objection.<sup>50</sup>

If the unit owner fails to respond to the notice within thirty days, the owner is deemed to have acquiesced to the appropriate condominium association acting as the owner's representative in all subsequent proceedings.<sup>51</sup> Those owners who do make a proper objection preserve their rights with respect to the taking, to the appraisal of value, and to any other rights which might appertain to unit ownership.<sup>52</sup> If no unit owners object, the condemnor can rely on a power of sale vested in the association.<sup>53</sup> And, in the event litigation becomes necessary, the condemnor need only name the association and the objecting owners as defendants.<sup>54</sup>

## II. COMMENTS ON THE NEW STATUTE

Critics have pointed to several problems with the new statute. First, there may be a serious question as to its constitutionality, particularly with respect to the so-called "benefit" being the only criteria to be used in awarding fees. The resolution of this question might very well hinge on whether the Supreme Court of Florida determines "reasonable" attorney's fees to be an essential component of the "full compensation" due property

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48. Ch. 94-336, § 1, 1994 Fla. Laws 2382, 2382 (current version at FLA. STAT. § 73.073 (1995)). The new law became effective on October 1, 1994.

49. FLA. STAT. § 73.073(2).

50. *Id.* § 73.073(2)(a)-(f).

51. *Id.* § 73.073(3).

52. *Id.*

53. *Id.*; see also FLA. STAT. § 718.112 (1993) (regarding the conveyance powers of the condominium association).

54. FLA. STAT. § 73.073(3).

owners under section 12 of the Declaration of Rights, and Article XVI, section 29 of the *Florida Constitution*. This issue has yet to be decided, and particularly so with respect to the new “percentage-based” statute. And, if “reasonable” attorney’s fees *are* included in the constitutional guarantee of full compensation, then the limitations imposed by the new statute could reduce the condemnee’s award below that guarantee. If so, the statute might be subject to a constitutional challenge on these grounds.

Others claim the new fee statute might be challenged on both substantive and procedural due process grounds as well, in light of the fact that it will most certainly act to deny smaller property owners adequate access to the courts. The new fee limitations have been variously referred to by members of the condemnee bar as “arbitrary,” “draconian,” and “inflexible.”<sup>55</sup> Whatever the outcome, such characterizations indicate that the new statute is sure to be challenged.

The “offer of judgment” provisions in the new statute may prove even more susceptible to challenge. As the supreme court has made clear on a number of occasions—and specifically so in the context of “offer of judgment” statutes—the legislature does not possess constitutional authority to implement rules of court; this power rests exclusively with the Supreme Court of Florida.<sup>56</sup> In fact, the predecessor offer of judgment statute has already been declared unconstitutional by at least one circuit court on grounds that the “procedural”<sup>57</sup> aspects of the statute (drafted by a selected

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55. This topic was discussed at some length at the 1994 Condemnation Law Seminar sponsored by the Eminent Domain Committee of the Florida Bar (Oct. 14 - Nov. 14, 1994).

56. In a trio of fairly recent cases, the Supreme Court of Florida made it clear that to the extent “offer of judgment” statutes attempt to regulate court “procedures,” such statutes unconstitutionally impinge on the exclusive rule-making authority granted the supreme court under section 2(a) of Article V of the *Florida Constitution*. See *Timmons v. Combs*, 608 So. 2d 1, 2 (Fla. 1992); *Leapai v. Milton*, 595 So. 2d 12, 15 (Fla. 1992); *Florida Bar Re: Amendment to Rules of Civil Procedure, Rule 1.442 (Offer of Judgment)*, 550 So. 2d 442, 443 (Fla. 1989).

Indeed, as well documented in a recent article in the *Florida Bar Journal*, § 73.032 of the *Florida Statutes* is entirely “procedural,” and, under the authority of the cited cases, is thus unconstitutional. See Richard A. Harrison, *Offers of Judgment in Eminent Domain Cases*, 67 FLA. B.J. 23, 23-28 (Jan. 1993).

57. The “procedural” aspects of the statute include: requirements as to the “form” and contents of the offer; instructions on how and when it is to be accepted, rejected or withdrawn; directions as to its service; and rules governing its admissibility in court. FLA. STAT. § 73.032 (1993). As a matter of fact, almost the entire text of § 73.032 is “procedural” in nature. Moreover, a newly added subsection (1) expressly states that the section is the “exclusive” offer of judgment provision for all actions in eminent domain, thereby precluding the use of any other statute or rule of court (i.e., Florida Rule of Civil

“committee” and then adopted by the legislature) violate Florida’s strict separation of powers doctrine.<sup>58</sup> The new statute retains many, if not all, of the procedural aspects of the old section 73.032, and its constitutionality will most likely be challenged on those same grounds.

In addition (as was discussed), the new statute imposes an upper limit of \$100,000 on any offer of judgment submitted by the condemnee, but places no such limitation on the condemnor.<sup>59</sup> This disparity<sup>60</sup> is sure to be exaggerated, and the statute is sure to be subjected to constitutional challenges based on equal protection and due process grounds in addition to those already mentioned. And there are some practical problems with the new statute as well.

For example, it still permits a condemnor to make an offer of judgment relatively early on in the project; in fact, it may end up submitted even though the petition may not have a complete (and final) set of construction plans.<sup>61</sup> How can a condemnee evaluate an offer without knowing exactly what to ultimately expect from the condemning authority with respect to the project? And, because a *condemnee’s* offer cannot be submitted until after the answer has been filed,<sup>62</sup> if it is used at all, it will most likely result in a (lower) counteroffer, thereby raising the very real threat of a fee-diminished award—with no risk to the condemnor. In any event, because the condemnee is not permitted to make an offer of judgment for more than

Procedure 1.442) in the event the statute is declared unconstitutional. *Id.* § 73.032 (1995). And, if the statute is declared unconstitutional, condemnees will be left with no power to avoid the bad “benefit” analysis, and will have almost no protection against the unlimited resources of the state.

58. Department of Transp. v. Lee, No. 93-04239-14 (Fla. 17th Cir. Ct. March 20, 1994). The court determined that under well settled principles of Florida law, the legislature cannot create rules of court, that responsibility lies exclusively with the Supreme Court of Florida. *Id.* Accordingly, the court declared § 73.032 of the *Florida Statutes* unconstitutional as applied. *Id.* The author represented the condemner in the successful constitutional challenge.

59. FLA. STAT. § 73.032(3).

60. Proving that “disparity” might prove more problematic than it appears at first glance, however. Since the differing provisions also have disparate impacts (an unjustified rejection of a *condemnee’s* offer results in a modified fee schedule; a rejection of a *condemnor’s* offer only limits the cost award), any equal protection challenge is certain to be complicated by these dynamics.

61. FLA. STAT. § 73.032(7). Section 73.032(7) does require the condemnor to provide the condemnee with any plans which may “exist” at the time of the offer, but those plans may be incomplete and they are almost never in “final” form. Additionally, although it is unlikely, the express wording of the statute does actually permit the condemnor to make an offer when no plans are in existence at all. *Id.*

62. *Id.* § 73.032(3).

\$100,000, this provision will only be utilized in small cases involving less valuable property or very small businesses.

What will be the result of all of these changes? It is really too soon to tell. Some results are quite predictable, however. Most small cases will be forced to settle. Many condemnees will be forced to appear *pro se*<sup>63</sup> against the government rather than risk a fee-diminished award. The more experienced condemnation lawyers will shy from cases where the “benefit-percentage” potential is not commensurate with the time and effort they might reasonably expect to expend defending such a case.<sup>64</sup> Some of the very large cases will result in windfall fees.

The intent of these legislative changes was to make fee awards in eminent domain cases more equitable. Unfortunately, the new law eliminates much (if not all) judicial discretion, and inserts in its place an unyielding, percentage-based formula which may very well result in unjustifiably large fee awards in the bigger cases, and little compensation—perhaps even less than full compensation—in the smaller ones. Only time will tell; but one thing is for certain, the new statute is sure to be challenged on a number of fronts.

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63. In a case in which the condemnee’s attorney could expect to expend 250 hours to prepare and try an eminent domain action, even a benefit of \$50,000 over the initial offer would yield fees of less than \$75 per hour. Why would an experienced eminent domain attorney take on such a case and perhaps risk an even lesser “benefit,” lesser fees, or go broke in the process? When the action involves even smaller, marginally valuable property interests, the infirmities of the statute are exposed even further. For example, if the property involved is only worth around \$15,000, any “benefit” cannot reasonably be expected to be more than a few thousand dollars. This would make the award of attorney’s fees—through a full blown trial—a couple of hundred dollars. How many attorneys are going to take a case like that to trial—or take it at all? It is likely, therefore, that the property owner is going to end up representing his or herself in the eminent domain action and will probably settle without a fight.

64. Condemnation cases are very often complicated matters. It is not uncommon for both sides to spend several hundred hours in preparation for a trial. Moreover, the condemnee typically retains counsel well before the condemnation petition is even filed, so the attorney may very well have already spent a significant amount of time attempting to settle during presuit negotiations.

Furthermore, the typical valuation case is almost always founded on expert testimony, so pretrial preparation and discovery can intensify the process. The statute also requires the parties to participate in mediation. Thus, a complicated case can take years to resolve. In cases where the potential benefit will be small, there is no motivation for a condemnation attorney to take the case at the statutory fee; and, if the attorney charges a “reasonable” (i.e., hourly) fee, the condemnee’s award will no doubt be reduced by that fee. It is enough to dissuade any property owner to settle or appear *pro se*.

### III. CASE LAW

A number of significant appellate opinions involving issues of condemnation law were reported over the last year. The Supreme Court of Florida itself generated no less than five separate opinions on condemnation law; and the district courts produced another two dozen more, many involving questions of “access.” Several of the more significant cases are discussed below.

#### A. Attorney’s Fees

In July of 1994, at the very beginning of the survey period, the Supreme Court of Florida issued *Department of Transportation v. Gefen*.<sup>65</sup> In *Gefen*, the plaintiff in an inverse condemnation suit—who had won at the circuit court level but then lost on appeal—requested that fees be awarded under section 73.131(2) of the *Florida Statutes*. In refusing, the court focused on the specific wording of the authorizing statute and declined the award of fees even though the plaintiff had initially been successful at the trial level.<sup>66</sup> Because she was ultimately unsuccessful in her action (i.e., losing after final appeal),<sup>67</sup> the court found she was unable to avail herself of the statutory award of fees.<sup>68</sup>

In *Downtown Square Associates v. Department of Transportation*,<sup>69</sup> the Fourth District Court of Appeal held that it was error for a trial court to consider any factors other than those specifically enumerated in the statutory criteria of section 73.092 of the *Florida Statutes*.<sup>70</sup> Citing several prior cases, the court reversed the portion of the fee award which was not in strict compliance with the statute.<sup>71</sup>

65. 636 So. 2d 1345 (Fla. 1994).

66. *Id.* at 1347.

67. The supreme court quashed the original taking. *Id.* at 1346.

68. *Id.* at 1347.

69. 648 So. 2d 1265 (Fla. 4th Dist. Ct. App. 1995).

70. *Id.* at 1265-66. The case involved the 1993 version of § 73.092.

71. *Id.* at 1266. *See, e.g.,* Schick v. Department of Agric. & Consumer Servs., 599 So. 2d 641, 643 (Fla. 1992) (stating that if a statute sets forth criteria to be considered in awarding fees, that specific statute controls); Department of Transp. v. Denmark, 354 So. 2d 100, 101 (Fla. 4th Dist. Ct. App. 1978) (stating that if a statute does not contemplate other factors in awarding fees, other factors cannot be considered); Stewart Select Cars, Inc. v. Moore, 619 So. 2d 1037, 1038 (Fla. 4th Dist. Ct. App. 1993) (noting that where the legislature has set forth certain criteria to be utilized in awarding fees, the trial judge is bound to use only that criteria). This line of cases, when coupled with the newly restrictive fee statute, will effectively handcuff trial courts into issuing fee awards based *only* on “the

In *Whitlow v. South Georgia Natural Gas Co.*,<sup>72</sup> the First District Court of Appeal reversed a fee award because nothing in the lower court's final order disclosed whether it had considered a reduced hourly rate for various non-lawyer services.<sup>73</sup> Citing to section 57.104 of the *Florida Statutes*—which requires courts to consider such facts in formulating fee awards—the court reversed and remanded for further clarification.<sup>74</sup>

In *Department of Transportation v. D.J.P. Associates, Inc.*,<sup>75</sup> the Second District reversed a fee award because of an “ambiguity” contained in the trial court's order.<sup>76</sup> Here, one trial judge had initially conducted the fee hearings, and had issued a letter to the parties explaining his intentions with respect to the fee award. Unfortunately, the judge's calculation was not mathematically accurate; when a successor judge included an enhancement of the hourly award (in order to make the first judge's calculation work), he created an ambiguity in the order which was sufficient to require clarification.<sup>77</sup> The case stands as a strong reminder to trial courts (and to litigants) to be sure and use sufficient detail in drafting condemnation fee awards; and this admonishment becomes even more critical in light of the restrictive criteria contained in the new statute.

Finally, in *Orlando/Orange County Expressway Authority v. Latham*,<sup>78</sup>—a case discussed elsewhere in this article regarding the suppression of expert testimony on the issue of severance damages,—the Fifth District Court of Appeal properly awarded a condemnee appellate attorney's fees for having to defend an appeal brought by the condemnor—even though the condemnee eventually lost the appeal. The court relied on section 73.131 of the *Florida Statutes*, which mandates such an award under these circumstances.<sup>79</sup>

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benefits” achieved, without regard for other criteria.

72. 650 So. 2d 637 (Fla. 1st Dist. Ct. App. 1995).

73. *Id.* at 638.

74. *Id.* (citing FLA. STAT. § 57.104 (1989)).

75. 640 So. 2d 1201 (Fla. 2d Dist. Ct. App. 1994).

76. *Id.* at 1201.

77. *Id.*

78. 643 So. 2d 10 (Fla. 5th Dist. Ct. App. 1994); see discussion *infra* part III.I. and accompanying text.

79. *Id.* at 11; see also *Denmark v. Department of Transp.*, 389 So. 2d 201 (Fla. 1980) (holding that condemnees are to be awarded attorney's fees even if he/she losses on appeal).



## B. *Inverse Condemnation Access*

A number of decisions involving a loss of access were reported during the survey period. While none of these cases seriously impacted on the well-seasoned rules established in cases like *Anhoco Corp. v. Dade County*,<sup>80</sup> and *Palm Beach County v. Tessler*,<sup>81</sup> some raise interesting issues nonetheless.

For example, in June of 1995 in *Rubano v. Department of Transportation*,<sup>82</sup> the Supreme Court of Florida rejected an inverse condemnation claim grounded on a temporary loss of access caused by a major road construction project.<sup>83</sup> In *Rubano*, the construction project temporarily severed the owners' direct access to the highway by eliminating a protected U-turn, and by increasing the travel mileage required to reach the owners' property by one and one-half miles.<sup>84</sup> The circuit court determined that the Department had effected a taking through these activities, but the Fourth District reversed, believing the temporary rerouting of traffic required by the construction was noncompensable.<sup>85</sup> In doing so, the court certified the question to the Supreme Court of Florida as one of great importance.<sup>86</sup>

80. 144 So. 2d 793 (Fla. 1962). In *Anhoco*, the court ruled that although a property owner would be entitled to compensation for a "total" destruction of his access, a taking does not occur when the government merely "regulates" that access through the use its police power, as in prescribing the number and location of driveways, or of other access facilities. *Id.* at 798.

81. 538 So. 2d 846 (Fla. 1989). In *Tessler*, the property owners lost access to their property which resulted in their customers having to travel 660 yards through a residential neighborhood to get to their business. The court concluded that the property owners could recover damages for their loss of access because they had lost "more than their most convenient means of access." *Id.* at 850.

82. 656 So. 2d 1264 (Fla. 1995).

83. *Id.* at 1265.

84. *Id.* at 1266.

85. *State Dep't of Transp. v. Rubano*, 636 So. 2d 749, 750 (Fla. 4th Dist. Ct. App. 1994), *aff'd*, 656 So. 2d 1264 (Fla. 1995).

86. *Id.* at 752-53. The district court only certified as to whether there was a "compensable taking of access." *Id.* at 753. The supreme court formulated the following question on its own volition:

DID THE DEPARTMENT OF TRANSPORTATION ENGAGE IN A COMPENSABLE TEMPORARY TAKING OF ACCESS WHEN IT ELIMINATED PETITIONERS' DIRECT ACCESS TO A STATE ROAD BY PLACING PETITIONERS' PROPERTY ON A SERVICE ROAD, ELIMINATED A PROTECTED U-TURN AND REPLACED IT WITH ANOTHER U-TURN WHICH ADDED ONE AND ONE-HALF MILES OF TRAVEL TO REACH THE PROPERTIES, AND SEVERED THE CONNECTIONS FROM

The supreme court, in a unanimous opinion, found that none of the Department's activities constituted a compensable taking of access.<sup>87</sup>

In a well thought-out, reflective opinion, Justice Anstead addressed each of the Department's activities. First, he characterized the property owners' loss of direct highway access as a noncompensable "diversion of traffic,"<sup>88</sup> comparable to that found in *Department of Transportation v. Gefen*.<sup>89</sup> Next, Justice Anstead noted that the elimination of the U-turn did not sufficiently impair the owners' access to the highway so as to be compensable,<sup>90</sup> and particularly so in light of the fact that the elimination only affected traffic flow in one direction.<sup>91</sup> Finally, the court concluded that the Department's construction of a "service road," built to allow the owners continuing access to the highway during construction did not "completely destroy[]" the owners' access to the highway,<sup>92</sup> and thus were noncompensable.

Similarly, in *Port St. Lucie Shopping Center Associates v. Board of County Commissioners*,<sup>93</sup> the Fourth District Court of Appeal refused to find that the closure of a median cut, requiring eastbound motorists to make a U-turn at the next traffic light, caused an abutting property owner to incur a substantial "loss of access," thus, the closure was noncompensable.<sup>94</sup>

On the other side of the issue, in *Department of Transportation v. Kreider*,<sup>95</sup> the Fourth District Court of Appeal affirmed a trial court order of taking which found that a departmentally-constructed retaining wall had caused a property owner to incur a "substantial loss of access" by: 1) removing the property owner's eastbound access to the highway; 2)

#### INTERSTATE 95 TO STATE ROAD 84?

*Rubano*, 656 So. 2d at 1265.

87. *Id.* at 1271.

88. *Id.* at 1267.

89. 636 So. 2d 1345 (Fla. 1994) (holding that a redirection of traffic, as opposed to an actual deprivation of access, is not compensable).

90. *Rubano*, 656 So. 2d at 1268 (citing *Division of Admin. v. Capital Plaza*, 397 So. 2d 682 (Fla. 1981) (holding that construction of median which impedes or impairs traffic flow does not necessarily warrant compensation because property owner has no property right to maintenance of traffic flow past his property)).

91. *Id.* at 1269.

92. *Id.* The court found petitioner's reliance on *Anhoco* misplaced, holding that the property owner incurred compensable taking when its rights of access were "completely destroyed," and not merely regulated. *Id.*

93. 638 So. 2d 202 (Fla. 4th Dist. Ct. App. 1994).

94. *Id.* at 202.

95. 658 So. 2d 548 (Fla. 4th Dist. Ct. App. 1995).

substituting a burdensome<sup>96</sup> alternate route which increased travel well over one mile; and 3) blocking the owner's visibility from the road.<sup>97</sup>

The court pointed out that before and after *Tessler*, the supreme court has narrowly applied the concept of "compensable loss of access,"<sup>98</sup> and noted that the trigger to a *Tessler* analysis is the destruction of direct access to an abutting road.<sup>99</sup> Applying *Tessler*, the court had no difficulty in concluding that the property owner had incurred a "substantially diminished" access.<sup>100</sup>

### C. Regulatory Takings

In an inverse condemnation case which did not involve "access," *City of Pompano Beach v. Yardarm*,<sup>101</sup> the Fourth District Court of Appeal reversed an order of taking which had issued after a two-decade dispute over a construction project.<sup>102</sup> In rejecting the takings claim, the court found no evidence that the defendant City denied the petitioner all use of the subject property. Even though the trial court may have found the City's actions to be variously "illegal," "arbitrary and capricious," and "not taken to promote the public's health, safety and welfare," this did not establish a taking.<sup>103</sup> The court held these characterizations might very well identify a deprivation of "due process," but they do not establish a "taking," which specifically requires a showing that the regulation or restriction has denied the property owner "all economic, beneficial or productive use of the property."<sup>104</sup>

In dealing with the twenty-year old litigation, the Fourth District Court of Appeal issued an extended opinion containing a relatively thorough

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96. In determining that the route was "more burdensome than . . . *Tessler*," the court mentioned the factors of "time, distance, and difficulty of navigation." *Id.* at 550. The court also noted that this case was unlike the typical "traffic flow" case, in that the alternative route was a "one way 'road to nowhere.'" *Id.*

97. *Id.* at 549.

98. *Id.*

99. *Kreider*, 658 So. 2d at 549.

100. *Id.* at 550.

101. 641 So. 2d 1377 (Fla. 4th Dist. Ct. App. 1994), *review denied*, 651 So. 2d 1197 (Fla.), *cert. denied*, 115 S. Ct. 2583 (1995).

102. *Id.* at 1379.

103. *Id.* at 1385-86.

104. *Id.* at 1385. In finding as it did, the court rejected the petitioner's contention that its inability to maintain financing over the long haul of the litigation—even if caused by dilatory, unlawful acts of the City—constituted a compensable "taking." *Id.* at 1386-87.

treatment of the law of inverse condemnation.<sup>105</sup> After twenty years, the facts of *Yardarm* are somewhat complicated, but the dispute started when the owners sued the City because it had revoked the permits it had previously issued, claiming the revocation was due to “administrative oversights.”<sup>106</sup> Two years later, a circuit court ruled that the City did have the right to rescind the permit.<sup>107</sup> The property owners did not appeal and instead resubmitted the plans in order to receive a new permit. The City denied the permit and once more the property owner sought relief. This time the court ruled in favor of the property owner, and the City once more issued a permit.<sup>108</sup>

Allegedly in some financial difficulty at this point, the property owners nevertheless began work on the project. Unfortunately, they soon discovered that the permit they had received was incomplete, so they once again sought approval from the City, which eventually issued permits for everything but the construction of an all-important dock.<sup>109</sup>

During the next decade, the City and property owners fought over the project continuously, and over the course of the ensuing litigation, the property owners were eventually forced to file for bankruptcy and lost the property through foreclosure. The owners then sued the City, claiming that the City’s extended obstruction of its construction project had worked an inverse condemnation of its property.<sup>110</sup>

The court first addressed the threshold question as to whether an actual “taking” had occurred. In determining that a compensable regulatory “taking” had *not* occurred, the court reaffirmed the well-established principle of law requiring the property owner in such cases to establish the complete deprivation of substantially all use of the property.<sup>111</sup> Here, the court noted that while the City may have acted “arbitrar[ily] and capricious[ly],” and not in the best interests of the public, these are references which typically denote a violation of due process and not necessarily a taking.<sup>112</sup> The court determined that the property owner’s ability to put the property to alternative uses during the period prior to 1981 when all requested

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105. *Yardarm*, 641 So. 2d at 1379-89.

106. *Id.* at 1379. The permit was issued based on a special-use exception to a height-restrictive ordinance the City passed as result of pressure from nearby residents. *Id.*

107. *Id.*

108. *Id.*

109. *Yardarm*, 641 So. 2d at 1379.

110. *Id.* at 1382.

111. *Id.* at 1384.

112. *Id.* at 1385.

permits had been issued, precluded a finding that the City had denied “all use” of the property.<sup>113</sup> As such, no taking had occurred.<sup>114</sup>

However, the court went further and determined that even if the City’s actions constituted a taking, the four-year statute of limitations applicable to takings claims expired prior to the property owner filing the takings claim.<sup>115</sup> In so doing, the court rejected the owner’s claim that it “could not bring a taking case against [the City] because it kept winning.”<sup>116</sup> This case bodes a serious warning to those who believe they have such an action, to bring it before the action expires.

In *Tinnerman v. Palm Beach County*,<sup>117</sup> the Fourth District Court of Appeal held a suit for inverse condemnation based on a conditioned moratorium/delay in the County’s issuance of building permits was not ripe because: 1) the record revealed the County had not actually made a “final” decision on the matter; 2) plaintiff had not taken sufficient steps to “alter” the County’s decision; and 3) plaintiff failed to establish the absence of any alternative uses for the property during the temporary period in which the permit did not issue.<sup>118</sup> The court also noted that plaintiff had not taken sufficient steps to determine whether an alternative plan could have forced the City into lifting the challenged moratorium on building permits.<sup>119</sup> The court found that a plaintiff in such a case cannot establish the “futility” of taking such action, unless “at least one meaningful application has been filed.”<sup>120</sup> The court then decided the absence of a firm determination by the government as to the permissible uses of the property precluded any inference that plaintiff has lost “all economically viable use” of the property so as to constitute a taking.<sup>121</sup>

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113. *Id.* at 1386; *cf.* *Bello v. Walker*, 840 F.2d 1124 (3d Cir.) (holding that denial of a certain kind of permit insufficient to establish a taking when property owner retains right to put property to multiple alternative uses), *cert. denied*, 488 U.S. 868 (1988).

114. *Yardarm*, 641 So. 2d at 1387.

115. *Id.* at 1388. The court mentioned § 95.11(3)(f) and § 95.11(3)(p) of the *Florida Statutes* which might govern such actions, both of which contain a four-year limitations period. *Id.* at 1387.

116. *Id.* at 1388.

117. 641 So. 2d 523 (Fla. 4th Dist. Ct. App. 1994).

118. *Id.* at 525-26.

119. *Id.* at 526-27.

120. *Id.* at 526 (citing *Glisson v. Alachua County*, 558 So. 2d 1030 (Fla. 1st Dist. Ct. App.), *review denied*, 570 So. 2d 1304 (Fla. 1990)).

121. *Id.*

In *Key West v. Berg*,<sup>122</sup> the Third District Court of Appeal held a property owner's claim for regulatory taking was not ripe because the owner had not even applied for a permit under the challenged plan.<sup>123</sup> Noting that the plan contained a "beneficial use exception," and rejecting the trial court's determination that an application would be "futile," the court concluded it was too soon to tell if the plan would actually deprive the owner of all economical use of the property.<sup>124</sup>

In February, of 1995, the First District Court of Appeal issued *City of Jacksonville v. Wynn*.<sup>125</sup> In *Wynn*, the court reiterated the established principle that a question of taking is not ripe for judicial resolution until the property owner has received a "final" determination from the government as to the permissible uses of the property.<sup>126</sup>

In *Wynn*, several residential lot owners sued the City for a commercial rezoning after their requests had been denied by the City for failing to comply with its comprehensive plan. The circuit court found that the plan had affected a taking, and the City appealed.<sup>127</sup> Amidst a host of other issues, the appellate court discussed "ripeness" and the similarities between due process and takings claims, and concluded that both require some sort of "final" determination before they may be adjudicated.<sup>128</sup> The court found that the property owners had not received a "final" decision, in that they had not submitted any specific plan to develop the property, or sought any amendment to the comprehensive plan.<sup>129</sup> The court concluded that a taking could not have occurred because the City had not even been afforded the opportunity to apply its plan to the property in question.<sup>130</sup>

122. 655 So. 2d 196 (Fla. 3d Dist. Ct. App.), *review denied*, 663 So. 2d 629 (Fla. 1995).

123. *Id.* at 196. The challenged portion of the plan restricted the development of "wetlands." *Id.*

124. *Id.*

125. 650 So. 2d 182 (Fla. 1st Dist. Ct. App. 1995).

126. *Id.* at 188; *see also* *Glisson v. Alachua County*, 558 So. 2d 1030, 1035-36 (Fla. 1st Dist. Ct. App.), *review denied*, 570 So. 2d 1304 (Fla. 1990); *Moviematic v. County Comm'rs*, 349 So. 2d 667 (Fla. 3d Dist. Ct. App. 1977).

127. *Wynn*, 650 So. 2d at 184.

128. *Id.* at 187. As Judge Kahn put it, "a court cannot determine that a regulation has gone too far until the court actually knows how far the regulation goes." *Id.* (citing *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985)).

129. *Id.*

130. *Id.*

#### D. The "Reservation Map" Cases

In *Tampa-Hillsborough Expressway Authority v. A.G.W.S.*,<sup>131</sup> the supreme court held that the filing of a map of reservation, in and of itself, does not constitute a per se regulatory taking, nor does it relieve the petitioner of the burden of establishing that the mere filing of the map effectively deprived it of all economically viable use of the land.<sup>132</sup> However, if that fact can be established, the filing could constitute a taking.<sup>133</sup>

In *Tampa-Hillsborough County Expressway Authority v. Harrell*,<sup>134</sup> the Second District Court of Appeal reversed a damage award given for a temporary taking which had allegedly been caused by the Authority's filing of a reservation map.<sup>135</sup> Relying on *A.G.W.S.*, the court reminded the petitioner that in order to establish a taking based on the filing of a map of reservation, the affected landowner must first establish that the filing of the map, in and of itself, denied the owner all economically viable use of the property.<sup>136</sup>

In an almost identical decision, the Fifth District Court of Appeal, in *Department of Transportation v. Zyderveld*,<sup>137</sup> added that the focus of such inquiries should always be directed at "the extent of the interference or deprivation of economic use."<sup>138</sup> In reaching this conclusion, the court

131. 640 So. 2d 54 (Fla. 1994).

132. *Id.* at 58. The court stated: "A taking occurs where regulation denies substantially all economically beneficial or productive use of land." *Id.* at 58. The court also noted that even a "temporary deprivation" may be compensable, but only when the deprivation is of substantially all economic use. *Id.* (citing *First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), *cert. denied*, 493 U.S. 1056 (1990)).

133. *Id.*

134. 645 So. 2d 1026 (Fla. 2d Dist. Ct. App. 1994).

135. *Id.* at 1027.

136. *Id.*

137. 647 So. 2d 308 (Fla. 5th Dist. Ct. App. 1994).

138. *Id.* at 309 (citing *Department of Transp. v. Weisenfeld*, 617 So. 2d 1071 (Fla. 5th Dist. Ct. App. 1993), *approved*, 640 So. 2d 73 (Fla. 1994); *Joint Ventures, Inc. v. Department of Transp.*, 563 So. 2d 622, 625 (Fla. 1990)).

pointed out that it is the petitioner in such cases who has the burden of establishing the debilitating effect caused by the filing of the map.<sup>139</sup>

### E. *Miscellaneous*

In November of 1994, the Fifth District Court of Appeal decided *White v. Department of Transportation*,<sup>140</sup> wherein it found that a trial court erred by requiring a condemnee to publish a portion of a report prepared for him by an appraiser he did not call to testify.<sup>141</sup> The court found it was impermissible for the condemnor's attorney to cross-examine the condemnee on the contents of this report, and thus create an inference for the jury that the information was being "cover[ed] up."<sup>142</sup>

In *Sarasota County v. Ex*,<sup>143</sup> the Second District Court of Appeal reversed a finding of inverse condemnation based on an allegedly "involuntary" dedication of land which had occurred some eight years before the landowner filed the action.<sup>144</sup> Noting that even the "longest" applicable statute of limitations was no more than seven years,<sup>145</sup> the court found the action time-barred.<sup>146</sup>

The following month, in *Heckman v. City of Oakland Park*,<sup>147</sup> the Fourth District Court of Appeal held the statute of limitations for an inverse condemnation action grounded on an unlawfully-extracted dedication of

139. *Zydveld*, 647 So. 2d at 308 (citing *A.G.W.S.*, 640 So. 2d at 54). The court also noted that a claim for severance damages, as alleged by the petitioner, only arises when there has been a "partial" taking. In this regard, the court found that the trial court erred in allowing the condemnee's expert to testify on the issue of severance because he had already stated, quite contrarily, that the actions of the Department had caused the petitioner to incur a total (albeit, temporary) taking, rather than a partial one. *Id.*

140. 645 So. 2d 114 (Fla. 5th Dist. Ct. App. 1994).

141. *Id.* at 115.

142. *Id.*; see *Sun Charm Ranch, Inc. v. City of Orlando*, 407 So. 2d 938, 940-41 (Fla. 5th Dist. Ct. App. 1981) (disallowing any inference that a party who hires, but fails to call, an expert witness is covering up harmful evidence or concealing bad facts).

143. 645 So. 2d 7 (Fla. 2d Dist. Ct. App. 1994), *review denied*, 654 So. 2d 918 (Fla. 1995).

144. *Id.* at 10.

145. The court actually never stated which statute of limitations applies to eminent domain cases, but it did cite § 95.14 of the *Florida Statutes*, which governs actions founded on title to real property. *Id.*

146. *Id.* Although the court never stated it, the opinion implies that the petitioner's cause of action began to run at the time of the "forced" conveyance.

147. 644 So. 2d 525 (Fla. 4th Dist. Ct. App. 1994).



property begins to run at the time of the “forced” conveyance,<sup>148</sup> and not at the time the resolution which requires the dedication is passed.

In a companion case, the Fourth District Court of Appeal held that the city had not acted as an “agent” of the Department of Transportation by requiring the property owners to dedicate the required easement in order to get the permit—an easement the city then intended to turn around and give to the Department.<sup>149</sup> Without sufficient record evidence to establish that the city was actually acting as the Department’s agent, the court refused to allow recovery against the Department.<sup>150</sup>

In *City of Jacksonville Beach v. Prom*,<sup>151</sup> the First District Court of Appeal reversed an order of regulatory taking because the property owner had failed to exhaust his administrative remedies.<sup>152</sup> The court discussed the evolving nature of the “comprehensive plan,” as outlined in Florida’s Local Government Comprehensive Planning Act, and concluded that the owner’s failure to request an amendment or conditional approval to the City’s comprehensive plan, which was also permitted under the local municipal code, negated the trial court’s finding that the owner had exhausted all administrative remedies.<sup>153</sup> The case stands as a reminder to condemnee’s counsel to make sure to identify and exhaust all administrative remedies before filing a suit for inverse condemnation.

At the same time, counsel must also be sure to file the “taking” action in the right forum. In *Ortega v. Department of Environmental Protection*,<sup>154</sup> the First District Court of Appeal affirmed a decision issued by the Department of Environmental Protection which had dismissed a takings claim for lack of jurisdiction.<sup>155</sup> Citing *Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund*,<sup>156</sup> the court pointed out that administrative agencies may not adjudicate takings claims; rather, jurisdiction lies exclusively with the circuit court.<sup>157</sup>

148. *Id.* at 527.

149. *Department of Transp. v. Heckman*, 644 So. 2d 527, 529 (Fla. 4th Dist. Ct. App. 1994), *review denied*, 651 So. 2d 1194 (Fla. 1995).

150. *Id.*

151. 656 So. 2d 581 (Fla. 1st Dist. Ct. App. 1995).

152. *Id.* at 582-83.

153. *Id.* The court also found no support in the record to indicate that an attempt to seek an exception or amendment to the plan would be “futile.” *Id.* at 583.

154. 646 So. 2d 797 (Fla. 1st Dist. Ct. App. 1994).

155. *Id.* at 797.

156. 427 So. 2d 153 (Fla. 1982) (holding that circuit courts have jurisdiction over valid takings claims).

157. *Ortega*, 646 So. 2d at 797.

In *Sarasota County v. Taylor Woodrow Homes Ltd.*,<sup>158</sup> the Second District Court of Appeal reversed a circuit court's dismissal with prejudice, whereby the County's attempted to specifically enforce a 1974 contract dedication.<sup>159</sup> The County brought suit for declaratory judgment and specific performance after the property owner refused to effect the dedication, claiming the 1974 exaction constituted an unauthorized taking under current constitutional law.<sup>160</sup> The circuit court dismissed the action because the County failed to allege the existence of an enacting ordinance or establish a "rational nexus" between the dedication and the "negative impact" expected from the proposed development.<sup>161</sup> The circuit court determined that the dedication was void ab initio based on 1974 law and the current pleadings.<sup>162</sup>

The Second District Court of Appeal, noting the absence of any meaningful factual record, and the complicated nature of the issues raised by those facts, was unconvinced that the dedication should be declared void based solely on the pleadings, and—troubled by the lengthy delay by the owner in asserting the taking—it refused to take such harsh steps.<sup>163</sup> The court then skirted the constitutional question by finding that the County's complaint established a right to declaratory relief, and that as such, the trial court had erred in dismissing it.<sup>164</sup>

In addition, the court made sure to formally acknowledge the recent line of opinions by the Supreme Court of the United States, which hold that a property owner cannot be compelled to give up a constitutional right to property in exchange for a discretionary benefit if the property sought has little relationship to the benefit.<sup>165</sup> The court reconfirmed the notion that a government cannot condition the issuance of a permit upon a specific condition without (1) establishing an "essential nexus"<sup>166</sup> between the condition and a legitimate state interest and (2) producing an individualized

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158. 652 So. 2d 1247 (Fla. 2d Dist. Ct. App. 1995).

159. *Id.* at 1248.

160. *Id.* at 1250.

161. *Id.*

162. *Id.* at 1251.

163. *Sarasota*, 652 So. 2d at 1250-51.

164. *Id.* at 1251.

165. *Id.*; *see, e.g.*, *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

166. The court actually found the "essential nexus" requirement was satisfied in 1974, but was unable to determine the issue of "rough proportionality" without more facts. *Sarasota*, 652 So. 2d at 1252.

determination as to the “rough proportionality” existing between the dedication and the nature and extent of the development’s impact.<sup>167</sup>

Recently, in *City of Dania v. Broward County*,<sup>168</sup> the Fourth District Court of Appeal refused to allow the City to intervene in an eminent domain action brought by the County against several properties located within the boundaries of the City.<sup>169</sup> The City argued it should be permitted to intervene in the taking because the County condemnation would effectively cause it to incur a loss of tax base and other infrastructure expenditures.<sup>170</sup> Noting the City’s failure to provide it with any legal authority which would permit it to recover something in the eminent domain proceeding, the court held the City had no grounds to intervene.<sup>171</sup>

#### F. *Public Purpose*

In *Basic Energy Corp. v. Hamilton County*,<sup>172</sup> the First District Court of Appeal found there was no “municipal purpose” in a municipality’s attempt to condemn land for subsequent donation to the state for use as a state prison.<sup>173</sup> Acknowledging that such a donation might very well be “incidentally relate[d]” to the protection and well being of the municipality’s residents, the court found the relationship was insufficient to establish a primarily “municipal purpose,” rather than one which would benefit the citizens of the state as a whole.<sup>174</sup>

167. *Id.* at 1251.

168. 658 So. 2d 163 (Fla. 4th Dist. Ct. App. 1995).

169. *Id.* at 166.

170. *Id.* at 165.

171. *Id.* at 165-66. The court affirmed the trial court order which had denied the City the right to intervene in the taking, but it did not rule out the possibility that the City might be entitled to relief “in more appropriate proceedings.” *Id.* at 166.

172. 652 So. 2d 1237 (Fla. 1st Dist. Ct. App. 1995).

173. *Id.* at 1239.

174. *Id.*; see *State v. City of Orlando*, 576 So. 2d 1315 (Fla. 1991) (holding that “[a] municipality exists in order to provide services to its inhabitants”); *State v. City of Jacksonville*, 50 So. 2d 532 (Fla. 1951); *City of Winter Park v. Montesi*, 448 So. 2d 1242, 1244 (Fla. 5th Dist. Ct. App.), *review denied*, 456 So. 2d 1182 (Fla. 1984). The City argued, quite unsuccessfully, that § 180.06 of the *Florida Statutes*, granting cities the authority to construct and operate “jails,” provided it with a valid “municipal” purpose. The court rejected this contention by noting that the City never intended to operate a jail; it just donated the land to the state so the state could use it for a prison. *Basic Energy*, 652 So. 2d at 1238. The court also explained that the real question in these cases is not whether a particular statute will permit the City to exercise a specific scope of authority, but whether the exercise of authority is actually for “a valid municipal purpose.” *Id.* at 1239 (citing *City of Ocala v. Nye*, 608 So. 2d 15 (Fla. 1992)).

In *JFR Investment v. Delray Beach Community Redevelopment Agency*,<sup>175</sup> the Fourth District Court of Appeal found an “[i]ncidental private use . . . is permissible where the overall purpose of the taking is clearly and predominately a public one.”<sup>176</sup> In *JFR*, the municipality declared a large tract of land to be blighted and a slum and in determining it needed rehabilitation, created a community development agency to effect that rehabilitation.<sup>177</sup> The project included a combination of public facilities, retail and office space, and an entertainment center. The “taken” property was acquired to serve, in part, as a parking lot for these facilities.<sup>178</sup> The court held that such “incidental” use can be permissible if the overall purpose is “predominately a public one.”<sup>179</sup>

### G. Valuation Issues

In *Finkelstein v. Department of Transportation*,<sup>180</sup> the Supreme Court of Florida answered a question certified to it<sup>181</sup> by the Fourth District Court of Appeal concerning the relevance of environmental contamination to issues of valuation. Not surprisingly, the court held evidence of environmental contamination can be relevant if an appropriate factual predicate is laid linking the contamination to value.<sup>182</sup> Reminding the litigants that the focus of opinion testimony in such cases must always be on “value,” the court held evidence of contamination can be relevant, but only if coupled with expert testimony, based on hard data,<sup>183</sup> all of which specifically establishes the contamination resulted in a decrease in value.<sup>184</sup> The

175. 652 So. 2d 1261 (Fla. 4th Dist. Ct. App. 1995).

176. *Id.* at 1263.

177. *Id.* at 1262.

178. *Id.* at 1263. The taken property was also to be used as allocation for two publicly owned “historic houses.” *Id.* at 1262.

179. *JFR*, 652 So. 2d at 1263 (citing *Grubstein v. Urban Renewal Agency of Tampa*, 115 So. 2d 745 (Fla. 1959)).

180. 656 So. 2d 921 (Fla. 1995).

181. *Id.* at 922-23, 924. The Fourth District Court of Appeal certified a “question,” but the Supreme Court of Florida never received it. Instead, the court used a question formulated by agreement of the parties: “Whether evidence of environmental contamination is relevant and otherwise admissible in an eminent domain valuation trial.” *Id.* at 922.

182. *Id.*

183. *Id.* at 925. The court stated: “There must be a factual basis through evidence of sales of comparable contaminated property upon which to base a determination that contamination has decreased the value of the property.” *Finkelstein*, 656 So. 2d at 925.

184. *Id.* The court noted that the condemnor in such cases has the burden of establishing the effect of the contamination on value, and also emphasized the importance

burden on establishing that decrease in value is on the condemning authority.<sup>185</sup>

#### H. *Business Damages*

In a somewhat disturbing (for condemnees) statement of law contained in *Weaver Oil Co. v. City of Tallahassee*,<sup>186</sup> the Supreme Court of Florida held section 73.071(3) of the *Florida Statutes* only authorizes business damages in cases where the damages have been incurred from a partial taking of "land," as opposed to a taking of "access."<sup>187</sup> Quoting directly from its 1964 decision in *State Road Department v. Lewis*,<sup>188</sup> the court, somewhat unnecessarily,<sup>189</sup> reaffirmed its interpretation of the language of section 73.071(3), by specifically holding that business damages may not be recovered under this provision unless the condemnee can establish they were caused by a partial taking of "land."<sup>190</sup>

Because the taking in *Weaver* was based solely on an alleged "loss of access" caused by the construction of a traffic island on the publicly owned right-of-way, the court concluded that no "land" had actually been taken.<sup>191</sup> Thus, while the City's action might have effectively diminished the extent and nature of the property owner's access, it did not technically constitute a taking of "land," and as such, business damages were not compensable under the strict wording of the statute.<sup>192</sup>

In a business damage case of somewhat lesser significance, *Department of Transportation v. Manoli*,<sup>193</sup> the Fourth District Court of Appeal held that when a court awards business damages based upon lost profits to a property owner running a "self-employed" business, it must be sure to

of "timing" in such calculations. *Id.* This would mean that the condemnor must establish that the contamination existed "at the time of the taking," so as to link up with the appropriate time of valuation (i.e., the "time of the taking"). See FLA. STAT. ch. 73 (1995).

185. *Finkelstein*, 656 So. 2d at 925 (citing *City of Fort Lauderdale v. Casino Realty, Inc.*, 313 So. 2d 649, 652-53 (Fla. 1975)).

186. 647 So. 2d 819 (Fla. 1994).

187. *Id.* at 822-23.

188. 170 So. 2d 817 (Fla. 1964) (holding that a partial taking of access will not support claim for business damages).

189. It is unclear from the opinion whether the court needed to make this finding after having already found that there had been no taking at all. *Weaver*, 647 So. 2d at 822 (finding no compensable loss of access).

190. *Id.* at 822-23.

191. *Id.* at 822.

192. *Id.* at 822 n.1.

193. 645 So. 2d 1093 (Fla. 4th Dist. Ct. App. 1994).

deduct the reasonable value of the self-employed owner's services from the profits—as it would with any other employee wages.<sup>194</sup>

### I. Severance Damages

In *Orlando/Orange County Expressway Authority v. Latham*,<sup>195</sup> the Fifth District Court of Appeal found the trial court erred in excluding the condemnor's expert testimony as to severance damages.<sup>196</sup> The court determined that the proffered testimony concerning an alleged right to an east-west arterial access was relevant, and thus concluded the severance issue was not improperly presented below.<sup>197</sup> In light of recent developments in *Department of Transportation v. Gefen*<sup>198</sup> and *Broward County v. Patel*,<sup>199</sup> the court determined a remand would be the most appropriate remedy under the circumstances.<sup>200</sup>

In *Brevard County v. Canaveral Properties, Inc.*,<sup>201</sup> the Fifth District Court of Appeal reversed an award of severance damages grounded on a finding of a "parent parcel"<sup>202</sup> as is defined in *Department of Transportation v. Jirik*.<sup>203</sup> The court found that the checkerboard-like, noncontiguous nature of the 499 lots, the lack of any coventure or partnership agreement between the various property owners, and the historical treatment of the lots as individual parcels indicated a "diversity of ownership, diversity of usage and an absence of contiguity."<sup>204</sup> The court noted that in cases where the condemnee seeks severance damages, the burden is on the condemnee to

194. *Id.* at 1094-95.

195. 643 So. 2d 10 (Fla. 5th Dist. Ct. App. 1994).

196. *Id.* at 11.

197. *Id.*

198. 636 So. 2d 1345 (Fla. 1994).

199. 641 So. 2d 40 (Fla. 1994) (holding that possibility of securing future rezoning or variance may be admitted on severance issue under certain circumstances).

200. *Latham*, 643 So. 2d at 11.

201. 658 So. 2d 590 (Fla. 5th Dist. Ct. App. 1995).

202. *Id.* at 590.

203. 498 So. 2d 1253 (Fla. 1986). *Jirik* concerned three separate but contiguous parcels of land—all owned by the same person. The sole issue in the case concerned "unity of use," which is the primary criteria used to determine whether contiguous parcels of land should be considered as "one parcel" or separate and independent. *Id.* at 1255. If property is not in use, however, "unity of use" becomes problematic. In such cases, there is a presumption of "separateness" as to vacant platted urban lots, which can be rebutted by contrary evidence. *Canaveral Properties*, 658 So. 2d at 590-91 (citing *Jirik*, 498 So. 2d at 1256-57).

204. *Canaveral Properties*, 658 So. 2d at 591.

establish the basis for such damages.<sup>205</sup> In this case, the condemnee had to show that despite the disparate ownership and physical separation of the 499 lots, their proximity and integration of use was so substantial, that the lots were in effect "one lot."<sup>206</sup> The court found the owners had not met that burden.<sup>207</sup>

#### IV. CONCLUSION

Florida's appellate courts issued a number of interesting opinions in condemnation law over the last year. Perhaps more importantly, however, the legislature made sweeping changes in the ways fees and costs are awarded in such cases. These changes are quite controversial and are sure to be challenged. Next year should prove to be even more interesting.

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205. *Id.*

206. *Id.*

207. *Id.*

# Coastal Ecosystem Protection in Florida

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## I. INTRODUCTION

The coasts of the United States, and of Florida in particular, have created an intrigue in a way that no other geological region has. The popularity created by this intrigue has created numerous problems for the ecosystems of the coastal zone.

The coastal zone itself is a "critical interface between the land, the sea, and the atmosphere."<sup>1</sup> Far from being a stable and constant environment, it is an ecosystem in a constant state of flux.<sup>2</sup> There is no permanence

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1. ROBERT B. DITTON ET AL., COASTAL RESOURCES MANAGEMENT: BEYOND BUREAUCRACY AND THE MARKET 2 (1977) [hereinafter DITTON].

2. *Id.* at 16.



attached when the land itself can, and will, disappear with the water or the wind.

The coastal zone is comprised of numerous habitats in which “communities of plants and animals that are endemic and that carry out the functional activities of the system” exist.<sup>3</sup> This includes the sandy beaches with dune systems and barrier islands, and the estuaries and coastal wetlands. Each one of these systems is fragile and unique, and contains its own delicate balance. When this balance is disrupted by population growth and development, danger can occur without stringent control mechanisms to protect it.

It is estimated that by the year 2000, eighty-five percent of Florida’s population will be living in coastal counties.<sup>4</sup> Florida will then have the fourth largest population in the United States filled with 14,000,000 residents and 55,000,000 tourists per year, all of whom love the coasts.<sup>5</sup> In addition, by that same year, 153,000,000 Americans will be boating annually.<sup>6</sup> What the state chooses to do today will determine whether this population boom will overdevelop and destroy our coasts, or whether this development will be sustainable, thus protecting the coasts for generations to come.

Sustainable development has been defined as “the use of natural resources to support economic activity without compromising the environment’s carrying capacity, which is its ability to continue producing . . . goods and services.”<sup>7</sup> When this carrying capacity can be quantified, the limits of growth and development can be practically addressed.

According to one commentator, “[a]t a density of 1 person per square kilometer little of the natural functioning of the environment [will] be lost, (unless the person is using an off-road vehicle).”<sup>8</sup> “At 10 persons per square kilometer the likelihood of being alone and of seeing wildlife [is] sacrificed.”<sup>9</sup> “At 100 persons per square kilometer most wildlife will depart[, and] in the absence of any management intervention, there will be

3. *Id.* at 4.

4. RICHARD G. HAMANN, CONSTITUTIONAL ISSUES IN LOCAL COASTAL RESOURCE PROTECTION 1 (1986).

5. *Id.*

6. FRANK E. MALONEY ET AL., LEGAL ASPECTS OF RECREATIONAL MARINA SITING IN FLORIDA 1 (1986).

7. Edward W. Manning & David T. Dougherty, *Sustainable Tourism*, CORNELL HOTEL & RESTAURANT ADMIN. Q., Apr. 1995, at 29, 30.

8. *Id.* at 39.

9. *Id.* at 40.

visible pollution[] and noticeable ecological degradation.”<sup>10</sup> Finally, at a capacity of “1,000 persons per square kilometer urban densities are reached, and the experience is no longer a natural one[,] . . . and intensive management is needed to maintain the site and to remove trash and human waste.”<sup>11</sup> The state is going to be required to establish more maintenance and preservation policies as the population and tourism intensifies and the beaches all grow closer to this maximum carrying capacity.

Florida has established a system of protection for the coastal ecosystems of the state. In doing so, the legislature has addressed several problems which present themselves in separate and distinct ecosystems. Methods chosen by the state to address these problems include establishing protection from coastal construction on sandy beaches,<sup>12</sup> establishing a system by which the local government may acquire public beaches,<sup>13</sup> and allowing for establishment of renourishment and replenishment programs.<sup>14</sup>

This article focuses on the impact that population growth has had on Florida’s coasts, what impact it may have in the future, and what the legislature has done to alter this impact and rectify any damage that may have occurred in the past.<sup>15</sup> Distinct subsystems of the coastal zone ecosystem will be examined in turn, along with the steps taken by the state to protect or repair those systems. The first area examined is the sandy beaches, including the dune system and barrier islands, followed by the coastal estuaries and wetlands. Because both types of coastal areas, although not thoroughly independent, are unique and precious in their own way, each deserves and requires individual management techniques and policies. To treat the coast as one entity is to ignore the dynamics that make the coast important and special to both Floridians and persons worldwide who associate Florida with its endless coasts.

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10. *Id.*

11. *Id.*

12. FLA. STAT. § 161.041 (1995).

13. FLA. STAT. § 259.045 (1995).

14. FLA. STAT. § 161.082 (1995).

15. This article will not address federal coastal management programs, nor will it address, more than briefly, county or municipal coastal management programs. While these programs are integral to the functioning of coastal growth management as a whole, they are beyond the scope of this article.

## II. BEACHES AND SANDY SHORES

### A. *Description of the Ecosystem and Problems Caused by Development*

The beach ecosystem includes not only the sandy coasts, but the beach dune system and the barrier island system as well. The ecosystem is probably the habitat which persons most immediately identify with the coast. Because of its beauty and popularity, it is also where many people choose to reside.

The sandy shore is an area in constant motion. This process begins when suspended particles are carried by the rivers into the ocean.<sup>16</sup> The sediments and nutrients are then transported and dispersed by waves and currents along the coast.<sup>17</sup> The process by which the beach is formed is called littoral drift or longshore transport of sand.<sup>18</sup> This occurs when the waves approach the coastline at an angle, both eroding and further nourishing the shore. The sand particles which move within the waves are then transported and deposited along the shore to form the beach.<sup>19</sup>

This cycle of erosion and accretion is what creates and transforms the beach shores and the dunes. The wind is the greatest manipulator of these landforms.<sup>20</sup> The waves generated by the wind erode and accrete the shore, while the wind action erodes and accretes the dunes.<sup>21</sup> One large storm may completely obliterate a dune.<sup>22</sup> When a coastal area is undeveloped, the erosional phase of this cycle may completely eliminate the beach and dune system.<sup>23</sup>

This unpredictability of the shoreline, which is completely natural and would be acceptable for an undeveloped coast, is considered thoroughly unacceptable where development has already occurred. The cyclic changes of the shoreline can be hostile and dangerous to a landowner on the beach. Most of the largest metropolitan areas in the United States are located within the coastal zone. It is unlikely, therefore, that people will stand by and

16. DITTON, *supra* note 1, at 4.

17. *Id.*

18. *Id.*

19. *Id.*

20. Karl F. Nordstrom, *The Concept of Intrinsic Value and Depositional Coastal Landforms*, GEOGRAPHICAL REV., Jan. 1990, at 68, 69.

21. *Id.*

22. *Id.*

23. *Id.* at 70.

watch their homes and buildings be destroyed by a natural erosion process.<sup>24</sup> Without human involvement in the natural processes, such as beach erosion, little fundamental damage will probably occur to the geologic system.<sup>25</sup> Unfortunately, people have chosen to play a very active role in manipulating the natural processes of the coastal system.

Some of the human influences which cause severe changes to beaches and dunes include: houses, grading, or bulldozing; stabilization structures (coastal armoring); beach and dune nourishment; sand fences; artificial vegetation planting; and introduction of exotic species.<sup>26</sup> Many other invasions such as tramping and vehicular use can cause change, although on a smaller scale.<sup>27</sup> As a result of these alterations, a rate of landform change occurs which exceeds that which existed prior to the changes made by humans.<sup>28</sup> Eventually, erosion caused by waves will have a greater impact on the altered beaches than it had on the unaltered beaches.<sup>29</sup>

Although shore protection efforts, such as seawalls and groins,<sup>30</sup> are established to prevent erosion, they seem to actually exacerbate the process.<sup>31</sup> Bulkheads and seawalls, which are parallel to the shore, tend to prevent the coastal formations which supply sediment to the beach.<sup>32</sup> Groins and jetties, which are perpendicular to the shore, tend to trap the sand that moves parallel to the shoreline in the longshore-transport system.<sup>33</sup>

Coastal barrier islands also are caused by accretion parallel to the coast, and consist of shell, sand, and gravel. These islands are similarly damaged by human alteration of the ecosystem.<sup>34</sup> Because these barrier islands are

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24. DITTON, *supra* note 1, at 45.

25. Orrin H. Pilkey & Mark Evans, *Rising Sea, Shifting Shores*, in *COAST ALERT: SCIENTISTS SPEAK OUT* 13, 30 (Thomas C. Jackson & Diana Reische eds., 1981).

26. *Id.*

27. Nordstrom, *supra* note 20, at 69.

28. *Id.* at 71.

29. *Id.* at 72.

30. A seawall is "a wall or embankment to protect the shore from erosion or to act as a breakwater." WEBSTER'S NEW COLLEGIATE DICTIONARY 1035 (1973). A groin is "a rigid structure built out from a shore to protect the shore from erosion, to trap sand, or to direct a current for scouring a channel." *Id.* at 502.

31. Nordstrom, *supra* note 20, at 72.

32. *Id.*

33. *Id.*

34. John R. Clark, *Management of Coastal Barrier Biosphere Reserves*, *BIOSCIENCE*, May 1991, at 331, 331.

temporary and continually changing shape, many of the protection programs that have been implemented to protect them have been unsuccessful.<sup>35</sup>

Despite the number of protective measures, sandy beaches in the United States are eroding at a phenomenal rate. Approximately ninety percent of this country's beaches are eroding.<sup>36</sup> Of Florida's 1000 miles of coastline, 440 miles are eroded, and 230 miles have an erosion problem deemed critical by the state because the coastline has been threatened by development and recreation.<sup>37</sup> As a solution to this problem, more than ninety beaches throughout the United States have been "renourished"<sup>38</sup> and Dade and Broward Counties in Florida have undertaken seventeen renourishment projects since 1970.<sup>39</sup> Renourishment, or replenishment, is the process by which the sand on an eroded beach is artificially replaced with sand mined from "backbays, inlets, offshore, and inland sources."<sup>40</sup> Often, the sand that is used is coarser than the natural sand. Furthermore, a nourished beach often results in an unnatural, widened, and oversteepened upper beach.<sup>41</sup> The rate of erosion of a nourished beach is much higher than the rate of erosion of a natural beach due to the lack of equilibrium of the larger foreshore.<sup>42</sup> Eventually, the high erosion rate of the nourished beach slows and conditions begin to resemble the natural processes once again.<sup>43</sup>

As a result of the large number of renourishment projects undertaken in Florida, the supply of sand to renourish the Florida beaches is almost depleted.<sup>44</sup> Dade County, for example, is now considering importing sand from the Bahamas to fill eroded beaches. This action may have serious repercussions, however, because Bahamian sand does not contain the same type of material as Florida sand.<sup>45</sup> Additionally, non-native sand may not retain enough heat to allow marine turtles to reproduce adequately.<sup>46</sup>

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35. *Id.*

36. Kathy Kiely, *Letter From Kitty Hawk: Send for King Canute*, MGMT. TODAY, Aug. 1989, at 15, 15.

37. *Florida Running out of Sand*, Engineering News-Rec., Mar. 6, 1995, at 19.

38. Nordstrom, *supra* note 20, at 75.

39. Cyril T. Zaneski, *South Florida Short of Sand? Believe it*, TORONTO STAR, Dec. 4, 1993, at J12.

40. Nordstrom, *supra* note 20, at 75.

41. *Id.*

42. *Id.*

43. *Id.*

44. Zaneski, *supra* note 39, at J12.

45. Bahamian sand is made of argonite, "a dense crystallized mineral unlike common Florida sand." *Florida Running out of Sand*, *supra* note 37, at 19.

46. *Id.*

Solutions which may appear simplistic and non-problematic may indeed have severe consequences in an ecosystem so delicately balanced. Therefore, a complex solution is needed to protect a complex ecosystem such as the coast, particularly where past programs damaged the natural processes instead of improving them.

### B. *The Regulation of Beaches, Shores, and Dunes*

The Florida Legislature has recognized that coastal areas are “dynamic geologic systems with topography that is subject to alteration by waves, storm surges, flooding, or littoral currents[,]” and that “coastal areas are among Florida’s most valuable resources and have extremely high recreational and aesthetic value which should be preserved and enhanced.”<sup>47</sup> Because of the extraordinary importance our beaches and shores hold, Florida has enacted a series of elaborate coastal protection measures. These measures include protection from construction of a variety of structures landward of the mean-high water line,<sup>48</sup> protection from vehicular traffic,<sup>49</sup> and specific enactments for barrier islands.<sup>50</sup>

To Florida, beaches and shores hold unquestionable importance economically. They are the “backbone of tourism in the state of Florida.”<sup>51</sup> Without specific protection, these economic resources would be lost. The legislature has declared that the “highest and best use of the seacoast of the state is as a source of public and private recreation[,]” and that “such use can only be served effectively by maintaining the coastal waters, . . . beaches, and public lands adjoining the seacoast in as close to a pristine condition as possible . . . .”<sup>52</sup>

#### 1. Construction Controls

There are several mechanisms by which the state controls construction and development of the beaches and shores. The primary mechanism by which it undertakes this control is through the Beach and Shore Preservation

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47. FLA. STAT. § 161.53(2), (3) (1995).

48. FLA. STAT. §§ 161.052, .053 (1995).

49. FLA. STAT. § 161.58 (1995).

50. FLA. STAT. § 161.55(5) (1995).

51. Zaneski, *supra* note 39, at J12 (quoting Lonnie Ryder, Florida Department of Environmental Protection).

52. FLA. STAT. § 376.021(1), (2) (1995).

Act ("BSPA")<sup>53</sup> and the Coastal Zone Protection Act ("CZPA"),<sup>54</sup> which requires construction restriction lines.<sup>55</sup> The Florida Legislature recognizes the problem with "increasing growth pressures" upon the coastal regions of the state.<sup>56</sup> The CZPA states that "unless these pressures are controlled, the very features which make coastal areas economically, aesthetically, and ecologically rich will be destroyed."<sup>57</sup> Therefore, the CZPA sets forth construction restrictions upon the coasts to protect them from the adverse impacts which inevitably result from growth.

The primary impact which the CZPA protects against is beach erosion. The legislature declared erosion to be a menace and an emergency to the State of Florida, and stated that the government must protect the beaches and shores.<sup>58</sup> The *Florida Administrative Code* states that further degradation of the coastal ecosystem must be prevented and promotion of existing degraded portions of the coastal ecosystem must occur.<sup>59</sup> The only way to achieve these ends is to restrict coastal construction.<sup>60</sup>

The state has established a fifty-foot setback line for coastal construction in section 161.052 of the *Florida Statutes*.<sup>61</sup> By declaring the construction site a public nuisance, the statute makes it a misdemeanor to construct or excavate without a permit within fifty feet of the mean high water mark at any riparian coastal location.<sup>62</sup> However, the statute does not apply to any "vegetation-type nonsandy shores," such as estuaries.<sup>63</sup> If the local construction restriction is stricter than the fifty-foot setback line, the more stringent requirements shall prevail.<sup>64</sup>

Section 161.053 establishes coastal construction control lines ("CCCL") "on a county basis along the sand beaches of the state fronting on the Atlantic Ocean, the Gulf of Mexico, or the Straits of Florida."<sup>65</sup> This

53. Chapter 161 of the *Florida Statutes* is the Florida Beach and Shore Preservation Act. FLA. ADMIN. CODE ANN. r. 62B-33.002(1) (1995).

54. Sections 161.52-.58 of the *Florida Statutes* are known as the "Coastal Zone Protection Act of 1985." FLA. STAT. §§ 161.52-.58 (1995).

55. *Id.* § 161.55.

56. *Id.* § 161.53(1).

57. *Id.*

58. FLA. STAT. § 161.088 (1995).

59. FLA. ADMIN. CODE ANN. r. 62B-41.005(1) (1995).

60. *Id.*

61. FLA. STAT. § 161.052.

62. *Id.* § 161.052(7), (8).

63. *Id.* § 161.052(5).

64. *Id.* § 161.052(2)(b).

65. *Id.* § 161.053(1)(a).

section authorizes the Department of Environmental Protection ("Department") to establish CCCLs to protect the beach "from imprudent construction which can jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection to upland structures, endanger adjacent properties, or interfere with public beach access."<sup>66</sup> In addition, the CCCLs do not apply to those coastal areas dominated by vegetation, but only to those sandy beaches subject to erosion.<sup>67</sup>

Generally, the CCCLs are established to define the portion of the beach-dune system subject to severe fluctuations based upon a 100-year storm surge.<sup>68</sup> The method for determining the location of the CCCL is extremely technical and involves "complex computer modeling and extensive surveying."<sup>69</sup> The construction line will be established only where necessary to protect upland properties and prevent erosion.<sup>70</sup> Under section 161.053, it is a misdemeanor to construct or excavate seaward of the line without a permit, and such construction or excavation is declared a public nuisance.<sup>71</sup>

Section 161.053 establishes that where a CCCL has not been designated, the fifty-foot setback line remains in place until the CCCL or a municipal control line is established.<sup>72</sup> However, development and construction under these two sections are not entirely precluded. The *Florida Administrative Code* limits the construction and requires the person applying for the permit to clearly justify the need for the construction.<sup>73</sup> Only the Governor and Cabinet, the Executive Director, and the Division Director have the authority to issue a permit for excavation or construction.<sup>74</sup>

The *Florida Administrative Code* identifies several policy criteria to be taken into account upon the application of a permit for construction or excavation. If construction occurs seaward of either of the two lines, the code requires the construction to conform to special siting, structural, and other design considerations for the protection of the beach-dune system.<sup>75</sup>

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66. FLA. STAT. § 161.053(1)(a).

67. *Id.* § 161.053(1)(c).

68. *Id.* § 161.053(1)(a).

69. Deborah A. Getzoff & Kenneth G. Oertel, *Beach, Shore, and Coastal Zone Regulation*, in II FLORIDA ENVIRONMENTAL AND LAND USE LAW, 14-1, 14-9 (2d ed. 1994).

70. FLA. STAT. § 161.053(2).

71. *Id.* § 161.053(7), (8).

72. *Id.* § 161.053(11).

73. FLA. ADMIN. CODE ANN. r. 62B-33.005(1) (1995).

74. *Id.* at r. 62B-33.006(2).

75. *Id.* at r. 62B-33.005(2).



In addition, elevated dune walkover structures are encouraged by the Department to protect the dunes.<sup>76</sup>

The Department must also consider the cumulative effect of several structures or activities having an adverse impact on the beaches and dunes, even if the individual structure or activity alone may not have any adverse impact.<sup>77</sup> If, however, the "immediate contiguous or adjacent area" contains a number of structures which have "established a reasonably continuous and uniform construction line" closer to the high water mark than either the CCCL or the fifty-foot setback line, whichever is in effect, then a proposed structure may be built.<sup>78</sup> This is contingent, however, upon the existing structures not having been unduly affected by erosion and upon approval of the Department.<sup>79</sup> However, under section 161.052, a waiver or variance of the fifty-foot setback line is authorized.<sup>80</sup>

Under section 161.053, this uniform construction line, described in section 161.052, is one condition which may justify the granting of a permit to construct beyond the CCCL.<sup>81</sup> Other considerations under section 161.053 justifying the grant of a permit for construction seaward of the CCCL include: 1) the "shoreline stability;" 2) the "[d]esign features of the proposed structures;" and 3) the potential impacts, cumulative or individual, upon the beach-dune system.<sup>82</sup> In addition, construction of structures which interfere with public access along the beach will be limited.<sup>83</sup>

Although the applicant must clearly state and justify the necessity of the development,<sup>84</sup> the city need not demonstrate any other evidence to prove its acceptance of the applicant's justification of this necessity other than the application itself.<sup>85</sup> In a hearing contesting the application, the burden of proof is on the petitioner challenging it.<sup>86</sup> The petitioner "must identify the areas of controversy and allege a factual basis for the contention

76. *Id.* at r. 62B-33.005(4).

77. *Id.* at r. 62B-33.005(7).

78. FLA. STAT. §§ 161.052(2)(b), .053(5)(b).

79. *Id.*

80. *Id.* § 161.052(2).

81. *Id.* § 161.053(5)(a).

82. *Id.*

83. FLA. STAT. § 161.053(5).

84. FLA. ADMIN. CODE ANN. r. 62B-33.005(1) (1995).

85. *Woodholly Ass'n v. Department of Natural Resources*, 451 So. 2d 1002, 1004 (Fla. 1st Dist. Ct. App. 1984).

86. *Id.*

that the facts relied upon by the applicant fall short of carrying the . . . burden cast upon the applicant.”<sup>87</sup>

Section 161.053 also provides that no permit will be authorized where the proposed location for construction is seaward of the seasonal high-water line within thirty years after the date of application for the permit.<sup>88</sup> This section defines “seasonal high-water line” as the “line formed by the intersection of the rising shore and the elevation of 150 percent of the local mean tidal range above local mean high water.”<sup>89</sup> In determining this thirty-year seaward area, the Department will not include any areas landward of the CCCL. This restriction does not include some “coastal or shore protection structure[s], minor structure[s], or pier[s].”<sup>90</sup>

Additional protective requirements are specified under the *Florida Administrative Code*.<sup>91</sup> For example, “[t]he proposed structure or other activity shall be located a sufficient distance landward of the beach-dune system to permit natural shoreline fluctuations and to preserve the dune stability and natural recovery following storm induced erosion.”<sup>92</sup> In addition, structures must be designed to “minimize any expected adverse impact on the beach-dune system.”<sup>93</sup>

The CZPA<sup>94</sup> was created to protect coastal areas because of their “important role in protecting the ecology and the public health, safety, and welfare of the citizens of the state . . . .”<sup>95</sup> The Act places requirements and restrictions upon construction within the “coastal building zone.”<sup>96</sup> This zone consists of:

the land area from the seasonal high-water line landward to a line 1,500 feet landward from the coastal construction control line as established pursuant to s. 161.053 . . . and not included under s. 161.053, the land area seaward of the most landward velocity zone (V-zone) line as established by the Federal Emergency Management Agency . . . .<sup>97</sup>

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87. *Id.* (quoting *Florida Dep’t of Transp. v. J.W.C., Inc.*, 396 So. 2d 778 (Fla. 1st Dist. Ct. App. 1981)).

88. FLA. STAT. § 161.053(6)(b).

89. *Id.* § 161.053(6)(a)2.

90. *Id.*

91. FLA. ADMIN. CODE ANN. r. 62B-33.007 (1995).

92. *Id.* at r. 62B-33.007(1).

93. *Id.* at r. 62B-33.007(2).

94. FLA. STAT. § 161.52.

95. *Id.* § 161.53(1).

96. *Id.* § 161.55.

97. *Id.* § 161.54(1).

Numerous requirements are established for construction within the coastal building zone.<sup>98</sup> The requirements for major structures<sup>99</sup> include anticipating loads resulting from a 100-year storm event when designing the foundation and constructing the structure.<sup>100</sup> With regard to minor structures,<sup>101</sup> this section requires that structures be designed “to produce the minimum adverse impact on the beach and the dune system . . . .”<sup>102</sup> Generally, no structure may be constructed unless it is a “sufficient distance landward of the beach to permit natural shoreline fluctuations and to preserve dune stability,” with the exception of “elevated walkways, lifeguard support stands, piers, beach access ramps, gazebos, and coastal or shore protection structures . . . .”<sup>103</sup>

With regard to coastal barrier islands, all requirements which apply to the coastal building zone apply to the barrier islands.<sup>104</sup> However, the zone for barrier islands is identified as “the land area from the seasonal high-water line to a line 5,000 feet landward from the coastal construction control line pursuant to s. 161.053, or the entire island, whichever is less.”<sup>105</sup> This subsection identifies specific zone requirements for certain islands in identified inlets.<sup>106</sup>

In summary, the coastal construction control line, the fifty-foot setback line, and the coastal building zone are methods whereby the state may

98. *Id.* § 161.55.

99. A “major structure” is defined in § 161.54(6)(a) as: “houses, mobile homes, apartment buildings, condominiums, motels, hotels, restaurants, towers, other types of residential, commercial, or public buildings, and other construction having the potential for substantial impact on coastal zones.” FLA. STAT. § 161.54(6)(a).

100. *Id.* § 161.55(1)(e).

101. A “minor structure” is defined in § 161.54(6)(b) as:

pile-supported, elevated dune and beach walkover structures; beach access ramps and walkways; stairways; pile-supported, elevated viewing platforms, gazebos, and boardwalks; lifeguard support stands; public and private bathhouses; sidewalks, driveways, parking areas, shuffleboard courts, tennis courts, handball courts, racquetball courts, and other uncovered paved areas; earth retaining walls; and sand fences, privacy fences, ornamental walls, ornamental garden structures, aviaries, and other ornamental construction. It shall be a characteristic of minor structures that they are considered to be expendable under design wind, wave, and storm forces.

*Id.* § 161.54(6)(b).

102. *Id.* § 161.55(2).

103. *Id.* § 161.55(4).

104. FLA. STAT. § 161.55(5).

105. *Id.*

106. *Id.*

protect the coast from encroaching development. Through these procedures, the state agencies and officials have the discretion to permit development based upon the ecological consequences to the beach and shore. Specified nondiscretionary requirements and restrictions also exist. As long as this discretion is used wisely and permits and waivers are issued only in extraordinary circumstances, these systems will endure in protecting the shores from encroaching development.

## 2. Coastal Stabilizing and Armoring

Neither the coastal construction control line<sup>107</sup> nor the fifty-foot setback requirement<sup>108</sup> applies to shore protection structures or coastal armoring. Section 161.041 of the *Florida Statutes*,<sup>109</sup> as well as certain rules in the *Florida Administrative Code*,<sup>110</sup> regulate these shore protecting structures by restricting construction below the mean-high water mark—those areas which constitute the sovereignty lands within the State of Florida.

These shore protecting measures can broadly be described by the term “rigid coastal structures,” which is defined as “structures characterized by their solid or highly impermeable design or construction.”<sup>111</sup> Included within this definition are “groins, breakwaters, mound structures, jetties, weirs, seawalls, bulkheads and revetments.”<sup>112</sup> “Armoring,” on the other hand, is a more limited term and is defined as the “placement of manmade structures or devices in or near the coastal system for the purpose of preventing erosion of the upland property or to protect upland structures from the effects of coastal wave and current activity.”<sup>113</sup> This does not include jetties, groins, and other structures which are implemented to add sand to the beach or dune, alter natural coastal currents, or stabilize the mouths of inlets.<sup>114</sup>

The *Florida Administrative Code* states that these rigid coastal structures can cause damage to the beach by exacerbating erosion. Under the code, permits shall not be issued for this purpose “except as a last resort

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107. *Id.* § 161.053(9).

108. *Id.* § 161.152(3).

109. FLA. STAT. § 161.041(1).

110. FLA. ADMIN. CODE ANN. r. 62B-41.001 (1995).

111. *Id.* at r. 62B-41.002(56)(a).

112. *Id.*

113. *Id.* at r. 62B-41.002(5).

114. *Id.*

to provide protection to eligible structures.”<sup>115</sup> The code also requires that construction shall be limited and fully justified<sup>116</sup> because rigid coastal structures “may be expected to have a long-term adverse effect on the beach in the immediate vicinity.”<sup>117</sup>

Therefore, coastal armoring is permitted only where several criteria are met. The Department of Environmental Protection requires that: 1) the structure to be protected is “vulnerable to erosion from a five (5) year return interval storm event”;<sup>118</sup> 2) “[a]ll other alternatives, including dune enhancement, beach restoration, structure relocation, and modification of the structure’s foundation . . . are determined not to be economically and physically feasible”;<sup>119</sup> and 3) there will be no significant adverse impact.<sup>120</sup> In addition, in reviewing applications for coastal armoring, the Department considers the historic erosion rates and sea level rise,<sup>121</sup> and “[w]hether a permit for beach restoration or nourishment project . . . has been applied for . . .”<sup>122</sup> It is important that the structure not interfere with the use by the public of the beach seaward of the mean high-water line. If this interference is unavoidable, the Department may require alternative access to the beach area for the benefit of the public.<sup>123</sup>

The effect on marine turtles also is a factor in granting an application for coastal construction. All construction must be sited and designed so as to minimize any expected adverse impact to the marine turtles in the area.<sup>124</sup> Armoring structures are prohibited entirely in a federally designated critical habitat for marine turtles at the Archie Carr National Wildlife Refuge.<sup>125</sup>

The *Florida Administrative Code* allows for permits for experimental coastal construction involving new technologies.<sup>126</sup> However, the criteria for this project are very strict and limited. The construction must occur in

115. FLA. ADMIN. CODE ANN. r. 62B-41.005(6) (1995).

116. *Id.* at r. 62B-41.005(2).

117. *Id.* at r. 62B-41.005(6).

118. *Id.* at r. 62B-41.005(6)(b).

119. *Id.* at r. 62B-41.005(6)(c).

120. FLA. ADMIN. CODE ANN. r. 62B-41.005(6)(e) (1995).

121. *Id.* at r. 62B-41.005(7)(c).

122. *Id.* at r. 62B-41.005(7)(d).

123. FLA. STAT. § 161.041(1).

124. FLA. ADMIN. CODE ANN. r. 62B-41.007(1)(a) (1995).

125. *Id.* at r. 62B-41.0055(4).

126. *Id.* at r. 62B-41.0075.

an area of erosion<sup>127</sup> which is not considered environmentally sensitive by the Department.<sup>128</sup> Applicants also must demonstrate that the project “has the potential to provide a positive benefit to the coastal system and is not expected to result in a significant adverse impact.”<sup>129</sup> A test plan and mitigation program must be submitted for permit approval.<sup>130</sup>

The state also permits county control of construction of coastal armoring and rigid shore protection measures under certain circumstances. Under section 161.35, “the board of county commissioners may regulate and supervise all physical work or activity along the county shoreline which is likely to have a material physical effect on existing coastal conditions or natural shore processes.”<sup>131</sup> This includes “installation of groins, jetties, moles, breakwaters, seawalls, revetments, and other coastal construction . . .”<sup>132</sup> The board of county commissioners must first have the consent of the Department of Environmental Protection and of “any municipality or other political authority involved,” however, before assuming responsibility.<sup>133</sup>

Rigid shore protection measures and coastal armoring is truly a pretentious idea. The idea that people can control the ocean and all the force and power behind it must be thrilling to some, while ludicrous to others. However, where mistakes upon the beaches and shores have already been made—construction where construction should not have taken place—perhaps rigid shore protection is the only solution. It is a solution, however, which is short-sighted, and therefore, must be eliminated as soon as possible.

### 3. State Acquisition of Beaches and Shores

Another method whereby the state undertakes protection of its beaches and shores is land acquisition. This is perhaps the most basic of the growth protection schemes. If the ever-growing population cannot own the lands, they cannot harm them—at least to the extent that they might be harmed in private hands. The state has established two major statutory schemes to acquire beaches for the use of the public and for the purpose of conserva-

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127. The erosion area must be one which is identified in the Department’s beach restoration management plan. *Id.* at r. 62B-41.0075(1)(a).

128. *Id.*

129. FLA. ADMIN. CODE ANN. r. 62B-41.0075(1)(d) (1995).

130. *Id.* at r. 62B-41.0075(4).

131. FLA. STAT. § 161.35(1) (1995).

132. *Id.*

133. *Id.*

tion. These are the Land Conservation Act, under chapter 259 of the *Florida Statutes*,<sup>134</sup> and the Outdoor Recreation and Conservation provisions under chapter 375 of the *Florida Statutes*.<sup>135</sup>

Chapter 259 identifies as the policy of the state an assurance to its citizens that "public ownership of natural areas for purposes of maintaining the state's unique natural resources" will be undertaken.<sup>136</sup> This chapter identifies coastal areas as those areas to be acquired for the purpose of conservation and protection.<sup>137</sup> It requires that lands acquired under section 259.032 will be managed in such a manner as to "provide the greatest combination of benefits to the public and to the resources."<sup>138</sup>

Section 259.101 establishes the Florida Preservation 2000 Act,<sup>139</sup> which deals with the rapidly growing population contributing to the degradation of the environment.<sup>140</sup> The Act further states that "[i]mmminent development of Florida's remaining natural areas and continuing increases in land values necessitate an aggressive program of public land acquisition during the next decade to preserve the quality of life that attracts so many people to Florida."<sup>141</sup>

Additionally, the Act establishes that fifty percent of the proceeds of the Preservation 2000 Trust Fund will be given to the Department of Environmental Protection for the acquisition of public lands.<sup>142</sup> Of that amount, one-fifth will be used for the acquisition of coastal lands.<sup>143</sup> Some of the criteria for acquisition include: 1) whether the land is in "imminent danger of development"; 2) whether development is likely within the next twelve months; and 3) whether a significant portion of the land will protect valuable natural resources.<sup>144</sup> The Act also specifies that in acquiring coastal lands, parcels in highly developed urban areas should be given special consideration.<sup>145</sup>

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134. FLA. STAT. ch. 259 (1995).

135. FLA. STAT. ch. 375 (1995).

136. FLA. STAT. § 259.032(1) (1995).

137. *Id.* § 259.032(3)(d).

138. *Id.* § 259.032(9)(a)1.

139. FLA. STAT. § 259.101 (1995).

140. *Id.* § 259.101(2).

141. *Id.* § 259.101(2)(b).

142. *Id.* § 259.101(3)(a).

143. *Id.*

144. FLA. STAT. § 259.101(4)(a)1.-3.

145. *Id.* § 259.101(4)(d)2.

The Florida Preservation 2000 Trust Fund is established for the purpose of carrying out section 375.031 of the *Florida Statutes*<sup>146</sup> and empowers the Department of Environmental Protection to identify lands for acquisition.<sup>147</sup> It specifies beaches as lands which may be acquired under this section.<sup>148</sup> In addition, chapter 375 authorizes the Department to provide financial assistance to local governments for the purpose of acquiring public beach properties.<sup>149</sup> As specified in chapter 259, public beaches in urban areas are to be given priority in the trust fund application process.<sup>150</sup>

Although these beach acquisition programs are not complicated, they can be significant. If the state gains control of the few remaining beaches still in their natural state, their pristine condition may survive for future generations—perhaps longer than if the beaches remain in private control. In this manner, the state may be able to retain some of the beaches' natural qualities which appeal to so many people.

#### 4. Comprehensive Planning

Florida requires a comprehensive plan of development of all municipalities "based on the area's needs, proposed improvements, and principles for future development."<sup>151</sup> In addition, the state has enacted a comprehensive plan requirement to "provide long-range policy guidance for the orderly social, economic, and physical growth of the state."<sup>152</sup> Each plan requires protection from beach and shore growth to be identified through a coastal element of the plan.<sup>153</sup> A major function of the comprehensive plan is the protection of natural resources. Because the beaches have been identified as a natural resource in great need of protection, they must be an integral part of comprehensive planning.<sup>154</sup>

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146. *Id.* § 259.101(3).

147. FLA. STAT. § 375.031(1) (1995).

148. *Id.* § 375.031(5).

149. FLA. STAT. § 375.065(1) (1995).

150. *Id.* § 375.065(4).

151. James Jay Brown, *A Brief Guide to Understanding Planning and Zoning*, in II FLORIDA ENVIRONMENTAL AND LAND USE LAW 1-1, 1-17 (2d ed. 1994).

152. FLA. STAT. § 187.101(1) (1995).

153. FLA. STAT. §§ 163.3177(6)(d), 186.009(2)(j) (1995).

154. The comprehensive planning statutes are extremely detailed and beyond the scope of this article. For an in-depth analysis of all elements of the comprehensive planning process, see Thomas Pelham et al., *Managing Florida's Growth: Toward an Integrated State, Regional, and Local Comprehensive Planning Process*, 13 FLA. ST. U. L. REV. 515 (1985).



Section 163.3178 requires the local governments to include a coastal management element into their comprehensive plan for the purpose of protecting the “significant interest in the resources of the coastal zone of the state.”<sup>155</sup> This element must be based upon “studies, surveys, and data,”<sup>156</sup> and must include: a land use map of public access to beach and shore resources;<sup>157</sup> an analysis of the effect of development upon the barrier islands, including beach and dune systems, and other fragile coastal resources;<sup>158</sup> and “[a] component which outlines principles for protecting existing beach and dune systems from man-induced erosion and for restoring altered beach and dune systems.”<sup>159</sup> The statute also requires counties to establish a “process for identifying and prioritizing coastal properties so they may be acquired as part of the state’s land acquisition programs.”<sup>160</sup> Additionally, the *Florida Administrative Code* implements this comprehensive planning requirement for coastal management by requiring an inventory and analysis of beach and dune systems, “including past trends in erosion and accretion, the effects upon the beaches or dunes of coastal or shore protection structures, and identification of existing and potential beach renourishment areas.”<sup>161</sup>

The Executive Office of the Governor is required to prepare a growth management portion of the state comprehensive plan which is strategic in nature.<sup>162</sup> This includes “[e]stablish[ing] priorities regarding coastal planning and resource management.”<sup>163</sup> The coastal element of the state comprehensive plan includes: 1) accelerated public acquisition of coastal land to protect resources or “meet projected public demand”;<sup>164</sup> 2) ensuring the public’s right of access to beaches;<sup>165</sup> 3) protection of coastal resources and dune systems “from the adverse effects of development”;<sup>166</sup> 4) prohibition of “development and other activities which disturb coastal dune systems”;<sup>167</sup> and 5) ensuring and promoting the restoration of

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155. FLA. STAT. § 163.3178(1) (1995).

156. *Id.* § 163.3178(2).

157. *Id.* § 163.3178(2)(a).

158. *Id.* § 163.3178(2)(b).

159. *Id.* § 163.3178(2)(e).

160. FLA. STAT. § 163.3178(8).

161. FLA. ADMIN. CODE ANN. r. 9J-5.012(2)(f) (1995).

162. FLA. STAT. § 186.009(1).

163. *Id.* § 186.009(2)(j).

164. FLA. STAT. § 187.201(9)(b)1. (1995).

165. *Id.* § 187.201(9)(b)2.

166. *Id.* § 187.201(9)(b)4.

167. *Id.* § 187.201(9)(b)9.

damaged coastal dune systems.<sup>168</sup> These comprehensive planning systems are primarily a building block to positive action by the state and local governments toward protecting the coast, and the beach and dune system.

### 5. Beach Renourishment and Replenishment

Beach renourishment or replenishment is not a protective measure, but one which attempts to reverse the adverse impacts of existing overgrowth and overdevelopment. Once the erosion process has occurred, either at its natural pace or accelerated due to human intervention, there is little that can be done to reverse this process. Renourishment of the beaches is one method by which the state can physically replace the loss which has occurred to the beach, thus possibly halting damage to structures upland and minimizing impacts on tourism.

The primary mechanism the state implemented for renourishment is codified in section 161.161 of the *Florida Statutes*.<sup>169</sup> Under this section, a comprehensive, long-term beach management plan must be adopted with regard to renourishment projects.<sup>170</sup> This section also establishes the criteria for approval of a beach renourishment project,<sup>171</sup> and establishes how the project will be funded.<sup>172</sup>

The elements which the beach management plan must address include: 1) "long-term solutions to the problem of critically eroding beaches in this state";<sup>173</sup> 2) whether each improved coastal beach inlet is a significant cause of beach erosion;<sup>174</sup> 3) design criteria for renourishment projects;<sup>175</sup> 4) evaluation of "the establishment of feeder beaches as an alternative to direct beach restoration";<sup>176</sup> 5) strategies for protection of marine turtles and their nests;<sup>177</sup> and 6) "alternative management responses to preserve undeveloped beach and dune systems, to restore damaged beach and dune systems, and to prevent inappropriate development and redevelopment on migrating beaches."<sup>178</sup> As problems arise in beach renourish-

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168. *Id.*

169. FLA. STAT. § 161.161 (1995).

170. *Id.* § 161.161(1)(c).

171. *Id.* § 161.161(2).

172. *Id.* § 161.161(6).

173. *Id.* § 161.161(1)(a).

174. FLA. STAT. § 161.161(1)(b).

175. *Id.* § 161.161(1)(c).

176. *Id.* § 161.161(1)(d).

177. *Id.* § 161.161(1)(i).

178. *Id.* § 161.161(1)(j).

ment projects, this section outlines additional criteria for the approval of the project. The prospect for long-term success of the project,<sup>179</sup> total anticipated cost of the project,<sup>180</sup> proximity of the source of beach-compatible sand, and the sand quality are all considered.<sup>181</sup> With regard to funding of the renourishment project, section 161.161 indicates that if approval of the project is granted by the Board of Trustees of the Internal Improvement Trust Fund, then seventy-five percent of the cost of the project will be authorized from the Beach Management Trust Fund.<sup>182</sup>

The problem of locating sand for a renourishment project is partially answered by section 161.042 of the *Florida Statutes*. This section is implemented by the *Florida Administrative Code*, which identifies authorized construction or maintenance dredging as a source of sand to be used for renourishment projects.<sup>183</sup> When the sand has been determined by the Department of Environmental Protection to be suitable for a renourishment project, the sand will be deposited upon an adjacent beach in a location determined by a beach management plan, as adopted under section 161.161.<sup>184</sup> Although this type of sand is probably compatible in most instances, the state's supply is nearly depleted.

Another factor which must be taken into account when undertaking a beach renourishment project is the effect upon the marine turtle population. As stated previously, the temperature of the sand itself can have a huge impact on a turtle's ability to procreate.<sup>185</sup> The state, to this effect, has established standards to protect turtles from devastating renourishment projects. Under the *Florida Administrative Code*, "[b]each restoration, nourishment and mechanical sand bypassing projects shall be designed to provide habitat which is suitable for successful marine turtle nesting activity."<sup>186</sup> This reproductive process is a delicate one and, therefore, consideration must be taken prior to introducing foreign material into the turtles' nesting environment.

The state also allows for a review of innovative beach renourishment technologies. Under section 161.082, the Department of Environmental

179. FLA. STAT. § 161.161(2)(c).

180. *Id.* § 161.161(2)(e).

181. *Id.* § 161.161(2)(f).

182. *Id.* § 161.161(6). The Beach Management Trust Fund is enacted in § 161.091 of the *Florida Statutes*. FLA. STAT. § 161.091 (1995).

183. FLA. ADMIN. CODE ANN. r. 62B-41.005(15) (1995).

184. *Id.*

185. See *Florida Running out of Sand*, *supra* note 37, at 19.

186. FLA. ADMIN. CODE ANN. r. 62B-41.0055(3) (1995).

Protection may authorize, on a limited basis, and through the permitting process, alternatives to the "traditional dredge and fill projects to determine the most effective and less costly techniques for beach renourishment."<sup>187</sup>

In summary, Florida requires that many facets of beach renourishment be taken into consideration prior to undertaking a project, thus demonstrating an understanding of the unique nature of the undertaking. However, introducing foreign substances into a delicate ecosystem is never a good idea, and it is not always one which is going to be able to successfully achieve the objectives for which it was designed. By utilizing the growth management techniques to protect beaches and sandy shores in Florida, these renourishment projects will not be needed as often. What is truly essential for the beaches and shores of Florida is protection from growth and development. By enforcing these established protection measures stringently and allowing construction and armoring permits and waivers only in rare circumstances, the state will have fewer erosion emergencies with which to contend.

### III. COASTAL WETLANDS AND ESTUARIES

#### A. *Description of the Ecosystem and Problems Caused by Development*

The coastal wetlands and marshes are a vibrant and complex ecosystem, where fresh and salt water combine, nurturing incredible amounts of wildlife. As one commentator notes "[a]ll organic life is beautifully and variedly adjusted to the conditions of its environment, but it is doubtful if in any other zone of the organic world the accommodations are more exquisitely ordered than in the marshes of the ocean shore."<sup>188</sup>

An estuary is defined as "a semi-enclosed coastal body of water which has a free connection with the open sea and within which seawater is measurably diluted with fresh water derived from land drainage."<sup>189</sup> The estuary is protected from the surge of the sea "by barrier islands, sand dunes, submerged reefs, peninsulas, or rocky promontories . . ."<sup>190</sup> Sea

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187. FLA. STAT. § 161.082.

188. JOSEPH V. SIRY, MARSHES OF THE OCEAN SHORE: DEVELOPMENT OF AN ECOLOGICAL ETHIC 3 (1984) (quoting James Morris, *The Estuary: One of Nature's keystones*, in *ESSAYS IN SOCIAL BIOLOGY* 243-45 (Bruce Wallace, ed. 1972)).

189. William C. Boicourt, *Estuaries: Where the River Meets the Sea*, OCEANUS, Summer 1993, at 32 (relying on a definition provided by D.W. Pritchard, Professor of Oceanography at Johns Hopkins University).

190. SIRY, *supra* note 188, at 3.

water and fresh water combine in a dynamic circulation caused by the winds and tides.<sup>191</sup> This flow causes the estuary to retain nutrients and sustain its extraordinary productivity.<sup>192</sup>

Estuaries are bordered by coastal wetlands, a series of “low-lying, water-tolerant vegetation” which includes salt marshes, tidelands, swamps, and sloughs.<sup>193</sup> Tidal marshes are the “portions of the coastal wetlands formed by tidal action and sedimentation in certain river mouths and bays.”<sup>194</sup> The marshlands of the estuarine system support greater numbers of wildlife than any other type of marshland because the waters which drain into the tidal marshes flow into the oceans. The tidal patterns distribute food into the river mouth, while sending the wastes into the sea.<sup>195</sup>

Because the estuary is where the ocean and river meet, the convenience of access to inland areas caused commerce and cities to develop around estuarine areas very early on in history.<sup>196</sup> However, the mudflats which occur along estuaries are where seagrass grows and traps silt. Because of the possible hindrance to commerce, reclamation of coastal wetlands occurs and, in turn, threatens estuarine and wetland productivity.<sup>197</sup>

191. Boicourt, *supra* note 189, at 32.

192. *Id.* at 33.

193. SIRY, *supra* note 188, at 3. Section 373.019(17) of the *Florida Statutes* defines wetlands as:

those areas that are inundated or saturated by surface water or groundwater at a frequency and a duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soils. Soils present in wetlands generally are classified as hydric or alluvial, or possess characteristics that are associated with reducing soil conditions. The prevalent vegetation in wetlands generally consists of facultative or obligate hydrophytic macrophytes that are typically adapted to areas having soil conditions described above. These species, due to morphological, physiological, or reproductive adaptations, have the ability to grow, reproduce, or persist in aquatic environments or anaerobic soil conditions. Florida wetlands generally include swamps, marshes, bayheads, bogs, cypress domes and strands, sloughs, wet prairies, riverine swamps and marshes, hydric seepage slopes, tidal marshes, mangrove swamps and other similar areas. Florida wetlands generally do not include longleaf or slash pine flatwoods with an understory dominated by saw palmetto.

FLA. STAT. § 373.019(17) (1995).

194. SIRY, *supra* note 188, at 4.

195. *Id.* at 5-6.

196. *Id.* at 6; *see also* Boicourt, *supra* note 189, at 30.

197. SIRY, *supra* note 188, at 6-7.

Because of the popularity of living in a coastal region, the wetlands and estuaries are utilized for increased housing needs.<sup>198</sup> Dredge and fill projects provide development-ready land parcels. These lands are located near settled urban areas and are generally lower in cost.<sup>199</sup>

The effects of the urbanization of estuaries are widespread and potentially disastrous. In their natural state, wetlands are able to filter and cleanse runoff waters. When these wetlands are destroyed, they are unable to filter this pollution. As a result, the adjacent waters are impacted by increased pollution.<sup>200</sup> The natural storage capacity for excess water is likewise destroyed when a wetland is destroyed. This causes changes in flooding patterns during storms which could cause damage to the surrounding homes and businesses.<sup>201</sup>

In addition to their ability to control floods, reduce pollution, and produce enormous sources of food, wetlands are needed to maintain global cycles of carbon, nitrogen, sulfur, and other vital elements.<sup>202</sup> Studies indicate that the methane produced by the wetlands plays an important role in maintaining the earth's ozone layer as well.<sup>203</sup> The repercussions of a destroyed wetland and estuarine system can be felt around the globe.

Estuarine damage and human impact are not quickly or easily detectable, though it may seem so.<sup>204</sup> The changes in the system, however, are "typically subtle, creeping changes in sometimes unexpected indicators, [which] slowly manifest over many decades."<sup>205</sup> Human impact is not limited to urban estuaries. Apparently pristine estuaries which may seem untouched by humans are increasingly facing threats from human impact and damage.<sup>206</sup>

The estuary and wetland systems are vibrant havens for biodiversity. The competition for their resources, a long and endless battle,<sup>207</sup> is perhaps becoming increasingly inevitable as the population increases. People will utilize these ecosystems for their personal use as long as protection systems

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198. DITTON, *supra* note 1, at 45.

199. *Id.*

200. *Id.* at 26.

201. *Id.*

202. Eugene P. Odum, *A New Ecology for the Coast*, in *COAST ALERT: SCIENTISTS SPEAK OUT* 145, 149 (Thomas C. Jackson & Diana Reische eds., 1981).

203. *Id.*

204. Boicourt, *supra* note 189, at 34.

205. *Id.*

206. *Id.* at 31.

207. For a history of development of coastal wetlands and estuaries, see SIRY, *supra* note 188.

are not imposed. Thus, protective measures are essential to keep the coastal wetlands and estuaries alive because, although man has historically developed these areas, “‘man’s way is not always the best.’”<sup>208</sup>

### B. *The Regulation of Coastal Wetlands, Estuaries, and Marshes*

The estuaries and coastal wetlands are vital to all parts of the Florida ecosystem and are vulnerable to development. Therefore, they must be protected as stringently as possible to avoid possible permanent loss. Florida has taken several measures to protect and preserve the estuarine and wetland system. These measures primarily entail selecting certain coastal wetland systems for protection and conservation. This includes designating certain Florida lands as areas of critical state concern,<sup>209</sup> and implementing land acquisition programs.<sup>210</sup> In addition, comprehensive planning statutes signify the importance of the coastal wetland system, and identify it as one in need of special protection and conservation.<sup>211</sup>

#### 1. Areas of Critical State Concern

The “areas of critical state concern” program, enacted in section 380.05, is a limited program whereby the state land planning agency may identify up to five percent of the state’s land as an area of critical state concern.<sup>212</sup> An area of critical state concern is one which contains or has a significant impact on “environmental or natural resources of regional or statewide importance . . . .”<sup>213</sup> This includes estuaries.

The criteria considered in designating an area as one of critical state concern include: 1) “[w]hether the ecological value of the area . . . is of substantial regional or statewide importance”;<sup>214</sup> 2) whether the area is one which is designated by any state or federal agency as one for threatened or endangered plant or animal species;<sup>215</sup> and 3) “[w]hether any existing or planned substantial development within the area will directly, significantly, and deleteriously affect any or all of the environmental or natural resources

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208. SIRY, *supra* note 188, at 17 (quoting Paul Brooks, THE HOUSE OF LIFE: RACHEL CARSON AT WORK 226 (1989)).

209. FLA. STAT. § 380.05 (1995).

210. FLA. STAT. § 259.01 (1995).

211. *Id.* § 163.3177.

212. *Id.* § 380.05.

213. *Id.* § 380.05(2)(a).

214. *Id.* § 380.05(2)(a)2.

215. FLA. STAT. § 380.05(2)(a)3.

of the area which are of regional or statewide importance."<sup>216</sup> No person may undertake development in an area of critical state concern except in accordance with the regulations established for these areas.<sup>217</sup> The affected local governments under this section must submit land development regulations or a local comprehensive plan within 180 days following the adoption of a rule designating an area under that government's control as an area of critical state concern. If they do not, or if the regulation or plan submitted does "not comply with the principles for guiding development set out in the rule designating the area of critical state concern," within 120 days, regulations and a plan which is in compliance will be recommended by the state land planning agency.<sup>218</sup>

In addition, a fund was established under section 380.0558 of the *Florida Statutes* to reimburse "actual costs incurred by the Department of Environmental Protection" for injury and damage to natural resources within an area of critical state concern.<sup>219</sup> This fund was established because "natural resources within areas of critical state concern are subject to instantaneous injury or loss from a variety of negligent and willful acts, in ways that cannot be foreseen and provided for in the normal budget process."<sup>220</sup> Therefore, under this section "extraordinary expenses" which are incurred by the state from injury or damage to natural resources, such as those within coastal wetlands and estuaries, may be reimbursed on behalf of the residents of the state.<sup>221</sup>

The Florida Keys is one area which has been designated as an area of critical state concern. This area, comprised of approximately 400 islands and about 700 square miles, is an extremely fragile ecosystem and is extremely vulnerable to development.<sup>222</sup> Tourism is plentiful in the Keys with 6,000,000 tourists in 1993 alone.<sup>223</sup> In addition, the Keys held 78,000 residents in 1990.<sup>224</sup> With these enormous numbers, it is difficult, if not impossible, to sustain the attractive qualities which attracted these people to the Keys in the first place.<sup>225</sup> Problems from excessive salinity

216. *Id.* § 380.05(2)(a)5.

217. *Id.* § 380.05(16).

218. *Id.* § 380.05(8).

219. FLA. STAT. § 380.0558(4) (1995).

220. *Id.* § 380.0558(3)(a).

221. *Id.*

222. Patricia Byrnes, *In the Kingdom of the Keys; Ecoregion Destruction in the Keys; The Bankruptcy Files*, WILDERNESS, June 22, 1994, at 19, 19.

223. *Id.* at 20.

224. *Id.*

225. *Id.*



in the Florida Bay, a result of diversion of freshwater from the Everglades, has resulted in extreme destruction of seagrass in the Keys.<sup>226</sup>

The Florida Keys were designated as an area of critical state concern by the Florida Keys Area Protection Act pursuant to section 380.0552.<sup>227</sup> This Act was created to: “establish a land management system that protects the natural environment of the Florida Keys,”<sup>228</sup> “establish a land management system that conserves and promotes the community character of the Florida Keys,”<sup>229</sup> and promote “orderly and balanced growth . . . .”<sup>230</sup> The comprehensive plans implemented in the Florida Keys area must be consistent with certain requirements. These requirements include protection of “shoreline and marine resources, including mangroves, coral reef formations, seagrass beds, wetlands, fish and wildlife, and their habitat.”<sup>231</sup>

The designated purpose of chapter 380 is to “provide optimum utilization of our limited water resources, facilitate orderly and well-planned development, and protect the health, welfare, safety, and quality of life of the residents of this state . . . .”<sup>232</sup> With regard to areas within the areas of critical state concern program, these purposes are achieved by designating certain portions of the state as being entitled to special and specific protection because of their importance and fragility. Where coastal wetlands and estuaries are concerned, this is only one small piece in an important puzzle which merely begins with identifying and protecting those areas in the greatest danger.

## 2. State Acquisition of Coastal Wetlands and Estuaries

As was done with sandy beaches and shores, the state has established a system whereby it may acquire parcels of land for the purposes of conservation and the good of the public. As stated previously, this system has its advantages because less damage will result to wetlands owned by the state. The legislation implemented to achieve this purpose is: the Land Conservation Act under chapter 259 of the *Florida Statutes*,<sup>233</sup> the Outdoor

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226. George Barley, *Integrated Coastal Management: The Florida Keys Example From an Activist Citizen's Point of View*, OCEANUS, Fall 1993, at 15, 18.

227. FLA. STAT. § 380.0552 (1995).

228. *Id.* § 380.0552(2)(a).

229. *Id.* § 380.0552(2)(b).

230. *Id.* § 380.0552(2)(c).

231. *Id.* § 380.0552(7)(b).

232. FLA. STAT. § 380.021 (1995).

233. *Id.* ch. 259.

Recreation and Conservation provisions of chapter 375,<sup>234</sup> and the Water Resources provisions of chapter 373.<sup>235</sup>

Under chapter 259, money from the Conservation and Recreation Lands Trust Fund may be allocated to protect coastal resources.<sup>236</sup> In acquiring these lands, priority will be given to counties of high population, as well as those lands designated as areas of critical state concern.<sup>237</sup> Under the Florida Preservation 2000 Act, one-fifth of half of the proceeds under the Trust Fund are designated for the acquisition of coastal lands.<sup>238</sup> This section also specifies that in the acquisition of coastal lands, "[t]he value of acquiring identified parcels, the development of which would adversely affect coastal resources" will be taken into consideration.<sup>239</sup> This would include estuaries and coastal wetlands, as these are extremely valuable coastal resources.

Section 375.031 of the *Florida Statutes* authorizes the Department of Environmental Protection to acquire lands for the Board of Trustees of the Internal Improvement Trust Fund.<sup>240</sup> The lands which may be acquired specifically include wetlands and water access sites.<sup>241</sup> After acquisition, the Department has authority to improve, maintain, sell, or develop the land.<sup>242</sup>

Finally, chapter 373 provides for the acquisition of property for the purpose of conservation of water-related resources.<sup>243</sup> The policy specified

234. *Id.* ch. 375.

235. FLA. STAT. ch. 373 (1995).

236. FLA. STAT. § 259.032(3)(d).

237. *Id.* § 259.032(1).

238. *Id.* § 259.101(3)(a).

239. *Id.* § 259.101(4)(d)3.

240. *Id.* § 375.031(1).

241. FLA. STAT. § 375.031(5). The Internal Improvement Trust Fund is established under § 253.01, which states that:

So much of the 500,000 acres of land granted to this state for internal improvement purposes by an Act of Congress passed March 3, A.D. 1845, as remains unsold, and the proceeds of the sales of such lands heretofore sold as now remain on hand and unappropriated, and all proceeds that may hereafter accrue from the sales of such lands; and all of the swampland or lands subject to overflow granted this state by an Act of Congress approved September 28, A.D. 1850, together with all the proceeds that have accrued or may hereafter accrue to the state from the sale of such lands, are set apart, and declared a separate and distinct fund called the Internal Improvement Trust Fund of the state . . . .

FLA. STAT. § 253.01(1)(a) (1995).

242. *Id.* § 375.031(1), (2).

243. FLA. STAT. § 373.139 (1995).

by the legislature includes: providing “for the management of water and related land resources;”<sup>244</sup> promoting “the conservation, development, and proper utilization of surface and groundwater;”<sup>245</sup> and preserving “natural resources, fish, and wildlife . . . .”<sup>246</sup> Section 373.139 specifies that wetlands specifically may be acquired by the governing board of the water management district.<sup>247</sup> Any lands acquired through the methods in this section may also be open to recreational use by the public whenever practicable.<sup>248</sup>

Preservation of lands for the enjoyment and pleasure of the growing population can be positively achieved through these land acquisition programs. Once held in public trust, the wildlife and plant life which exists in such huge quantities in estuaries and wetlands can be protected to some extent from human development. However, the undertaking must be cautious. Keeping the land for the benefit of the public cannot mean excessive use by the public or the purpose of conserving these lands will be lost. The coastal wetlands’ and estuaries’ extraordinary practical benefits must be weighed against their equally extraordinary aesthetic benefits.

### 3. Comprehensive Planning

As previously discussed in Section II, the comprehensive plan is the means by which the state and local governments may identify and plan for problems in growth and development which would threaten the standard of life desired by the residents of that area. In the case of coastal wetlands and estuaries, planning for the future is needed to prevent possible irrevocable damage to these fragile ecosystems today. The state requires a coastal element of the local comprehensive plans. Thus, local comprehensive plans must necessarily include the estuaries and wetlands which lie on the coast.

The state comprehensive plan identifies that Florida must ensure that development does not negatively impact natural resources along the coast.<sup>249</sup> To this end, the state’s policies regarding the coast include: avoiding expenditures which “subsidize development in high-hazard coastal areas”;<sup>250</sup> protecting coastal and marine resources “from the adverse effects

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244. FLA. STAT. § 373.016(2)(a) (1995).

245. *Id.* § 373.016(2)(b).

246. *Id.* § 373.016(2)(f).

247. *Id.* § 373.139(2).

248. *Id.* § 373.139(5).

249. FLA. STAT. § 187.201(9)(a).

250. *Id.* § 187.201(9)(b)3.

of development”;<sup>251</sup> encouraging “land and water uses which are compatible with the protection of sensitive coastal resources”;<sup>252</sup> and avoiding “the exploration and development of mineral resources which threaten marine, aquatic, and estuarine resources.”<sup>253</sup>

Chapter 163 requires that a coastal element be integrated into every local government’s comprehensive plan when that local government exists in a coastal area.<sup>254</sup> This element must be implemented with respect to: “[m]aintenance, restoration, and enhancement of the overall quality of the coastal zone environment, including, but not limited to, its amenities and aesthetic values”;<sup>255</sup> “[c]ontinued existence of viable populations of all species of wildlife and marine life”;<sup>256</sup> “[a]voidance of irreversible and irretrievable loss of coastal zone resources”;<sup>257</sup> and “[e]cological planning principles and assumptions to be used in the determination of suitability and extent of permitted development.”<sup>258</sup> In addition to the coastal element of the plan, the plan must also include “[a] conservation element for the conservation, use, and protection of natural resources in the area, including . . . wetlands, . . . [and] estuarine marshes.”<sup>259</sup> A land use map must also be integrated into the plan which identifies and depicts estuarine systems and wetlands.<sup>260</sup>

The local comprehensive plan must include an inventory and analysis of estuarine pollution conditions and actions needed to maintain estuaries.<sup>261</sup> This includes the impacts of future development as proposed in the future land use element and the impacts of sewage, drainage, and natural groundwater aquifer recharge elements upon water quality of the estuary.<sup>262</sup> This element must also identify action needed to correct existing pollution problems, as well as local programs which are going to be used to maintain the quality of the estuary.<sup>263</sup>

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251. *Id.* § 187.201(9)(b)4.

252. *Id.* § 187.201(9)(b)6.

253. *Id.* § 187.201(9)(b)8.

254. FLA. STAT. § 163.3177(6)(g).

255. *Id.* § 163.3177(6)(g)1.

256. *Id.* § 163.3177(6)(g)2.

257. *Id.* § 163.3177(6)(g)4.

258. *Id.* § 163.3177(6)(g)5.

259. FLA. STAT. § 163.3177(6)(d).

260. *Id.* § 163.3177(6)(d)2., 4.

261. FLA. ADMIN. CODE ANN. r. 9J-5.012(2)(d) (1995).

262. *Id.*

263. *Id.*

The state must also inventory and analyze the effect of future land use on wetland areas, areas subject to coastal flooding, wildlife habitats, and living marine resources.<sup>264</sup> Maps of these areas which are of special concern to the local government must also be prepared for the plan.<sup>265</sup> Provisions must be made in the plan for wetlands and estuaries which have already been damaged. A policy must be made and management techniques identified for “[r]estoration or enhancement of disturbed or degraded natural resources including . . . estuaries, wetlands, . . . and programs to mitigate future disruptions or degradations.”<sup>266</sup>

Protection of wetlands and estuaries which are not damaged or pristine, are addressed by the conservation element of the plan. The *Florida Administrative Code* requires identification and analysis of wetlands and estuaries under this portion of the plan.<sup>267</sup> Under this rule, policies regarding wetlands are specifically addressed. This rule indicates that wetlands must be protected and conserved. This “shall be accomplished through a comprehensive planning process which includes consideration of the types, values, functions, sizes, conditions and locations of wetlands . . . .”<sup>268</sup> Land use planned for the future must be “directed away from the wetlands” and be designed for minimal impact on wetlands.<sup>269</sup> This rule also allows for mitigation “as one means to compensate for loss of wetlands functions” where incompatible land uses are allowed to occur.<sup>270</sup>

If a coastal wetland or estuary is within one or more local government’s jurisdiction, each government must provide policies and management techniques within their plan for protecting that wetland or estuary.<sup>271</sup> This includes “methods for coordinating with other local governments to ensure adequate sites for water-dependent uses, prevent estuarine pollution, control surface water runoff, protect living marine resources, reduce exposure to natural hazards, and ensure public access . . . .”<sup>272</sup>

In summary, the coastal comprehensive plan with regard to estuary systems and coastal wetlands consists of the objectives needed to protect these regions and the resources within them from growth. The potential for

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264. *Id.* at r. 9J-5.012(2)(b).

265. *Id.*

266. FLA. ADMIN. CODE ANN. r. 9J-5.012(3)(c)2. (1995).

267. *Id.* at r. 9J-5.013(1)(a)1.

268. *Id.* at r. 9J-5.013(3)(a).

269. *Id.* at r. 9J-5.013(3)(b).

270. *Id.*

271. FLA. ADMIN. CODE ANN. r. 9J-5.012(3)(c)14. (1995).

272. *Id.*

state and local plans that would be sufficiently protective of coastal wetlands and estuaries is created by the provisions established by the state. These governments must first, however, choose to take these steps.

#### IV. CONCLUSION

The coastal regions over the years have come to represent more than merely the freedom and power of the ocean. They have emerged as a place which we have the power and ability to destroy. Yet we now begin to fear the repercussions of what we would lose if the ecosystem is destroyed. Hopefully, years of pollution and development of the coasts have begun to teach us some lessons.

The importance and use of our coasts has grown as our country has grown. The early settlers saw little need for coastal development, as they anxiously explored the new world. Coastal villages were primarily established for fishing.<sup>273</sup> Shortly after the American Revolution, some coastal communities developed around ports.<sup>274</sup> Wetlands and estuaries were long viewed as wastelands.<sup>275</sup> As the population began to concentrate in the cities, development on the coasts began to grow. However, depleting and developing these "wastelands" was not seen as problematic.<sup>276</sup> An appreciation of coastal wetlands only emerged later, as naturalists and poets romanticized a region of the coast never before romanticized. Sydney Lanier described, in the poem *The Marshes of Glynn*:

Sinuous southward and sinuous northward the shimmering band  
Of the sand-beach fastens the fringe of the marsh to the folds of the  
land.<sup>277</sup>

This romantic notion of the coast will only serve to protect the shores, however, if it is accompanied by a practical plan of action for their protection. As the economic value of coastal lands rises, forced protection of them is necessary to avoid damage from development. Realism, as well as an understanding of the implications of population growth, will save our

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273. DITTON, *supra* note 1, at 6.

274. *Id.*

275. SIRY, *supra* note 188, at 4.

276. DITTON, *supra* note 1, at 6.

277. SIRY, *supra* note 188, at 60 (quoting Sydney Lanier, *The Marshes of Glynn* (1868), reprinted in *AMERICAN POETRY AND PROSE: PART II, SINCE THE CIVIL WAR 1059-61* (Norman Foerster & Houghton Mifflin eds., 1934)).

coasts from having the sickly state which they are in now to be worsened. Scientific insights have led to the conclusion that:

The coast body is sick. Most of its systems function weakly, or not at all. The coast no longer protects us from storms and floods in many places, cannot provide suitable habitats for many of its creatures. Consistently, sandy beaches disappear, salt marshes vanish, species decline; some have ended their time on earth. Poisons, penetrating deep in estuaries and offshore water, affect the entire food chain, man included.<sup>278</sup>

In Florida, where the coasts are particularly popular, a special challenge emerges. Florida is not famous for its industry or its sprawling cities, but rather for its beauty and its beaches. Ecological consequences aside, the destruction of the coasts would cause a significant financial impact on Florida. This is apparently recognized and understood by the Florida Legislature, as the legislation enacted identifies a specific need to keep these beautiful areas open for the public to enjoy and use with as little destruction as possible.

However, the financial future of Florida is not the only area jeopardized should development continue to destroy the coasts. If coastal governments do not take an aggressive approach to systematically address these problems, the damage will be beyond imagination. If we do manage to kill the natural shore and its biodiversity along with it, it is not the ocean nor the earth that will die, but we as human beings.

*Joy R. Brockman*

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278. Anne W. Simon, *Foreword* to *COAST ALERT: SCIENTISTS SPEAK OUT* vii, vii (Thomas C. Jackson & Diana Reische eds., 1981).

# Concurrency and Its Relation to Growth Management

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## I. INTRODUCTION

Florida’s explosive population increase over the last few decades has necessitated a new outlook on how state and local governments plan for and control their future. With the many different types of land within the state, the need for an overall coherent plan, which provides for the needs of each locality, is obvious. In response to this issue, the Florida Legislature adopted the Local Government Comprehensive Planning and Land Development Regulation Act (“Act”).<sup>1</sup>

One of the major legal doctrines arising in the context of the Act is the law of concurrency. Concurrency is “land use regulation which controls the timing of property development and population growth. Its purpose is to ensure that certain types of public facilities and services needed to serve new residents are constructed and made available contemporaneously with the impact of new development.”<sup>2</sup> It has been described as the “teeth” of Florida’s growth management system.<sup>3</sup> In other words, concurrency

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1. FLA. STAT. §§ 163.3161-.3243 (1995).

2. H. Glenn Boggs, II & Robert C. Apgar, *Concurrency and Growth Management: A Lawyer’s Primer*, 7 J. LAND USE & ENVTL. L. 1, 1 (1991) [hereinafter Boggs & Apgar].

3. *Id.*



regulations set minimums for developments as to what public service infrastructure must be in place, or planned to be in place, to compensate for the burdensome impact caused by the new development. These concurrency requirements are set forth in the *Florida Statutes*.<sup>4</sup>

This article will begin by examining the history and development of the law of concurrency in Florida which includes an overview of the relevant *Florida Statutes*. Part II will follow with a detailed analysis of the landmark case of *Golden v. Planning Board*.<sup>5</sup> From this decision, the emphasis will turn to Florida case law of the taking remedy and how it applies to the law of concurrency. Finally, this paper will conclude with a discussion of the problem of overcrowded schools plaguing Florida, and the possibility of adding a mandatory capital school element to Florida's concurrency law.

## II. HISTORY

During the early years of Florida's population explosion of the 1950s and 1960s, little was done by the Florida Legislature to regulate land use on a state-wide basis.<sup>6</sup> Instead, the state relied on the municipalities' authority to exercise their police power to regulate local land use.<sup>7</sup> However, in 1969, the Florida Legislature attempted to create more consistency in land use decisions by giving local governments the option to participate in comprehensive land use planning, but it did so without providing state-sponsored funding to finance the initiative.<sup>8</sup> Without this funding, uniform land use controls were slow to develop and as late as 1973, "two-thirds of the state had no land use controls whatsoever and ad hoc decision-making, regarding development, predominated throughout the state."<sup>9</sup>

In 1972, the Florida Legislature enacted the Florida Environmental Land and Water Act.<sup>10</sup> With it came the creation of the "Critical Area" program and the "Development of Regional Impact" program, two state-run

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4. FLA. STAT. § 163.3180.

5. 285 N.E.2d 291 (N.Y. 1972).

6. Boggs & Apgar, *supra* note 2, at 3.

7. *See S.A. Healy Co. v. Town of Highland Beach*, 355 So. 2d 813, 814 (Fla. 4th Dist. Ct. App. 1978) (authorizing use of police power to restrict use of land); *see also Cooper v. Sinclair*, 66 So. 2d 702, 705 (Fla.) (holding land use regulation adopted municipality to be valid as a "reasonable exercise of police power"), *cert. denied*, 346 U.S. 867 (1953).

8. Boggs & Apgar, *supra* note 2, at 3 (quoting Terrell K. Arline, *The Consistency Mandate of the Local Government Comprehensive Planning Act*, 55 FLA. B.J. 661, 661 (Oct. 1981)).

9. *Id.*

10. FLA. STAT. §§ 380.012-.10 (1972).

programs designed to monitor Florida's local growth management and land use regulation in certain areas of "critical concern" and major development.<sup>11</sup> Through these programs, the state gained valuable insight into the impact of development on local infrastructure. It used this insight to develop initiatives designed to coordinate development with the implementation of municipal services and facilities.<sup>12</sup> These initiatives were later reflected in the Local Government Comprehensive Planning and Land Development Regulation Act.<sup>13</sup>

Arising from the efforts of the legislature to address these land use regulations problems, Florida passed the Local Government Comprehensive Planning Act in 1975.<sup>14</sup> This statute required every local government in Florida to "adopt and implement a comprehensive plan to guide and control future development."<sup>15</sup> The statute did not, however, set forth any "concurrency" requirements. It did, however, provide that any land use regulations adopted or amended by a Florida municipality must be consistent with the state's adopted comprehensive plan.<sup>16</sup>

In 1985, following a substantial overhaul of the state's growth management section of the statutes, the legislature renamed the Act as the "Local Government Comprehensive Planning and Land Development Regulation Act" ("1985 Act").<sup>17</sup> The 1985 Act provided that each of the municipalities adopt a comprehensive plan and submit it to the state for approval,<sup>18</sup> and its adopted local plans must comply with the State Comprehensive Plan ("Plan").<sup>19</sup> It further defined and distinguished the state's and the municipality's authority and responsibilities.<sup>20</sup> In addition, the legislature added provisions making it possible for any "aggrieved or adversely affected party" to challenge the validity of the local comprehensive plan, the land development regulations, and the local government development orders.<sup>21</sup> The 1985 Act required the local plan to include a capital improvements element and an established level of service standard

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11. Boggs & Apgar, *supra* note 2, at 4 nn.19-20.

12. *Id.* at 4.

13. FLA. STAT. § 163.3161.

14. 1975 Fla. Laws ch. 75-257.

15. Boggs & Apgar, *supra* note 2, at 5 (quoting Arline, *supra* note 8, at 661).

16. *Id.*

17. Ch. 85-55, § 1, 1985 Fla. Laws 207, 207 (current version at FLA. STAT. § 163.3161 (1995)).

18. FLA. STAT. § 163.3184.

19. *Id.* § 163.3177.

20. *Id.* § 163.3167(1).

21. *Id.* § 163.3215.

for certain public facilities and services.<sup>22</sup> The 1985 Act also prohibited local governments from issuing a development order for any development which would reduce the number of available public service facilities to a level below the minimums set by the comprehensive plan.<sup>23</sup>

The Plan<sup>24</sup> was enacted to preserve the state's natural resources and enhance the quality of life by directing development to areas which already have in place, or have agreements to provide, "the land and water resources, fiscal abilities, and service capacity to accommodate growth in an environmentally acceptable manner."<sup>25</sup> The Plan provides that existing facilities should be preserved and that new facilities be planned for and financed "to serve residents in a timely, orderly, and efficient manner."<sup>26</sup> The 1985 Act, working in conjunction with the State Comprehensive Plan, seemed to accomplish the overall goal of increasing the consistency of land use planning decisions in the state, while still reserving some discretion for each locality. Thus, with this legislation came Florida's foundation for stability in land use decisions as well as an opportunity for growth in a more responsible and efficient manner.

Although the 1985 Act clearly seemed to require a certain level of "concurrency," the term itself was not expressed in the statutes until it was included in the 1986 amendment's legislative "intent" language:

It is the intent of the Legislature that public facilities and services needed to support development shall be available *concurrent* with the impacts of such development . . . . In meeting this intent, public facility and service availability shall be deemed sufficient if the public facilities and services for a development are phased, or the development is phased, so that the public facilities and those related services which are deemed necessary by the local government to operate the facilities necessitated by that development are available *concurrent* with the impacts of the development.<sup>27</sup>

While this newly adopted language sheds some light on the legislature's intentions implicit in the two sections of the statutes, it left some confusion as to the specific requisite public services. Because of this, the Department

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22. *Id.* § 163.3177(3)(a).

23. FLA. STAT. § 163.3202(2)(g).

24. *See* FLA. STAT. §§ 187.101-201 (1995).

25. *Id.* § 187.201(16)(a).

26. *Id.* § 187.201(18)(a).

27. *Id.* § 163.3177(10)(h) (1986) (emphasis added).

of Community Affairs (“DCA”)<sup>28</sup> was left to develop the concurrency doctrine through its interpretation of local land use regulations.

Much of the law of concurrency, as interpreted by the DCA, was confirmed by the legislature in 1993.<sup>29</sup> The legislature provided that, as a matter of state law, concurrency applies to seven forms of public infrastructure: 1) potable water; 2) sanitary sewer; 3) solid waste; 4) drainage; 5) parks and recreation facilities; 6) roads; and in certain jurisdictions, 7) mass transit.<sup>30</sup> In other words, these are the only public services which must comply with the minimum level of service standards set forth in the Local Government Comprehensive Planning and Land Development Regulation Act before a municipality may issue a development order.

### III. CASE LAW

#### A. Golden v. Planning Board

Several years prior to Florida’s adoption of the Local Government Comprehensive Planning and Land Development Regulation Act, a small town in New York adopted an ordinance outlining a specific plan to provide for the capitalization and implementation of all public service facilities within the town to be completed within an eighteen year period.<sup>31</sup> To aid in the construction of this plan, Ramapo conducted studies of the town’s “existing land uses, public facilities, transportation, industry and commerce, housing needs and projected population trends” and these studies were ultimately reflected in the plan.<sup>32</sup> In essence, the Ramapo ordinance imposed restrictions on residential development that corresponded to the availability of the specified public service facilities.<sup>33</sup> In other words, the restriction effectively precluded landowners from developing their property until the necessary municipal services were provided.

The ordinance required that in order to develop land in Ramapo, developers must apply for and receive a “special permit” for new residential

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28. This state agency, established by the Florida Environmental Land and Water Management Act of 1972, ch. 72-317, §1, 1972 Fla. Laws 1162, 1162 (codified at FLA. STAT. §§ 380.012-.10 (1972)), was created to implement the Development of Regional Impact program and made recommendations of specific statewide guidelines based on studies of the impacts of development on the local environment. *See* FLA. STAT. § 380.06(2) (1995).

29. FLA. STAT. § 163.3180.

30. *Id.* § 163.3180(1).

31. *Golden v. Planning Bd.*, 285 N.E.2d 291, 294-95 (N.Y. 1972).

32. *Id.* at 294.

33. *Id.* at 294-95.

development.<sup>34</sup> To receive the “special permit,” the proposed development must have accrued a certain number of points based on the availability of certain public-service facilities.<sup>35</sup> Points were assigned to the proposed development depending on its distance from requisite public service facilities.<sup>36</sup> The five required public facilities were: “(1) public sanitary sewers or approved substitutes; (2) drainage facilities; (3) improved public parks or recreation facilities, including public schools; (4) State, county, or town roads—major, secondary or collector; and, (5) firehouses.”<sup>37</sup>

In *Golden*, a facial attack against the validity of the ordinance was brought by property owners who were denied approval of an application for a special permit to develop a subdivision on their property, because the city lacked the time and money to provide necessary public services and facilities at a pace commensurate with increased public need.<sup>38</sup> Although the special term sustained the ordinance, the appellate division treated the proceeding as an action for declaratory judgment and reversed.<sup>39</sup> The decision was then appealed by the town to the Court of Appeals of New York Court.<sup>40</sup>

The Court of Appeals of New York first noted that the ordinance was designed with certain “savings and remedial” provisions to protect the restrictions from being potentially unconstitutional for unreasonableness.<sup>41</sup> For example, the planning board could issue special permits, vesting a present right to develop at some future date when development is scheduled to meet its minimum point criteria.<sup>42</sup> Accordingly, these special permits were assignable. The board also deemed improvements scheduled for completion within one year complete and developers always had the option of providing the necessary improvements themselves to meet the requisite point minimums.<sup>43</sup> Variances on point requirements were also available upon application to the board so long as the variance would be consistent with the ongoing plan.<sup>44</sup>

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34. *Id.* at 295.

35. *Id.*

36. *Golden*, 285 N.E.2d at 295.

37. *Id.*

38. *Id.* at 301.

39. *Golden v. Planning Bd.*, 324 N.Y.S.2d 178, 186 (App. Div. 1971).

40. *Golden*, 285 N.E.2d at 291.

41. *Id.* at 296.

42. *Id.*

43. *Id.*

44. *Id.*

Notwithstanding these options to circumvent the restrictions imposed by the ordinance, the landowners argued that these restrictions were intended to control population growth within the town, and thus an ultra vires objective of the zoning enabling legislation. The court of appeals disagreed, however, stating that although there is no express authorization in the zoning enabling legislation for the land use controls adopted:

The power to restrict and regulate conferred [by the Town Law] includes . . . by way of necessary implication, the authority to direct the growth of population for the purposes indicated, within the confines of the township. It is the matrix of land use restrictions, common to each of the enumerated powers and sanctioned goals, a necessary concomitant to the municipalities' recognized authority to determine the lines along which local development shall proceed, though it may divert it from its natural course.<sup>45</sup>

From this language, it appears that the court allows the town a significant amount of leeway in exercising its zoning power. Further, by deferring to the quasi-legislative nature of Ramapo's Planning Board, the court is implying that the local government is best suited to establish boundaries and guidelines for development, while still requiring that the ordinance finds its basis within the perimeters of current zoning enabling legislation.

The landowners' next argument was that recent shifts in population, combined with inconsistent land use policies, resulted in distorted growth patterns and undermined efforts in solving regional and state growth control problems.<sup>46</sup> The court dealt with this argument by emphasizing the seemingly obvious fact that undirected growth does not necessarily lead to controlled growth patterns.<sup>47</sup> The court reasoned that even if it did strike the ordinance, as the landowners would have it do, the absence of such an

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

46. *Id.* at 299. The state and regional growth control problems asserted by the landowners included: pollution controls, adequate housing, and public transportation. *Id.* The Florida Legislature seemed to avoid this problem by adopting the State Comprehensive Plan and requiring each municipality to adopt a comprehensive plan that conforms with it. This conformity requirement creates consistency throughout the state and allows local governments to have a real chance of controlling and alleviating some of the problems purported by the landowners in the instant case.

47. *Id.* at 300. Another common misconception is that adequate public service facilities in a growing area are implemented as a matter of course.

ordinance would not guarantee that problems of broad public interest would be solved.<sup>48</sup>

For example, suppose that a community suddenly attracts an influx of new citizens requiring new residential development and it has no land use controls to delegate which public facilities must be in place and how they should be placed in accordance with the population distribution. Suppose further that the local government has only one fire truck available to the entire community, and it is called to three different fires at the same time. The community may be perfectly constructed so that a car can travel from one side of the community to the other without delay, however, even if the fire truck can get to the first fire immediately, the other two fires will have burned the houses to the ground. If a community has a local comprehensive plan which requires a certain number of fire stations be in place prior to, or in conjunction with, new development then this disaster will not occur.

Consider another example involving public parks. Suppose that on a beautiful fall afternoon a large number of the citizens decide to spend the day at the community park. What if the local government has not provided adequate park space under its comprehensive plan to handle all of its citizens? Obviously, the local citizens will be subject to overcrowding and all of the problems that accompany it.<sup>49</sup> From the preceding examples, it is obvious that land use controls, such as the ones adopted by the town of Ramapo, serve distinct advantages and perhaps should be included in every town's comprehensive plan.

The *Golden* court subjected the ordinance to rational basis scrutiny. The court renewed its deference to the "considered deliberations" of the plan's progenitors, deeming matters of land use and development particularly suited to the "expertise of students of city and suburban planning and thus well within the legislative prerogative."<sup>50</sup> Accordingly, the ordinance is presumed to be a valid exercise of police power.<sup>51</sup> Therefore, the burden of proving the ordinance's unconstitutionality rests with the challengers to prove that the ordinance fails to advance a legitimate state interest.<sup>52</sup>

It was agreed that the ordinance advanced legitimate zoning purposes because it assured that any newly built residence would have adequate public facilities. The landowners conceded that the zoning power,

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48. *Id.* at 299-300.

49. Examples of overcrowding problems are: increased littering, traffic congestion in and around the park, and injuries related to overcrowding within the park.

50. *Golden*, 285 N.E.2d at 301.

51. *Id.*

52. *Id.*

incorporated by the ordinance, included reasonable restrictions on private property, exacted to further a well-conceived plan and to benefit the public welfare.<sup>53</sup> However, they argued that this ordinance went too far, in that the city was seeking to avoid the financial burden and responsibility of providing public services when needed.<sup>54</sup>

The court upheld the ordinance.<sup>55</sup> It reasoned that it is in “the nature of all land use and development regulations to circumscribe the course of growth within a particular town or district . . . [which] invariably impede the forces of natural growth.”<sup>56</sup> So long as the regulations are reasonable and necessary to benefit the welfare of the community, such regulations have been sustained.<sup>57</sup> The court put this “zoning ordinance” into context by holding it to be “inextricably bound to the dynamics of community life and [that] its function is to guide, not to isolate or facilitate efforts at avoiding the ordinary incidents of growth.”<sup>58</sup> However, the court’s determination of a restriction’s validity was determined based on its purpose and its impacts on the community and the general public. The court concluded that:

where it is clear that the existing physical and financial resources of the community are inadequate to furnish the essential services and facilities which a substantial increase in population requires, there is a rational basis for “phased growth” and hence, the challenged ordinance is not violative of the Federal and State Constitutions.<sup>59</sup>

Thus, the ordinance passed constitutional muster.

Due to the constitutional nature of the decision, authority to implement such programs within a municipality’s growth management scheme became apparent under standard zoning enabling legislation.<sup>60</sup> However, the court did not rule on the ordinance’s validity as applied. Thus, while the authority existed implicitly in standard zoning enabling legislation to adopt such an

53. *Id.*

54. *Id.*

55. *Golden*, 285 N.E.2d at 304-05.

56. *Id.* at 301 (citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).

57. *Id.*

58. *Id.* at 302.

59. *Id.* at 304-05. Ironically, the town of Ramapo was forced to abandon this plan due to a series of natural disasters which overburdened its financial resources. DANIEL R. MANDELKER & ROGER A. CUNNINGHAM, *PLANNING AND CONTROL OF LAND DEVELOPMENT* 612 (3d ed. 1990).

60. *See, e.g.*, FLA. STAT. §§ 163.3161-.3243.



ordinance, it seems that an aggrieved landholder may still challenge such ordinance, as applied to his property, as an arbitrary and unreasonable restriction. In other words, such regulations may not be used to mask an exclusionary scheme such as preventing low income or minority groups from moving into an area. It seems clear that such regulation would be stricken.<sup>61</sup>

## B. Florida Law

### 1. Standard of Review

This author has discovered no current Florida appellate decisions which have specifically ruled on the constitutionality of Florida's concurrency statute. However, Florida appellate decisions, examining zoning regulations, seem to indicate a strong tendency in favor of the validity of comprehensive plans by requiring strict compliance.<sup>62</sup> For instance, in *Machado v. Musgrove*,<sup>63</sup> where landowners sought to have their land rezoned to allow for office buildings, the court held:

The test in reviewing a challenge to a zoning action on grounds that a proposed project is inconsistent with the comprehensive land use plan is whether the zoning authority's determination that a proposed development conforms to each element and the objectives of the land use plan is supported by competent and substantial evidence. The traditional and non-deferential standard of strict judicial scrutiny applies.<sup>64</sup>

Accordingly, the court placed the burden of proof on the party seeking the zoning change to show that the proposed development strictly conforms with the elements of the local comprehensive plan.<sup>65</sup> Furthermore, in determining whether the evidence provided by that party is actually

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61. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 505 (1975) (indicating where immediate harm is suffered by members of minority group attempting to attain housing in an area which they are illegally excluded, they may have standing to challenge zoning regulation). It is also possible that such a regulation may be deemed as a taking of the landowner's property. See discussion *infra* part III.B.2.-3.

62. E.g., *White v. Metropolitan Dade County*, 563 So. 2d 117, 128 (Fla. 3d Dist. Ct. App. 1990).

63. 519 So. 2d 629 (Fla. 3d Dist. Ct. App. 1987), *review denied*, 529 So. 2d 694 (Fla. 1988).

64. *Id.* at 632.

65. *Id.*

consistent with the plan, the court required the stricter standard, not the traditional “fairly debatable” standard.<sup>66</sup> The court reasoned that to truly be consistent with the plan, the regulation should not “deviate or depart in any direction or degree” from the parameters set by the plan, and thus an increased standard is necessary.<sup>67</sup>

In essence, this type of judicial scrutiny affords much respect to a local comprehensive plan. By requiring strict conformity with each element of the local comprehensive plan, and placing the burden of proving consistency with the plan on the rezoning applicants, the court is implying that the plan is an essential element of the growth management process not to be easily overcome. More importantly, it seems to further expand a municipality’s authority to regulate zoning through its local comprehensive plan. The plan’s drafters already have the ability to (and presumably do) perform in-depth studies of the community’s land use and growth management needs.<sup>68</sup> Once they have evaluated these needs, they can incorporate appropriate regulations in their comprehensive plan to help correct localized problems. The state has thus provided the municipalities with a powerful pen. However, by retaining the right to review each plan, the state has also secured overall conformity. In so acting, the legislature has recognized these plans as having the utmost significance in local land use decision-making, which is a strong indication that local comprehensive plans are valid.

This judicial approach toward local comprehensive plans by the court makes sense. While some would argue that a strict type of scrutiny by the courts is just another governmental intrusion further burdening the typical landholder, the opposite may in fact be true. First, land use problems typically arise at the local level. If land use regulations are controlled strictly at the state level, adequate protection of local interests may not be realized, and the burden on local landowners would seemingly increase.

Next, by allowing local governments to play an active role in land use decision-making, specific locally-based problems may be addressed without

66. *Id.* at 633.

67. *Id.* at 634 (quoting *City of Cape Canaveral v. Mosher*, 467 So. 2d 468 (Fla. 5th Dist. Ct. App. 1985)).

68. In *Machado*, Dade County’s land use plan required a neighborhood area study to guide where, when, what kind, and what amount of nonresidential uses would be allowed in a specified residential zone. *Machado*, 519 So. 2d at 635. Dade’s mandatory element of neighborhood study solidified the implication in the *Golden* opinion that it is most suitable to leave the details of a local land use plan to the “expertise of students of city and suburban planning.” *Golden*, 285 N.E.2d at 301.

wasting state funds to research issues which are relevant only to a particular locality. Similarly, local governments are saved from dealing with burdensome regulations which should not have been applied to their area in the first place. Accordingly, the resources saved by the local governments may be better used to study and evaluate issues which are relevant to their area.

Since a local comprehensive plan is specific to one area, and is tailored by the people it affects the most, these plans should be firmly upheld. Furthermore, when a municipality has discovered, researched, evaluated, and adopted a plan to remedy a local land use problem, landowners should be required to strictly comply with the program in order to give the program a chance to succeed. Requiring such strict compliance is not unreasonable because a landowner has other remedies available to challenge the application of an ordinance to his property.<sup>69</sup> Therefore, requiring strict conformity of a developer's compliance with the comprehensive land use plan is a *must* for consistent and efficient land use regulation.

## 2. Takings

One of the most prominent challenges of land use regulations is that the regulation constitutes a taking without just compensation. One of private property's most fundamental protection is against its seizure for public use without "just" and "full" compensation. The Fifth Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment, embodies this protection by prohibiting the taking of private property for public use without just compensation.<sup>70</sup> This principle may also be found in the Florida Constitution which provides that "[n]o private property shall be taken except for public purpose and with full compensation therefor paid . . . ."<sup>71</sup>

The question that arises from these provisions is how far does the government have to go to have committed a taking. To answer this question one must begin with one of the landmark cases in land use taking challenges, *Pennsylvania Coal Co. v. Mahon*.<sup>72</sup> In *Pennsylvania Coal*, the Supreme Court was asked to determine whether Pennsylvania's Kohler Act was constitutional because it was alleged to have destroyed certain contract and

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69. An example of an alternative remedy is a taking claim. See discussion *infra* part III.B.2.

70. U.S. CONST. amend. V.

71. FLA. CONST. art. X, § 6(a).

72. 260 U.S. 393 (1922).

property rights of a property owner protected by the *Constitution*.<sup>73</sup> The Court initially recognized that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”<sup>74</sup> Accordingly, the Court held that the general rule is, although “property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”<sup>75</sup> Although not stated as such, the Court seemed to use a balancing test, weighing the harm suffered by the property owner against the societal gain, which requires an independent analysis of the facts and circumstances relevant to each case.<sup>76</sup> Unfortunately, this rule does not provide a concrete test upon which valid land use regulations may be distinguished from invalid regulations.

In a more recent decision, the Eleventh Circuit Court of the United States Court of Appeals reversed a federal magistrate’s decision that the adoption of a comprehensive land use plan effectuated a taking against the property owners entitling them to just compensation.<sup>77</sup> The case involved approximately forty acres of waterfront land which the property owners sought to develop for single-family residences. However, in 1984, Lee County adopted a comprehensive land use plan which classified the Reahard’s property as a “Resource Protection Area” and limited development of the parcel to a single residence.<sup>78</sup> The Reahards did not challenge the plan’s classification of their property, conceding that it was a valid exercise of police power; however, they did allege that the classification interfered with their reasonable investment-backed expectations entitling them to monetary compensation.<sup>79</sup>

As a threshold issue, the court noted that the monetary compensation claim must be ripe for review.<sup>80</sup> Specifically, the landowner must have obtained a final decision regarding the application of the regulation to his property, and he must have exhausted all state procedures available for

73. *Id.* at 412.

74. *Id.* at 413.

75. *Id.* at 415.

76. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (discussing balancing of interests in takings cases).

77. *Reahard v. Lee County*, 968 F.2d 1131 (11th Cir. 1992), *cert. denied*, 115 S. Ct. 1693 (1995).

78. *Id.* at 1133.

79. *Id.* at 1135. It is interesting to note that the Reahards inherited the property from Mr. Reahard’s parents who were not parties to the suit. *Id.* at 1133.

80. *Id.* at 1135 n.7.

obtaining just compensation.<sup>81</sup> Once the threshold questions were satisfied, the court employed the two tests to determine whether a land use regulation is a taking.<sup>82</sup> First, the regulation must substantially advance a legitimate state interest.<sup>83</sup> Second, the regulation must not deny an owner all “economically viable use of his property.”<sup>84</sup> The court bypassed the first test because Reahard conceded that Lee County’s comprehensive plan was a valid exercise of police power which substantially advanced a legitimate governmental interest.

The second test of whether the owner has been denied economically viable use of his property is more difficult. The two factors that the court determined must be analyzed by the fact finder are “(1) the economic impact of the regulation on the claimant; and (2) the extent to which the regulation has interfered with investment-backed expectations.”<sup>85</sup> The court remanded the case for further proceedings to analyze the above factors.<sup>86</sup>

It would seem then that the two-part test as illustrated in *Reahard*, provides us with the type of analysis which would be applied in a concurrency challenge. Concurrency regulations are essentially land use regulations which can be so restrictive on a property as to render a taking. For example, consider a situation in which a developer would like to construct single-family residences on a forty-acre parcel of raw land, zoned residential. The municipality, in which the land is situated, has just adopted a comprehensive land use plan in which one of its mandatory elements requires that a public elementary school be located within two miles of every new development. Unfortunately for our developer, though, the nearest public elementary school is five miles away. Accordingly, the developer’s permit is denied. What is the developer to do now? Should she have to build the school herself? What if there is no land within two miles which would be suitable for an elementary school? Should she have to dedicate part of her land for its construction? May she bring suit for a taking?

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81. *Reahard*, 968 F.2d at 1135 n.7.

82. These two tests originated in the opinion of *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987).

83. *Reahard*, 968 F.2d at 1135 (citing *Nollan*, 483 U.S. at 834).

84. *Id.*

85. *Id.* at 1136 (citing *Bowen v. Gilliard*, 483 U.S. 587, 606 (1986)). The court vacated the judgment and remanded the case for new proceedings because the findings of fact by the magistrate were insufficient to make a proper taking analysis. *Id.* at 1137.

86. This case was later vacated on ripeness grounds. *See Reahard v. Lee County*, 30 F.3d 1412 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1693 (1995).

If she challenges the ordinance as a taking without just compensation, then according to the *Reahard* court the two part takings test will apply.<sup>87</sup> The first part of the test involves a determination of whether the concurrency regulation “substantially advances a legitimate state interest.”<sup>88</sup> The state’s “legitimate interest” in educating the children of the state is arguably “substantially advanced” by the concurrency element requiring public elementary schools to be located within two miles of the new development. Thus, the first prong of the test should be satisfied.

The second prong requires that, for a taking to occur, the developer must be denied all, or substantially all, economically viable use of her property. She would claim that the regulation precludes her from building any houses on it which happens to be its highest and best use and, therefore, the regulation denies her the right to all economically viable use of her property. However, the court would probably consider several factors centering on the nature of the property itself. For instance, how has the land previously been used? For what other uses could it be developed? What is the history of its zoning? What were the reasonable investment-backed expectations of the landowner?

In this hypothetical, the court will probably not deem the regulation a taking because of the mere fact that the property owner could not put her land to its highest and best use. So long as she can make some economically viable use of her property, there will be no taking. However, the preceding factors must also be considered.

For example, suppose she purchased this forty acres while it was being used as a private hunting ground. Notwithstanding its present use, because the property’s zoning classification allows single family residences to be built, the change in the nature of its use alone does not present a problem. However, the ordinance requiring the elementary school imposes a factor which could substantially affect the value of the property. But, the requirement itself does not change the nature of the property to the extent that it precludes the development of new homes. Thus, it would be difficult to establish a taking on this basis alone.

The history of the property’s zoning is another important consideration as well. Suppose the property has been zoned residential and subject to the ordinance for several years, but the growth of the surrounding community had only recently reached this property necessitating its development. It would seem that the lack of development could be attributed to the lack of

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87. Of course, she would first have to satisfy the threshold requirement by exhausting all procedural options. See *Reahard*, 968 F.2d at 1135 n.7.

88. *Id.* at 1135.

demand for new housing in the community, not the ordinance. However, once the community's growth reaches the property, the ordinance will be a significant factor in the property owner's decision of whether to build.

Similarly, if the property is zoned residential concurrent with the need for new housing in the community, and the ordinance is in effect when the property is purchased, then the regulation has not imposed any new burden. Moreover, this ordinance should have been factored into the development costs and the purchase price. Thus, if these considerations were ignored by our developer, then her error could be financially devastating, and it would be unlikely that the court would force the government to account for her mistake via a taking.

Next, when considering a landowner's "reasonable investment-backed expectations," the effect of the regulation on the property after it is passed plays a very important role in the analysis. As previously indicated, if a purchaser of land ignores existing regulations in his or her computation of property value, the consequences could be financially devastating. However, assuming our developer purchased the property prior to the ordinance's adoption, the effect on her "reasonable investment-backed" expectations generated by the ordinance must be determined.

Suppose she financed the property with a thirty-year amortized, "interest-only" loan, with a balloon payment due in five years. It is quite possible, that the county will not build an elementary school within the requisite radius in the next five years. Accordingly, she will be unable to develop her property in time to make her balloon payment. In other words, the ordinance would preclude her from developing her property because without the construction of the school, she will not be given a development order; and as she is unable to develop her land, she will probably be unable to meet her loan obligations. Consequently, if the ordinance was imposed after she purchased (and financed) the property, her reasonable investment-backed expectations presumably did not include factoring for the existence of an elementary school. Thus, in this situation, her reasonable investment-backed expectations appear to have been abrogated which bodes strongly in favor of the premise that the government has imposed a taking of her property.

Another factor to consider is the alternative development options available to her. Obviously, she could continue to operate the property as a private hunting ground, but this is not the reason she purchased it. One option she may have, depending on road locations and the zoning classifications of the surrounding area, is to attempt to rezone the property or apply for a variance. Secondly, she could hold the property until a school is built

within the requisite radius, and then develop or sell at a higher price.<sup>89</sup> A further option is for her to build the school herself. This, however, is a very unlikely option due to the relatively small piece of land she is developing. Considering the high cost of constructing a school, it is improbable that she will be able to build enough homes on forty acres so that she could allocate the school's cost into the purchase price of each new home and still make a profit. On the other hand, if a developer purchases one thousand acres to develop single family homes, it seems much more probable that he will have the resources necessary to construct the school(s), and that, due to the volume of homes that can be built on one thousand acres, he could allocate the cost of the school(s) into the purchase price of each new home and still realize a profit.

In sum, when purchasing a piece of property, it is important for the developer to consider all regulations which currently affect the property and all possible development alternatives, because that is what a "reasonable" developer would do if he or she expects to make a profit; and perhaps most importantly, that is what a court will consider in determining the developer's "reasonable investment-backed expectations."

Next, suppose that the municipality has recently allocated capital expenditures in its long-term budget for the school to be built five years from now, and the property is otherwise in compliance with all concurrency requirements. May she commence with her development? Should she have to wait an interim period? What if the budget included no time frame of when the school would be built? How long would be reasonable? These questions involve temporary takings as discussed in the next section.

### 3. Temporary Takings

The leading Supreme Court case in this area is *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.<sup>90</sup> In this case,

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89. However, due to the substantial risks involved, such as the county not building a school, this is probably not an advisable action. Arguably, though, if the school is built, the property value will rise as there is one less hurdle to overcome in the development process. Accordingly, she could realize a profit by selling the property if she is willing to take the risk of playing the "waiting-game." If, however, the ordinance was not in existence when she bought the property, then it was presumably not a factor in the purchase price. Thus, once the school is built (after the adoption of the ordinance), the value of the property (everything else remaining the same) should equal her purchase price, and she will break even. The "waiting-game" option, in the opinion of the author, is a very risky one and not advisable to the "reasonable" developer.

90. 482 U.S. 304 (1987), *cert. denied*, 493 U.S. 1056 (1990).



the church owned land in a canyon along the banks of a natural drainage channel for a watershed area which it used as a retreat known as "Lutherglen." Much of the watershed area burned in a forest fire creating a serious flood risk. Such flooding soon occurred destroying the entire site. Consequently, Los Angeles County enacted an ordinance prohibiting construction or improvements on property located within the outer boundary lines of the interim flood protection area, which encompassed Lutherglen, to prevent further loss of property or life.<sup>91</sup>

The church filed suit against the county claiming, inter alia, that the ordinance denied the church of all use of its "Lutherglen" property.<sup>92</sup> The issue which ultimately arose was whether the Just Compensation Clause of the Fifth Amendment requires the government to pay for "temporary" regulatory takings.<sup>93</sup> Specifically, the Court had to decide whether, when an ordinance denies a property owner all use of its property and the ordinance has yet to be declared unconstitutional, the government must compensate the landowner from the initial point of deprivation.<sup>94</sup>

The Court initially examined the relevant language of the Fifth Amendment of the United States Constitution: "private property [shall not] be taken for public use, without just compensation."<sup>95</sup> Indicative in this language, the Fifth Amendment does not prohibit takings of property; however, it does condition such governmental action on the provision of "just compensation" being paid to the affected landholder.<sup>96</sup> It also noted that the Fifth Amendment was not designed to limit valid governmental interference in private property rights.<sup>97</sup>

The Court restated the general rule laid down in *Pennsylvania Coal Co.* that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."<sup>98</sup> Furthermore, when enforcing such a valid regulation, the government should not force individual property owners to "bear public burdens which, in all fairness and justice, should be

91. *Id.* at 307.

92. *Id.* at 308.

93. *Id.* at 314.

94. *Id.* at 312. The court does not actually answer the questions of whether the property owner was denied all use of the land or whether the ordinance was unconstitutional. It merely determines whether such a remedy exists. *First English*, 482 U.S. at 312.

95. U.S. CONST. amend. V.

96. *First English*, 482 U.S. at 314-15.

97. *Id.* at 315.

98. *Id.* at 316 (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

borne by the public as a whole.”<sup>99</sup> It seems, then, that regulations imposed on land will not be deemed a taking so long as they are reasonable.

However, once a taking has been established, the government still has the ability to amend the ordinance, repeal it, or actually pay just compensation. But merely exercising its ability to amend or repeal the ordinance does not eliminate the fact that the property was subject to a “taking” while the ordinance was in effect. Accordingly, the *First English* Court held that once an ordinance has been found to effect a “taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.”<sup>100</sup>

This decision has been followed by the state and federal courts in Florida. In *Villas of Lake Jackson v. Leon County*,<sup>101</sup> the district court ruled that the Florida courts have construed the *First English* decision as mandating a compensation remedy for cases to the extent that a taking has been found to result from the enforcement of a confiscatory ordinance.<sup>102</sup> It concluded that after *First English*, “it is now certain that a property owner in Florida has a state remedy for compensation for the period of the taking until the regulation is amended or withdrawn.”<sup>103</sup>

Similarly, in *J.T. Glisson v. Alachua County*,<sup>104</sup> the court upheld the constitutionality of an amendment to Alachua County’s Comprehensive Plan which placed significant development restrictions on certain environmentally sensitive property owned by the appellants.<sup>105</sup> The court stated that for a landowner to show that a taking exists, he must have “no available beneficial use of his property under the land use ordinance.”<sup>106</sup> Moreover, the court cited *First English* when it noted that once a taking is found the government has a duty to compensate an aggrieved landowner for the period that his property was affected by the ordinance, even if the ordinance is repealed.<sup>107</sup> Accordingly, it seems clear that a remedy for a temporary

99. *Id.* at 319 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

100. *Id.* at 321.

101. 796 F. Supp. 1477 (N.D. Fla. 1992).

102. *Id.* at 1482.

103. *Id.* at 1483.

104. 558 So. 2d 1030 (Fla. 1st Dist. Ct. App.), *review denied*, 570 So. 2d 1304 (Fla. 1990).

105. *Id.* at 1032-33, 1038.

106. *Id.* at 1036 (citing *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 830 F.2d 977, 982 (9th Cir. 1987)).

107. *Id.* (citing *First English*, 482 U.S. at 321). The court treated this case as a facial challenge, however, because the property owners had not satisfied the threshold issue of ripeness. The record reflected that “no individual appellant-landowner ha[d] applied for or

taking exists in Florida, and may therefore be used when challenging a concurrency regulation. Thus, to successfully challenge a concurrency regulation via a takings claim, the landowner must demonstrate to the court that the regulation does not substantially advance a legitimate governmental interest or that the ordinance denies him all economically viable use of his property.

By applying the rationale of the above decisions to our hypothetical, the first question to ask in challenging the ordinance is whether, by not making a provision for the construction of an elementary school within a reasonable period of time, the municipality has effected a taking against the developer. Assuming that it has effected a taking, and the municipality does not amend or repeal the ordinance, the municipality must pay the developer the reasonable value for the use of all her property.

However, once the city amends its budget to provide for the construction of the school, the question is, how much of a delay to the developer before a development order is issued is reasonable? The case law seems to indicate that this question will be answered on a case by case basis, depending on the circumstances.<sup>108</sup> If the delay is determined to be unreasonable, then there is at least a temporary taking and the government must pay just compensation for the period beginning with when the regulation took effect against our developer's property. However, if the delay is deemed reasonable, then no taking has occurred and she is entitled to no compensation.

### C. "Even-Swap"—A Landowner's Option to Circumvent Concurrency?

A new option available to a landowner in the concurrency context has reared its head and requires the landowner to bargain with government officials in order to gain development rights. An example of this is seen in Jacksonville in a "swap" made between the city and a family owning several hundred acres within the city.<sup>109</sup> In exchange for the city crediting four

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been denied a development proposal, rezoning request, or variance from the development regulation[s]" since the adoption of the amendment. *Id.* at 1036. See generally *City of Jacksonville v. Wynn*, 650 So. 2d 182, 187-88 (Fla. 1st Dist. Ct. App. 1995) (holding that landowner must obtain final judgment regarding application of challenged ordinance to property and must utilize all state procedures providing relief for a taking without compensation, before inverse condemnation claim is ripe for review).

108. See *Golden v. Planning Bd.*, 285 N.E.2d 291, 302 (N.Y. 1972).

109. Kathy Horak, *Skinnners Give City 150 Acres*, BUS. J.-JACKSONVILLE, Nov. 26, 1993, available in WL, ALLNEWS Directory, 1993 WL 3026987.

thousand vehicle trips on “busy” nearby roads to a 460 acre parcel of undeveloped land owned by the family, the family donated a 150-acre piece of property to the city as right-of-way for the extension of a state road.<sup>110</sup> Although this family had no immediate plans to develop the 460 acres, the property’s value was increased and it was easier for them to sell the property to a developer as an important concurrency requirement was now satisfied.<sup>111</sup>

This does not appear to be an isolated incident. This family alone had several other similar deals planned with the city, and apparently has set a precedent because many other landowners are freely negotiating with the city to bargain for development rights.<sup>112</sup>

This type of bargaining seems to directly contradict the intent of the legislature in adopting the Local Government Comprehensive Planning and Land Development Act (“the Act”).<sup>113</sup> To illustrate, if the purpose of concurrency is to time the growth of development to the government’s provision of certain facilities and services, i.e., roads, then how is this purpose furthered by allowing a property owner to develop property that does not have roads capable to support the increase in traffic? Increasing the capacity of roads in another area seems to condone a theory of “no-net-increase” to the overall usage of the city’s roads; however, it does not seem wise or synonymous with the Act’s intent to sacrifice the resources of one area of the city merely to benefit another area of the city.

Suppose, for example, that a property owner wants to develop a certain piece of property and the roads supporting it are capable of a capacity of up to 5000 “trips”<sup>114</sup> attributable to this property. If the property owner’s proposed development will create 10,000 trips, then the development order will presumably not be issued until the roads are capable of handling the extra 5000 trips. Suppose instead that the landowner donated a piece of property to the city on the other side of town for the construction of a new road which will have no effect on the capacity of the roads supporting the proposed development in exchange for a credit of 5000 trips being allocated to his development. He is now free to secure a development order (assuming all other permit obstacles are met) even though the surrounding roads will be subject to double their intended capacity.

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110. *Id.*

111. *Id.*

112. *Id.*

113. See FLA. STAT. § 163.3161 (1995).

114. For example, one single family home could be classified as creating 2.5 “trips.”

This option does not make sense to this author. We cannot allow one part of the city to benefit at the expense of another part of the city and still maintain consistency with a local comprehensive plan. Even if the city officials claim that their actions were in conformity with the local comprehensive plan, who is to be the judge? Can we really expect the general public, in a public hearing, to be able to distinguish between the pitfalls of a "no net-increase" in overall usage and the statute's true intent, that each area of the community be treated consistently and in conformity with the local comprehensive plan?<sup>115</sup> What if the area which will suffer is composed of citizens unable to afford adequate representation while the area which will benefit is composed of affluent citizens able to afford the best representation?

D. *Should the State Impose a Mandatory Concurrency Element for Schools?*

Due to the continuing population growth of Florida, several school systems throughout the state have been forced to consider several alternatives to counter-act the effects of over-crowding in schools.<sup>116</sup> Many options have been suggested, ranging from increasing sales taxes to scheduling school days in double sessions.<sup>117</sup> Perhaps the most dynamic suggested alternative would be to include schools as a mandatory element in the state's concurrency requirements. The problem this brings, though, is who pays for these new schools?

One possibility, which has been proposed in Pasco County, entails the exaction of school impact fees being imposed against the development of any new homes.<sup>118</sup> In general, this would entail a fee being charged for the construction of new homes; and such fees would be earmarked

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115. It is entirely possible that a trade for development rights could be in conformity with the local comprehensive plan, but there should be a clear relationship between the private and governmental action. In other words, the compensation given to the city in exchange for development rights should have a direct relationship with the benefit to the immediate community. For example, if in the Jacksonville example, the land donated by the family would have extended a highway to compensate for the increased travel created by developing that property, then the exchange would seem to be justified.

116. Peter Mitchell, *After Funding Setbacks, Schools Prepare Painful Lessons for Parents*, WALL ST. J., Nov. 8, 1995, at F1, available in WL, ALLNEWS Directory, 1995 WL-WSJ 9907304.

117. *Id.*

118. *Id.*

specifically for the construction of new schools necessitated by the new development.<sup>119</sup> This proposal, however, is not a novel one.

In *St. Johns County v. Northeast Florida Builders Ass'n*,<sup>120</sup> the court considered “whether St. Johns County could impose an impact fee on new residential construction to be used for new school facilities.”<sup>121</sup> After conducting a careful study calculating how to maintain an acceptable level of public facilities in the county, including schools, a method of allocating the cost of providing these new school facilities to each unit of new residential development was proposed.<sup>122</sup> Incorporating this proposal, an ordinance was enacted which specified that:

no new building permits will be issued except upon the payment of an impact fee. The fees are to be placed in a trust fund to be spent by the school board solely to “acquire, construct, expand and equip the educational sites and educational capital facilities necessitated by new development.”<sup>123</sup>

The ordinance recited that it would be applicable within both incorporated and unincorporated areas of the county, but not in municipalities in which an interlocal agreement to collect the impact fees had not been entered into with the County.

To determine whether the imposition of this impact fee was valid, the court invoked the “dual rational nexus test.”<sup>124</sup> As the name indicates, two requirements must be satisfied:

There must be a reasonable connection, or rational nexus, between the need for additional capital facilities and the growth in population generated by the subdivision. In addition, the government must show a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the subdivision. In order to satisfy this later requirement, the ordinance must specifically

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119. See *Contractors & Builders Ass'n v. City of Dunedin*, 329 So. 2d 314, 320 (Fla. 1976) (authorizing municipality to exact impact fees to meet proportion of costs of expanding public facilities attributable to new development, so long as fees are limited to meeting costs of expansion), *cert. denied*, 444 U.S. 867 (1979).

120. 583 So. 2d 635 (Fla. 1991).

121. *Id.* at 636. This is an issue of first impression for the court. *Id.* at 638.

122. *Id.* at 637.

123. *Id.* (quoting ST. JOHNS COUNTY, FLA., ORDINANCE 87-60, § 10(B) (1987)).

124. *St. Johns County*, 583 So. 2d at 637.

earmark the funds collected for use in acquiring capital facilities to benefit the new residents.<sup>125</sup>

The court, in considering the first prong of the test, determined whether St. Johns County demonstrated that there was a reasonable connection between the need for more schools and the growth in population attributable to the new development.<sup>126</sup> The parties did not dispute that the county must expand its facilities commensurate with the rate of new development to maintain its current levels of service.<sup>127</sup> However, the challengers to the ordinance argued that not all new residents will have children who will benefit from the new schools.<sup>128</sup> The court countered this argument by pointing out that even though benefits from fire protection and parks will not be used by every citizen, the city must still be in the position to serve every dwelling unit.<sup>129</sup> Thus, the court held that the ordinance met the first prong of the rational nexus test.<sup>130</sup>

However, the court determined that the second prong of the test was not met because the ordinance did not specifically earmark the funds collected for use in acquiring capital facilities strictly to benefit the new residents who actually paid the fees.<sup>131</sup> In other words, there was no express provision in the ordinance ensuring that the impact fees would be kept from being spent for the construction of new schools to accommodate new development in municipalities which have not entered into the interlocal agreement.<sup>132</sup> For example, if a municipality within the county chose not to impose this impact fee on its citizens by not entering into a collection agreement with the county, then under the ordinance, it is entirely possible that fees collected in another part of the county will be spent to build a new school in the municipality which is exempt from the impact fees. This possibility, the court decided, was not acceptable. Consequently, it held that no impact fees could be collected under this ordinance until "substantially all of the population of St. Johns County is subject to the ordinance."<sup>133</sup>

The St. Johns County ordinance also included a provision that essentially allowed a development to be exempt from the impact fee if it

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125. *Id.*

126. *Id.* at 638.

127. *Id.*

128. *Id.*

129. *St. Johns County*, 583 So. 2d at 638.

130. *Id.* at 639.

131. *Id.*

132. *Id.*

133. *Id.*

could show that it would be comprised totally of families without children attending public schools, that is, families with children attending private schools only, families without children, adult communities, etc.<sup>134</sup> However, due to the requirement that these families would have to pay the impact fees if they subsequently have children who will attend public schools while residing in their homes, the court determined that the impact fees had the potential of being “user fees” in that the fees seemed to be based solely on whether any children attending public schools resided on the property.<sup>135</sup> Thus, invoking the severability clause, the court struck this provision from the ordinance, because the court determined that imposing “user fees” on public education collides with Florida’s constitutional requirement<sup>136</sup> of free public schools.<sup>137</sup>

It seems that the St. Johns ordinance failed on a mere technicality. However, by imposing this strict test, the court insured that impact fees may not be imposed at the whim of government officials. Ironically, instead of attempting to accommodate every party who “perhaps” should not be subject to the fee, if the County would have been more aggressive in drafting the ordinance, i.e., eliminating the exceptions and requiring no interlocal agreements, the ordinance apparently would have survived. From this opinion, however, it seems clear that impact fees earmarked for construction of new schools to keep up with the demands caused by new development may be exacted against new home construction with a carefully drafted ordinance.

Although this decision seems to have provided a supplementary means of providing revenue to construct new schools, it did not solve the potential for intergovernmental conflicts. As pointed out by C. Allen Watts, if municipal consent is required to impose a county-wide school impact fee, then a 51 percent majority of a small municipality’s voters could effectively veto this type of fee county-wide.<sup>138</sup> However, if there is no procedure for collecting the fees, then the government will not receive the revenue. Thus,

134. *St. Johns County*, 583 So. 2d at 640.

135. *Id.*

136. FLA. CONST. art. IX, § 1.

137. *St. Johns County*, 583 So. 2d at 640. The court did note that it would have no problem with an exemption for residential adult facilities in which land use restrictions were placed on the property that prohibited minors from residing within the community. *Id.* at 640 n.6.

138. C. Allen Watts, *Beyond User Fees? Impact Fees for Schools and . . .*, 66 FLA. B.J. 56, 59 (Feb. 1992).



there must be a next step. Is this next step a state-wide mandate for schools as a mandatory concurrency element?

#### IV. CONCLUSION

It is quite apparent that Florida's Local Government Comprehensive Planning and Land Development Regulation Act is appropriately named. The substance embodied from its original form and subsequent amendments reflect many years of study, experience, and planning. As a state growing at such an explosive pace, land use controls are imperative to Florida and its government officials. The legislature has provided a means by which each local government entity is assured of its ability to diagnose a problem and remedy it according to its individual needs. At the same time, however, Florida as a whole is assured of consistency and uniformity throughout its land use decisions.

The legislature has mandated that certain elements be included in each local government's comprehensive plan. Of course, this does not preclude a plan from including other elements not in the state's plan. Rather, the plan must merely be consistent with it. Presumably, the mandatory elements found in Florida's concurrency statute<sup>139</sup> are what the legislature has determined to be absolutely necessary on a statewide basis for a community's health, benefit, and welfare. However, as with anything else, with changing conditions comes changing needs. Thus, the logical reason the legislature withheld some control over local comprehensive plans is so that it retains the ability to make changes whenever a statewide need arises.

It is becoming all too obvious that the conventional approach of hoping that government will expand its facilities in time with the needs of the community is not working.<sup>140</sup> It seems that it is time for the legislature to look at this problem and consider the concurrency alternative. Although concurrency regulations have been criticized as overly bureaucratic and time-consuming for the developer, should the prospect of our children's

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139. FLA. STAT. § 163.3180.

140. *See, e.g.*, Mitchell, *supra* note 116. A sign at Suntree Elementary School in Melbourne, Florida warns newcomers to the area that this new school is overcrowded and enrollment is capped so any new students must be bused to other schools. The school district in Broward County, Florida is forced to consider a year-round calendar, double sessions, busing students to distant schools, and hauling in portable classrooms to be placed on playing fields and parking lots due to a growth of 10,000 students per year. The school district in Leon County, Florida, by redrawing boundaries to ease school overcrowding, could mean eliminating drop-out prevention and advanced-study programs to accommodate the influx of new students.

education be undermined at the expense of “progress”? Accordingly, this author proposes a statewide mandate be included in Florida’s concurrency law that requires capital expenditures for schools be provided prior to the construction of new residential development.

*Craig A. Robertson*

# The Vermont Barrier: How Economic Protectionism Kept Wal-Mart Stores, Inc. Out of St. Albans, Vermont

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## I. INTRODUCTION

Wal-Mart Stores, the world's largest retailer, is experiencing opposition to the execution of its expansion plans from citizens' groups in different areas of the country, particularly in the northeast United States.<sup>1</sup> In Hornell, New York, a group called "Taxpayers Against Floodmart" obtained a court order to stop construction on a partially completed 125,000 square-

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1. See David Morris, *Superstore Invasion Provides a Good Test of Local Democracy*, BUFF. NEWS, Feb. 14, 1995, at C3.

foot Wal-Mart store.<sup>2</sup> Wal-Mart also faced opposition in several other New York towns, namely East Aurora, Lake Placid, and Catskill.<sup>3</sup> Wal-Mart expansion plans have also been hindered in towns in several New England states.<sup>4</sup>

In fact, until recently, Vermont was the only state in the Union without a Wal-Mart store.<sup>5</sup> However, that may be changing according to one media article entitled *Wal-Mart Breaks Vermont Barrier*.<sup>6</sup> The report explained that Wal-Mart will take over a 50,000 square-foot property in Bennington, Vermont, which was formerly operated by F.W. Woolworth.<sup>7</sup>

This article will introduce the reader to the tangible legal opposition which Wal-Mart has faced from these citizens' groups in the northeast. Its purpose is to expose what is referred to as the "Vermont barrier" through a case study of the opposition faced by Wal-Mart in one particular community. Furthermore, this article will discuss how Wal-Mart was excluded from St. Albans, Vermont through the practical application of the Vermont Land Use and Development Act, commonly referred to as Act 250.<sup>8</sup>

Part II of this article provides a background explanation of Act 250 and its application and execution by the several district environmental commissions ("commission") and the Vermont Environmental Board ("Board"), the governmental bodies charged with executing the provisions of Act 250. Part III explores how Act 250 was applied in the Board's recent decision to void a land use permit granted to the retailer by one of the commissions.<sup>9</sup> The Board's decision was primarily based on its belief that the project would result in a net job loss for the local region and adversely impact the tax base of local municipalities.<sup>10</sup>

2. Sharon Linstedt, *Citizens Group Blocks Hornell Project for Wal-Mart, Wegmans*, BUFF. NEWS, Feb. 1, 1995, at C6.

3. *Id.*; see also Peter P. Donker, *Chain's Decision to Locate in Sturbridge Splits Tourist-Dependent Town*, SUNDAY TELEGRAM (Worcester, Mass.), Mar. 26, 1995, at E1.

4. Linstedt, *supra* note 2, at C6. These towns include Bath, Maine; North Kingston, Rhode Island; the Connecticut towns of Cromwell, Plainville, New Milford, Newington, East Windsor, and Branford; the Massachusetts towns of Greenfield, Westford, Quincy, Plymouth, Saugus, Lee, Billerica, Somerset, and Sturbridge; and the Vermont towns of Williston and St. Albans.

5. Donker, *supra* note 3, at E1.

6. *Wal-Mart Breaks Vermont Barrier*, PALM BEACH POST, June 4, 1995, at 2E [hereinafter *Wal-Mart*].

7. *Id.*

8. 1969 Vt. Laws 250 (codified at VT. STAT. ANN. tit. 10 §§ 6021, 6026 (1993)).

9. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 1, 3, 60 (Vt. Env'tl. Bd. Dec. 23, 1994).

10. *Id.* at 27-29.

Part IV explains some of the arguments which the retailer is making in the pending appeal in the Supreme Court of Vermont. Part V analyzes the effect of Act 250 as an economic barrier in light of our nation's ambitions of achieving economic union. Finally, part VI submits that it is the practical application of Act 250 which is the "Vermont barrier" and that Wal-Mart cannot break this barrier by opening a store in an existing retail property.

## II. LAND USE AND DEVELOPMENT LAW IN VERMONT

Commonly referred to as Act 250,<sup>11</sup> Vermont's law governing land use and development requires a permit<sup>12</sup> before commencing land development.<sup>13</sup> The power to issue permits<sup>14</sup> is vested in nine commissions<sup>15</sup> and the Board.<sup>16</sup> The Board is vested with the authority to promulgate rules governing the proceedings before itself and the several commissions.<sup>17</sup> Persons seeking a permit must first file an application with the appropriate commission in accordance with the rules promulgated by the Board.<sup>18</sup> Once a decision is made by a particular commission, the Board hears appeals of those decisions.<sup>19</sup>

### A. *Composition of the Commissions and the Board*

Through Act 250, the Vermont Legislature created the nine commissions and the Board. The Governor of Vermont is vested with the power to appoint members and alternates to each of these bodies.<sup>20</sup> Appointments

11. See VT. STAT. ANN. tit. 10 §§ 6001-92 (1993); *In re Presault*, 292 A.2d 832, 833 (Vt. 1972). The court observed that it was interpreting "the Vermont Land Use and Development Act passed by the 1969 Adjourned Session of the Legislature as Act No. 250." *Id.*

12. VT. STAT. ANN. § 6081.

13. *Id.* § 6001(3). This section defines development as "the construction of improvements on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres of land within a radius of five miles of any point on any involved land, for commercial or industrial purposes." *Id.*

14. *Id.* § 6086.

15. *Id.* § 6026. This section divides the state into nine numbered districts and creates a district environmental commission for each district. VT. STAT. ANN. § 6026.

16. *Id.* § 6021 (creating the State Environmental Board).

17. *Id.* § 6025(a). This section directs the Board to "adopt rules . . . to interpret and carry out the provisions of this chapter . . ." *Id.*

18. *Id.* § 6083.

19. VT. STAT. ANN. § 6089(a).

20. *Id.* §§ 6021, 6026(b).

of Board members are made "with the advice and consent of the senate."<sup>21</sup> Thus, the members of the commissions and the Board are political appointees of the governor, not officials popularly elected by the citizenry.<sup>22</sup>

The several commissions are composed of three members from the district in which the particular commission sits.<sup>23</sup> One of the three members of each commission is appointed as the chair and serves a term of two years, while the other two members are appointed for terms of four years.<sup>24</sup> The chair of each commission serves "at the pleasure of the governor" while the other two members can be removed only with a showing of cause.<sup>25</sup>

The Board, on the other hand, is composed of nine members.<sup>26</sup> The chair is appointed for a term of two years, while the other eight members are appointed for terms of four years.<sup>27</sup> As with the commissions, the chair serves "at the pleasure of the governor" while the other eight members can be removed only for cause.<sup>28</sup>

#### B. *Permit Applications and Their Evaluation*

As noted above, parties required to obtain a permit to lawfully execute their development plans must file an application with the appropriate commission.<sup>29</sup> Notice of the application must be given by the applicant on or before the date of filing to specifically enumerated parties including the municipality, and municipal and regional planning commissions where the proposed development is located.<sup>30</sup> Notice must also be provided to the Board, as well as any state agency directly affected, and any other municipality or state agency, or person the commission or Board deems appropriate.<sup>31</sup> Such notice includes sending a copy of the application to the appropriate parties and publication in a local newspaper.<sup>32</sup>

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21. *Id.* § 6021(a).

22. *Id.*

23. *Id.* § 6026(b).

24. VT. STAT. ANN. § 6026(b).

25. *Id.* § 6026(c).

26. *Id.* § 6021(a).

27. *Id.*

28. *Id.* § 6021(c).

29. *See supra* note 13 and accompanying text.

30. VT. STAT. ANN. § 6084(a).

31. *Id.* § 6084(b).

32. *Id.*

The Supreme Court of Vermont has observed that “processing a permit application first involves consideration . . . of the ten criteria of 10 V.S.A. § 6086(a), each of which involve myriad subcategories of concern.”<sup>33</sup> These criteria address several concerns including water or air pollution, soil erosion, and traffic.<sup>34</sup> In turn, as alluded to above, some of these criteria have “myriad subcategories of concern.”<sup>35</sup> For example, under the criterion addressing water or air pollution, the Vermont Legislature has addressed issues concerning headwaters, waste disposal, water conservation, and any relevant wetland rules.<sup>36</sup>

One might naturally expect all of the criteria cited thus far to be included within the statutorily vested province of such bodies designated as a district environmental commission or a State Environmental Board. However, Act 250 includes other criteria which the uninitiated might be surprised to see included within the province of such bodies. For example, Act 250 includes other criteria addressing impact on schools and local government services, impact of growth, costs of scattered development, public investments and facilities, and conformance with local and regional plans.<sup>37</sup> The Board has labeled these as fiscal criteria.<sup>38</sup>

These fiscal criteria are particularly interesting because they have been interpreted by the Board to justify an investigation into not only the effect of a proposed development upon the ecological environment, but also its effects upon the *economic* environment.<sup>39</sup> Such conclusions by the Board concerning the relevance of a proposed development’s competitive effects on the economy are especially significant since the Supreme Court of

33. *In re Wildlife Wonderland, Inc.*, 346 A.2d 645, 653 (Vt. 1975). These criteria are often referred to by a number which corresponds to their respective codification as subdivisions under § 6086(a), followed by a parenthetical indication of what the particular criterion relates to. For example, at § 6086(a)(8), the district commissions and Board are charged by statute not to grant a permit before finding that the proposed development “[w]ill not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.” VT. STAT. ANN. § 6086(a)(8). Accordingly, this subdivision has been referred to as criterion eight (historic sites). *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 4 (Vt. Env’tl. Bd. Dec. 23, 1994).

34. VT. STAT. ANN. § 6086(a).

35. *In re Wildlife Wonderland*, 346 A.2d at 653.

36. VT. STAT. ANN. § 6086(a)(1).

37. *Id.*

38. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 26 (Vt. Env’tl. Bd. Dec. 23, 1994).

39. *Id.* at 27.

Vermont has “accorded ‘a high level of deference’ to the interpretation of Act 250 by the Board.”<sup>40</sup>

Act 250 dictates that the applicant does not have the burden of proving compliance with all ten criteria.<sup>41</sup> Depending on the particular criterion in controversy, the burden of proof may be on either the applicant or the party opposing the applicant.<sup>42</sup> However, the Supreme Court of Vermont has noted that:

Nothing in the language of the statute prevents the Board from finding against the applicant on an issue even though the applicant does not have the burden of proof on that issue. In fact, the statute requires the Board to make a finding on each factor . . . irrespective of the placement of the burden of proof.<sup>43</sup>

Furthermore, permits may be granted with certain conditions prescribed by the issuing authority.<sup>44</sup> The Vermont Legislature has directed that applications should not be denied by the Board or commissions unless those bodies find that the proposed development plan, if realized, would be detrimental to public health, safety, or general welfare.<sup>45</sup>

### C. *Procedures Before the Commissions and Board*

The Board is vested with the authority to promulgate rules to execute the provisions of Act 250.<sup>46</sup> Accordingly, the Board has issued rules governing the presentation of evidence and the proceedings generally before the Board and the several commissions.<sup>47</sup> The *Environmental Board Rules* contemplate several methods for the presentation of evidence to the Board including prehearing conferences, prefiled testimony, and live hearings before the commissions or Board.<sup>48</sup> Also, the Board may conduct site

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40. *In re Denio*, 608 A.2d 1166, 1169 (Vt. 1992) (citing *In re Vitale*, 563 A.2d 613, 615 (Vt. 1989)).

41. VT. STAT. ANN. § 6088.

42. *Id.*

43. *In re Denio*, 608 A.2d at 1170 (citing VT. STAT. ANN. § 6086(a)).

44. VT. STAT. ANN. § 6086(c).

45. *Id.* § 6087(a).

46. *Id.* § 6025(a) (directing the Board to “adopt rules . . . to interpret and carry out the provisions of this chapter . . .”).

47. See ENVTL. BD. R. 17 (1993).

48. *Id.* at 16-18.



visits to observe the location of the subject development.<sup>49</sup> Thus, brief discussion of some of these rules will reveal how the proceedings before the Board and commissions are conducted.

One forum contemplated by the *Environmental Board Rules* for the expedition of proceedings before the commissions and the Board is the prehearing conference, governed by Environmental Board Rule 16.<sup>50</sup> Rule 16 states that the purposes behind prehearing conferences are to clarify issues in controversy, identify relevant sources of evidence which may be presented at hearings, and obtain appropriate stipulations of the parties.<sup>51</sup> Prehearing conferences are conducted by a delegate authorized by the commission or Board who, if an actual member thereof, may make preliminary rulings regarding scheduling, party status, and other preliminary matters.<sup>52</sup> Thus, the prehearing conference presents a method used by the commissions and the Board to expedite Act 250 proceedings.<sup>53</sup>

Environmental Board Rule 17(D) also allows parties to submit prefiled testimony in writing.<sup>54</sup> However, prefiled testimony is intended only to facilitate the presentation of the direct testimony of the particular witness.<sup>55</sup> The witness must be present at the hearing to present the written evidence, to affirm its truthfulness, and to remain available for cross-examination.<sup>56</sup> To further expedite proceedings, if the other parties have received copies of the written testimony, the Board or commission may dispense with direct examination and order that cross-examination of the witness proceed immediately.<sup>57</sup>

Hearings are available upon request by those parties required by statute to receive notice of the permit application.<sup>58</sup> However, hearings are not required if not requested by any such party.<sup>59</sup> Rule 18 addresses the conduct of hearings, setting a quorum requirement of more than half the

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49. *See, e.g., In re Quechee Lakes Corp.*, 580 A.2d 957, 962 (Vt. 1990) (concluding that "the Board's partial reliance on knowledge garnered from the site visits was not erroneous").

50. ENVTL. BD. R. 16.

51. *Id.* at 16(A)(1)-(3).

52. *Id.* at 16(B).

53. *Id.* at 16(A).

54. *Id.* at 17(D).

55. ENVTL. BD. R. 17(D)(2).

56. *Id.*

57. *Id.*

58. VT. STAT. ANN. § 6085.

59. *See id.*

members of the relevant body which may be waived by agreement of all parties.<sup>60</sup>

The order of the presentation of evidence is within the discretion of the commission or Board as it deems expeditious and equitable.<sup>61</sup> The admissibility of evidence presented at hearings is governed by the Vermont Administrative Procedure Act.<sup>62</sup>

Act 250 also contemplates the creation of Environmental Board Rules concerning the acceptance of certain permits issued by other state agencies as evidence which creates a rebuttable presumption of compliance with certain Act 250 criteria.<sup>63</sup> For example, under Environmental Board Rule 19(E), the issuance of a Discharge Permit or a Water Supply and Wastewater Disposal Permit creates a rebuttable presumption that waste materials can be disposed of without resulting in undue water pollution.<sup>64</sup> The issuance of these permits creates a rebuttable presumption of compliance with the criteria concerning waste disposal and streams.<sup>65</sup>

#### D. *Party Status to Proceedings Before the Commissions and Board*

Party status is desirable because it enables individuals or groups with such status to present evidence to the commission or Board.<sup>66</sup> Party status to the proceedings before the commission can derive directly under statute or indirectly from the rules promulgated by the Board.<sup>67</sup> The Board is charged with making rules concerning party status to the proceedings before the commissions and itself.<sup>68</sup> Act 250 directs that “[p]arties shall be those who have received notice, adjoining property owners who have requested a hearing, and such other persons as the board may allow by rule.”<sup>69</sup>

Pursuant to the legislative charge, the Board has addressed party status through Environmental Board Rule 14. Rule 14(A), which addresses parties

60. ENVTL. BD. R. 18.

61. *Id.* at 17(C).

62. VT. STAT. ANN. tit. 3 § 810 (1993).

63. *Id.* tit. 10 § 6086(d).

64. ENVTL. BD. R. 19(E).

65. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 12, 13, 15 (Vt. Env'tl. Bd. Dec. 23, 1994).

66. *See* ENVTL. BD. R. 17. This particular rule is written, like many of the others, in terms of what “parties” may do. *Id.*

67. VT. STAT. ANN. § 6085(b).

68. *Id.* § 6085(c).

69. *Id.*

by right, closely follows the statutory language of Act 250 outlined above and does not broaden the class of persons or groups eligible for party status.<sup>70</sup>

Through rule 14(B), the Board uses its statutorily granted rule-making authority to broaden the prospective class of parties to the proceedings before the Board or several commissions.<sup>71</sup> Rule 14(B) allows the Board or commission to grant party status to a petitioner in either of two ways. First, party status may be granted if the Board or commission is persuaded by the petitioner that the proposed development will affect the petitioner's interest under any of the several Act 250 criteria.<sup>72</sup> Second, party status may be granted if the petitioner sufficiently demonstrates that the petitioner's participation will materially assist the Board or commission through presenting evidence or argument.<sup>73</sup>

Through rule 14, the Board uses its rule-making authority to create a class of individuals and groups contemplated, but not specifically addressed by the Vermont Legislature, who may participate alongside those parties statutorily defined.<sup>74</sup> Other provisions of rule 14 address the procedural requirements for obtaining party status.<sup>75</sup> These procedural requirements differ according to whether the individual or group seeks to implement party status accorded by statute or seeks a permissive grant of party status.<sup>76</sup>

#### E. *Appealing Commission Decisions: The Province of the Board*

Decisions of the commissions are appealable to the Board.<sup>77</sup> Parties wishing to appeal the decisions of the commissions must file a notice of appeal with the Board within thirty days of that decision.<sup>78</sup> The notice of appeal must include a statement of the issues to be addressed in the appeal as it<sup>79</sup> controls the scope of the appellate hearing before the Board.<sup>80</sup>

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70. ENVTL. BD. R. 14(A); VT. STAT. ANN. § 6085(c).

71. ENVTL. BD. R. 14(B).

72. *Id.* at 14(B)(1)(a).

73. *Id.* at 14(B)(1)(b).

74. *See* VT. STAT. ANN. § 6085(c).

75. ENVTL. BD. R. 14.

76. *Id.*

77. VT. STAT. ANN. § 6089(a).

78. *Id.*

79. *Id.*

80. *Id.*; *see also In re Taft Corners Assocs.*, 632 A.2d 649, 653 (Vt. 1993).

The Board conducts a de novo review on all findings requested by any party that files an appeal or cross-appeal.<sup>81</sup> In its "first confrontation with the Vermont Land Use and Development Act,"<sup>82</sup> the Supreme Court of Vermont commented on the de novo nature of appeals to the Board, stating:

A de novo proceeding at an appellant level commonly designates a hearing as though no action whatever had been instituted in the District Environmental Commission below. A de novo proceeding is one in which all the evidence is heard anew, and the probative effect thereof determined. A de novo proceeding contemplates those parties who had an interest in the original proceeding being allowed to appear and participate as proper parties at the second set of hearings.<sup>83</sup>

However, while the Board may scrutinize and even disregard the factual findings of the commissions, the Board has no jurisdiction to decide issues not raised before the district commission.<sup>84</sup>

Act 250 expressly makes the factual determinations of the Board conclusive, provided only that such determinations are supported by substantial evidence.<sup>85</sup> Substantial evidence is that which is, "relevant and which a reasonable person might accept as adequate to support a conclusion."<sup>86</sup>

#### F. *Appealing Board Decisions to the Supreme Court of Vermont*

Decisions of the Board can be appealed to the Supreme Court of Vermont.<sup>87</sup> The right to appeal decisions of the Board to the supreme court is reserved for those parties whose status as such in the lower proceedings was derived directly from the statute.<sup>88</sup> Those receiving

81. VT. STAT. ANN. § 6089(a).

82. *In re Preseault*, 292 A.2d 832, 833 (Vt. 1972).

83. *Id.* at 835 (citations omitted).

84. *In re Taft Corners Assocs.*, 632 A.2d at 650.

85. VT. STAT. ANN. § 6089(c).

86. *In re Denio*, 608 A.2d 1166, 1170 (Vt. 1992) (citing *In re McShinsky*, 572 A.2d 916, 919 (Vt. 1990)).

87. VT. STAT. ANN. § 6089(b).

88. *Id.* This section provides that appeals to the Supreme Court of Vermont shall be "by a party as set forth in section 6085(c) of this title." *Id.* Section 6085(c) dictates that parties to hearings before the commissions and Board:

shall be those who have received notice, adjoining property owners who have requested a hearing, and such other persons as the board may allow by rule. For the purposes of appeal only the applicant, a state agency, the regional and

permissive grants of party status before the district environmental commission or Board are excluded from the class of parties eligible to appeal Board decisions to the Supreme Court of Vermont.<sup>89</sup>

Appeals of decisions of the Board are reviewed under a more deferential standard before the supreme court than the *de novo* nature of review by which appeals of district environmental commission decisions are conducted.<sup>90</sup> Because Board findings of fact are expressly made conclusive by Act 250, the supreme court will not reweigh conflicting evidence.<sup>91</sup> Thus, on appeal before the supreme court, evidence is viewed in a light most favorable to the prevailing party below.<sup>92</sup> Therefore, Board decisions are not easily set aside by resorting to the supreme court.

### III. THE *ST. ALBANS* CASE

#### A. *The Setting, the Parties, and Their Positions*

The proposed Wal-Mart store was to be erected in the town of St. Albans, Vermont.<sup>93</sup> The town is a different political entity from the city of St. Albans.<sup>94</sup> The proposed site is located about two miles from the city's downtown.<sup>95</sup> Both the town and the city are located in Franklin County, near the northeast arm of Lake Champlain.<sup>96</sup> Because the pro-

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municipal planning commissions and the municipalities required to receive notice shall be considered parties.

*Id.* § 6085(c). Thus, the Supreme Court has commented that:

“appeal” is used in two different senses in 10 V.S.A. § 6085(c). One refers to the transfer from the District Commission to the Environmental Board. . . . However, “appeal” is also used with reference to appellate review, and . . . this statute limits those eligible to come to this Court. . . . Viewing the statute any other way makes it internally inconsistent, if not incomprehensible.

*In re George F. Adams & Co.*, 353 A.2d 576, 577 (Vt. 1976).

89. VT. STAT. ANN. § 6089(b).

90. See *In re Wildlife Wonderland, Inc.*, 346 A.2d 645, 648 (Vt. 1985).

91. *Id.*

92. *In re Hawk Mountain Corp.*, 542 A.2d 261, 263 (Vt. 1988) (citing *In re Brileya*, 515 A.2d 129, 131 (Vt. 1986)).

93. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 7-8 (Vt. Envtl. Bd. Dec. 23, 1994).

94. *Id.* at 8.

95. *Id.*

96. *Id.*

posed development involved forty-four acres, more than the ten acre threshold under Act 250,<sup>97</sup> a permit was required.

Several parties participated in the proceedings before the District Six Environmental Commission and the Vermont Environmental Board regarding the proposed development.<sup>98</sup> The permit applicants included the St. Albans Group, which owns the land upon which the store was to be constructed, and Wal-Mart Stores, Inc.<sup>99</sup> Opposing the applicants before the Commission, and again on appeal before the Board, were the Franklin/Grand Isle County Citizens for Downtown Preservation ("Citizens") and the Vermont Natural Resources Council ("VNRC").<sup>100</sup> The parties advocated their positions before the Board for much of 1994, until the Board eventually issued its order, finding against the applicants, and voiding Land Use Permit No. 6F0471 on December 23, 1994.<sup>101</sup>

The Citizens initially attacked Wal-Mart along several fronts, petitioning the Commission for party status with respect to many Act 250 criteria, including: waste disposal, streams, wetland rules, soil erosion, traffic, impact on schools and local government services, historic sites, impact of growth, costs of scattered development, public investments and facilities, and conformity with local plan.<sup>102</sup> The Commission granted the Citizens party status on the criteria addressing local government services, historic sites, impact of growth, costs of scattered development, and public investments and facilities, while denying the group party status on the remaining criteria.<sup>103</sup>

VNRC's attack on Wal-Mart, on the other hand, was not as widespread as that of the Citizens. VNRC petitioned the Commission for party status on fewer criteria: historic sites, impact of growth, costs of scattered development, public investments and facilities, and conformity with local plan.<sup>104</sup> The Commission denied VNRC's petition for party status on all these criteria.<sup>105</sup>

97. See VT. STAT. ANN. § 6001(3).

98. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 3-4 (Vt. Envtl. Bd. Dec. 23, 1994).

99. *Id.* at 8.

100. *Id.* at 3, 4.

101. *Id.* at i.

102. *Id.* at 4.

103. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 4 (Vt. Envtl. Bd. Dec. 23, 1994).

104. *Id.*

105. *Id.*

Despite this opposition, the applicants initially succeeded in obtaining a permit.<sup>106</sup> On December 21, 1993, a Land Use Permit was issued by the District Six Environmental Commission, authorizing construction of a 126,090 square-foot Wal-Mart Store.<sup>107</sup> However, Wal-Mart could not rest upon its initial success because on January 20, 1994, the Citizens and VNRC filed appeals with the Board, excepting to the Commission's decisions regarding all the criteria for which they sought party status.<sup>108</sup> The groups also appealed the District Commission's refusal to grant them party status on the relevant aforementioned criteria.<sup>109</sup>

On February 2, 1994, the applicants filed a cross-appeal in which they excepted to the Commission's grant of party status to the Citizens on all relevant criteria except the criterion addressing conformance with the relevant local plan and argued to sustain the Commission's denial of party status to VNRC.<sup>110</sup>

### B. *The Proceedings Before the Board*

On April 15, 1994, the Board issued a memorandum of decision addressing party status.<sup>111</sup> The Board denied party status to both the Citizens and VNRC on the criterion addressing historic sites.<sup>112</sup> However, the Board denied the balance of the applicants' cross-appeal, granting both the Citizens and VNRC party status regarding the other criteria on which they sought status as such.<sup>113</sup> Thus, the Board conducted a *de novo* review of a multitude of Act 250 criteria.<sup>114</sup>

106. *Id.* at 3.

107. *Id.*

108. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 3 (Vt. Envtl. Bd. Dec. 23, 1994).

109. *Id.* at 4.

110. *Id.*

111. *Id.*

112. *Id.*

113. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 4-5 (Vt. Envtl. Bd. Dec. 23, 1994). Later, on May 11, 1994, following motions presented by the applicants for reconsideration of the party status issues, the Citizens, and VNRC, the Board stood by its April 15, 1994 ruling concerning party status. *Id.*

114. *Id.* Specifically, review was conducted under those criteria addressing water pollution, soil erosion, traffic, impact on schools, local governmental services, impact of growth, costs of scattered development, public investments and facilities, and conformity with local plan. *Id.* The Board further limited the water pollution criterion issues to headwaters, waste disposal, streams, and wetlands. *Id.* at 5.

During June and July of 1994, the parties met for prehearing conferences and filed prefiled testimony.<sup>115</sup> The Board convened hearings on July 7, 13, and 14. Also in July, the Board visited the site of the proposed Wal-Mart store.<sup>116</sup>

The Board conducted deliberations to consider the evidence on several dates from August until December, when the Board issued its Findings of Fact, Conclusions of Law, and Order on December 23, 1994.<sup>117</sup> This document exposes much of the "Vermont barrier" because the document reveals the deliberations of the Board in evaluating permit applications. In particular, the Board's concerns for the protection of the St. Albans economy from the competitive force which Wal-Mart presents are expressly and openly confessed.<sup>118</sup>

### C. *Ecological Concerns Allayed*

The ecologically-related criteria under which the Board reviewed the St. Albans' Wal-Mart permit application were those criteria addressing headwaters, waste disposal, streams, wetland rules, and soil erosion.<sup>119</sup> Many of the Board's findings of fact supported its conclusions of law regarding compliance with multiple criteria.<sup>120</sup> The Board found that the proposed Wal-Mart project complied with each of these ecologically-related Act 250 criteria.<sup>121</sup> The fact that the Board found for Wal-Mart on these criteria supports the conclusion that the "Vermont barrier" has been erected from the mortar of economic protectionism rather than from truly environmental or ecological concerns.

115. *In re* Wal-Mart Stores, Inc., No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 5 (Vt. Envtl. Bd. Dec. 23, 1994). These maneuvers included the filing of prefiled direct and rebuttal testimony, lists of witnesses and exhibits, and written evidentiary objections, pursuant to Environmental Board Rule 17(D) (prefiled testimony) and 17(E) (prehearing submissions). ENVTL. BD. R. 17.

116. *In re* Wal-Mart Stores, Inc., No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 5 (Vt. Envtl. Bd. Dec. 23, 1994).

117. *Id.* at i.

118. *See id.* at 27-29.

119. *Id.* at 4-5.

120. *Id.* at 7. The Board instructed that its findings of fact "should be read as cumulative," stating "[w]here findings from the general category or another specific category are relevant, they are assumed and are not repeated." *In re* Wal-Mart Stores, Inc., No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 7 (Vt. Envtl. Bd. Dec. 23, 1994).

121. *Id.* at 11-16.



In evaluating the permit under the ecologically-related criteria addressing waste disposal and streams, the Board expressed concern for the excessive amounts of plant nutrients, particularly phosphorus, in St. Albans Bay, which is located in the northeast arm of Lake Champlain near the town and city of St. Albans.<sup>122</sup> Excessive amounts of phosphorus promote blooms of algae, which can negatively impact water quality.<sup>123</sup> St. Albans Bay has for many years contained excessive amounts of phosphorus, and despite millions of dollars of public investment to reduce nutrient loading, water quality in the Bay has not been "significantly improved."<sup>124</sup> Stevens Brook, a tributary of the Bay, is suspected of carrying a prominent amount of phosphorus into the Bay.<sup>125</sup> The fact that stormwater runoff from the proposed St. Albans Wal-Mart would be guided into Stevens Brook made the Board's concerns regarding the phosphorus levels in St. Albans Bay relevant to the subject case.<sup>126</sup>

The site of the proposed Wal-Mart was being used as a corn field, and the Board recognized that after completion, the proposed development would

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122. *Id.* at 8-12. The criterion addressing waste disposal required that the applicants prove that, "the development or subdivision will meet any applicable health and environmental conservation department regulations regarding the disposal of wastes, and will not involve the injection of waste materials or any harmful or toxic substances into ground water or wells." VT. STAT. ANN. § 6086(a)(1)(B).

The criterion addressing streams required that the applicants prove that "the development or subdivision of lands on or adjacent to the banks of a stream will, whenever feasible, maintain the natural condition of the stream, and will not endanger the health, safety, or welfare of the public or of adjoining landowners." *Id.* § 6086(a)(1)(E).

123. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 9 (Vt. Envtl. Bd. Dec. 23, 1994). The Board noted that algal blooms often negatively impact water quality by decreasing water transparency and producing noxious odors, which fosters a "corresponding significant decline in recreational values." *Id.* The Board recognized that agriculture, which is not regulated by Act 250, is a major source of the excessive levels of phosphorus and other plant nutrients in the Bay. *Id.*

124. *Id.* at 9-10.

125. *Id.* at 10. The highest concentrations of phosphorus in the Bay have been measured where Stevens Brook flows into St. Albans Bay. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 10 (Vt. Envtl. Bd. Dec. 23 1994).

126. *Id.* at 9. On January 9, 1994, the applicants obtained Discharge Permit No. 1-1159 from the Wastewater Management Division of the Department of Environmental Conservation of the State of Vermont Agency of Natural Resources. *Id.* This permit authorized the applicants to discharge stormwater runoff in the manner described in the permit: "Stormwater runoff from the access roadway, parking and building roofing via catch basins and a closed collection system to a sedimentation/detention basin. The basin discharges via a stabilized outlet to an existing grassed drainageway to Stevens Brook." *Id.*

actually result in less phosphorus discharge into Stevens Brook than pre-development levels.<sup>127</sup> The fact that post-development phosphorus flows would be reduced by development helped the applicants obtain a discharge permit from the Department of Environmental Conservation of the State of Vermont Agency of Natural Resources (“ANR”).<sup>128</sup>

The city’s wastewater treatment plant had also been a major contributor of plant nutrients into St. Albans Bay until a major 1987 upgrade of the facility resulted in a striking reduction in its contribution of plant nutrients into the bay.<sup>129</sup> On September 9, 1993, the applicants obtained a Water Supply and Wastewater Disposal Permit which approved connecting the Wal-Mart project to the city’s existing wastewater facilities.<sup>130</sup>

Pursuant to Environmental Board Rule 19, the applicants created a rebuttable presumption of compliance with the criteria addressing waste disposal and streams.<sup>131</sup> The Citizens sought to rebut the presumption of compliance with these criteria by arguing that although the project would reduce the pre-development amount of phosphorus discharge, the continued discharge would constitute undue water pollution of St. Albans Bay because the applicants had not gone far enough in designing their project to reduce the projected phosphorus discharge.<sup>132</sup>

The Citizens also criticized ANR’s Draft Stormwater Procedures, which guided that agency’s decision to issue the Discharge Permit.<sup>133</sup> The Citizens felt that ANR’s draft procedures were inadequate to protect the environment because rather than setting a “natural state” design standard, the

127. *Id.* at 10.

128. *See In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 9-11 (Vt. Env’tl. Bd. Dec. 23, 1994); *see also infra* note 130 and accompanying text.

129. *See In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 9-10 (Vt. Env’tl. Bd. Dec. 23, 1994).

130. *See id.* at 8-9. The applicants obtained Water Supply and Wastewater Disposal Permit No. WW-6-0229 from the Department of Environmental Conservation of the State of Vermont Agency of Natural Resources. *Id.* at 9. The permit allowed a maximum of 9731 gallons per day to be discharged into the city’s system. *Id.*

131. *Id.* at 12-15.

132. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 13-14 (Vt. Env’tl. Bd. Dec. 23, 1994). The Citizens contended that the projected levels of phosphorous discharge were unduly high because the applicants had “not taken all feasible and reasonable measures to reduce the level of phosphorous in the project’s stormwater runoff.” *Id.* at 14.

133. *Id.*

draft procedures merely required that the proposed development not increase the levels of plant nutrient discharge.<sup>134</sup>

Addressing the Citizens' arguments, the Board noted that it could properly consider the adequacy of ANR's draft procedures because of the Board's "supervisory role over ANR."<sup>135</sup> The Board stated concern that because the existing site was used for agricultural purposes, and that agriculture is a major source of the plant nutrients in St. Albans Bay,<sup>136</sup> pre-development nutrient contribution levels may be an inadequate benchmark.<sup>137</sup>

Despite the Board's concerns regarding the phosphorus contribution levels expected from the project, the Board believed that it would be unfair to find the relevant compliance presumptions rebutted by the Citizens since the applicants had designed the project in accordance with the regulations

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134. *Id.* at 10-11, 13-14. ANR's Draft Procedures state that "[t]he control of stormwater runoff requires the use of detention structures such that the post-development peak flow from the site does not exceed the pre-development peak flow based on the runoff from a 10-year, 24 hour design storm." *Id.* at 10-11.

135. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 14 (Vt. Envtl. Bd. Dec. 23, 1994). Here, the Board cited *In re Hawk Mountain Corp.*, 542 A.2d 261, 264 (Vt. 1988). In that case, the Supreme Court of Vermont observed that:

The legislative scheme [of Act 250] indicates that the legislature intended to confer upon the Board powers of a supervisory body in environmental matters. For example, although 10 V.S.A. § 6082 provides that the permit required under Act 250 does not replace permit requirements from other state agencies, 10 V.S.A. § 6086(d) provides that the Environmental Board is not bound by the approval or permits granted by the other agencies. Permits and Certificates of Compliance from other agencies create a presumption that the project satisfies the relevant 10 V.S.A. § 6086(a)(1) criteria; however, the Board must conduct an independent review of the proposed development and may deny the Act 250 permit if it finds the Certificate of Compliance or other required permits were improvidently granted.

*Id.* (citation omitted).

Thus, the Board could properly disregard ANR's issuance of the discharge permit in evaluating the proposed St. Albans Wal-Mart development's compliance with Act 250.

136. *See supra* note 123 and accompanying text.

137. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 10 (Vt. Envtl. Bd. Dec. 23, 1994). Here, the Board stated that "[u]sing such as a benchmark clearly presents little or no real potential of improving the Bay's water quality." *Id.* at 14. The Board noted that other states have required that projects be designed to achieve "natural state" nutrient contribution levels, and that such a standard may be best suited to improve the water quality in St. Albans Bay. *Id.* The Board also criticized ANR's use of draft procedures which by definition have not been finalized as a basis for permit issuance standards. *Id.* at 15.

then being used by ANR.<sup>138</sup> Based on these conclusions, the Board found the St. Albans Wal-Mart project complied with the criteria addressing waste disposal and streams.<sup>139</sup>

The Board also evaluated the Wal-Mart project under the criterion addressing soil erosion, noting that the project was designed in accordance with ANR's *Vermont Handbook of Soil Erosion and Sediment Control*.<sup>140</sup> The design called for the construction of sedimentation basins and silt barriers.<sup>141</sup> The Board was convinced that the applicants had sufficiently discharged their burden of proof and that the St. Albans Wal-Mart project, as designed, complied with the criterion addressing soil erosion.<sup>142</sup>

The issues before the Board in its evaluation of the St. Albans Wal-Mart application also included the criteria addressing headwaters and wetland rules.<sup>143</sup> Because the Board found that the project would not affect any relevant headwaters or wetlands, the project was deemed to comply with both of these criteria.<sup>144</sup>

138. *Id.* The Board warned that future conclusions on future applications might be different regarding design according to existing regulation. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 15 (Vt. Envtl. Bd. Dec. 23, 1994).

139. *Id.* at 15-16.

140. *See id.* at 4, 11, 16. This criterion directed the Board not to issue a permit unless it found that the proposed St. Albans Wal-Mart would "not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result." VT. STAT. ANN. § 6086(a)(4).

141. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 11 (Vt. Envtl. Bd. Dec. 23, 1994). As an example of other soil erosion control measures, the Board noted that the project designers envisioned that upon completion, "[d]rainage paths with slopes greater than five percent will be stone lined. Drainage paths with slopes between one percent and five percent will be seeded and protected with erosion matting. Drainage paths with slopes that are less than one percent will be seeded and mulched." *Id.* Thus, it is clear that the Board paid detailed attention to the applicants' plans to control soil erosion.

142. *Id.* at 16.

143. *Id.* at 5, 8, 11-12, 16.

144. *Id.* at 11-12, 16. The criterion addressing headwaters involves:

the quality of the ground or surface waters flowing through or upon lands which are not devoted to intensive development, and which lands are:

- (i) headwaters of watersheds characterized by steep slopes and shallow soils; or
- (ii) drainage areas of 20 square miles or less; or
- (iii) above 1,500 feet elevation; or
- (iv) watersheds of public water supplies designated by the Vermont department of health; or
- (v) areas supplying significant amounts of recharge waters to aquifers.

Thus, the Board found that the St. Albans Wal-Mart project complied with all of the ecologically-related criteria under which review was conducted.<sup>145</sup> This finding supports the conclusion that the construction of the "Vermont barrier" is justified by protectionist concerns for the local economy rather than ecologically-grounded concerns for the environment.

#### D. Protectionist Fears Displayed

The Board conducted a review of the St. Albans Wal-Mart project under several fiscal criteria: impact on schools and local government services, impact of growth, costs of scattered development, and public investments and facilities.<sup>146</sup> The Board found against the applicants on all but one of these criteria, finding compliance with the criterion addressing public investments and facilities.<sup>147</sup>

As with the ecologically-related criteria under which the Board reviewed the project, many of the Board's findings of fact supported its conclusions of law regarding compliance with multiple criteria.<sup>148</sup> The Board considered both direct and indirect growth caused by the project, as well as the associated public benefits and costs.<sup>149</sup> The Board found the effect of the project on retail competition to be a common issue relevant to all these fiscal criteria.<sup>150</sup> The Board concluded that "the competitive effect of a project on existing businesses is relevant to the Act 250 criteria."<sup>151</sup> The Board elaborated, stating that:

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VT. STAT. ANN. § 6086(a)(1)(A). The Board made specific factual findings regarding the characteristics of the site of the project in relation to this statutory description of headwaters, and found that none would be affected by it. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 8, 12 (Vt. Env'tl. Bd. Dec. 23, 1994).

The criterion addressing wetland rules directs a determination prior to permit issuance that "the development or subdivision will not violate the rules of the water resources board, as adopted under section 905(9) of this title, relating to significant wetlands." VT. STAT. ANN. § 6086(a)(1)(G). As with the criterion addressing headwaters above, the Board made specific factual findings and determined that "the proposed project will not violate the Wetland Rules." *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 16 (Vt. Env'tl. Bd. Dec. 23, 1994).

145. *Id.* at 11-16, 27-29.

146. *Id.* at 16-53.

147. *Id.* at 34, 48, 51-53.

148. *See supra* note 120 and accompanying text.

149. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 17-26 (Vt. Env'tl. Bd. Dec. 23, 1994).

150. *Id.* at 27-29.

151. *Id.* at 27.

[t]he issue is protection of the tax base. It is clear to the Board that . . . the General Assembly intended that the Board and district commissions consider that part of the economic impact of a development is any reduction in the tax base caused by a proposed development. For example, [the] Criteria [addressing impact on schools and local governmental services] . . . speak in terms of the "ability" of a local government to provide services, which can only be determined by reference to the available tax base. Similarly, Criterion 9(A) [addressing impact of growth] speaks of the impact of a project on a town's "financial capacity." Also, Criterion 9(H) [addressing costs of scattered development] refers to a project's "indirect" costs.<sup>152</sup>

Here, the Board confessed that its objections to the St. Albans Wal-Mart project were driven by protectionist concerns for the local economy.<sup>153</sup> Deeming the effects of the St. Albans Wal-Mart upon retail competition relevant to these fiscal criteria, the Board endeavored to determine just what these effects would be.<sup>154</sup>

The Board first discussed its findings under the criterion addressing impact of growth.<sup>155</sup> The applicants bore the burden of proof on this

152. *Id.* (citations omitted).

153. *Id.*

154. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 19-24, 42-49 (Vt. Envtl. Bd. Dec. 23, 1994).

155. *Id.* at 17-19, 29-34. The Vermont Legislature has directed in the criterion addressing impact of growth that:

In considering an application, the district commission or the board shall take into consideration the growth in population experienced by the town and region in question and whether or not the proposed development would significantly affect their existing and potential financial capacity to reasonably accommodate both the total growth and the rate of growth otherwise expected for the town and region and the total growth and rate of growth which would result from the development if approved. After considering anticipated costs for education, highway access and maintenance, sewage disposal, water supply, police and fire services and other factors relating to the public health, safety, and welfare, the district commission or the board shall impose conditions which prevent undue burden upon the town and region in accommodating growth caused by the proposed development or subdivision. Notwithstanding section 6088 of this title the burden of proof that proposed development will significantly affect existing or potential financial capacity of the town and region to accommodate such growth is upon any party opposing an application, excepting however, where the town has a duly adopted capital improvement program the burden shall be on the applicant.

VT. STAT. ANN. § 6086(a)(9)(A). Because the town of St. Albans had such a duly adopted plan, the burden of proof was on the applicants. *In re Wal-Mart Stores, Inc.*, No. 6F0471-

criterion.<sup>156</sup> The project would result in little direct population growth, as all but about five of the employees at the St. Albans Wal-Mart would be hired from the local labor market.<sup>157</sup> These five employees would bring six children.<sup>158</sup> Thus, the direct population growth expected from the project was minor. The Board, however, expressed more concern for what it called secondary growth than the direct growth mentioned above.<sup>159</sup> As had occurred in other New England communities where Wal-Mart had located, the project was likely to cause the development of other “highway-oriented businesses in the area.”<sup>160</sup> On this issue of secondary growth, the Board found that the applicants had provided no specific evidence concerning the anticipated public costs and public benefits caused thereby, and had simply argued that “the proposed project will have an unquantified but positive impact on the ability of the Town of St. Albans and the Franklin County region with regard to the costs of development caused by the project.”<sup>161</sup> Such an argument was inadequate to sustain their burden of proof under this criterion, and the application was denied pursuant thereto.<sup>162</sup>

The Board next considered the application under the criterion addressing costs of scattered development.<sup>163</sup> First, the Board held that

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EB, Findings of Fact, Conclusions of Law, and Order at 30 (Vt. Envtl. Bd. Dec. 23, 1994).

156. *See id.*

157. *Id.* at 17.

158. *Id.*

159. *Id.* at 18-20, 30-34.

160. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 18 (Vt. Envtl. Bd. Dec. 23, 1994). Here, the Board elaborated on what it meant by highway-oriented development, stating “[t]hese types of stores are generally highway-oriented development, and typically can include fast-food franchises such as Burger King and Kentucky Fried Chicken, pizza and sandwich shops, gas stations, banks, video rental stores, new shopping centers, and expansion of existing shopping centers.” *Id.*

161. *Id.* at 33. Consultants from RKG Associates, Inc., testified on behalf of the applicants in this regard. *Id.* at 18. Their testimony was deemed not credible, supposedly because they accounted for “only public benefits from secondary growth in the form of increased tax revenues and [did] not consider any public costs.” *Id.* at 19. The Board believed that such a credible numerical study was feasible. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Vt. Envtl. Bd. Dec. 23, 1994).

162. *Id.* at 33-34. Here, the Board declared that it needed “specific projections as to the total growth and rate of secondary growth to be caused by the proposed project and the anticipated costs and benefits associated with such growth.” *Id.*

163. *Id.* at 19-26, 34-49. This criterion directs that:

The district commission or board will grant a permit for a development or subdivision which is not physically contiguous to an existing settlement

this criterion was applicable to the St. Albans Wal-Mart project application because the project indeed constituted scattered development since it was not physically contiguous to an existing settlement.<sup>164</sup> Evaluation under this criterion involves a determination of whether the public benefits outweigh the public costs, in which case the project is in compliance.<sup>165</sup> Thus, the Board attempted to discern just what these costs and benefits were.<sup>166</sup>

As one might have expected, conflicting evidence was presented to the Board concerning the issues of public costs and public benefits.<sup>167</sup> The

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whenever it is demonstrated that, in addition to all other applicable criteria, the additional costs of public services and facilities caused directly or indirectly by the proposed development or subdivision do not outweigh the tax revenue and other public benefits of the development or subdivision such as increased employment opportunities or the provision of needed and balanced housing accessible to existing or planned employment centers.

VT. STAT. ANN. § 6086(a)(9)(H).

164. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 34-42 (Vt. Env'tl. Bd. Dec. 23, 1994). Four Board members, including the chair, dissented from this finding. *Id.* at 42. The Board undertook a lengthy discussion of the term "existing settlement" as used in the statutory language of this criterion, concluding that:

the phrase "existing settlement" as used in that criterion means an extant community center similar to the traditional Vermont center in that it is compact in size and contains a mix of uses, including commercial and industrial uses, and, importantly, a significant residential component. It is a place in which people may live and work and in which the uses largely are within walking distance of each other. The term specifically excludes areas of commercial, highway-oriented uses commonly referred to as "strip development."

The Board further concludes that, to be contiguous to an existing settlement, a proposed project must be within or immediately next to such a settlement and must be compatible with the settlement buildings in terms of size and use.

*Id.* at 39 (footnote omitted). This discussion by the Board will likely haunt, or at least hinder, future attempts by Wal-Mart to enter the Vermont market because this definition of "existing settlement" seems tailor-made to exclude Wal-Mart's characteristic superstores. One is unlikely to find many other buildings which are compatible with the firm's superstores in terms of size and use. The exclusion of their superstores from this definition means this criterion should always be held applicable, and the firm will need to overcome the burden of proof by presenting inherently intangible and conjectural public cost and benefit estimations.

165. *See id.*

166. *Id.* at 19-24, 42-48.

167. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 43-45 (Vt. Env'tl. Bd. Dec. 23, 1994). Testifying for the applicants were the consultants RKG Associates, Inc. *See supra* note 161 and accompanying text. Elizabeth Humstone and Thomas Muller testified on behalf of the Citizens and VNRC. *In re Wal-Mart*



Citizens and VNRC filed a joint set of fiscal impact charts.<sup>168</sup> Reportedly due to significant differences in accounting for particular items in the calculations, the Board found the numbers presented by the Citizens and VNRC more credible.<sup>169</sup> Siding with the Citizens and VNRC on the accounting, the Board commented on the significance of the differences in the fiscal calculations:

All of this means that many more existing businesses will suffer or go out of business from competition with the proposed Wal-Mart, and therefore many more jobs will be lost, than projected by the Applicants. The loss of such businesses and jobs is likely therefore to have a much more negative effect on the tax base of the Franklin County towns than the Applicants project. Accordingly, the public costs of the proposed Wal-Mart are likely to be much higher than the Applicants estimate.<sup>170</sup>

Again, the Board openly revealed its protectionist concerns for the local economy.

Using the numbers provided by the Citizens and VNRC, the Board calculated the net annual public benefit to be approximately \$109,000 in 1995 dollars, countered against and outweighed by \$315,000 in total annual

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Stores, Inc., No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 43-45 (Vt. Env'tl. Bd. Dec. 23, 1994). As one might further expect, RKG testified that the proposed project would result in a net public benefit, while the opposition testified that the project would result in a net public loss. *Id.*

168. *Id.* at 6. This was most likely a tactical decision, as the credibility of both the Citizens' and VNRC's numbers would be reduced if they stood in conflict with each other.

169. *Id.* at 43-44. The Board observed that the differences in the projections were caused by conflicting assumptions made by the parties regarding three factors which affected their projections:

(a) the annual average sales per square foot for the proposed Wal-Mart; (b) the recapture of "leakage," that is purchases by Franklin County residents presently made in other places such as Chittenden County that would be made at the proposed Wal-Mart; and (c) the percentage of total sales that would be made to Canadian citizens.

*Id.* at 43.

The Board noted that RKG used a sales per square foot number which was less than the national average at Wal-Marts, which Muller and Humstone used, and ultimately found the Muller/Humstone assumptions more credible on all three assumptions. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 43-44 (Vt. Env'tl. Bd. Dec. 23, 1994).

170. *Id.* at 45.

costs.<sup>171</sup> Of the public cost figure, \$129,000 was attributed to losses in tax receipts caused by competition from the Wal-Mart store.<sup>172</sup> Here again, the failure of the applicants to offer specific calculations concerning public benefit from secondary development hurt their cause because without any credible numbers for this factor, the Board could not establish a higher estimated total net annual public benefit figure.<sup>173</sup> The absence of these numbers also precluded imposing mitigating conditions, such as impact fees.<sup>174</sup>

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171. *Id.* at 45-48. The Board explained the benefit figure, stating “[t]he benefits will consist of approximately \$77,000 in property tax revenues to the Town and approximately \$32,400 in increased state aid to education to the City of St. Albans and the Towns of Enosburg and Swanton.” *Id.* at 45. On the cost side, the Board gave a detailed, itemized accounting:

The annual costs to governments caused by the proposed project will include, in 1995 dollars:

(a) approximately \$61,000 in state aid to education which the Town will lose;

(b) approximately \$25,000 in operating costs caused by the addition of six students to the school system;

(c) as much as approximately \$110,000, representing lost revenue to the relevant municipalities due to changes in the Grand Lists caused by competition from the proposed project;

(d) as much as approximately \$19,000, representing lost revenue because of job loss in the region;

(e) approximately \$11,500, representing the cost to the Town of direct services to the proposed project;

(f) approximately \$88,000, representing the public funds which have been invested in the City’s historic downtown. This investment is likely to be lost if the proposed project has the projected negative impact on the City.

*Id.* at 46.

172. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 46 (Vt. Env’tl. Bd. Dec. 23, 1994).

173. *Id.* at 48. The Board stated, “[s]uch information is necessary not only to reach a positive finding under Criterion 9(A) [addressing impact of growth], but is also necessary to reach a positive finding under Criterion 9(H) [addressing costs of scattered development], which addresses both direct and *indirect* costs.” *Id.*

174. *Id.* at 49. The Board commented that it had considered the possibility of imposing conditions to secure compliance with the criterion addressing costs of scattered development, but that:

because of the absence of information concerning the public costs and benefits associated with the secondary growth discussed above, and because the present record contains little focus on such remedies by the parties, the Board is not persuaded that it can arrive at an amount for an impact fee or a bond with sufficient precision to ensure that the impacts of the proposed project will actually be ameliorated.

The Board concluded that “the ratio is approximately three dollars of public cost for each dollar of public benefit.”<sup>175</sup> Drawing such a conclusion, the Board had no choice but to deny the permit application under the criterion addressing costs of scattered development.<sup>176</sup>

Next, the Board revealed its conclusions regarding compliance of the St. Albans Wal-Mart with the criterion addressing impact on schools.<sup>177</sup> The burden of proof on this criterion is placed on the parties opposing the project.<sup>178</sup>

Reviewing the permit application under this criterion, the Board found that the project would add six children to the school system, which already lacked “the physical capacity to accommodate the projected six additional school children.”<sup>179</sup> Financially, the proposed project would directly add an additional \$25,000 in annual operating costs to the relevant municipalities, and again, insufficient figures regarding secondary growth precluded imposing mitigating conditions.<sup>180</sup> As a result of the increase in the an-

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*Id.* Thus, the St. Albans Wal-Mart permit application was unconditionally denied under this criterion. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 49 (Vt. Env'tl. Bd. Dec. 23, 1994).

175. *Id.* at 47.

176. *Id.* at 49.

177. *Id.* at 23-24, 49-52. This criterion involves a determination by the body reviewing the permit application that the project “[w]ill not cause an unreasonable burden on the ability of a municipality to provide educational services.” VT. STAT. ANN. § 6086(a)(6).

178. *Id.* § 6088(d). Although not outcome-determinative in the present case, a permit may not be denied solely for failure to comply with this criterion. *Id.* § 6087(b). The same is true of the criterion addressing public investments and facilities, under which the application in the present case was also reviewed by the Board. *Id.*

179. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 50 (Vt. Env'tl. Bd. Dec. 23, 1994).

180. *Id.* at 50-51. The Board commented on the insufficiency of data, concluding “if, as concluded above, insufficient information has been provided concerning the impact of secondary growth on the area governments, then the Board cannot reach a conclusion concerning how such growth may affect the ability of those governments to provide educational services.” *Id.* at 51. Regarding the possibility of imposing mitigating conditions, the Board commented that due to the lack of sufficient information concerning secondary growth, “the Board is unable to fashion a reasonable permit condition to alleviate the burden to be caused by the proposed project.” *Id.* After noting that it could not deny the permit application on the basis of this criterion alone, the Board stated, “[i]f the Board did not find, as it does elsewhere in this decision, that the application must be denied under other criteria, the Board would consider re-opening the hearing to take evidence regarding permit conditions under [this] Criterion . . . designed to mitigate the burden created on the relevant educational systems.” *Id.* Thus, the question of permit conditions under this criterion became moot by the Board’s conclusion regarding other fiscal criteria.

nual operating costs, the Board found against the applicants on this criterion.<sup>181</sup>

Next under review was the criterion addressing local government services.<sup>182</sup> Incorporating its relevant findings of fact concerning the other previously discussed fiscal criteria, the Board denied the permit application on the basis of this particular criterion.<sup>183</sup>

The last fiscal criterion under which the permit was reviewed was that addressing public investments and facilities.<sup>184</sup> A significant historic district, containing over one hundred buildings on the United States Department of the Interior's National Register of Historic Places, is located within the city of St. Albans.<sup>185</sup> Although most of the buildings in the historic district are in private use, millions of dollars in public money have been invested for their preservation.<sup>186</sup> The permit opponents argued that due to these public investments, the city's historic district was a relevant

181. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 51 (Vt. Env'tl. Bd. Dec. 23, 1994).

182. *Id.* Review under this criterion requires that before granting a permit the issuing body be convinced that a proposed project "[w]ill not place an unreasonable burden on the ability of the local governments to provide municipal or governmental services." VT. STAT. ANN. § 6086(a)(7).

183. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 52 (Vt. Env'tl. Bd. Dec. 23, 1994).

184. *Id.* at 52-54. This criterion dictates that:

A permit will be granted for the development or subdivision of lands adjacent to governmental and public utility facilities, services, and lands, including, but not limited to, highways, airports, waste disposal facilities, office and maintenance buildings, fire and police stations, universities, schools, hospitals, prisons, jails, electric generating and transmission facilities, oil and gas pipe lines, parks, hiking trails and forest and game lands, when it is demonstrated that, in addition to all other applicable criteria, the development or subdivision will not unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, the public's use or enjoyment of or access to the facility, service, or lands.

VT. STAT. ANN. § 6086(a)(9)(K).

185. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 24-25 (Vt. Env'tl. Bd. Dec. 23, 1994). Also considered by the Board under this criterion was the question "whether the traffic impacts of the proposed project will materially jeopardize or interfere with the function, safety, or efficiency of Route 7." *Id.* at 53. This question and the concerns relevant to both this criterion and that addressing traffic were addressed in the Board's written opinion in the portion discussing the criterion addressing traffic. *See id.*

186. *Id.* at 24-25, 53.

consideration for review under this criterion.<sup>187</sup> The Board disagreed on this point, and found overall that the project complied with this criterion.<sup>188</sup>

Thus, the St. Albans Wal-Mart permit application was denied on all but one of the fiscal criteria under which review was conducted by the Board. The Board acknowledged that the effect of retail competition from the proposed St. Albans Wal-Mart was an issue common to its deliberations under all these fiscal criteria.<sup>189</sup> However, the Board distinguished between the protection of existing businesses from new competition and protection of the tax base of the relevant governments:

[W]e wish to make clear that our concern under Act 250's criteria is exclusively with the economic impact of a proposed development on public, not private entities. A proposed development may have a direct and substantial adverse economic impact on one or more existing businesses; however, that impact on competing private entities is irrelevant to our analysis under Act 250 unless it can also be shown that there is a resultant material adverse economic impact on the ability or capacity of a municipality or other governmental entity to provide public services.<sup>190</sup>

Whether the Board felt it was protecting governments, businesses, or both, the result was the same for Wal-Mart—no store in St. Albans, Vermont.

### E. *Other Issues*

The Board also considered the St. Albans Wal-Mart project in light of the criteria addressing conformity with the relevant local plan and traffic.<sup>191</sup> The criterion addressing conformance with the local plan was not

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187. *Id.* at 53.

188. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 53 (Vt. Envtl. Bd. Dec. 23, 1994). Here, the Board commented that “[p]ublic funds, however, potentially may be invested in many private structures or enterprises.” *Id.* However, the expected public costs associated with detrimental effects to the city’s historic district were considered by the Board in its review of the project under the criterion addressing costs of scattered development, and estimated at \$88,000 of annual costs in 1995 dollars. See *supra* note 184 and accompanying text.

189. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 26-29 (Vt. Envtl. Bd. Dec. 23, 1994).

190. *Id.* at 29 (citing *In re Pyramid Co. of Burlington*, No. 4C0821, Findings of Fact, Conclusions of Law, and Order at 8 (ENVTL. COMM’N OCT. 12, 1978)).

191. *Id.* at 4-5, 16-17, 21-22, 54-57.

applicable to the permit application for want of a town or regional plan with which to conform.<sup>192</sup> Regarding the criterion addressing traffic, the Board would have issued the permit with mitigating conditions if it were not denying the permit application for lack of compliance with other Act 250 criteria.<sup>193</sup>

#### IV. THE PENDING APPEAL IN THE SUPREME COURT OF VERMONT

The applicants have taken appeal of the Board's decision to the Supreme Court of Vermont.<sup>194</sup> The case has been completely briefed, and as of the printing of this note, the case has not been scheduled for argument before the court.<sup>195</sup> Among other things, the applicants are arguing on appeal that the Board erred in basing its decision on the anticipated effects the proposed development would have on local retail industry competition and that the alleged secondary impacts of competition are too speculative for consideration.<sup>196</sup>

Regarding effects on retail competition, the applicants allege that "[b]y its actions, the Board is regulating market competition."<sup>197</sup> The applicants urge that such considerations are outside the scope of Act 250, which

192. *Id.* at 16-17, 54. The criterion addressing conformance with the local plan dictates that to obtain a permit a project must be "in conformance with any duly adopted local or regional plan or capital program under chapter 117 of Title 24." VT. STAT. ANN. § 6086(a)(10). No such plans were in effect at the time the application was filed. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 17, 54 (Vt. Envtl. Bd. Dec. 23, 1994). The town of St. Albans' plan took effect only eight days after the filing date, a fact which most likely influenced the decision to file sooner rather than later. *Id.* at 17.

193. *Id.* at 54-57. The criterion addressing traffic requires a finding before permit issuance that the project "[w]ill not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports and airways, and other means of transportation existing or proposed." VT. STAT. ANN. § 6086(a)(5). Interestingly, the applicants proposed to pay for several improvements to U.S. Route 7 near the project, including installing a traffic signal at the intersection of routes U.S. 7 and Vermont 207, and the construction of an additional lane of traffic. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 54-55 (Vt. Envtl. Bd. Dec. 23, 1994).

194. Telephone Interview with Peter M. Collins, Appellate Counsel for Wal-Mart and the St. Albans Group (Nov. 19, 1995).

195. Telephone Interview with Jane Fitzpatrick, Docket Clerk for the Supreme Court of Vermont (Feb. 11, 1996). Oral argument was requested by Mark G. Hall, counsel for the appellants. *Id.*

196. Appellants' Brief at 5-17, *In re Wal-Mart, Inc.*, No. 6F0471-EB (Vt. Envtl. Bd. Dec. 23, 1994) (No. 95-398).

197. *Id.* at 5.

focuses on and is triggered by changes in the use of land and the accompanying effects on the environment.<sup>198</sup> In support of this position, the applicants note that were Wal-Mart to move into an existing retail site, the same economic factors which concerned the Board would be present, yet no permit would be required because no change in the use of the land had occurred.<sup>199</sup> The applicants accuse the Board of creating "an anomalous situation in which Wal-Mart cannot obtain a permit due to impacts that would not, in themselves, trigger Act 250 review. . . . To the contrary, free market competition, being divorced from actual physical changes in the use of land, does not warrant consideration under Act 250."<sup>200</sup>

The applicants have also argued that the Board erred in relying on "impacts arising from market competition [which] are too speculative and inherently inaccurate to provide the degree of certainty necessary to adjudicative action."<sup>201</sup> The applicants have cited expert studies which conclude that studies of secondary impacts are not reliable.<sup>202</sup> Such speculative evidence, it is argued, is inappropriate for consideration under the Act 250 process, which "is a highly adversarial process in which evidence is presented and credibility determinations are made by a quasi-judicial tribunal. If a permit is denied, fairness dictates that there be some degree of certainty that an alleged impact will in fact occur."<sup>203</sup>

## V. PROPOSAL

Wal-Mart has experienced opposition to its plans to enter many communities in the northeastern United States.<sup>204</sup> The St. Albans, Vermont case is just one example of this opposition. As the St. Albans case illustrates, much of the motivation for this opposition is protectionist fear for the local retail industry. The Vermont Environmental Board was candid in basing its denial of the St. Albans Wal-Mart Act 250 permit application on the motivation of pure and simple economic protectionism.

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198. *Id.* at 6-7.

199. *Id.* at 7.

200. *Id.* (citations omitted).

201. Appellants' Brief at 13, *In re Wal-Mart, Inc.* (No. 95-398).

202. *Id.* at 13-17 (citing ROBERT W. BURCHELL & DAVID LISTOKIN, *THE FISCAL IMPACT HANDBOOK 2* (1980); JOHN M. LEVY, *ECONOMIC DEVELOPMENT PROGRAMS FOR CITIES & TOWNS 137* (1990); Ervin G. Schuster & E. Lee Medema, *Accuracy of Economic Impact Analyses*, J. FORESTRY SERVS., Aug. 1989, at 29).

203. Appellants' Brief at 17, *In re Wal-Mart, Inc.* (No. 95-398).

204. *See* Donker, *supra* note 3, at E1.

Wal-Mart's motivation for placing its superstores in small-town business communities has been criticized as predatory. The popular CBS television news magazine *60 Minutes* recently presented a report on the opposition to Wal-Mart.<sup>205</sup> In that piece, Mr. Glenn Falgoust, a former store owner, criticized the retailer, stating "[t]hey moved into towns all across the South because the easiest person they could put out of business was mom and pop."<sup>206</sup>

It is axiomatic that our nation's strength, our position of world leadership, and our status as the richest nation in the history of the world are the fruits of a capitalist economy driven by the market forces of competition. Our capitalist roots are as much a reason for the existence of the proverb declaring America to be "the land of opportunity" as any other fiber in our social fabric. However, our experience as such a nation has also demonstrated that market forces, left unchecked, can and often do produce unfair, inefficient economic conditions.

Addressing these concerns, Congress and many states, including Vermont, have enacted laws to guard against monopolies, predatory pricing, price fixing, and other inefficient economic conditions and practice.<sup>207</sup> These laws, in part, were created for the protection of *the consumer, not the tax base*.<sup>208</sup> These laws, like all human creations, are imperfect. However, many afford remedies to those who can allege and prove in a court of law, not in the media, that they have been unlawfully wronged.<sup>209</sup> If Wal-

205. *60 Minutes: Profile: Up against the Wal-Mart; citizen grass-roots activists fight movement of Wal-Mart chain into small town areas* (CBS television broadcast, Apr. 30, 1995), available in WL, ALLNEWS Directory, 1995 WL 2729677. This interview was conducted by 60 Minutes co-host Morley Safer.

206. *Id.* Safer did not disguise the implication that Wal-Mart was responsible for Falgoust's status as a *former* store owner when he told the audience that:

Angela and Glenn Falgoust once owned a store in Donaldsville, Louisiana, population 8,000. They sold a bit of everything: bikes, toys, lawn mowers. Business was thriving until Wal-Mart arrived in 1983 . . . . The bitter fact was the Falgousts couldn't buy bikes wholesale for what Wal-Mart was selling them retail. Wal-Mart's enormous purchasing power is the reason. Also, the Falgousts say, they reduce prices to purposely put competitors like themselves out of business.

*Id.* When asked if he and his family shopped at Wal-Mart, Falgoust replied "Yes. We have to—not that we like to." *Id.*

207. See generally WILLIAM J. HAYNES, JR., STATE ANTITRUST LAW 75, 78 (1989); WILLIAM C. HOLMES, ANTITRUST LAW HANDBOOK 1995 EDITION §§ 2.03, .05, .07 (1995).

208. See generally MORRIS D. FORKOSCH, ANTITRUST AND THE CONSUMER (ENFORCEMENT) 57-58 (1956).

209. See generally HOLMES, *supra* note 207, § 8.10.



Mart, or any other business entity, operates in violation of these laws to the injury of any persons, let it be for the wronged to advocate their own rights and protect their own interests. Otherwise, let American consumers choose how best to protect their interests by spending their own money wherever they lawfully elect.

The notion of state and local governments protecting their economies as a means of protecting their own tax bases (as the Vermont Environmental Board candidly admitted to doing in denying an Act 250 permit to the St. Albans Wal-Mart project) should alarm the people and lawmakers of the United States as well as Vermont. Domestic economic protectionism of this sort presents a threat to the very fabric of which our Union is woven. The words of Justice Cardozo are as profound now as in 1935: “[t]he Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.”<sup>210</sup>

The Vermont Legislature should examine decisions of the Vermont Environmental Board, such as in the St. Albans’ Wal-Mart case, closely and consider if the responsibilities and powers of that body and the several district environmental commissions should be modified. If they are unwilling to do so, parties such as Wal-Mart should consider challenging the constitutional validity of these state-imposed commercial restrictions.

## VI. CONCLUSION

Wal-Mart’s struggle in St. Albans, Vermont supports the conclusion that the “Vermont barrier” has been constructed from protectionist fears for the local economy. The Board found that the St. Albans project complied with *all* of the ecologically-related criteria under which the application was reviewed.<sup>211</sup> Ironically, Wal-Mart’s strong record in the retail industry proved to be the firm’s undoing before the Board.<sup>212</sup> This barrier constitutes economic protectionism of the local economy in a manner which should concern the people of Vermont as well as the rest of the United States. The Board candidly announced its protectionist fears for the local

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210. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935); *see also C & A Carbone, Inc. v. Town of Clarkson*, 114 S. Ct. 1677, 1683 (“The Commerce Clause presumes a national market free from local legislation that discriminates in favor of local interests.”).

211. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 11-16 (Vt. Env’tl. Bd. Dec. 23, 1994).

212. *Id.* at 26-53.

economy as a common factor in its denial of the application on several fiscal criteria.<sup>213</sup>

One is left to ponder the veracity of that headline announcing "Wal-Mart breaks Vermont barrier."<sup>214</sup> Inasmuch as Act 250 is that barrier, Wal-Mart cannot break it by taking over existing retail space as it did in Bennington, Vermont, because such a maneuver does not require an Act 250 permit.<sup>215</sup> The final chapter to the tale of Wal-Mart's struggles to break the Vermont barrier has yet to be written.

*Michael A. Schneider*

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213. *Id.*

214. *See Wal-Mart, supra* note 6 and accompanying text.

215. *See* VT. STAT. ANN. § 6081(a) (requiring permits to "commence construction on a subdivision or development").

# *Finkelstein v. Department of Transportation:* The Supreme Court of Florida “Takes” a Look at Evidence of Contamination

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### I. INTRODUCTION

The cost of expanding Florida’s over-crowded urban traffic ways is skyrocketing. The Florida Department of Transportation’s (“FDOT”) actual total expenditure for right of way production and eminent domain litigation for June 1994 through May 1995 was \$271.1 million,<sup>1</sup> up from \$243.5 million the previous year.<sup>2</sup> According to these figures, \$166.1 million was spent for production costs, including purchasing right of way and paying severance and business damages to landowners and tenants.<sup>3</sup> An additional \$105 million was spent litigating FDOT’s takings state-wide.<sup>4</sup> One writer anticipates that over the next ten years, Florida will spend \$44.3 billion to

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1. Figures provided by the Cost Management Systems Department, State of Florida Department of Transportation, District IV, June 9, 1995 [hereinafter Costs]. During the first 11 months of fiscal year 1994-1995, i.e., June 1994 through May 1995, Florida Department of Transportation District IV, encompassing Broward, Palm Beach, Martin, and St. Lucie Counties, spent a total of \$22.9 million, compared to \$64.3 million spent by District VI, comprised of only Dade County.

2. See Erik Milstone, *Roadblock*, FLA. TREND, Mar. 1995, at 56, 59 (citing statistics provided by the Center for Urban Transportation Research in Tampa, Florida).

3. See Costs, *supra* note 1.

4. *Id.*

expand its roadway system.<sup>5</sup> This estimate is \$9 billion more than the state will have available at current tax rates.<sup>6</sup> Faced with the challenge of balancing Florida's constitutional guarantee of "full compensation"<sup>7</sup> against a rapidly expanding eminent domain program and its increasing cost, the Florida Legislature has taken steps to decrease the state's eminent domain litigation exposure.<sup>8</sup> Florida's courts, however, have been reluctant to follow the legislature's lead.

One of the many factors contributing to the increase in state-wide right of way costs is environmental contamination. Environmental contamination takes many forms including asbestos, urea-formaldehyde foam insulation, lead in drinking water, and petroleum hydrocarbon.<sup>9</sup> The Federal Highway Administration ("FHWA"), which contributes up to ninety percent of the funds spent by FDOT to revamp its overburdened state roads, often requires FDOT to clean up contamination prior to construction of federally-funded state roadways.<sup>10</sup> This cost traditionally has been paid by the FDOT and the FHWA. The cost of clean-up, however, ultimately falls on the taxpayer.

5. See Milstone, *supra* note 2, at 60.

6. *Id.*

7. See FLA. CONST. art. X, § 6(a), which states that "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner." See also *Dade County v. Brigham*, 47 So. 2d 602 (Fla. 1950) (stating that test for full compensation is not met if landowner is required to pay attorney fees and costs out of damages awarded for value of property taken).

8. See, e.g., FLA. STAT. § 73.092 (1995) (restructuring attorney's fees awarded in eminent domain cases and generally limiting such awards to percentage of benefit obtained for condemnee/client); see also FLA. STAT. § 337.27(2) (1995).

9. See generally James R. Arnold, *The Appraisal and Valuation of Contaminated Properties*, C643 A.L.I.-A.B.A. 405 (1991), available in WL, TP-ALL Directory, ALI-ABA Database; Vincent D'Elia & Catherine M. Ward, *The Valuation of Contaminated Property*, 111 BANKING L.J. 350 (1994); John D. Dorchester, Jr., *Environmental Pollution: Valuation in a Changing World*, 59 APPRAISAL J. 289 (1991); Peter J. Patchin, *Valuation of Contaminated Properties*, 56 APPRAISAL J. 7 (1988) [hereinafter Patchin, *Valuation*]; William B. Johnson, Annotation, *State and Local Government Control of Pollution from Underground Storage Tanks*, 11 A.L.R.5TH 388 (1994); Gregor I. McGregor, *Some Practical Suggestions for Valuing Contaminated Real Estate*, MASS. LAW. WKLY., Feb. 21, 1994, at 40, available in WL, TP-ALL Directory, LP Database (providing general discussions on numerous types of contamination).

10. Telephone Interview with Paul Lampley, District Contamination Impact Coordinator, District IV, Florida Department of Transportation Environmental Management Office (June 26, 1995). Mr. Lampley also indicated that an agreement between the FDOT and the Florida Highway Contractor's Association states that the FDOT will not send construction personnel onto the right of way, if contaminated.

In the recent first impression case of *Finkelstein v. Department of Transportation (Finkelstein II)*,<sup>11</sup> the Supreme Court of Florida answered a question of great public importance. The court answered in the affirmative the question whether evidence of contamination was relevant to property value.<sup>12</sup> The decision has the potential to slow cost increases attributable to contamination because real estate appraisers may now consider the negative effect of contamination on the value of property acquired in eminent domain actions.<sup>13</sup> The *Finkelstein II* decision also gives the FDOT the authority to present evidence of contamination and its corresponding negative effect on fair market value at trial.<sup>14</sup> Full compensation is linked to an estimate of fair market value.<sup>15</sup> Because fair market value may now reflect the negative impact of on-site contamination,<sup>16</sup> it is possible that FDOT could pay less for property negatively “stigmatized” by contamination. In the end, FDOT’s exercise of this newly-granted authority should help to control a portion of Florida’s rising eminent domain costs.

This comment examines the decision of the Supreme Court of Florida in *Finkelstein v. Department of Transportation*. Part II presents the facts of the case, the procedural history, and a summary of the supreme court decision. Part III of this comment discusses the relevance of evidence of contamination in eminent domain valuation proceedings and current appraisal valuation methodology,<sup>17</sup> as a result of the *Finkelstein II* decision.

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11. 656 So. 2d 921 (Fla. 1995).

12. *Id.* at 922.

13. *Id.* at 924.

14. *Id.* at 925.

15. See generally FLA. STAT. § 73.071(3)(a) (1995) (giving a jury of twelve persons the power to determine “the amount of compensation to be paid, which compensation shall include . . . [t]he value of the property sought to be appropriated”). Additionally, Jacksonville Expressway Auth. v. Henry G. Du Pree Co., 108 So. 2d 289 (Fla. 1958), states:

[w]e feel our constitutional provision for full compensation requires that the courts determine the value of the property by taking into account all facts and circumstances which bear a reasonable relationship to the loss occasioned the owner by virtue of the taking of his property under the right of eminent domain.

*Id.* at 291.

16. See *Finkelstein II*, 656 So. 2d at 922.

17. See *id.* at 923.

## II. *FINKELSTEIN v. DEPARTMENT OF TRANSPORTATION*

### A. *Facts of the Case*

In March 1990, the FDOT filed a petition to condemn Parcel 239, a whole taking of an environmentally contaminated gasoline service station located at Davie Boulevard and Interstate 95 in Fort Lauderdale, Broward County, Florida, as a part of the Interstate 595 expansion project.<sup>18</sup> The parcel was owned by Ida Finkelstein and Alice Fox and was leased to Tenneco Oil Company ("Tenneco").<sup>19</sup> The petition stated a good faith estimate of value for the property of \$642,650.<sup>20</sup> After the Order of Taking hearing was held May 1, 1990, FDOT deposited \$642,650 into the registry of the court, and title to the property vested in the FDOT.<sup>21</sup> Finkelstein and Fox answered the petition in May and June of 1990, respectively, and no other pleadings were filed until April 3, 1992, when a pretrial order setting the cause for trial was filed.<sup>22</sup>

Prior to December 1988, Tenneco discovered petroleum groundwater contamination beneath the service station site.<sup>23</sup> According to the supreme court, Tenneco reported the contamination to the Department of Environmental Regulation ("DER")<sup>24</sup> as encouraged by Florida law,<sup>25</sup> and began monitoring the contamination.<sup>26</sup> The parties agreed that the DER had determined the site was eligible for Florida's Early Detection Incentive

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18. *Id.*; State Dep't of Transp. v. Finkelstein (*Finkelstein I*), 629 So. 2d 932 (Fla. 4th Dist. Ct. App. 1993) (certifying question to Supreme Court of Florida), *review granted*, 648 So. 2d 722 (Fla. 1994), *aff'd*, 656 So. 2d 921 (Fla. 1995); Amended Brief of Petitioners at 1, *Finkelstein v. Department of Transp.*, 656 So. 2d 921 (Fla. 1995) (No. 83,308).

19. Amended Brief of Petitioners at 1, *Finkelstein* (No. 83,308).

20. *Finkelstein I*, 629 So. 2d at 932; Petition, State Dep't of Transp. v. Finkelstein, No. 90-06563(19) (Fla. Broward County Ct. Mar. 1, 1990).

21. *See* Certificate of the Clerk, State Dep't of Transp. v. Finkelstein, No. 90-06563(19) (Fla. Broward County Ct. May 1, 1990); *see also* discussion *infra* note 185.

22. *Finkelstein I*, 629 So. 2d at 932.

23. *Finkelstein II*, 656 So. 2d at 921, 923 (Fla. 1995).

24. *Id.* The Florida Department of Environmental Regulation is now known as the Florida Department of Environmental Protection.

25. *See* FLA. STAT. § 376.3071(9)(b) (1995).

26. Amended Brief of Petitioners at 2, *Finkelstein* (No. 83,308). Subsequently, FDOT investigated this matter and discovered that Tenneco, in fact, had not begun on-site remediation; rather, it was the FDOT itself who had begun the clean-up. *See* Transcript of Hearing on Remand at 29, *Department of Transp. v. Finkelstein*, No. 90-6563(19) (Fla. Broward County Ct. October 9, 1995).

("EDI") program.<sup>27</sup> The EDI program encouraged early detection, reporting, and clean-up of contamination from leaking petroleum storage systems through state reimbursement of clean-up expense.<sup>28</sup> Under the EDI program, only qualified sites were eligible for reimbursement, not qualified landowners.<sup>29</sup> Through a memorandum of understanding between the DER and the FDOT, the FDOT became the beneficiary of the site's EDI eligibility and state reimbursement of remediation costs.<sup>30</sup> Prior to the June 1992 trial, FDOT worked closely with the DER to quickly remediate the site to meet FDOT's construction schedule for the road improvement project.<sup>31</sup>

## B. Procedural Background

On June 12, 1992, FDOT filed a motion in limine seeking a pretrial determination of the admissibility of evidence that the property taken was contaminated with petroleum hydrocarbon and the cost of remediation.<sup>32</sup>

27. *Finkelstein II*, 656 So. 2d at 923.

28. See FLA. STAT. § 376.3071(9)(a)-(b), (12)(b); see also *Finkelstein II*, 656 So. 2d at 923; *Finkelstein I*, 629 So. 2d 932, 933 (Fla. 4th Dist. Ct. App. 1993), *aff'd*, 656 So. 2d 921 (1995); *Puckett Oil Co. v. State Dep't of Env'tl. Regulation*, 549 So. 2d 720 (Fla. 1st Dist. Ct. App. 1989) (determining eligibility for gasoline service station site under EDI program); *Commercial Coating Corp. v. State Dep't of Env'tl. Regulation*, 548 So. 2d 677 (Fla. 3d Dist. Ct. App. 1989), *review denied*, 560 So. 2d 232 (Fla. 1990) (defining mineral spirits as "petroleum product" under EDI statute to find site eligible for remediation cost reimbursement); Amended Brief of Petitioners at 1-2, *Finkelstein* (No. 83,308); Johnson, *supra* note 9, §§ 3-5, 13-15, at 402-12, 428-37.

Prior to June 1995, only sites with leaky underground storage tanks were eligible to participate in the EDI program. FLA. STAT. § 376.3071(9)(a)-(b), (12)(b). The majority of sites with this contamination problem are gasoline service stations. Reforms to the problem-laden EDI program limit eligibility for reimbursement of remediation costs to sites which score more than 50 under a new ranking system. Prakash Gandhi, *Critics: State Tank Program Revised But Not Repaired*, THE FLORIDA SPECIFIER, June 1995, at 1, 23. Of the 12,000 sites eligible for the EDI program, only 2300 score 50 or greater. *Id.* See S. 2578, 1995 Fla. Reg. Sess. (1995) for changes to Florida's EDI program.

29. See FLA. STAT. § 376.3071(9) (1987).

30. Amended Brief of Petitioners at 2, *Finkelstein* (No. 83,308). FDOT filed for EDI reimbursement on September 5, 1995, after the original application had been lost. Letter from Paul A. Lampley, District Contamination Impact Coordinator, District IV Florida Department of Transportation Environmental Management Office, to Charles Williams, Florida Department of Environmental Protection, Petroleum Cleanup Reimbursement Section (Sept. 5, 1995) (on file with author).

31. *Id.*; see also Interview with Linda Feroli Nelson, Administrator of Eminent Domain, District IV, Florida Department of Transportation, in Plantation, Fla. (June 20, 1995).

32. *Finkelstein II*, 656 So. 2d 921, 923 (Fla. 1995); Petitioner's Motion in Limine, State Dep't of Transp. v. *Finkelstein*, No. 90-06563(02) (Fla. Broward County Ct. June 12, 1992).

The FDOT took the position that evidence of contamination was relevant to the issue of full compensation and should be admitted.<sup>33</sup> The defendants argued that the evidence was not relevant because remediation costs were not fully ascertained at the time of trial and because the amount of the EDI reimbursement was not determined.<sup>34</sup> Following argument, the trial judge denied the FDOT's motion,<sup>35</sup> later confirming that counsel for the parties would not be permitted to comment upon contamination during opening statements.<sup>36</sup> The FDOT then proffered the contamination and remediation testimony of its environmental consultants, who were responsible for assessing the contamination, designing a remediation plan, and implementing the plan.<sup>37</sup> The FDOT also proffered the testimony of its appraiser.<sup>38</sup> In sum, the FDOT contended that the testimony of its experts would have established that: 1) the property was contaminated at the date of taking; 2) remediation costs ranged between \$750,000 and \$800,000; 3) buyers, sellers, and lending institutions routinely request contamination assessments of real property; 4) banks are reluctant to finance "dirty" property or take such property back in default; and 5) contamination "stigmatizes" real property and affects the marketability and desirability of the property and would have a negative effect on the value of the subject property of at least twenty to twenty-five percent.<sup>39</sup> Defendant's counsel objected to FDOT's proffer.<sup>40</sup> The trial court sustained the objection.<sup>41</sup>

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33. *Finkelstein I*, 629 So. 2d 932, 933 (Fla. 4th Dist. Ct. App. 1993), *aff'd*, 656 So. 2d 921 (Fla. 1995).

34. *Id.*

35. *Finkelstein II*, 656 So. 2d at 923; Trial Proceedings at 7, *State Dep't of Transp. v. Finkelstein*, No. 90-06563(02) (Fla. Broward County Ct. June 30, 1992).

36. Hearing on Petitioner's Motion in Limine at 13, *State Dep't of Transp. v. Finkelstein*, No. 90-06563(02) (Fla. Broward County Ct. June 29, 1992).

37. Brief for Respondent at 2-4, *Finkelstein* (No. 83,308); *see also* *Swift & Co. v. Housing Auth.*, 106 So. 2d 616 (Fla. 2d Dist. Ct. App. 1958) (holding that trial court should have allowed jury to do its duty after hearing testimony regarding possible zoning changes and value of site as phosphate mine).

38. Amended Brief of Petitioners at 4, *Finkelstein* (No. 83,308); Brief for Respondent at 4-5, *Finkelstein* (No. 83,308); Trial Proceedings at 2, *State Dep't of Transp. v. Finkelstein*, No. 90-06563(02) (Fla. Broward County Ct. June 30, 1992).

39. *Finkelstein II*, 656 So. 2d at 923; Brief for Respondent at 2-5, *Finkelstein* (No. 83,308); Petitioner's Motion in Limine, *State Dep't of Transp. v. Finkelstein*, No. 90-06563(02) (Fla. Broward County Ct. June 11, 1992).

40. *Finkelstein I*, 629 So. 2d 932, 933 (Fla. 4th Dist. Ct. App. 1993), *aff'd*, 656 So. 2d 921 (Fla. 1995).

41. *Id.*



The case was tried as if the property were “clean” on the date of valuation.<sup>42</sup> At trial, the parties agreed that the value of the improvements located on the subject site was \$350,000.<sup>43</sup> The FDOT’s appraiser testified at trial that the land, as if it were clean on the date of deposit, had a value of \$300,000.<sup>44</sup> The owner’s appraiser testified that the land had a value of \$567,000.<sup>45</sup> The range of testimony on full compensation ranged from \$650,000, according to the FDOT’s estimate, to \$917,000, by the owner’s estimate.<sup>46</sup> All of the comparable sales used to estimate the site’s value were uncontaminated.<sup>47</sup> The jury returned a verdict in favor of the landowners for \$525,000 for the value of the land plus the stipulated \$350,000 for the improvements, a total award of \$875,000.<sup>48</sup> Final judgment was entered in the amount of the verdict on July 27, 1992.<sup>49</sup> The FDOT filed a notice of appeal on August 13, 1992.<sup>50</sup>

In *Finkelstein I*, the Fourth District Court of Appeal reviewed the record and concluded that the proffered contamination, remediation, and stigma evidence had been improperly excluded by the trial judge.<sup>51</sup> Based primarily on another case decided by the Supreme Court of Florida,<sup>52</sup> the district court held that evidence of contamination and cost of remediation were relevant to the value of the property and that these issues should have gone before the jury.<sup>53</sup> The appellate court reversed the final judgment, remanded the cause for a new trial on the valuation issues, and certified the question to the Supreme Court of Florida as a matter of great public importance.<sup>54</sup>

42. *Id.*

43. *Id.*

44. *Id.*; Testimony of Edward N. Parker, State Dep’t of Transp. v. *Finkelstein*, No. 90-06563(19) (Fla. Broward County Ct. May 1, 1990).

45. *Finkelstein I*, 629 So. 2d at 933.

46. *Id.*

47. *Id.*

48. *Finkelstein II*, 656 So. 2d 921, 923 (Fla. 1995); *Finkelstein I*, 629 So. 2d at 933.

49. Amended Brief of Petitioners at 4, *Finkelstein* (No. 83,308); Brief for Respondent at 7, *Finkelstein* (No. 83,308).

50. Brief for Respondent at 7, *Finkelstein* (No. 83,308).

51. *Finkelstein I*, 629 So. 2d at 934-35.

52. See *Florida Power & Light Co. v. Jennings*, 518 So. 2d 895, 899 (Fla. 1987) (stating that “any factor, including public fear, which impacts on the market value of land taken for a public purpose may be considered to explain the basis for an expert’s valuation opinion”).

53. *Finkelstein II*, 656 So. 2d 921, 923 (Fla. 1995); *Finkelstein I*, 629 So. 2d at 934.

54. *Finkelstein II*, 656 So. 2d at 922. The lower court did not construct a certified question for the supreme court. Instead, the supreme court had to “glean” the certified question from record, as phrased by the parties. *Id.*

### C. *The Supreme Court of Florida Decision*

Justice Wells, writing for the majority,<sup>55</sup> began the opinion by quashing that portion of the district court's ruling that reversed the trial court's ruling that testimony concerning remediation costs was not admissible.<sup>56</sup> The court found from their review of the record that there was no factual issue as to the contamination of the property, the liability for the contamination, or the payment for the remediation costs under the EDI program.<sup>57</sup> Based on the FDOT's statements that the purpose for the remediation testimony was to show the basis for its expert valuation opinion,<sup>58</sup> the court held that the evidence of contamination and remediation costs was not relevant to the valuation of the subject site.<sup>59</sup> The court, however, limited this holding to the facts of this case where there was a program for reimbursement of the remediation costs, such as EDI.<sup>60</sup> The court further declined to decide whether remediation costs would be relevant in a valuation proceeding involving property for which reimbursement for remediation costs was not available.<sup>61</sup>

The court next agreed "with the district court that evidence of the fact that property is or has been contaminated is relevant to the market value of property in an eminent domain valuation proceeding."<sup>62</sup> The court relied on several sources to support its position. First, the court noted, based on an eminent domain law treatise,<sup>63</sup> that contamination can "stigmatize" a property thereby creating a reduction in value resulting from the increased risk associated with contaminated property.<sup>64</sup> Second, the court noted that the issue of valuing contaminated property has been the subject of articles by real estate appraisers, which recognize contamination as a factor that

55. Justice Wells delivered the opinion of the Court, in which Chief Justice Grimes, Justices Shaw, Kogan, and Harding concurred. *Finkelstein II*, 656 So. 2d at 923-26. Justice Anstead concurred specially with an opinion. *Id.* Justice Overton recused himself. *Id.*

56. *Id.* at 923.

57. *Id.*

58. *Finkelstein II*, 656 So. 2d at 923; *see also* Brief for Respondent at 11, *Finkelstein* (No. 83,308).

59. *Finkelstein II*, 656 So. 2d at 924.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* (citing 8 MELVIN A. RESKIN & PATRICK J. ROHAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 14C.06[1] (1994)).

64. *See Finkelstein II*, 656 So. 2d at 924.

experts consider in the valuation of property.<sup>65</sup> Finally, the court found its decision to be consistent with two other cases<sup>66</sup> holding that factors affecting market value are relevant in valuation proceedings.<sup>67</sup>

By analogizing to *Florida Power & Light Co. v. Jennings*, the court reasoned that if the fear of power lines was relevant to explain a decrease in value to the property in *Jennings*, evidence of contamination was a reasonable explanation for the decrease in value of the subject property.<sup>68</sup> In a quote from *Jennings*,<sup>69</sup> the court narrowed this reasoning by explaining that valuation experts routinely rely on sales of comparable property when valuing property.<sup>70</sup> Thus, the court stated, the focus of opinion testimony in a valuation proceeding must be value.<sup>71</sup> With regard to contaminated property, the court stated that “[e]vidence of contamination, because of its prejudicial nature, should not be a feature of a valuation trial beyond what is necessary to explain facts showing a reduction in value caused by contamination.”<sup>72</sup>

Returning to the facts of the case, the court recalled that the trial court had limited the FDOT’s proffer of evidence that the contamination stigma reduced the property value by twenty to twenty-five percent.<sup>73</sup> The court then noted that at oral argument, the FDOT’s counsel did not know whether its appraisal expert based his opinion on comparable sales of other contaminated property.<sup>74</sup> The court pointed out that for an appraiser’s opinion of a reduction in market value to be admissible it must have a basis

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65. *Id.* The court specifically cites a recent article appearing in the *Appraisal Journal*. See James A. Chalmers & Scott A. Roehr, *Issues in the Valuation of Contaminated Property*, 61 APPRAISAL J. 28 (1993), available in WL, TP-ALL Directory, JLR Database.

66. See *Florida Power & Light Co. v. Jennings*, 518 So. 2d 895, 899 (Fla. 1987); see also *Department of Agric. & Consumer Serv. v. Polk*, 568 So. 2d 35 (Fla. 1990) (stating that fair market value is that on which willing buyers and sellers agree only when they both are aware of all relevant facts regarding property at issue).

67. *Finkelstein II*, 656 So. 2d at 924.

68. *Id.* But see *Chappell v. Virginia Elec. & Power Co.*, 458 S.E.2d 282 (Va. 1995) (holding that owner’s testimony as to damages resulting to remainder property following condemnation for high voltage power lines was inadmissible).

69. See *Jennings*, 518 So. 2d at 898 (stating that eminent domain valuation trials “[t]ypically . . . involve[] real property brokers or appraisers who give valuation testimony based on, e.g., the current or potential use of the property in question, the population growth and development of the surrounding area, and sales of similar property”).

70. *Finkelstein II*, 656 So. 2d at 924-25.

71. *Id.*; see also *infra* part III.

72. *Finkelstein II*, 656 So. 2d at 925.

73. *Id.*

74. *Id.*

in facts and data reasonably relied upon by experts in the field of property valuation.<sup>75</sup> In addition, the court stated that such opinion testimony must pass the evidentiary test set forth in section 90.705(2) of the *Florida Statutes*.<sup>76</sup> The court held that there “must be a factual basis through evidence of sales of comparable contaminated property upon which to base a determination that contamination has decreased the value of the property.”<sup>77</sup> The court took this reasoning one step further by stating that if no evidence exists upon which a fact-finder could determine the decrease in property value, then the landowner would be entitled to fair market value of the property valued as uncontaminated.<sup>78</sup> After assigning to the condemnor the burden of proving decrease in value of contaminated property, the court found that because the Finkelstein property was in the process of being cleaned, it should be valued as if successfully cleaned on the date of taking.<sup>79</sup> In doing so, the court suggested that the FDOT’s appraiser base his opinion on sales of comparable properties which also have been successfully cleaned.<sup>80</sup>

Finally, the court rejected the landowner’s argument that because the stigma of contamination is temporary, it should not be admissible.<sup>81</sup> Relying on its previous discussion, the court concluded that if an expert’s opinion meets the evidentiary test described, then whether stigma is or is not temporary would be addressed during direct and cross examination.<sup>82</sup>

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75. *Id.* Section 90.704 of the *Florida Statutes* provides:

[t]he facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, him at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence.

FLA. STAT. § 90.704 (1995).

76. *Finkelstein II*, 656 So. 2d at 925. Section 90.705(2) of the *Florida Statutes* states: [p]rior to the witness giving his opinion, a party against whom the opinion or inference is offered may conduct a voir dire examination of the witness directed to the underlying facts or data for his opinion. If the party establishes prima facie evidence that the expert does not have a sufficient basis for his opinion, the opinions and inferences of the expert are inadmissible unless the party offering the testimony establishes the underlying facts or data.

FLA. STAT. § 90.705(2) (1995).

77. *Finkelstein II*, 656 So. 2d at 925.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Finkelstein II*, 656 So. 2d at 925.

In closing, the court declined to decide whether the FDOT's proffered evidence was admissible because the trial court so severely limited the proffer.<sup>83</sup> The court, however, repeated its holding that evidence of contamination is relevant to market valuation and is admissible upon meeting an adequate factual predicate.<sup>84</sup> This holding, however, was further limited to the particular circumstances of this case, where the site qualified for EDI reimbursement.<sup>85</sup> Accordingly, the supreme court approved of the district court's reversal of the trial court's ruling. The court then remanded the case for a determination by the trial court, upon a complete proffer of the FDOT's appraisal expert's testimony, of whether the evidence is admissible based on the analysis announced in the opinion.<sup>86</sup>

In a brief concurring opinion, Justice Anstead expressed uncertainty about the majority's imposition of additional restrictions on evidence of valuation.<sup>87</sup> While Justice Anstead stated that he would answer the certified question in the affirmative, he also stated he would "leave the issues of evidence and valuation to be resolved according to prevailing law."<sup>88</sup>

### III. DISCUSSION AND ANALYSIS

#### A. *Relevance of Contamination to Property Value*

Article X of the *Florida Constitution* guarantees that "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner . . . ."<sup>89</sup> Full compensation made to the landowner should be the "fair actual market value at the time of the lawful

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83. *Id.*

84. *Id.*

85. *Id.* at 925 n.1.

86. *Id.* On remand, the FDOT made its complete proffer, including the testimony of Edward N. Parker, the FDOT's appraiser, and Douglas R. Ashline, one of the FDOT's consultant environmental engineers. *See* Hearing Transcript at 2, 31-99, Department of Transp. v. Finkelstein, No. 90-06563(19) (Fla. Broward County Ct. Oct. 9, 1995). Following FDOT's complete proffer and argument by counsel, the trial court denied FDOT's Motion in Limine and signed a final judgment presented to the court by defense counsel. *Id.* at 118, 120. Upon making his decision, the trial judge asked FDOT counsel "[y]ou want to take that up and see what happens on that?" *Id.* at 120.

87. *Finkelstein II*, 656 So. 2d at 926 (Anstead, J., concurring).

88. *Id.*

89. FLA. CONST. art. X, § 6(a).

appropriation.”<sup>90</sup> Fair market value is the amount a willing purchaser, under no compulsion to buy, would pay for the property.<sup>91</sup> Determining full compensation, fair market value, and the value of the property taken and damages<sup>92</sup> to the property remaining, is the primary purpose of an eminent domain valuation trial.<sup>93</sup> Typically, this process involves real estate appraisers or brokers who give testimony on a variety of factors affecting value, including the current or potential highest and best use of the property,

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90. See *Sunday v. Louisville & N.R. Co.*, 57 So. 351 (Fla. 1912); see also *United States v. 429.59 Acres of Land*, 612 F.2d 459, 462 (9th Cir. 1980).

91. See *Dade County v. General Waterworks Corp.*, 267 So. 2d 633 (Fla. 1972); see also *State Road Dep't v. Stack*, 231 So. 2d 859 (Fla. 1st Dist. Ct. App. 1969). The court in *Stack* defines fair market value as the amount of money that a purchaser willing but not obliged to buy the property would pay an owner willing but not obliged to sell, taking into consideration all uses to which the property is adapted and might be applied in reason. *Id.* at 860. The American Institute of Real Estate Appraisers, now known as the Appraisal Institute, defines market value as:

[t]he most probable price in cash, terms equivalent to cash, or in other precisely revealed terms, for which the appraised property will sell in a competitive market under all conditions requisite to fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress.

Fundamental assumptions and conditions presumed in this definition are[:]

1. Buyer and seller are motivated by self-interest.
2. Buyer and seller are well informed and are acting prudently.
3. The property is exposed for a reasonable time on the open market.
4. Payment is made in cash, its equivalent, or in specified financing terms.
5. Specified financing, if any, may be the financing actually in place or on terms generally available for the property type in its locale on the effective appraisal date.
6. The effect, if any, on the amount of market value of atypical financing, services, or fees shall be clearly and precisely revealed in the appraisal report.

THE AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, NATIONAL ASS'N OF REALTORS, THE DICTIONARY OF REAL ESTATE APPRAISAL 194-95 (1984) [hereinafter DICTIONARY].

92. See *Jacksonville Expressway Auth. v. Henry G. Du Pree Co.*, 108 So. 2d 289 (Fla. 1958). “We are persuaded to the view that the facts of this case, viewed in the light of our constitutional guaranty of full and just compensation, call for a positive assertion of appellee’s right to reasonable compensation for the cost of moving its personal property.” *Id.* at 292.

93. See FLA. STAT. § 73.071(3).

population and development trends of the subject neighborhood, and recent sales of similar property.<sup>94</sup>

Eminent domain defense attorneys argue that full compensation is limitless and, therefore, testimony regarding factors negatively affecting value necessarily should be restricted.<sup>95</sup> This argument likely stems from the constitutional protection afforded to landowners from the state's wrongful exercise of its eminent domain police power.<sup>96</sup> Because of these constitutional guarantees, the supreme court also has been hesitant to place quantifiable limits on full compensation.<sup>97</sup> The supreme court, however, has held that "[a]lthough fair market value is an important element in the compensation formula, it is not an exclusive standard in this jurisdiction. Fair market value is merely a tool to assist us in determining what is full or just compensation, within the purview of our constitutional requirement."<sup>98</sup> In the wake of *Finkelstein II*, contamination has become another part of the

94. See *Florida Power & Light Co. v. Jennings*, 518 So. 2d 895, 898 (Fla. 1987); see also *Boynton v. Canal Auth.*, 265 So. 2d 722 (Fla. 1st Dist. Ct. App. 1972) (approving appraisal testimony based on the "development approach" where appraiser considered profit ratio, time to sell lots, price of lots, and present value of lots); *Division of Admin. State Dep't of Transp. v. West Palm Beach Garden Club*, 352 So. 2d 1177 (Fla. 4th Dist. Ct. App. 1977) (stating that "value in use" appraisal approach, rather than market valuation predicated on use for residential purposes, was proper standard of valuation to be used for park property).

95. See, e.g., Amended Brief of Petitioners at 14-15, *Finkelstein* (No. 83,308) (stating that the admission of contamination evidence in condemnation valuation would thwart full compensation). This argument is based primarily on *Dade County v. Brigham*, 47 So. 2d 602 (Fla. 1950), which states that the test for full compensation is not met if a landowner is required to pay attorney fees and costs out of damages awarded for the value of property taken.

96. See FLA. CONST. art. I, § 9 (Due Process Clause) (providing that "[n]o person shall be deprived of life, liberty or property without due process of law . . ."). *Daniels v. State Road Dep't*, 170 So. 2d 846 (Fla. 1964), states that the legislature cannot diminish the concept of full compensation as defined by the courts. The legislature, however, may require more than the amounts required by judicial interpretation. See also *De Soto County v. Highsmith*, 60 So. 2d 915 (Fla. 1952) (holding that except as limited by the constitution, proceedings for the acquisition of property by eminent domain shall be prescribed by law).

97. See *Daniels*, 170 So. 2d at 848 (concluding that both the United States and Florida Constitutions contain express provisions to safeguard private rights); see also *Peavy-Wilson Lumber Co. v. Brevard County*, 31 So. 2d 483 (Fla. 1947) (stating that the unrestrained power of eminent domain is one of the harshest proceedings practiced in the law).

98. See *Jacksonville Expressway Auth. v. Henry G. Du Pree Co.*, 108 So. 2d 289, 291 (Fla. 1958); see also *Jennings*, 518 So. 2d at 897 n.2 (stating "[t]here is no single test for determining what is full compensation").

full compensation formula and a tool by which Florida's definition of full compensation will be refined.

The starting place for determining full compensation in an eminent domain valuation proceeding is the appraiser's estimate of fair market value.<sup>99</sup> As stated above, fair market value reflects what willing buyers and sellers in the market place would pay for the property being acquired.<sup>100</sup> Numerous factors can affect this willing-buyer-seller test of fair market value.<sup>101</sup> Among them, physical characteristics of the property, use of the property, recent sales of other similar property, and improvements on the property are the most recognizable.<sup>102</sup> Until *Finkelstein II*, however, the list of judicially-recognized factors in Florida did not include evidence of contamination, even though buyers, sellers, appraisers, and mortgage lenders consider this important.<sup>103</sup>

As applied to the facts of the case, the Supreme Court of Florida rendered a narrow and limited decision in *Finkelstein II*. The broader holding, however, is that evidence of contamination is relevant to market value.<sup>104</sup> The decision requires condemnors to: 1) meet a factual predicate prior to introducing evidence of value decrease resulting from contamination;<sup>105</sup> 2) carry the burden of proof on this issue;<sup>106</sup> and 3) keep the focus of the eminent domain valuation proceeding on value.<sup>107</sup> Finally, the decision leaves open questions as to the legal requirements of the condemnor's appraiser in determining the effect of contamination on market value.

Applying the law announced in the decision to the facts of the case, the court specifically limited its holding in *Finkelstein II* to a site which had obtained EDI eligibility at the date of taking.<sup>108</sup> The decision, therefore, also is necessarily limited to the *Finkelstein* site, which was in the process

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99. *Du Pree*, 108 So. 2d at 292.

100. See *DICTIONARY*, *supra* note 91, at 116, 194-95.

101. See William G. Earle et al., *Compensation*, FLORIDA EMINENT DOMAIN PRACTICE AND PROCEDURE 175, 231-32 (4th ed. 1988) (providing a list of factors affecting the willing buyer-seller relationship and a list of factors that a willing buyer and seller probably would consider).

102. *Id.*

103. See *State v. Brandon*, 898 S.W.2d 224 (Tenn. Ct. App. 1994).

104. *Finkelstein II*, 656 So. 2d 921, 922 (Fla. 1995).

105. *Id.*

106. *Id.* at 922-25.

107. *Id.* at 925.

108. *Id.*



of being cleaned.<sup>109</sup> In *Finkelstein II*, the parties agreed that the site was contaminated and was eligible under the EDI program.<sup>110</sup> Remediation costs, however, were contested.<sup>111</sup> Because reimbursement for on-going remediation was available under the 1990 EDI program,<sup>112</sup> the supreme court found no factual issue regarding contamination and remediation costs.<sup>113</sup> The court also reasoned that to prevent the landowner from being prejudiced by the timing of FDOT's taking (during the clean-up process, for which the landowner would be reimbursed), the site should be assumed to be cleaned and valued as such.<sup>114</sup> Based on the facts of the case and the court's narrow application of the law to the specific facts presented, *Finkelstein II* would appear applicable only to sites with EDI eligibility and on-going remediation at the date of taking.

The broad holding of *Finkelstein II*, however, is that evidence of contamination is relevant to value.<sup>115</sup> The supreme court limited this broad holding only when applying it to the facts of this case.<sup>116</sup> Despite its narrow application here, *Finkelstein II* has the potential to apply in a variety of situations: 1) where any type of contaminant is present on a property; 2) alternate appraisal techniques are applied in valuing contaminated property; 3) in non-eminent domain valuation proceedings; and 4) where no EDI program or reimbursement plan exists. It is this broad holding regarding Florida valuation law which has the potential to impact the development of this continually evolving area of law.

The decision imposes a factual predicate on testimony regarding decrease in property value resulting from contamination.<sup>117</sup> Though the factual predicate, reflected in sections 90.704 and 90.705 of the *Florida Statutes*, is similar to evidence law throughout the nation,<sup>118</sup> the court articulated that to meet the predicate in this case, the appraiser "must [have] a factual basis through evidence of sales of comparable contaminated property upon which to base a determination that contamination has decreased the value of the property."<sup>119</sup> The court then assigned the

109. *Finkelstein II*, 656 So. 2d at 925.

110. *Id.* at 923.

111. Amended Brief of Petitioners at 2-3, *Finkelstein* (No. 83,308).

112. *See supra* note 28 and accompanying text.

113. *Finkelstein II*, 656 So. 2d at 924.

114. *Id.* at 925.

115. *Id.*

116. *Id.* at 925 n.1.

117. *Id.* at 922.

118. *See, e.g.*, FED. R. EVID. 704, 705.

119. *Finkelstein II*, 656 So. 2d at 925.

burden of meeting this evidentiary threshold, in addition to proving decrease in value, upon the condemnor.<sup>120</sup> Accordingly, the broad holding of *Finkelstein II* applies when a party meets the factual predicate set forth by the court and contained in the *Florida Statutes*.

The supreme court also stated that, in this case, the condemnor must prove value decrease based on market data.<sup>121</sup> Conversely, the condemnee would have to rebut with proof of no decrease or a lesser decrease, presumably based on market data.<sup>122</sup> In effect, parties must necessarily argue about market data and its effect on market value. Though the court stated that the focus of an eminent domain valuation proceeding must be value,<sup>123</sup> the court may not have realized the inherent difficulties associated with locating and analyzing sales of comparable contaminated property (market data).<sup>124</sup> As discussed in detail below, the difficulty with the court's approach is that if sales of contaminated sites are located at all, an appraiser may not be able to isolate a specific and quantifiable value decrease based on the data.<sup>125</sup> The court's decision, however, also is broad enough to allow for alternate methods of valuing contaminated property. These alternate methods would meet the factual predicate articulated by the supreme court and indicate that contaminated sites, or sites in the process of being cleaned, sell for less than uncontaminated sites. Without meeting the factual predicate, however, an appraiser's testimony would not be admissible. This result is consistent with the evidentiary threshold contained in the *Florida Statutes*, and with *Jennings*, holding that all factors relevant to value must be considered.<sup>126</sup>

Finally, the decision states that evidence of contamination should not become a central "feature" of an eminent domain valuation trial.<sup>127</sup> The court reasoned that the focus of an eminent domain valuation proceeding is value.<sup>128</sup> This rationale is supported by the court's reliance on *Jennings*. In *Jennings*, the supreme court articulated the issue in eminent domain

120. *Id.*

121. *Id.*

122. See *Florida Power & Light Co. v. Jennings*, 518 So. 2d 895, 896 (Fla. 1987). The landowner introduced expert testimony against a condemnor to rebut the condemnor's representation that potential buyers are knowledgeable about the alleged adverse effects and would depreciate the land adjacent to a power line before they would buy it. *Id.*

123. *Id.*

124. See *infra* text accompanying notes 265-76.

125. *Id.*

126. *Jennings*, 518 So. 2d at 899.

127. *Finkelstein II*, 656 So. 2d 921, 924-25 (Fla. 1995).

128. *Id.* at 925.

proceedings is to be full compensation to the landowner for the property taken.<sup>129</sup> In *Jennings*, the court disapproved of the landowner's use of expert witnesses to explain complex scientific evidence about alleged long-term medical effects from proximity to high-voltage power lines.<sup>130</sup> The court stated that "[a]llowing such scientific testimony into evidence . . . is irrelevant to the issue of full compensation."<sup>131</sup> The court further stated that "[t]he introduction into evidence of independent expert's scientific evidence is . . . unnecessary and only serves to confuse the actual issue before the jury."<sup>132</sup>

Based on *Jennings*, it is reasonable to believe that the court would similarly disapprove of complicated, technical evidence regarding contamination and cost of remediation in an eminent domain valuation proceeding, if full compensation and value are the focus of an eminent domain valuation proceeding.<sup>133</sup> It logically follows that the valuation expert (appraiser) should be the only expert witness required to testify regarding contamination. In addition, the valuation expert's testimony must necessarily be limited to the market-based effects of contamination on value, if any.<sup>134</sup> In this way, the "expert's valuation opinion is based on reasonable factors [which] may be determined by the jury without resort to other expert witnesses' testimony or documentary evidence concerning the reasonableness of the buying public's fears," as held in *Jennings*.<sup>135</sup> The supreme court's rationale is that this restriction should prevent eminent domain valuation proceedings from becoming a forum in which to resolve complicated environmental issues and present lengthy and complex expert testimony, both of which may be only peripherally related to value or full compensation. Finally, this limitation reserves for the jury, rather than for technical experts, the exclusive decision-making power with regard to the effect of contamination on value,<sup>136</sup> assuming that a trial court first permits the testimony.

From the condemnor's perspective, *Finkelstein II* has the potential to create conflict with the line of cases where landowners with contaminated

129. *Jennings*, 518 So. 2d at 898.

130. *Id.* at 899.

131. *Id.* at 897-98.

132. *Id.* at 899.

133. *Id.*

134. The *Jennings* court did not approve of the landowner's scientific experts' testimony. However, the court accepted the appraiser's testimony. *Jennings*, 517 So. 2d at 896.

135. *Id.* at 899.

136. *See id.* at 899. "We believe that a jury is certainly capable of determining whether an expert's valuation opinion is reasonable . . ." *Id.*

property seek tax abatement because of the contamination.<sup>137</sup> For example, a landowner may believe that his contaminated property is worth five dollars per square foot for tax purposes. Were this same landowner to become a condemnee, however, it is possible that the owner could assert that based on *Finkelstein II*, the property should be valued as if cleaned at fifteen dollars per square foot, leaving the condemnor to pay the clean-up bill. Because the taxing authority and the condemnor likely are not the same entity,<sup>138</sup> there is the potential for a landowner-turned-condemnee to “double-dip” and gain an incongruous advantage (or a fuller measure of compensation) in the combined tax abatement/condemnation situation. Almost all condemnees are taxpayers.<sup>139</sup> The converse, however, is not true. To prevent this result, *Finkelstein II* must necessarily cross litigation boundaries and be given full precedential effect in all types of valuation proceedings, including tax abatement cases.

*Finkelstein II* also encourages landowners of contaminated property to begin remediation quickly to gain the advantage of the decision, should they become a condemnee. For instance, if a landowner of contaminated property immediately begins environmental assessment or remediation and subsequently becomes a condemnee, it is likely that courts would find a factual similarity with, and therefore, reason to apply, *Finkelstein II*.<sup>140</sup> The decision, however, does not state in what stage of the remediation process the site must be to gain this valuation advantage. For example, the landowners of the *Finkelstein* site had “begun remediation” at the date of the taking.<sup>141</sup> It is uncertain as to how far into the remediation process the

137. See, e.g., Robert I. McMurry, *Treatment of Environmental Contamination in Eminent Domain Cases*, C975 A.L.I.-A.B.A. 237, 251-53 (1995), available in WL, TP-ALL Directory, ALI-ABA Database [hereinafter McMurry, *Treatment*] (presenting case law and an analysis of valuing contaminated property for tax purposes with an extensive bibliography); see also *University Plaza Realty Corp. v. City of Hackensack*, 624 A.2d 1000 (N.J. Super. Ct. App. Div.), cert. denied, 634 A.2d 527 (N.J. 1993).

138. In Florida, the Department of Transportation is authorized to condemn property to widen state roads. FLA. STAT. chs. 73, 74, 334-39 (1995). County government is responsible for real estate taxation.

139. It is generally known that examples of tax-exempt owners are not-for-profit corporations, charitable organizations, property owned by the state, county, or city, churches, libraries, and schools, and other public buildings.

140. *Finkelstein II* held that because clean-up on the site was under way at the date of taking, the site should be valued as if the clean-up were completed. *Finkelstein II*, 656 So. 2d 921, 925 (Fla. 1995).

141. Interview with Linda Ferroli Nelson, *supra* note 31; see also *supra* text accompanying note 26.

site was at the date of the taking.<sup>142</sup> Conversely, if a landowner in a similar factual setting had not begun remediation prior to the taking, it is likely that the *Finkelstein II* decision would require denial of a landowner's request to limit expert testimony on the effect of contamination on the value of the site.

The *Finkelstein II* decision also leaves open several other avenues for broader application. It would be reasonable for the decision to apply in cases where sites suffer from contamination other than underground petroleum hydrocarbon. Because of the court's reliance on *Jennings*, it is possible that *Finkelstein II* could apply in cases litigating the value of sites contiguous to contaminated sites, but which may not themselves be contaminated.<sup>143</sup> This also seems reasonable considering the court's reference to "stigma" created by the increased risk associated with contaminated property.<sup>144</sup> Appraisal professionals generally agree that stigma accrues to property that adjoins contaminated property, as well as to the contaminated property itself.<sup>145</sup> Finally, because value is the focus of any type of valuation proceeding, evidence of contamination also would be relevant in non-eminent domain valuation proceedings.

This is as far as the Supreme Court of Florida has gone. Until recently, little, if any, case law on this issue had emerged nationwide. Like *Finkelstein II*, however, a handful of courts in other states recently have held that evidence of contamination is relevant to market value.<sup>146</sup> These cases

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142. See *supra* text accompanying note 26.

143. See Lorraine Lewandrowski, *Toxic Blackacre: Appraisal Techniques & Current Trends in Valuation*, 5 ALB. L.J. SCI. & TECH. 55, 87-92 (1994), available in WL, TP-ALL Directory, JLR Database (discussing valuation techniques applicable to property near or adjacent to contaminated sites).

144. *Finkelstein II*, 656 So. 2d at 924.

145. See Lewandrowski, *supra* note 143, at 89; see also Howard R. Cabot, *Post-Remediation 'Stigma' Damages Hinge on Hard Evidence of Residual Risk*, INSIDE LITIG., Oct. 1994, at 28, available in WL, Law Reviews, Legal Texts and Periodicals Directory, Journals and Law Reviews Database; Arnold, *supra* note 9, at 415-16.

146. See *Redevelopment Agency v. Thrifty Oil Co.*, 5 Cal. Rptr. 2d 687 (Ct. App. 1992) (holding that evidence of contamination is just one of many factors that jury may consider in determining fair market value in eminent domain proceeding); *Murphy v. Town of Waterford*, No. 520173, 1992 WL 170588, at \*1 (Conn. Super. Ct. July 9, 1992) (holding that locality cannot reduce amount payable to landowner as just compensation for taking for cleanup expenses, because Connecticut statute provides for reimbursement of such expenses); *Department of Transp. ex rel. People v. Parr*, 633 N.E.2d 19 (Ill. App. Ct. 1994) (holding that state may not introduce cost required to remediate contaminated property in eminent domain proceeding because such costs are not condition influencing property's value); *City of Olathe v. Stott*, 861 P.2d 1287 (Kan. 1993) (holding that in eminent domain proceeding,

are similar to *Finkelstein II* in that each involved condemnation of contaminated property where the court addressed the question of whether evidence of contamination was relevant to value.<sup>147</sup> Of these few cases, those involving mass acquisition of uranium mines,<sup>148</sup> as well as tax abatement cases,<sup>149</sup> are not as analogous to *Finkelstein II* as are the following cases. Though considering the broad holding of *Finkelstein II*, the factually distinguishable uranium mine and tax abatement cases provide a valuable comparative source for case law addressing collateral issues such as appropriate and/or admissible appraisal methodology.<sup>150</sup>

In *State v. Brandon*,<sup>151</sup> the issue before the court was whether evidence of contamination and remediation costs were relevant in determining the fair market value of a property being acquired under eminent domain.<sup>152</sup> The Tennessee appellate court held that evidence of contamination and the cost to remediate it was relevant in determining the fair market value of a property being acquired under eminent domain.<sup>153</sup>

The Tennessee Department of Transportation ("TDOT") acquired a portion of a bulk oil distributorship and gasoline service station in December 1991.<sup>154</sup> After the court transferred title to the state, the state's contractor found underground petroleum hydrocarbon contamination.<sup>155</sup> Between

evidence of contamination is admissible for purpose of determining fair market value); *State v. Brandon*, 898 S.W.2d 224 (Tenn. Ct. App. 1994) (holding that trial court erroneously excluded environmental contamination evidence which was relevant to issue of valuation in eminent domain proceeding). All of these cases involve condemnation of contaminated property where relevance of evidence of contamination was questioned.

147. See cases cited *supra* note 146.

148. See, e.g., *Department of Health v. Hecla Mining Co.*, 781 P.2d 122 (Colo. Ct. App. 1989) (holding that jury may consider present and future use and condition of condemned land for purpose of determining value after state has exercised its power of eminent domain pursuant to Uranium Mill Tailings Radiation Control Act); see also *State Dep't of Health v. The Mill*, 887 P.2d 993 (Colo. 1994), *cert. denied*, 115 S. Ct. 2612 (1995).

149. See *McMurry, Treatment*, *supra* note 137, at 251-53.

150. See, e.g., *Westling v. Mille Lacs*, Nos. C4-93-504-R, C2-94-379-R, C9-94-380-R, C5-93-706-R, 1995 WL 128511, at \*2-\*3 (Minn. Tax Ct. Mar. 17, 1995), *aff'd*, 1996 WL 39626 (Minn. 1996) (holding that value of property for tax assessment purposes should account for negative "stigma" which attaches to previously contaminated property); *University Plaza Realty Corp. v. City of Hackensack*, 624 A.2d 1000 (N.J. Super. Ct. App. Div.), *cert. denied*, 634 A.2d 527 (N.J. 1993).

151. 898 S.W.2d 224 (Tenn. Ct. App. 1994).

152. *Id.* at 225.

153. *Id.*

154. *Id.*

155. *Id.*

January and April 1992, the state began to remediate the site.<sup>156</sup> In June 1992, the property owner was notified by TDOT of the contamination and was ordered to conduct additional pollution surveying and abatement procedures.<sup>157</sup> The landowners denied the existence of contamination and did not acquiesce to the state's demands to clean up the site.<sup>158</sup> The state subsequently completed the contamination remediation, at a total cost of \$64,525.58.<sup>159</sup> Acting on the motion of the landowners, the trial court ordered the state, its attorneys, and expert witnesses, not to mention at trial the existence of the contamination nor to reveal the cost of remediation.<sup>160</sup> The valuation experts were forced to testify on the value of the land as if it was uncontaminated.<sup>161</sup> The jury returned a verdict in favor of the landowners.<sup>162</sup> After the jury retired, TDOT attempted to proffer evidence concerning the contamination on the property and the cost of remediation.<sup>163</sup> The court stated that the proffer could be made at a later date.<sup>164</sup> TDOT then filed a Motion for Remittitur, or offset of remediation costs against the verdict and requested a new trial.<sup>165</sup> The trial court denied the motions and TDOT appealed.<sup>166</sup>

Relying on the *Tennessee Rules of Evidence*,<sup>167</sup> which state that relevant evidence is generally admissible,<sup>168</sup> the court held that the contaminated nature of the property is relevant to the issue of valuation because it tends to make a lower market value more probable than it would without the evidence.<sup>169</sup> The court also reasoned that the form of property, or a property characteristic, is relevant to valuation.<sup>170</sup> In reviewing the facts of the case, the court looked to the testimony of two experts.<sup>171</sup> An affidavit from a banker stated that banks generally will not finance

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156. *Brandon*, 898 S.W.2d 224, 225 (Tenn. Ct. App. 1994).

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Brandon*, 898 S.W.2d at 225.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Brandon*, 898 S.W.2d at 225-26.

167. *See* TENN. R. EVID. 401, 403.

168. *Id.*

169. *Brandon*, 898 S.W.2d at 227.

170. *Id.*

171. *Id.* at 226-27.

contaminated property or take back contaminated property, and that the subject site was the type of site which typically required an environmental assessment.<sup>172</sup> Similarly, the appraiser stated in an affidavit that some offset for remediation was required and that stigma was the detrimental effect of contamination on property value.<sup>173</sup> The court finally found support for its decision based on three cases from other jurisdictions,<sup>174</sup> including *Finkelstein I*.<sup>175</sup> In applying the law to the facts, the court found evidence of contamination relevant, but rejected a pure "1 to 1 offset" of remediation costs to land value.<sup>176</sup>

*Brandon* is consistent with *Finkelstein II*. However, *Brandon* is broader than *Finkelstein II* because it holds remediation costs, in addition to evidence of contamination, to be relevant to value.<sup>177</sup> The case is distinguishable on its facts because in *Brandon*, the contamination was not known at the date of the taking.<sup>178</sup> However, the balance of the factual circumstance is strikingly similar. Also, by relying on Tennessee evidence rules and case law,<sup>179</sup> the court's reasoning is similar to that utilized in *Finkelstein II*. At the time briefs for *Finkelstein II* were submitted to the Supreme Court of Florida,<sup>180</sup> *Brandon* had not yet been decided.<sup>181</sup> If it had, it is likely that the Tennessee decision would have bolstered the FDOT's position in *Finkelstein II*.

Likewise, the issue presented in *Department of Transportation ex rel. People v. Parr*,<sup>182</sup> also was whether evidence of contamination and remediation costs are relevant in determining the fair market value of a property being acquired under eminent domain.<sup>183</sup> However, the Illinois appellate court held that under the facts of the case, evidence of contamina-

172. *Id.* at 226.

173. *Id.* at 226-27.

174. *Brandon*, 898 S.W.2d at 227.

175. 629 So. 2d 932 (Fla. 4th Dist. Ct. App. 1993), *aff'd*, 656 So. 2d 921 (Fla. 1995).

176. *Brandon*, 898 S.W.2d at 228.

177. *Id.* at 226-28.

178. *Id.* at 225.

179. *Id.* at 225-28.

180. The Amended Brief of Petitioners was submitted July 7, 1994 and Respondent's Brief was submitted July 26, 1994. See Amended Brief of Petitioners at 30, *Finkelstein* (No. 83,308); Brief for Respondent at 25, *Finkelstein* (No. 83,308).

181. *Brandon* was decided on December 30, 1994. *Brandon*, 898 S.W.2d at 224.

182. 633 N.E.2d 19 (Ill. App. Ct. 1994).

183. *Id.* at 21.



tion and the cost to remediate was not relevant to the fair market value of a property being acquired.<sup>184</sup>

At the same time that the Illinois Department of Transportation (“IDOT”) notified the landowner that his property would be required to construct a bridge, IDOT informed the owner that he owed \$100,000 for the property’s environmental remediation costs.<sup>185</sup> Subsequently, IDOT filed a complaint to condemn the property via Illinois’ “quick-take” statute.<sup>186</sup> At the quick-take bench trial, IDOT presented evidence that the property’s value was zero due to the alleged presence of contamination and because of remediation costs.<sup>187</sup> The court awarded possession of the site to IDOT.<sup>188</sup> Pursuant to the Illinois “quick-take” law, the court’s written order following the trial stated that evidence of environmental contamination was not admissible in an eminent domain proceeding.<sup>189</sup> The trial court further found that IDOT failed to prove the existence of an “unsafe or unlawful condition” on the property, according to Illinois law.<sup>190</sup> IDOT undertook to remediate the site.<sup>191</sup> At the valuation trial, the landowners filed a motion to bar all testimony concerning environmental contamination.<sup>192</sup> The trial court held a hearing and ordered the parties to submit briefs and argument addressing: 1) whether evidence of environmental contamination and remediation costs was admissible; and 2) whether such evidence would implicate the landowner’s procedural due process rights.<sup>193</sup> After both parties submitted briefs, the trial court granted the landowner’s Motion to Bar Testimony on Contamination and Remediation.<sup>194</sup> The trial court certified the question to the Illinois appellate court. IDOT filed a Motion for Leave to Appeal.<sup>195</sup> The appellate court granted IDOT’s motion.<sup>196</sup>

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184. *Id.*

185. *Id.* at 20.

186. *Id.* The “quick-take” statute described is similar to that outlined in chapter 74 of the *Florida Statutes*, where a condemnor may take property under an expedited, or shortened, schedule.

187. *Parr*, 633 N.E.2d at 20.

188. *Id.*

189. *Id.*

190. *Id.* at 21. The court refers to § 7-119 of the Illinois Eminent Domain Act.

191. *Id.*

192. *Parr*, 633 N.E.2d at 21.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

Though the court in *Parr* held that, based on the facts of the case, evidence of contamination was not relevant to value,<sup>197</sup> *Parr* also is consistent with *Finkelstein II*. If the IDOT had proved that the contamination constituted an illegal condition affecting the value of the property, it is likely that the court would have found the contamination relevant to value,<sup>198</sup> in accord with Illinois' Eminent Domain Act.<sup>199</sup> Similarly, the Illinois court held that without proving the existence of the illegal condition (contamination), evidence of remediation costs also was not relevant to value.<sup>200</sup> This is not unlike the holding in *Finkelstein II* that because the site was eligible for EDI reimbursement, evidence of remediation cost also was not admissible.<sup>201</sup> The Illinois court, however, took this rationale a step further. It declared that evidence of remediation costs, if admissible in this case, would violate the procedural due process rights of the landowner because IDOT did not follow the procedural safeguards set forth in the Environmental Protection Act.<sup>202</sup> Specifically, IDOT failed to notify the landowner of the nature or extent of the environmental hazard on the property.<sup>203</sup> IDOT also failed to inform the landowner that it sought to hold them liable for remediation costs.<sup>204</sup> Because of these failures, the landowner's procedural due process claim succeeded.<sup>205</sup> Such a claim would not have been viable in *Finkelstein II* because the tenant was aware of the contamination and had taken steps to remediate it prior to the taking.<sup>206</sup> Aside from this constitutional claim, *Parr* also stands for the

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197. 633 N.E.2d at 21.

198. *Id.*

199. *See id.* at 21-22 (quoting ILL. ANN. STAT. ch. 735 para. 5/7-119 (West 1992)). Paragraph 5/7-119 provides that:

[e]vidence is admissible as to . . . (2) any unsafe, unsanitary, substandard, or illegal condition, use or occupancy of the property; . . . and (4) the reasonable cost of causing the property to be placed in a legal condition, use or occupancy. Such evidence is admissible notwithstanding the absence of any official action taken to require the correction or abatement of such illegal condition, use or occupancy.

ILL. ANN. STAT. ch. 735 para. 5/7-119.

200. *Parr*, 633 N.E.2d at 22.

201. *Finkelstein II*, 656 So. 2d at 922-24.

202. *Parr*, 633 N.E.2d at 22-23.

203. *Id.* at 23.

204. *Id.*

205. *Id.*

206. *Finkelstein II*, 656 So. 2d 921, 922-23 (Fla. 1995); Amended Brief of Petitioners at 1, *Finkelstein* (No. 83,308); Interview with Linda Ferrol Nelson, *supra* note 31.

proposition that given the correct evidentiary predicate, evidence of contamination would be relevant to value.

A third case, similar to *Finkelstein II*, was rendered by the Supreme Court of Kansas in *City of Olathe v. Stott*.<sup>207</sup> Like *Finkelstein II*, the court in *Stott* considered the relevance of contamination to value and, also like *Finkelstein II*, concluded that the Kansas underground storage tank reimbursement program did not prohibit evidence of the effect that contamination and stigma had on the subject property's value.<sup>208</sup>

In mid-1990, the city of Olathe, Kansas condemned eight tracts of land to expand the intersection at 119th Street and Interstate 35.<sup>209</sup> Two of the tracts had been operated as service stations for twenty-five years.<sup>210</sup> Each site had leaking underground gasoline and diesel fuel storage tanks.<sup>211</sup> At the eminent domain valuation trial, the appraisers for the city were allowed, over the landowners' objections, to testify to the impact of the contamination on value.<sup>212</sup> The landowners sought to introduce testimony that on previous occasions, the city had acquired contaminated sites without investigating the contamination.<sup>213</sup> The landowners also proffered testimony to impeach the credibility of the city's appraisers.<sup>214</sup> The trial court ruled that the landowners' evidence was not admissible because it was not relevant.<sup>215</sup> After the trial was concluded, the court inquired of the jury about how it considered the evidence of the contamination in reaching its verdict.<sup>216</sup> The juror who responded indicated that the jury did, in fact, consider the contamination and that it reduced the property's value by ten percent.<sup>217</sup> The landowners appealed claiming that the trial court erred by excluding their proffered testimony and by inquiring of the jury.<sup>218</sup>

The pertinent part of the decision presents a detailed look at the Kansas Storage Tank Act ("Act"),<sup>219</sup> which is similar in structure to Florida's EDI

207. 861 P.2d 1287 (Kan. 1993).

208. *Id.* at 1289.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Stott*, 861 P.2d at 1289.

213. *Id.* at 1290.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Stott*, 861 P.2d at 1290.

218. *Id.*

219. *Id.* at 1289-93 (citing KAN. STAT. ANN. § 65-34,100 to 65-34,212 (1993)).

program.<sup>220</sup> In brief, the Act provides for reimbursement of remediation costs for qualified sites.<sup>221</sup> The landowners' primary argument was that the Act preempted all other law that might address funding the clean-up costs required from the contamination.<sup>222</sup> In addition, the landowners argued that because of the Act, the impact of contamination on property value should not be an issue in an eminent domain valuation proceeding.<sup>223</sup> The court, however, sided with the city, stating that the Act did not specifically address reduction in property value attributable to risk or stigma associated with contamination.<sup>224</sup> Furthermore, the court held that the Act did not address what appeared to be primarily a cost issue—the reduction in value attributable to risk and stigma associated with the contamination.<sup>225</sup> The court held that the trial court did not abuse its discretion in permitting the appraisers' testimony that risk and stigma associated with the contamination had a negative effect on the properties' value because their opinion was formed over time after market investigation.<sup>226</sup>

The reasoning used in *Stott* is strikingly similar to that found in *Finkelstein II*. In effect, the Supreme Court of Florida held that the EDI program, like the Kansas Storage Tank Act, did not provide the only remedy for matters associated with on-site contamination and that any consideration of the issue is otherwise improper in an eminent domain valuation proceeding.<sup>227</sup> Like the Florida court, the Supreme Court of Kansas also recognized that a negative stigma attaches to property even after it has been cleaned.<sup>228</sup> Consideration of this issue in an eminent domain valuation proceeding, as noted by both courts, is proper because stigma has a direct bearing on, and is relevant to, property value.<sup>229</sup> Finally, it is interesting to note that the *Stott* decision was available to the Supreme Court of Florida at the time its decision in *Finkelstein II* was rendered.<sup>230</sup> The *Stott* decision, despite its similarities, is not mentioned in the *Finkelstein II*

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220. See *supra* note 28 and accompanying text.

221. *Stott*, 861 P.2d at 1290-93.

222. *Id.* at 1292.

223. *Id.*

224. *Id.*

225. *Id.* at 1293.

226. *Stott*, 861 P.2d at 1298.

227. *Finkelstein II*, 656 So. 2d 921, 922-23 (Fla. 1995).

228. *Stott*, 861 P.2d at 1293-98.

229. *Id.*; *Finkelstein II*, 656 So. 2d at 924.

230. *Stott* was decided by the Supreme Court of Kansas on October 29, 1993. *Stott*, 861 P.2d at 1287.

decision, however. Perhaps the Supreme Court of Florida was not compelled to place reliance on *Stott*, particularly because of the availability and applicability of *Jennings*, a Florida case.

Finally, a California Court of Appeal reached a similar conclusion in *Redevelopment Agency v. Thrifty Oil Co.*<sup>231</sup> The claim arose in an eminent domain proceeding involving the condemnation of a petroleum hydrocarbon contaminated gasoline service station.<sup>232</sup> In recognizing that evidence of contamination is relevant to value, the court rejected the condemnee's contention that remediation costs were not properly before the jury.<sup>233</sup> The court stated that contamination was considered by all experts in determining the fair market value of the property acquired.<sup>234</sup> The court in *Thrifty*, unlike the court in *Finkelstein II*, also stated that remediation was a characteristic of the property which would affect its value.<sup>235</sup> Despite the broader holding in *Thrifty*, the thrust of the decision is quite similar to and supportive of the reasoning announced in *Finkelstein II*.

Because only a handful of cases of this type exist, it would be somewhat premature to state that a trend in the law has developed. It is possible, however, to draw several distinct conclusions from a comparison of these cases. First, most courts seemed willing to recognize that given the proper factual predicate, evidence of contamination is relevant to value.<sup>236</sup> This evidence, in the form of a properly-qualified appraiser's testimony, could include the risk and stigma associated with the contamination<sup>237</sup> and remediation costs where a plan of clean-up was not already under way or completed.<sup>238</sup> Second, it is apparent that courts favor a "back-door" approach to admitting evidence of the effect of contamination on property value. In each case, the evidence sought to be admitted came from a valuation expert, not a contamination or environmental expert.<sup>239</sup> Accordingly, the relevant factors related to the contamination and effecting market

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231. 5 Cal. Rptr. 2d 687 (Ct. App. 1992).

232. *Id.* at 688.

233. *Id.* at 689 n.9.

234. *Id.*

235. *Id.*

236. See *Finkelstein II*, 656 So. 2d 921, 922-23 (Fla. 1995); *Thrifty*, 5 Cal. Rptr. 2d at 689; *State v. Brandon*, 898 S.W.2d at 224 (Tenn. Ct. App. 1994). But see *Department of Transp. ex rel. People v. Parr*, 633 N.E.2d 19, 22 (Ill. App. Ct. 1994).

237. *Finkelstein II*, 656 So. 2d at 925; *Thrifty*, 5 Cal. Rptr. 2d at 689; *Brandon*, 898 S.W.2d at 225. These cases describe factors which generally make up stigma.

238. See *Finkelstein II*, 656 So. 2d at 924; *Parr*, 633 N.E.2d at 21-23.

239. See *Finkelstein II*, 656 So. 2d at 924; *Thrifty*, 5 Cal. Rptr. 2d at 689; *Brandon*, 898 S.W.2d at 226; *Parr*, 633 N.E.2d at 20.

value should be addressed by a single valuation witness, such as an appraiser testifying on the question of "stigma." In this way, eminent domain valuation proceedings also do not become environmental trials. By following the courts' suggestions, a host of environmental technicians and expert witnesses would not dominate the trial, prejudice the defendant,<sup>240</sup> or confuse the jury.<sup>241</sup> Finally, those courts which have admitted evidence of remediation cost, have also disfavored "1-to-1" remediation cost to value set-offs.<sup>242</sup> Presumably, if an appraiser employs a valuation approach considering "stigma,"<sup>243</sup> the problem of a "1-to-1" set off can be avoided.

*Finkelstein II* declares that evidence of contamination is relevant to value.<sup>244</sup> Though the decision seems to be limited to the facts of the case, its broader holding should apply to the many situations where contamination and value intersect. The decision also is consistent with case law in other jurisdictions. Finally, *Finkelstein II* suggests a plan by which a condemnor may litigate both issues without prejudicing the defendant and without creating a highly technical environmental proceeding with the potential to confuse the jury.

### B. *Methods of Valuing Contaminated Property*

The Supreme Court of Florida noted that the issue of valuing contaminated property has been the subject of much recent discussion within the appraisal profession.<sup>245</sup> Particularly, the court noted that these sources recognize contamination as a factor considered by appraisers.<sup>246</sup> The court did not, however, stop at merely recognizing that the appraisal profession is developing techniques by which appraisers may estimate the value of contaminated property. In applying the law to the facts of the case, the court stated, based on Florida evidence law,<sup>247</sup> that a proper factual basis on which to base an opinion of the effect of contamination on property

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240. *Finkelstein II*, 656 So. 2d at 925 (stating that evidence of contamination, by its nature, is prejudicial).

241. See *Florida Power & Light Co. v. Jennings*, 518 So. 2d 895, 899 (Fla. 1987).

242. See *Brandon*, 898 S.W.2d at 226; see also *University Plaza Realty Corp. v. City of Hackensack*, 624 A.2d 1000 (N.J. Super. Ct. App. Div.), cert. denied, 634 A.2d 527 (N.J. 1993); *Inmar Assoc., Inc. v. Borough of Carlstadt*, 549 A.2d 38 (N.J. 1988); see generally *McGregor*, *supra* note 9.

243. See *infra* notes 283-89 and accompanying text.

244. *Finkelstein II*, 656 So. 2d at 922.

245. *Id.* at 923.

246. *Id.*

247. See FLA. STAT. §§ 90.703, .705 (1995).

value is through reliance on evidence of sales of comparable contaminated property.<sup>248</sup> Based on the court's statement, it would seem that such an approach is only one method of valuing contaminated property. Since the late 1980s, new approaches to valuing contaminated property have emerged from within the appraisal community. Prior to discussing these new approaches to valuing contaminated property, however, a brief discussion of general appraisal practice is appropriate.

The *Uniform Standards of Professional Appraisal Practice* requires appraisers to consider the three traditional approaches to valuing property.<sup>249</sup> These approaches are the cost approach, the income approach, and the market or sales comparison approach.<sup>250</sup> The outcome of each approach is weighed by the appraiser when making her final estimate of market value.<sup>251</sup>

The cost approach is a specialized set of procedures in which an appraiser derives a value indication by estimating the current cost to reproduce or replace the existing structure, deducting for all accrued depreciation in the property, and adding the estimated land value.<sup>252</sup> The cost approach is particularly useful in valuing new or nearly new improvements and properties that are not frequently exchanged in the market.<sup>253</sup> Specialty properties, like gasoline service stations, are particularly suited to being valued by the cost approach because of the absence of a significant market and comparable sales data.<sup>254</sup> In developing the cost approach for a *Finkelstein*-like site, the appraiser would be required to locate sales of comparable contaminated vacant land.<sup>255</sup> The appraiser also must develop

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248. *Finkelstein II*, 656 So. 2d at 925.

249. UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE 13-15 (Appraisal Foundation ed., 1995). Rule 1-4 sets forth the standards.

250. APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE 71 (10th ed. 1992) [hereinafter APPRAISAL TEXT].

251. *Id.* at 553-60.

252. See DICTIONARY, *supra* note 91, at 75.

253. See APPRAISAL TEXT, *supra* note 250, at 80. Gasoline service stations are generally considered to be "special purpose" properties. Special use properties, or limited market properties, are properties that are not frequently exchanged in the market because of unique physical design, special construction materials, specialized use improvements, or layouts that restrict their utility to the use for which they were originally built. *Id.* at 21; see also *Great Atlantic & Pacific Tea Co. v. Kiernan*, 366 N.E.2d 808, 811 (N.Y. 1977) (holding that special purpose properties are those which are uniquely adapted to business conducted upon them, or use made of them, and cannot be converted to other uses without expenditure of substantial sums of money); *Lewandrowski*, *supra* note 143, at 59.

254. See APPRAISAL TEXT, *supra* note 250, at 23.

255. See *id.* at 298-310 (discussing land valuation techniques).

a market-based rate of depreciation for any improvements on the property.<sup>256</sup> If the appraiser cannot locate comparable sales, she would have to employ an alternate appraisal method<sup>257</sup> which, if speculative or untried<sup>258</sup> within the professional appraisal community, may not satisfy the proper factual predicate.

The income approach is a set of procedures which an appraiser uses to derive a value indication for income-producing property by converting anticipated income benefits into an indication of present value.<sup>259</sup> Specifically, an indication of value is derived by capitalizing the property's net income based on a market-derived overall capitalization rate, which considers the risk associated with the investment.<sup>260</sup> For contaminated property, the income approach should consider factors including: 1) the extent and nature of the contamination, which may result in unmarketability or reduced marketability; 2) the type of contaminated property involved; 3) the presence of assumable financing; and 4) demand for alternative uses.<sup>261</sup> Most appraisal methodologists agree that the presence of contamination increases the risk associated with an investment-type, income-producing property.<sup>262</sup> Increased risk typically translates into less value.<sup>263</sup> In addition, factors including remediation costs, lost rental or investment

256. *Id.* at 243-65.

257. See, for example, Patchin, *Valuation*, *supra* note 9, which presents three different approaches to valuing contaminated property and frequently recognized as the seminal article addressing valuation of contaminated property. See also Peter J. Patchin, *Contaminated Properties—Stigma Revisited*, 59 APPRAISAL J. 167 (1991) [hereinafter Patchin, *Stigma Revisited*] (continuing the development of innovative valuation analyses and techniques).

258. See *Terra-Products, Inc. v. Kraft General Foods, Inc.*, 653 N.E.2d 89 (Ind. Ct. App. 1995); Robert I. McMurry & David H. Pierce, *New Developments for Environmental Practitioners in Hazardous Materials Litigation*, C750 A.L.I.-A.B.A. 343, 371-73 (1992), available in WL, TP-ALL Directory, ALI-ABA Database [hereinafter McMurry & Pierce, *New Developments*]; Anthony J. Rinaldi, *Contaminated Properties—Valuation Solutions*, 59 APPRAISAL J. 377 (1991). But see *Westling v. Mille Lacs County*, Nos. C4-93-504-R, C2-94-379-R, C9-94-380-R, C5-93-706-R, 1995 WL 128511, at \*1 (Minn. Tax Ct. Mar. 17, 1995), *aff'd*, 1996 WL 39626 (Minn. 1996) (approving of an appraiser's use of the cost, market, and income approaches to reach correlated opinions of "unimpaired value," then deducting a stigma factor and cost to cure from the unimpaired values to reach final conclusions of market value).

259. See DICTIONARY, *supra* note 91, at 159.

260. See APPRAISAL TEXT, *supra* note 250, at 409.

261. See Lewandrowski, *supra* note 143, at 60-61.

262. See, e.g., Patchin, *Valuation*, *supra* note 9, at 13 (advancing modified income capitalization method as most reliable approach to valuation of contaminated investment properties).

263. See APPRAISAL TEXT, *supra* note 250, at 415-19.



income, and “down time” during clean-up, also can negatively impact on an income stream and translate into less value.<sup>264</sup>

The market approach, or sales comparison approach, is a set of procedures by which an appraiser derives a value indication by comparing the property being appraised to similar properties that have recently been sold.<sup>265</sup> The appraiser then analyzes the appropriate units of comparison, and makes adjustments, based on the elements of comparison, to the sales prices of the comparable sales.<sup>266</sup> An appraiser considers factors including property rights conveyed, financing terms, conditions of sale, market conditions, location, physical characteristics, economic characteristics, use, and other non-realty components of the sale price.<sup>267</sup> The sales comparison approach is particularly appropriate and persuasive when sufficient market data, or recent sales of similar properties exist.<sup>268</sup> This approach, however, is rarely applied to specialty properties, such as gasoline service stations, because few similar properties may be sold in a given market, even one that is geographically broad.<sup>269</sup> In such a case, the market approach may establish only a broad limit for the value of the property being appraised and help to verify the findings of the other approaches to value.<sup>270</sup>

Most appraisal methodologists agree that the market approach has limitations which render it virtually ineffective when appraising contaminated property.<sup>271</sup> The ineffectiveness of this approach primarily arises due to the lack of market data.<sup>272</sup> Because the nature and extent of contamination on a property is unique to that parcel, it is all but impossible

264. Patchin, *Valuation*, *supra* note 9, at 11-13.

265. See *DICTIONARY*, *supra* note 91, at 268; D'Elia & Ward, *supra* note 9, at 357.

266. See *APPRAISAL TEXT*, *supra* note 250, at 371.

267. See *id.* at 367.

268. *Id.* at 368-69; see also Lewandrowski, *supra* note 143, at 63.

269. Lewandrowski, *supra* note 143, at 63.

270. *Id.*

271. See D'Elia & Ward, *supra* note 9, at 359; McMurry, *Treatment*, *supra* note 137, at 249 (discussing petroleum contaminated properties); Arnold, *supra* note 9, at 418; Robert I. McMurry & David H. Pierce, *Environmental Contamination and its Effect on Eminent Domain*, C791 A.L.I.-A.B.A. 133, 162 (1993); McMurry & Pierce, *New Developments*, *supra* note 258, at 343; Robert I. McMurry & David H. Pierce, *Environmental Remediation and Eminent Domain*, C709 A.L.I.-A.B.A. 105, 135 (1992), available in WL, TP-ALL Directory, ALI-ABA Database.

272. *APPRAISAL TEXT*, *supra* note 250, at 368-69; see also Lewandrowski, *supra* note 143, at 63; Chalmers & Roehr, *supra* note 65, at 36. *But see* McMurry, *Treatment*, *supra* note 137, at 249 (indicating that some appraisers have had success with appraising petroleum contaminated sites because such contamination is so common among the property type).

to locate sales of property similarly contaminated.<sup>273</sup> In addition, because the degree and nature of contamination is unique to each property, it also is difficult to compare remediation plans and costs.<sup>274</sup> Similarly, the owner's liability stemming from the contamination may vary from site to site, thereby making unit to unit comparison virtually impossible.<sup>275</sup> Even if market data exist, the amount of adjustment required to make a sale of contaminated property similar to the contaminated property being appraised may make any value indication highly speculative.<sup>276</sup>

Since the *Finkelstein* case was first litigated, advances in appraisal methodology have led to the development of several new and innovative approaches to appraising contaminated property.<sup>277</sup> The income approach is particularly well-suited to modification for use in valuing contaminated property. Once the income stream to the property is estimated, a complex series of mathematical calculations and income valuation models may be employed. Because of the appraiser's ability to more realistically and accurately quantify the effects of contamination through these models, the most promising advances in appraisal theory in regard to appraising contaminated property have developed here. At best, these new models are complex, intricate, and likely difficult for the average juror to understand. Though these methods are gaining industry approval, courts are likely to disfavor them as being complicated and too technical.

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273. See Lewandrowski, *supra* note 143, at 63. On remand, the FDOT made its complete proffer, including the testimony of Edward N. Parker, MAI, the FDOT's appraiser. See Hearing Transcript at 48-99, Department of Transp. v. Finkelstein, No. 90-06563(19) (Fla. Broward County Ct. Oct. 9, 1995). During FDOT's proffer, Mr. Parker testified to the information and data available to him since the time of trial and at the time of the hearing. *Id.* at 49. As to market data found after the trial, Mr. Parker discovered only seven case studies of Florida properties which were either contaminated or in the process of clean-up at the time of sale. *Id.* at 70 (case studies on file with author). Mr. Parker also testified to the extreme difficulty and time consuming process involved in locating this type of market data. *Id.* at 66, 69. The data indicated that "stigma" attaching to contaminated property ranged from 26 to 94%. *Id.* at 68.

274. See Arnold, *supra* note 9, at 418.

275. See Patchin, *Valuation*, *supra* note 9, at 10-12.

276. See APPRAISAL TEXT, *supra* note 250, at 373-74.

277. See, e.g., Patchin, *Valuation*, *supra* note 9; Lewandrowski, *supra* note 143, at 74-88 (describing the application to contaminated properties of such valuation techniques as future benefit analysis, discounted cash flow method, modified income approach, discounting for remediation costs, nominal value to site, and sales method); Rinaldi, *supra* note 258, at 377 (asserting as preferable a form of depreciation which involves appraisal of property as if uncontaminated, followed by appraisal which accounts for existence of contamination).

One of these new valuation approaches is a modified version of the income approach. The approach adjusts the overall capitalization rate to reflect higher risk associated with the contaminated site.<sup>278</sup> The higher capitalization rate, when applied to the property's income stream, indicates a lower overall value.<sup>279</sup> Another method, proposed by the same appraisal theorist, is to appraise the property as clean, then re-appraise it as dirty, and subtract the value indication of the latter from the former for an indication of damages to the property resulting from the contamination and clean-up costs.<sup>280</sup> Yet another approach is based on the premise that the contamination changes the highest and best use of the site, thereby resulting in reduced value.<sup>281</sup> Despite the emergence of these new methods, the appraisal community, as well as the courts, continues to struggle to find a way to quantify the effect that contamination has on market value.<sup>282</sup>

Perhaps the most frequently approved means of quantifying this effect is through testimony of "stigma."<sup>283</sup> Stigma has been defined as the impact on property value stemming from the increased risk associated with the property and the effect of this risk on marketability and financeability.<sup>284</sup> One author suggests that stigma contains seven elements including disruption, concealability, aesthetic effect, responsibility, prognosis, degree of peril, and level of fear.<sup>285</sup> This author also suggests that these seven

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278. Patchin, *Valuation*, *supra* note 9, at 13-14; *see also* Chalmers & Roehr, *supra* note 65. *But see* University Plaza Realty Corp. v. City of Hackensack, 624 A.2d 1000 (N.J. Super. Ct. App. Div.), *cert. denied*, 634 A.2d 527 (N.J. 1993) (disapproving of a landowner's appraiser's use of a discounted cash flow valuation technique). For another article discussing this topic *see* Richard A. Newstein, *Estimating Value Diminution by the Income Approach*, 60 APPRAISAL J. 293 (1992).

279. Patchin, *Valuation*, *supra* note 9 at 13-14.

280. *Id.* at 14.

281. *Id.*

282. *See generally* D'Elia & Ward, *supra* note 9.

283. *See Finkelstein II*, 656 So. 2d 921, 924 (Fla. 1995); *see also* Westling v. Mille Lacs, Nos. C4-93-504-R, C2-94-379-R, C9-94-380-R, C5-93-706-R, 1995 WL 128511, at \*1 (Minn. Tax Ct. Mar. 17, 1995), *aff'd*, 1996 WL 39626 (Minn. 1996) (approving of appraiser's testimony that stigma associated with the contamination had a negative effect on property value); City of Olathe v. Stott, 861 P.2d 1287 (Kan. 1993). *See generally* D'Elia & Ward, *supra* note 9 (stating that judicial recognition of reductions in market value because of the existence of contamination has been slow in coming).

284. Chalmers & Roehr, *supra* note 65; *see also* Terra-Products, Inc. v. Kraft General Foods, Inc., 653 N.E.2d 89 (Ind. Ct. App. 1995); Patricia R. Healy & John J. Healy, Jr., *Lenders' Perspectives on Environmental Issues*, 60 APPRAISAL J. 397 (1992).

285. Bill Mundy, *Stigma and Value*, 60 APPRAISAL J. 7 (1992).

criteria are used to evaluate and determine the degree of stigma.<sup>286</sup> Determining stigma, however, ultimately boils down to extensive research because appraisers will seldom find this type of market data in recorded transactions.<sup>287</sup> Not only does stigma attach to property that is contaminated, appraisers now contend that stigma also remains after the property has been cleaned.<sup>288</sup> Despite the difficulties inherent in quantifying stigma in the marketplace, courts seem willing to accept testimony regarding stigma if the appraiser supports an estimate of stigma based on reasonable appraisal methodology, including the methodology outlined above.<sup>289</sup> In addition, the logical simplicity of the "stigma approach" may make it more attractive and appeal to both judges and jurors who likely are unfamiliar and uncomfortable with complicated and highly technical valuation techniques.

#### IV. CONCLUSION

The Supreme Court of Florida held in *Finkelstein II* that evidence of contamination is relevant to market value. At first glance, the decision appears to be limited to eminent domain valuation proceedings in which the value of whole takings of contaminated sites with EDI eligibility is determined. *Finkelstein II*, however, presents a broader holding that transcends the factual limitations of the case. The decision expands the list of factors admissible when valuing all types of contaminated property. The decision is consistent with Florida case law and the law developing in other jurisdictions. Finally, the decision also suggests a means through which testimony regarding the negative effect of contamination on property value may be presented.

Evidence of contamination has only just begun to make its way into the courtroom. In the future, appraisers, attorneys, and courts will continue to struggle with this topic. Though *Finkelstein II* may appear to be a small

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286. *Id.* at 9.

287. Patchin, *Stigma Revisited*, *supra* note 257, at 172.

288. See Cabot, *supra* note 145, at 27; see also Bradford D. Roth & Neville M. Bili-moria, "Post-Cleanup Stigma" Claims: *It Can Happen to You*, ENVTL. PROTECTION, June 1995, at 52.

289. See *Terra-Products, Inc. v. Kraft General Foods, Inc.*, 653 N.E.2d 89 (Ind. Ct. App. 1995); *Westling v. Mille Lacs*, Nos. C4-93-504-R, C2-94-379-R, C9-94-380-R, C5-93-706-R, 1995 WL 128511, at \*1 (Minn. Tax Ct. Mar. 17, 1995), *aff'd*, 1996 WL 39626 (Minn. 1996); *City of Olathe v. Stott*, 861 P.2d 1287 (Kan. 1993); see also James D. Masterman, *Opinion Testimony in Eminent Domain Trials*, C975 A.L.I.-A.B.A. 87 (1995), available in WL, TP-ALL Directory, ALI-ABA Database (listing other cases in which appraiser testified regarding stigma).

step toward resolving the countless issues this type of litigation raises, it is a measured step in the right direction. It is logical to hold that evidence of contamination is relevant to value. Future decisions should begin to clarify this general logical basis and provide the legal and appraisal communities with specific guidance on this important, emerging area of law.

*Michael T. Sheridan*

# The Growth Management Pendulum: The Ecological Clock is Ticking for Florida and Other States

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## I. INTRODUCTION

Conservation is getting nowhere because it is incompatible with our Abrahamic concept of land. We abuse land because we regard it as a commodity belonging to us. When we see land as a community to which we belong, we may begin to use it with love and respect. There is no other way for land to survive the impact of mechanized man, nor for us to reap from it the esthetic harvest it is capable, under science, of contributing to culture. That land is a community is the basic

concept of ecology but that land is to be loved and respected is an extension of ethics . . . .<sup>1</sup>

Indifference has the potential for placing growth management on the cusp of catastrophe. Growth management is a land use control approach that aspires to govern the character, rate, and site of growth and development.<sup>2</sup> The primary purpose of growth management in Florida is to balance the influx of individuals pouring into the state with the vital need to protect natural resources.<sup>3</sup> The term growth management is interchangeable with ecosystem management in the context of environmental protection.<sup>4</sup> An ecosystem is defined as “[a]n ecological community together with its environment, functioning as a unit.”<sup>5</sup> Therefore, a key component of growth management is the necessity for local governments to establish land use patterns and intensities that are consistent with the protection of wildlife habitats.<sup>6</sup>

Part II of this article analyzes Florida’s growth management background, and how this state established important precedents in the early 1970s. Florida’s ability to maintain effective growth management has been attributed to factors such as citizen support, political and administrative guidance, and “[t]he state’s growth management watchdog group, 1000 Friends of Florida.”<sup>7</sup> However, the state must maintain vigilance and continually persist in struggling for new sources of revenue so a cohesive and balanced infrastructure can be sustained.<sup>8</sup>

Part III explains the concept of concurrency as it relates to traffic congestion and overcrowding of schools. The human factor is paramount. Attention should be given in devising sound plans to effectively utilize

1. LUTHER J. CARTER, *THE FLORIDA EXPERIENCE: LAND AND WATER POLICY IN A GROWTH STATE* 337-38 (1974) (quoting ALDO LEOPOLD, *A SAND COUNTY ALMANAC* x (Oxford Univ. Press 1966)). Aldo Leopold was one of the Wilderness Society organizers and the founder of scientific wildlife management in the United States. *Id.* at 200.

2. Quintin Johnstone, *Government Control of Urban Land Use: A Comparative Major Program Analysis*, 39 N.Y.L. SCH. L. REV. 373, 416 (1994). Although growth management resembles zoning, it relies more on comprehensive planning and significant direction by state governments. *Id.*

3. John M. DeGrove, *State and Regional Planning and Regulatory Activity: The Florida Experience and Lessons for Other Jurisdictions*, C930 A.L.I.-A.B.A. 397, 427 (1994).

4. Interview with Richard Grosso, Legal Director of 1000 Friends of Florida, in Fort Lauderdale, Fla. (July 12, 1995).

5. THE AMERICAN HERITAGE COLLEGE DICTIONARY 435 (3d ed. 1993).

6. Interview with Richard Grosso, *supra* note 4.

7. DeGrove, *supra* note 3, at 448.

8. *Id.* at 449.

concurrency requirements as a growth management tool in Florida and other states.

Part IV focuses on the connection between the Endangered Species Act ("ESA") and, more specifically, Florida's legal requirements under growth management. The ESA ensures the continued existence of threatened or endangered species by conserving "the ecosystems upon which . . . [they] depend."<sup>9</sup> This section will also discuss North Key Largo, Florida, which contains the highest concentration of listed endangered species.<sup>10</sup> A unique program established by the state for the continued survival of the Key Deer, found predominantly on Big Pine Key, will be examined.

Part V discusses the Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers ("COE"), regarding their attempts to safeguard and manage Florida's prevailing wetlands. Advance identification ("ADID"), which permits the EPA to gather data on the inherent value of wetlands, in cooperation with the COE and the state, is examined. Information gleaned from such studies is of merit to the community, local governments, environmental organizations, and conservation groups in taking preventative measures and in planning for the future.<sup>11</sup> For example, benefits may be conferred respectively upon project planning, land-use management, and wetland protection activities.<sup>12</sup> The concepts of cumulative and secondary impacts<sup>13</sup> are also discussed as they relate to the future of wetland protection and conservation.

The growth management statutes of Oregon and Vermont are the central focus of Part VI. This section also investigates how Florida fashioned its growth management statutes after both the Oregon and the Vermont models. While Florida and Vermont fall under the Model Land Development Code ("MLDC") for state growth management regulation, Oregon functions as the leading example for the "Planning Consistency" model ("PC").<sup>14</sup>

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9. 16 U.S.C. § 1531(b) (1994).

10. Interview with Richard Grosso, *supra* note 4.

11. Eric Hughes, *The Role of Planning in Wetland Permitting: Advanced Identification, Special Area Management Plans, State Wetland Management Plans 1.1* (Dec. 1993) (unpublished manuscript, on file with the Environmental and Land Use Law Section Public Interest Representation Committee).

12. *Id.*

13. *See infra* note 194 and accompanying text.

14. James H. Wickersham, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489, 490 (1994).



Part VII explores other states that have passed growth management statutes based on the PC model. They include Georgia,<sup>15</sup> Maine,<sup>16</sup> Maryland,<sup>17</sup> New Jersey,<sup>18</sup> Rhode Island,<sup>19</sup> and Washington.<sup>20</sup> This article concludes by reiterating the importance for involvement in growth management at all levels of government. For example, private individuals must also aid the government in the process of implementing land-use plans. In summary, growth management must balance the rights of landowners with the numerous threatened species, the primary reason behind the ESA.

## II. A HISTORICAL ANALYSIS OF FLORIDA'S GROWTH MANAGEMENT

Florida's natural environment has undergone a significant metamorphosis with individuals manipulating the land to make it more desirable for colonization.<sup>21</sup> As a result, mangrove flats and salt marshes were frequently saturated and enveloped within seawalls.<sup>22</sup> Interior wetlands were depleted in order to build and develop roads, and water in Florida was identified as the "common enemy" in the courts of law.<sup>23</sup> Rivers were "channelized" for controlled navigation and usefulness, and to promote the elimination of flood waters.<sup>24</sup> The environment was otherwise molested through water pollution, the cutting of forests, and degradation of habitat for various species of wildlife who were, in turn, forced into unstable retreats.<sup>25</sup>

Florida has one of the most comprehensive systems for handling rapid growth and development.<sup>26</sup> This system includes involvement from three governmental tiers at the state, regional, and local levels.<sup>27</sup> Together, these governmental entities implement permitting and regulatory programs which

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15. GA. CODE ANN. §§ 36-70, 50-8 (1990 & Supp. 1993).

16. ME. REV. STAT. ANN. tit. 30-A, §§ 4311-4344 (West Supp. 1993) (amending and repealing Comprehensive Planning and Land Use Regulation Act, 1989 Me. Laws 104).

17. MD. CODE ANN., STATE FIN. & PROC. §§ 5-701 to 5-7A-02 (Supp. 1993).

18. N.J. STAT. ANN. §§ 52:18A-196 to -207 (West Supp. 1993).

19. R.I. GEN. LAWS § 45-22.2 (1991 & Supp. 1993).

20. WASH. REV. CODE ANN. § 36.70A (West 1991 & Supp. 1993).

21. CARTER, *supra* note 1, at 4-5.

22. *Id.* at 5.

23. *Id.*

24. *Id.*

25. *Id.*

26. David L. Powell, *Managing Florida's Growth: The Next Generation*, 21 FLA. ST. U. L. REV. 223, 227 (1993) [hereinafter Powell, *Managing Florida's Growth*].

27. *Id.*

include land planning, developments of regional impact (“DRIs”), and state supervision of distinctive areas.<sup>28</sup>

The growth problem in Florida did not emanate from a shortage of space for newcomers to the state.<sup>29</sup> Rather, it occurred because these individuals were inclined to inhabit the identical land spaces as previous settlers.<sup>30</sup> The growth problem was exacerbated by steadfast population resulting in overdevelopment of specific areas.<sup>31</sup>

Florida’s growth management concerns began in 1970-71 as a result of a serious drought in the Southeast and Tampa Bay areas.<sup>32</sup> Then Governor Reubin Askew arranged for deliberations on water management which necessitated regulation of Florida’s growth.<sup>33</sup> Subsequently, the Governor enlisted a task force which presented the following:<sup>34</sup> the Environmental Land and Water Management Act,<sup>35</sup> the Water Resources Act,<sup>36</sup> the State Comprehensive Planning Act,<sup>37</sup> and the Land Conservation Act.<sup>38</sup> A companion law was also proposed which mandated that local governments accept plans approved by the 1975 legislature.<sup>39</sup>

Within a decade, the shortage of capital was evident, thus, it became essential that the cost of Florida’s growth management status be evaluated.<sup>40</sup> In 1978, a reappraisal of the system commenced<sup>41</sup> which continued until widespread growth management legislation was enacted by Congress in 1984 and 1985.<sup>42</sup> Upon his election, Governor Bob Graham established a task force on resource management which resulted in the enhancement of section 38.05 of the *Florida Statutes*.<sup>43</sup> This was accomplished by instituting a method “for defining areas of critical state concern . . . [whereby the]

28. *Id.* at 228.

29. CARTER, *supra* note 1, at 11.

30. *Id.*

31. *Id.*

32. DeGrove, *supra* note 3, at 427.

33. *Id.*

34. *Id.*

35. FLA. STAT. ch. 380 (1995).

36. FLA. STAT. ch. 373 (1995).

37. FLA. STAT. ch. 186 (1995).

38. FLA. STAT. ch. 259 (1995).

39. *See* FLA. STAT. ch. 163 (1975).

40. DeGrove, *supra* note 3, at 427.

41. *Id.* at 428.

42. *Id.*

43. *Id.*

new law, featuring resource planning and management committees, became the state's most effective growth management tool."<sup>44</sup>

Consequently, the Environmental Land Management Study Committee II ("ELMS II") was created.<sup>45</sup> It provided suggestions and a blueprint for Florida's future in growth management.<sup>46</sup> As a result, a second generation of growth management programs were enacted<sup>47</sup> including: the State Comprehensive Plan,<sup>48</sup> the Omnibus Growth Management Act of 1985,<sup>49</sup> and the Florida State and Regional Planning Act of 1984.<sup>50</sup>

In 1986, the "glitch bill" was passed.<sup>51</sup> It specified obligations for assigning concurrency levels of service, consistency requirements for local government plans, and altered windload criteria for the coastal zone.<sup>52</sup> On May 11, 1993, Governor Lawton Chiles signed House Bill 2315<sup>53</sup> into law. All of the provisions contained in the 1993 Act were to serve a function in Florida's future growth management, specifically, in the fields of land, air, water resources, and public utilities.<sup>54</sup>

The state planning system was directed to provide a portion of the State Comprehensive Plan that included the preparation of growth management.<sup>55</sup> Six substantive growth areas recognized in the 1993 Act include: classifica-

44. *Id.*

45. DeGrove, *supra* note 3, at 428.

46. *Id.*

47. *Id.* at 430.

48. *Id.* This strategic plan focused on the means and ends of achieving goals, as opposed to a traditional plan. *Id.* However, this plan comprised a significant framework and set the stage for the rest of the system. DeGrove, *supra* note 3, at 430.

49. *Id.* The objective of this law was to require the governor's office to provide a state plan which was to be introduced to the 1985 legislature, and for regional planning councils ("RPCs") to furnish comprehensive regional policy plans. *Id.* In turn, the legislature was to allocate funds, in the amount of \$500,000, in support of the plan. *Id.* Additional funds were appropriated in order to reinforce the State Land Planning Agency segment of the Department of Community Affairs ("DCA") by expanding the amount of available positions and further monetary functions. *Id.*

50. DeGrove, *supra* note 3, at 430. This law aimed at improving the growth management system through the inclusion of a provision requiring all local governments to prepare new or revised comprehensive plans, in association with the goals of the state and regional plans. *Id.* In doing so, a "critical link" was produced between the state, regional, and local levels, placing Florida in a managerial capacity in terms of growth. *Id.*

51. *Id.* at 432.

52. *Id.*

53. 1993 Fla. Sess. Law Serv. 93-206 (West).

54. Powell, *Managing Florida's Growth*, *supra* note 26, at 233.

55. *Id.* at 238 (citing FLA. STAT. § 186.009 (Supp. 1994)).

tion of urban and metropolitan growth centers<sup>56</sup> and standards for ascertaining favorable future urban growth;<sup>57</sup> recognition of sections of state and regional environmental importance, including the implementation of strategies for preservation;<sup>58</sup> planning policies regarding the state's future transportation infrastructure;<sup>59</sup> effecting policies that positively advance land acquisition programs;<sup>60</sup> establishing priorities in reference to coastal planning resource management;<sup>61</sup> and addressing the demand for affordable housing.<sup>62</sup>

In conclusion, the success of a growth management portion of the State Comprehensive Plan necessitates maintaining a delicate balance among all levels of government.<sup>63</sup> Such intergovernmental coordination also aids in the exchange of information between the various agencies whose jurisdictions and responsibilities may differ.<sup>64</sup> For continuation of future success in growth management, "[r]egulatory policies must be matched with practical encouragement for economic growth, incentives for particularly desirable types of growth, and strong direction to streamline regulatory approval processes."<sup>65</sup>

### III. THE GROWING PAINS OF CONCURRENCY

"Defining 'quality of life' . . . [relates to] philosophy and esthetics," however, many individuals fail "to ask the fundamental question: 'What kind of place do we want this to be?'"<sup>66</sup> Aiding in our quest for a utopian society is the concept of concurrency. Concurrency may be defined as a

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56. *Id.* at 243 (citing FLA. STAT. § 186.009(2)(b)).

57. *Id.* (citing FLA. STAT. § 186.009(2)(e)).

58. *Id.* at 244 (citing FLA. STAT. § 186.009(2)(c)).

59. Powell, *Managing Florida's Growth*, *supra* note 26, at 244 (citing FLA. STAT. § 186.009(2)(f)).

60. *Id.* at 244-45 (citing FLA. STAT. § 186.009(2)(g)).

61. *Id.* at 245 (citing FLA. STAT. § 186.009(2)(j)).

62. *Id.* (citing FLA. STAT. § 186.009(2)(h)).

63. *Id.* at 246.

64. Interview with Richard Grosso, *supra* note 4.

65. Powell, *Managing Florida's Growth*, *supra* note 26, at 246 (citing Robert M. Rhodes & Robert C. Appgar, *Charting Florida's Course: The State and Regional Planning Act of 1984*, 12 FLA. ST. U. L. REV. 583, 604 (1984)).

66. David J. Russ, *How the "Property Rights" Movement Threatens Property Values in Florida*, 9 FLA. ST. U. J. LAND USE & ENVTL. L. 395, 395 (1994) (citing Carter, *supra* note 1, at 14).

“land use regulation which controls the timing of property development and population growth.”<sup>67</sup>

Concurrency requirements seek to acquire an efficient chain of community growth.<sup>68</sup> This is accomplished by guaranteeing that infrastructure is obtainable upon demand.<sup>69</sup> For example, in order for a developer to construct, the required public services must be readily available.<sup>70</sup> Primary areas of concern entail transportation, water and stormwater management, sewer, solid waste, and parks and recreation.<sup>71</sup>

While the notion of concurrency is wrought with good intentions, there appears to be a catch twenty-two since the more that is built, the greater the number of individuals who will invade the land space. Some perceive growth as decreasing the “quality of life,” in that it creates traffic congestion and overcrowding of schools. Therefore, this presents a down-side to growth.

#### A. *Concurrency in Florida—“Build It and They Will Come”*

Concurrency in Florida acted as the most dominant policy requirement for the 1985 growth management system.<sup>72</sup> This evolved from the extreme proposal that Florida’s growth should become a “pay as you grow” system, with infrastructure added to sustain such development.<sup>73</sup> Thus, concurrency has been referred to as the “teeth’ of Florida’s growth management system.”<sup>74</sup>

Dade County, Florida, has been labeled as the county with the fourth worst traffic congestion problems in the nation.<sup>75</sup> According to a survey of local governments conducted for the Florida League of Cities, seventy-five percent of the respondents classified state roads as currently encounter-

67. H. Glenn Boggs, II & Robert C. Apgar, *Concurrency and Growth Management: Lawyer’s Primer*, 7 FLA. ST. U. J. LAND USE & ENVTL. L. 1, 1 (1991).

68. Wickersham, *supra* note 14, at 510.

69. David L. Powell, *Recent Changes in Concurrency*, 68 FLA. B.J. 67, 67 (Nov. 1994) [hereinafter Powell, *Concurrency*].

70. Wickersham, *supra* note 14, at 510.

71. DeGrove, *supra* note 3, at 434.

72. *Id.*

73. *Id.*

74. Powell, *Concurrency*, *supra* note 69, at 67 (quoting Letter from Thomas G. Pelham, Secretary, Department of Community Affairs, to Senator Gwen Margolis, North Miami Beach 1 (Mar. 7, 1988), *quoted in* DEPARTMENT OF COMMUNITY AFFAIRS, THE EVOLUTION AND REQUIREMENTS OF THE CMS RULE, TECHNICAL MEMO 4 (Aug. 1991)).

75. Greg Jaffe & Christina Binkley, *Growing Pains: Counties Rue the High Price of Success*, WALL ST. J., Jan. 3, 1996, at S1.

ing a facility deficit, or envisioning one at a later date.<sup>76</sup> In attempting to handle traffic problems, transportation acts as the most important focus of Florida's novel concurrency requirements.<sup>77</sup>

As a result, studies were performed to determine "potential refinements of transportation concurrency and additional sources of funding to provide needed facilities."<sup>78</sup> The resulting legislation was amended to include "compromise provisions" founded upon various suggestions by the above studies.<sup>79</sup> Subsequently, in 1993, local governments were permitted by the legislature to employ "a long-term transportation concurrency management system with a planning period of up to 10 years."<sup>80</sup>

The first city in Florida to implement concurrency in the school arena was Coral Springs.<sup>81</sup> The City Commission is scheduled to recommend a plan ordering developers to build an adequate number of schools in order to accommodate the growing number of children moving into the neighborhood.<sup>82</sup> Similarly, such growth management criteria are presently in place regarding various public facilities in the area.<sup>83</sup>

Because school districts are regarded as separate from municipalities, they did not fall under the guise of the 1985 Growth Management Act.<sup>84</sup> Thus, builders suggested that the only pragmatic solution was to impose taxes, paving the way for more schools to be built.<sup>85</sup> Many builders contend that overcrowding is not their fault; rather, they claim the escalating number of births, in addition to immigrants pouring into the state on a daily basis, cause the high student body in the school system.<sup>86</sup>

On September 19, 1995, Broward County voters rejected what was known as the "penny tax," which was to be used for school construction.<sup>87</sup> The proposal was struck down by "an overwhelming vote of no confidence

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76. Powell, *Managing Florida's Growth*, *supra* note 26, at 301.

77. Powell, *Concurrency*, *supra* note 69, at 68.

78. Powell, *Managing Florida's Growth*, *supra* note 26, at 301.

79. *Id.* at 302.

80. Powell, *Concurrency*, *supra* note 69, at 68.

81. Elaine Walker, *Bill: No School Fees Forced on Developers*, *MIAMI HERALD*, Mar. 20, 1995, at B2.

82. *Id.*

83. *Id.*

84. John Maines, *Builders Say Taxes Are Key: Group Says Schools Need The Money*, *SUN SENTINEL*, June 29, 1995, at 3B.

85. *Id.*

86. *Id.*

87. *Move On From Penny Tax Defeat, Address Reasons for Its Rejection*, *SUN SENTINEL*, Sept. 20, 1995, at 12A.

in the school system's leaders, their credibility and their money management skills."<sup>88</sup> Yet, it was suggested that voters must come to the "realiz[ation] that there is no free lunch . . . and that until the tax base is broadened, school property taxpayers will continue to pay the lion's share of the cost."<sup>89</sup>

Since the penny tax was declined, the Broward school district devised a new plan adding a requirement that classroom seats become part of the planning process of concurrency.<sup>90</sup> Developers fear that this would affect new construction. However, new construction would not necessarily be halted until the existing schools become significantly overcrowded.<sup>91</sup> For example, in elementary schools, overcrowding is not considered serious until the capacity reaches 175% or greater. Still, school construction has slowed due to the lack of sufficient revenues.<sup>92</sup> While most builders oppose the plan, the school district maintains that "[t]his is not a building moratorium" since builders may either construct the schools themselves, or provide the land in order for an adequate number of classrooms to be built.<sup>93</sup>

Unfortunately, Florida's public school system has been labeled as having one of the highest dropout rates in the country.<sup>94</sup> Florida's low graduation rate has been attributed to the growing number of students occupying classrooms.<sup>95</sup> For instance, individuals coming from various cultures, speaking different languages, do not have much of an opportunity to excel in a classroom that is significantly overcrowded.<sup>96</sup>

While Scholastic Aptitude Test ("SAT") scores have managed to remain stagnant or escalate somewhat over the last ten years,<sup>97</sup> success on high school exams has diminished.<sup>98</sup> Reports also indicate that over the last three years, fourth graders did twenty percent better on a writing

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88. *Id.*

89. *Id.*

90. Lisa Arthur, *Schools Try Again to Link Development, Classrooms*, MIAMI HERALD, Oct. 28, 1995, at 1BR.

91. *Id.*

92. *Id.* at 7BR.

93. *Id.*

94. Ron Wiginton, *Adult Ed: Night School for the '90s*, ORLANDO SENTINEL, Apr. 18, 1993, at G4.

95. *Id.*

96. *Id.*

97. *Id.*

98. Bill Hirschman, *State Issues Report on County Schools: Class Sizes Higher than Florida Average; Test Scores Down in High Schools*, SUN SENTINEL, Dec. 2, 1995, at 1B.

assessment test and five percent better on a nationwide math test.<sup>99</sup> However, students seem to have a problem with absenteeism, which has increased in 1995.<sup>100</sup>

As a result of the problems facing students, Hallandale, Florida, experimented with and implemented a year-round attendance policy.<sup>101</sup> In the summer of 1993, students began to attend classes in split sessions. While some students are on vacation, others are in school.<sup>102</sup> Specifically, the students are given four three-week vacations, alternating among the groups.<sup>103</sup> This means that the rooms are being utilized 220 days of the year, with thirty or fewer students at a time.<sup>104</sup> Even though this attempt at year-round schooling has been quite successful, there are still those parents who oppose the idea.<sup>105</sup> Nevertheless, there may not be much of a choice in areas that are becoming increasingly inhabited. With the influx of ex-Dade residents moving "west" to Broward, areas such as Weston are becoming congested. Although some relief is expected in the fall of 1996, when a new high school will be constructed in Pembroke Pines, Weston students are currently having to undertake courses at Western High School in Davie.<sup>106</sup>

In an attempt to handle the extra class load, Western High School has devised a plan to limit classes to four per semester as opposed to the usual seven.<sup>107</sup> With only four classes, each class session will last longer affording teachers more time for preparing lesson plans.<sup>108</sup> The rationale behind the above proposals should work well in the students' favor by furnishing them with increased individualized attention in the hopes that test scores will be positively affected.

The examples provided indicate that the human factor must be considered in weighing the demand for growth with overcrowding of certain areas. While concurrency seems to furnish an invisible hand in aiding expanding communities, there are those individuals who may have purposely

99. *Id.*

100. *Id.*

101. *Year-Round Schooling Experiment Gets Results Worth Expanding On*, SUN SENTINEL, Feb. 13, 1995, at 6A.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. Sarah Talalay, *Weston Crowd Demands Answers From School Chief*, SUN SENTINEL, Apr. 7, 1995, at 7B.

107. *Id.*

108. *Id.*



moved into an area for the serenity which is now lost. In the end, future generations will be negatively affected if today's growth is left uncurbed.

### B. *Implications of Growth Explosion in Other States*

In Gwinnett County, Georgia, 85,000 students cram into schools constructed for 73,000.<sup>109</sup> School officials fear that residents will follow the lead of Florida's citizens by refusing to foot the bill.<sup>110</sup> Until more schools are built, approximately 500 portable classrooms are being utilized to teach the increasing number of children in Gwinnett County.<sup>111</sup>

In the meantime, it is imperative that states such as Florida and Georgia look to other states which may provide valuable information regarding the management of concurrency. For example, in North Carolina, Dick Ludington formed 1,000 Friends of North Carolina when the population grew by thirty percent from 1970 to 1990.<sup>112</sup> Ironically, this organization was modeled after the one in Florida, as well as ones in Georgia, Massachusetts, and Oregon.<sup>113</sup> However, as Jim Wahlbrink, executive officer of the Homebuilders Association of Raleigh-Wake County noted, "[i]t created more problems than it solved in Florida' . . . [because] too many decisions were made by people too far away from local issues."<sup>114</sup> Instead, it was suggested that "those decisions . . . [should] be left at the local level."<sup>115</sup> Moreover, "economic development should be used as a tool to good growth . . . [by] attracting appropriate industries and protecting the quality of life."<sup>116</sup>

Another region hit hard with growing student enrollments is Los Angeles, California.<sup>117</sup> Because of overcrowding, thousands of students are bused to schools in other districts.<sup>118</sup> Those close to the problem have blamed busing for the increase in high school dropouts, since travelling to

109. Jaffe & Binkley, *supra* note 75, at S1.

110. *Id.*

111. *Id.*

112. Sally Hicks, *Group Forms to Help Manage N.C. Growth*, NEWS & OBSERVER, Mar. 11, 1995, at B3.

113. *Id.*

114. *Id.* (quoting Jim Wahlbrink, executive officer of the Homebuilders Association of Raleigh-Wake County).

115. *Id.*

116. *Id.*

117. Elaine Woo, *School Dropouts: New Data May Provide Elusive Clues*, L.A. TIMES, Sept. 11, 1989, at 1.

118. *Id.*

other districts dissuades students who may already be borderline drop-outs.<sup>119</sup>

In 1993, the Ventura Unified High School District reported that scores on the verbal portion of the SAT rose by seven points.<sup>120</sup> However, scores on the math portion declined by eighteen points.<sup>121</sup> Again, the slippage in the scores was attributed to overcrowded classrooms, ranging from forty students per class, and to gang violence.<sup>122</sup>

One area aspiring to raise the graduation rate is St. Louis, Missouri.<sup>123</sup> A 1988 report demonstrated that out of ten incoming freshman in the St. Louis public school system, only three will graduate.<sup>124</sup> Due to such staggering numbers, various programs were organized. They included: Continued Education (furnishing pregnant girls with classes in medical care, nutrition, and parenting); Attendance, Attitude and Academics ("Tri-A") (providing an alternative high school atmosphere, concentrating on students with behavioral problems); Adopt-A-Student Program (assigning an adult to act as mentor for students who need a positive role model); and truancy centers (permitting police to fine parents who allow their children to continuously skip classes).<sup>125</sup>

Coloradans also appear to be concerned over the diminishing quality of life.<sup>126</sup> Residents believe that the steadfast rate of new inhabitants will ultimately lead to problems such as crime, higher housing costs, and pollution.<sup>127</sup> However, the number one concern was traffic congestion.<sup>128</sup> In a poll, forty-six percent of Coloradans stated that they would support impact fees on new homes, if they were used for new schools, new highways, and more police officers.<sup>129</sup> In addition, fifty-one percent of

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119. *Id.*

120. Stephanie Simon & Brenda Day, *Ventura Math Scores Drop 18 Points on SAT Education: Verbal Skills Numbers Show Improvement. The District's High Schools Remain Above the State and National Average*, L.A. TIMES, Aug. 19, 1993, at 1.

121. *Id.*

122. *Id.*

123. Virginia Hick, *Schools Trying to Stem High Dropout Rate*, ST. LOUIS POST-DISPATCH, May 24, 1992, at 1A.

124. *Id.*

125. *Id.*

126. Mark Obmascik, *Poll: State Growing Too Fast*, DENVER POST, Jan. 25, 1995, at A01.

127. *Id.*

128. *Id.*

129. *Id.*

Coloradans agreed that a one-cent sales tax on building materials would be beneficial if used for construction of new roads and schools.<sup>130</sup>

The Denver Public Schools released statistics revealing that since 1991, the number of students graduating from high school has dropped by seven points.<sup>131</sup> It was reported that school officials were actually relieved that the figures were not lower.<sup>132</sup> Some of the factors contributing to the decrease were the "rising poverty among Denver families and the flight of the middle class from the schools."<sup>133</sup>

In July of 1995, Colorado passed their version of a concurrency management system.<sup>134</sup> The standards established for classrooms were an average of twenty-five students, and limits were set at 715 students per elementary school, 1238 per middle school, and 2150 per high school.<sup>135</sup> Finally, if developers fail to satisfy the above criteria, their building applications could be denied or economic sanctions could result.<sup>136</sup>

In Williamson County, Tennessee, residents have become disillusioned with their recent growth since Saturn moved its company headquarters into Spring Hill in 1990.<sup>137</sup> While the "[g]rowth has brought wealth to the Southeast . . . it also has brought traffic, bursting schools, higher taxes and an uneasy relationship between longtime residents and newcomers attracted by the promise of prosperity."<sup>138</sup> However, Williamson County has handled some aspects of growth better than other areas by building thirteen new schools and funding the preservation of historic buildings.<sup>139</sup> Still, many oldtimers remain disheartened when they remember the historic barns and rolling pastures that once made up the county's landscape.<sup>140</sup>

In conclusion, it is evident that the growth explosion occurring throughout the United States is causing severe overcrowding, especially in

130. *Id.*

131. Romel Hernandez, *Graduation Rate Sparks Call for Reform: 67.8% Figure Concerns Denver School Officials, Who Say They're Relieved It Didn't Drop Further*, ROCKY MTN. NEWS, Dec. 1, 1994, at 4A.

132. *Id.*

133. *Id.*

134. Shelley Gonzales, *Douglas Commission Oks Service Rules Before the Bulldozers Appear, the Developer Must Show Project Will Have No Adverse Effects*, ROCKY MTN. NEWS, Aug. 1, 1995, at 14A.

135. *Id.*

136. *Id.*

137. Jaffe & Binkley, *supra* note 75, at S1.

138. *Id.*

139. *Id.*

140. *Id.*

the school system. Something must be done—and quickly. If educators and community members unite to form programs, as did St. Louis, students will benefit tremendously. Moreover, by adding schools to the list of requirements of concurrency, states will be more apt to manage their growth before the dilemma intensifies. While the problem of overcrowding cannot be rectified overnight, concurrency in the school arena is one way to ensure that enough schools will be built to meet the demand in the first place. In doing so, the quality of life for those involved should also be elevated.

#### IV. GROWTH MANAGEMENT AND THE ENDANGERED SPECIES ACT

The Endangered Species Act of 1973 is evolving as a meaningful constraint on land use development.<sup>141</sup> Growth management relates to the ESA, in that its purpose is to preserve and conserve wildlife habitat, water resources, park land, and roads.<sup>142</sup> Therefore, a major component of growth management requires consideration of wildlife<sup>143</sup> and their existing ecosystems.<sup>144</sup>

Although Florida has not endured the same extent of ESA scrutiny as California,<sup>145</sup> the area of North Key Largo<sup>146</sup> has met with adversity in the generating of adequate biological data.<sup>147</sup> The site of projected development is the habitat for the Key Largo Woodrat and the Key Largo Cotton Mouse.<sup>148</sup> Insufficient available resources by local governments and small developers may be contributing factors to the origination of problems.<sup>149</sup> Their ability to properly research and prepare the necessary

141. Craig A. Arnold, *Conserving Habitats and Building Habitats: The Emerging Impact of the Endangered Species Act on Land Use Development*, 10 STAN. ENVTL. L.J. 1, 1 (1991).

142. Telephone Interview with Jim Antista, General Counsel of the Florida Game & Fresh Water Fish Commission (July 27, 1995).

143. *Id.*

144. Arnold, *supra* note 141, at 5 (citing 16 U.S.C. § 1531(b) (1988)).

145. The first area in the United States subject to a Habitat Conservation Plan ("HCP") was the development of the San Bruno Mountain in California, and it serves as a model in evaluating future HCPs. *Id.* at 24.

146. This area is "a barrier island in the northern Florida Keys." J.B. Ruhl, *Regional Habitat Conservation Planning Under the Endangered Species Act: Pushing the Legal and Practical Limits of Species Protection*, 44 SMU L. REV. 1393, 1405 (1991). In 1989, an HCP consisting of twelve miles of hardwood hammock forest island habitat was developed by the Growth Management Division of Monroe County. *Id.* at 1405-06.

147. Arnold, *supra* note 141, at 29.

148. *Id.* at 28-29.

149. *Id.* at 29.

comprehensive reports for an incidental taking permit and an HCP was impaired.<sup>150</sup> However, various rigid requirements imposed by the ESA correspond to Florida's environmental statutes and regulations, which implies a "pre-ESA check" on growth in environmentally susceptible areas.<sup>151</sup>

Currently, the Clinton Interior Department is working with landowners in order to devise HCPs specifically designed to suit both the needs of wildlife and the landowner.<sup>152</sup> If these plans become widely accepted, they will offer owners greater management flexibility, and simultaneously safeguard the endangered species. Said HCPs provide a mechanism under the ESA by which developers may receive incidental taking<sup>153</sup> permits.<sup>154</sup> The Department of Committee Affairs has the authority to require such set-asides of habitat.<sup>155</sup> This mitigation program relates to "incidental [taking] permits"<sup>156</sup> under the section 10(a) provision.<sup>157</sup> Regarding these conservation areas or reservations, counties have an affirmative responsibility to designate such viable areas for development.<sup>158</sup>

For example, but for the woodrat, if a contractor could develop an area, such a permit may be granted if the taking itself does not jeopardize the survival of the species and alternative measures will not offset the damage.<sup>159</sup> This balance between conservation and development appears to protect the species, as well as allow for continued growth of the land. Thus,

150. *Id.*

151. *Id.*

152. Eric Pryne, *High Court's Decision on Habitat Protection: Ruling of the Decade?*, THE SEATTLE TIMES, Jan. 8, 1995, at B1.

153. See generally *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2412 (1995) (holding the word "harm" to include habitat modification). The majority also reasonably construed Congress' intent as prohibiting indirect, as well as direct, takings of the land used by wildlife. *Id.* at 2408. Although the landmark ruling of *Sweet Home* is a victory for environmentalists, the future of the ESA may run into difficulty since the Republican-run Congress is scheduled to rewrite the act. Brent Walth, *An Environmental Landmark*, PORTLAND OREGONIAN, June 30, 1995, at A1.

154. Telephone Interview with Jim Antista, *supra* note 142.

155. *Id.*

156. *Id.*

157. Arnold, *supra* note 141, at 13. "Incidental take" is defined by the Fish & Wildlife Service ("FWS") as a taking resulting from, but "not the purpose of, an otherwise lawful activity." *Id.* at 14 (citing 50 C.F.R. § 402.02 (1990)).

158. Telephone Interview with Jim Antista, *supra* note 142.

159. *Id.*

saving and protecting endangered species is a national concern.<sup>160</sup> However, with adequate participation at the state level, successful remedies may cure ailments and act as models for other states.<sup>161</sup>

#### A. *Habitat Depletion in North Key Largo*

North Key Largo is comprised of 12,000 acres of mangrove wetlands and hardwood hammock.<sup>162</sup> Enclosed by park land, it is situated in close proximity to one of the greatest reef systems in existence today.<sup>163</sup> The island and adjacent islands are facing critical loss of habitat due to rapid development.<sup>164</sup> This has resulted in a depleted habitat for the various endangered species<sup>165</sup> including the woodrat, cotton mouse, Schaus swallowtail butterfly, American crocodile, and wading birds, such as the little blue heron, ospreys, and the snowy egret.<sup>166</sup>

#### B. *Extraordinary Measures in Protecting the Key Deer*

An example of local governments successfully taking part in a rescue program for endangered species involves the Key Deer.<sup>167</sup> These deer are found in the lower Florida Keys, primarily on Big Pine Key.<sup>168</sup> The Key Deer is a small subspecies of the Virginia white-tailed deer<sup>169</sup> which gained notoriety in 1934, when a well-known biologist and artist, J.N.

160. *Senate Subcommittee of Environment and Public Works Hearing of Water, Fish, Wildlife, and the Endangered Species Act* (C-SPAN television broadcast, July 13, 1995) (statement of Bruce Babbitt, Secretary of the Interior).

161. *Id.*

162. Ann Banks, *Conscience of the Keys: Vietnam Veteran Ed Davidson Thought His Fighting Days Were Over. Then Came the Battle to Save North Key Largo*, SUN SENTINEL, July 22, 1990, at 6.

163. *Id.*

164. Telephone Interview with James Bell, Interpretative Specialist for the Florida Keys National Wildlife Refuges (July 28, 1995).

165. *Id.*

166. Telephone Interview with Jim Antista, *supra* note 142.

167. Jeffrey Schaeffer, *Local Government and the Protection of an Endangered Species: The Florida Key Deer*, ENDANGERED SPECIES UPDATE, Sept. 1988, at 1, 1.

168. Mary Tebo, *Florida Key Deer: Can the Florida Key Deer Be Saved?*, FLA. WILDLIFE, Jan.-Feb. 1990, at 26, 26. Big Pine Key supplies stable sources of fresh water and its pine/palm communities and tropical hardwood hammocks supply suitable food. *Id.* at 27.

169. Schaeffer, *supra* note 167, at 1.

“Ding” Darling, portrayed the predicament of the Key Deer in a national cartoon.<sup>170</sup>

In 1957, a bill was passed by Congress which created the National Key Deer Wildlife Refuge.<sup>171</sup> However, for the past ten years, their death rate has risen by sixty to sixty-five deer annually.<sup>172</sup> Currently, approximately 250 to 300 Key Deer remain in the area.<sup>173</sup> The following factors have contributed to their demise: road deaths, disease, inappropriate nutrition, social disorders, and stress.<sup>174</sup> Additionally, development alters their natural environment which, in turn, reduces habitat quality.<sup>175</sup> The FWS, in connection with conservation groups, has endeavored to obtain acreage to add to their refuge.<sup>176</sup> Also, refuge personnel employed various land management procedures, such as designated burning, which intensify and promote the native vegetation growth.<sup>177</sup>

Monroe County executed an innovative land use plan on September 15, 1985, which emphasized improvements for safeguarding the deer and their habitat.<sup>178</sup> Certain bans on the development of wetlands were instituted along with the requirement that landowners reserve vital parcels of their land in a natural state.<sup>179</sup> In addition, residential density requirements were changed to limit growth and fences were reconstructed so as not to trap and entangle deer.<sup>180</sup>

It appears clear that local governments should share responsibility with state and federal agencies in protecting threatened and endangered species.<sup>181</sup> The distribution of building permits by local governments gives them jurisdiction over habitats.<sup>182</sup> The dilemma of the Key Deer may be viewed as an illustration whereby local governments initiate programs for the continued survival of such threatened species.

170. Tebo, *supra* note 168, at 27. Specifically, the Key Deer were shown fleeing from poachers and large dogs. *Id.*

171. *Id.*

172. Dan Keating, *Spots Before Your Eyes on Big Pine Key: Deer Babies Arrive Late This Year*, MIAMI HERALD, Sept. 1, 1993, at 1B.

173. *Id.*

174. Rick Sullivan, *Killing Wildlife with Kindness*, THE SKIMMER, Fall 1988, at 1, 1.

175. Tebo, *supra* note 168, at 27.

176. *Id.*

177. *Id.*

178. Schaeffer, *supra* note 167, at 3.

179. *Id.*

180. *Id.*

181. *Id.* at 1.

182. *Id.*

V. FLORIDA'S CONNECTION TO THE ENVIRONMENTAL  
PROTECTION AGENCY AND THE UNITED STATES ARMY CORPS  
OF ENGINEERS

The EPA and the COE are uniting to preserve and manage prevailing wetlands.<sup>183</sup> The information obtained from such "ecologically high value" areas is gathered through ADID.<sup>184</sup> ADID<sup>185</sup> is a planning mechanism which permits the EPA and the COE to collaborate.<sup>186</sup> The information is then published and made accessible to the managed community in order to countervail future ecological impacts from potential development in low quality wetlands.<sup>187</sup>

Because wetlands are viable ecosystems, the EPA is interested in conducting studies where the strain of urban development clashes with the protection and conservation of the wetlands.<sup>188</sup> The EPA is committed to working with local governments, state governments, and environmental and conservation groups.<sup>189</sup> In certain circumstances, the EPA will also interact with private organizations.<sup>190</sup>

Regarding human growth, Florida's population is increasing at a projected rate of sixteen million by the year 2000.<sup>191</sup> Over the last fifty years, more than eight million acres of forest and wetland habitats (24% of the state) were appropriated in order to adjust to such human demands.<sup>192</sup> Therefore, if plant and animal populations are to survive as a result of these drastic alterations, habitats able to withstand future population increases must be identified and preserved at an early stage.<sup>193</sup>

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183. Hughes, *supra* note 11, at 1.1. Such collaboration entails execution of section 404 of the Clean Water Act which requires a permit subsequent to conducting projects on wetlands. *Id.*

184. *Id.*

185. ADID programs in Florida include: the Northeast Shark River Slough (East Everglades), West Broward County, Southwest Biscayne Bay in Dade County, St. John's Forest in St. John's County, the Florida Keys, and Rookery Bay in Collier County. *Id.* at 1.3-1.5.

186. *Id.*

187. Hughes, *supra* note 11, at 1.3-1.5.

188. *Id.* at 1.6.

189. *Id.*

190. *Id.*

191. James Cox, Identification of Important Habitat Areas in Florida 2.1 (Mar. 18, 1994) (unpublished manuscript, on file with the Environmental and Land Use Law Section Public Interest Representation Committee).

192. *Id.*

193. *Id.*



Although they are not prescribed in rule form, the concepts of cumulative and secondary impacts have been notable regarding wetland permitting.<sup>194</sup> Cumulative impacts are those “of a similar nature in the same geographical area to those at issue in a specific project.”<sup>195</sup> In addition, this type of impact can be anticipated “as a result of other, unrelated projects.”<sup>196</sup> Consideration of these impacts was the result of a Department of Environmental Regulation (“DER”) policy to ensure that individuals reviewing the permits take environmental effects into account where the permit functions as a precedent for corresponding permits in the future.<sup>197</sup>

Secondary impacts are those anticipated to follow as a result of the project at issue.<sup>198</sup> However, they are not the immediate result of the contemplated project.<sup>199</sup> Consideration of these impacts transpired through DER non-rule policy.<sup>200</sup> This policy was exemplified in *del Campo v. State Department of Environmental Regulation*,<sup>201</sup> in which the court reversed a permitting decision where conceivable environmental impacts of an island development were declined.<sup>202</sup>

Wetlands are critical elements of the water resource because they act as a means of reproduction, nursery, and nourishment habitats for various species of fish and wildlife.<sup>203</sup> In addition, they supply significant food storage, detrital production, nutrient cycling, and recreational and water quality functions.<sup>204</sup> Therefore, standards of water quality in suitable

194. Peter B. Belmont, Cumulative and Secondary Impacts 3.1 (Mar. 18, 1994) (unpublished manuscript, on file with the Environmental and Land Use Law Section Public Interest Representation Committee).

195. *Id.*

196. *Id.*

197. *Id.* at 3.2.

198. *Id.* at 3.1.

199. Belmont, *supra* note 194, at 3.1.

200. *Id.* at 3.2-3.3 (citing *Dougherty v. Department of Env'tl. Regulation*, 4 Fla. Admin. L. Rep. 1079-A (1982)) (stating DER based its classification of impacts upon presumed conditions of full development of project and upon all impacts directly or indirectly related to establishment which may include pollution repercussions).

201. 452 So. 2d 1004 (Fla. 1st Dist. Ct. App. 1984).

202. *Id.* at 1005; *see also* *Environmental Confederation of Southwest Florida, Inc. v. Cape Cave Corp.*, 8 Fla. Admin. L. Rep. 317, 382-83 (1985) (granting a permit to construct supplementary phases of residential development using septic tanks which would generate secondary water quality impact issues on condition of installing central sewage collection system).

203. Belmont, *supra* note 194, at 3.23.

204. *Id.*

wetlands and additional surface waters is crucial to their capability of providing these operations.<sup>205</sup>

## VI. OREGON AND VERMONT IN RELATION TO FLORIDA'S GROWTH MANAGEMENT

In the early 1970s, growth management statutes were enacted by Florida, Oregon, and Vermont, thus, shifting "regulatory power . . . to the state or regional level"<sup>206</sup> in order to regulate the opposing intentions of economic development and protection of the environment.<sup>207</sup> First, it is important to note that Florida has drawn on both Oregon and Vermont in devising sound growth management regulation. The MLDC was inspired by the Vermont statute, which later became the model to the Florida statute.<sup>208</sup> The PC model, influenced by Oregon, acted as the prototype for a second surge of growth management statutes across the United States during the mid-1980s through 1993.<sup>209</sup>

Florida and Vermont possess certain common attributes, such as demanding state or regional level consent for significant development projects which removes authoritative control away from municipalities.<sup>210</sup> The Florida statute also empowers "state and regional agencies to identify certain natural areas of critical concern, in which local regulations can be superseded."<sup>211</sup> Because both states rely heavily on tourism and have experienced a marked population increase, they endorse state supervision over growth management.<sup>212</sup>

The competence of significant project provisions in both states have been commended.<sup>213</sup> However, Florida has been criticized for its large threshold size, allowing voluminous projects to escape scrutiny.<sup>214</sup> While Florida's regional planning agencies ("RPAs"), including representatives from local governments, have been denounced for insufficient oversight, Vermont's regional commissions have been applauded for their citizen

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205. *Id.*

206. Wickersham, *supra* note 14, at 512.

207. *Id.* at 489.

208. *Id.* at 490.

209. *Id.*

210. *Id.* at 512.

211. Wickersham, *supra* note 14, at 512.

212. *Id.* at 513.

213. *Id.* at 518.

214. *Id.*

involvement and cooperation.<sup>215</sup> In addition to efforts by local citizens, Vermont requires the state government to emphasize information sharing and mediation.<sup>216</sup>

With respect to Florida's future in growth management, the state prepared four novel plan provisions to be utilized by land development regulations ("LDRs") by December 31, 1997.<sup>217</sup> They are comprised of an intergovernmental coordination element ("ICE") which includes: ascertaining whether a proposed development, which may or may not constitute a DRI-scale project, would significantly impact other local jurisdictions, state or regional facilities, or resources; supplying procedures for mitigating notable extra-jurisdictional impacts in the developing jurisdiction in agreement with local plans; employing the regional planning council's dispute resolution process for controversies regarding significant impacts on suggested development; and permitting development orders to be modified for approved DRIs compatible with new plan policies on mitigation of significant impacts.<sup>218</sup>

With reference to the intergovernmental workings of such plans, the ICE must exhibit concern over affected local governments by being mindful of the consequences of the local plan upon such development.<sup>219</sup> In the fulfillment of this goal, the proposed ICE rule renders three alternatives whereby a local government may select "to work toward compatible resource and facility identification, definitions of significant impact, and mitigation standards."<sup>220</sup> Therefore, Florida is continually preparing for the next generation of growth by enhancing its intergovernmental affairs.

Additionally, Florida repealed its DRI program after twenty successful years which led to the supremacy of the PC model over the MLDC.<sup>221</sup> The PC model guarantees that all projects will be submitted to the state for review.<sup>222</sup> Additionally, the projects must conform to an approved local

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215. *Id.* at 518-19.

216. VT. STAT. ANN. tit. 3, § 7 (1994).

217. Powell, *Managing Florida's Growth*, *supra* note 26, at 275.

218. *Id.* at 273-75.

219. Katherine Castor, *New Requirements of the Intergovernmental Coordination Element of Local Government Comprehensive Plans and the Replacement of the Development of Regional Impact 1.1* (Jan. 28, 1994) (unpublished manuscript, on file with The Florida Bar Continuing Legal Education Committee).

220. *Id.* at 1.5.

221. Wickersham, *supra* note 14, at 519.

222. *Id.*

plan by the state.<sup>223</sup> Therefore, the trend toward state oversight of growth management activities is evident.

The planning program of Oregon was adopted in 1973<sup>224</sup> and dictates that all cities and counties prepare comprehensive land use plans for evaluation and endorsement, thereby, maintaining unanimity with state objectives.<sup>225</sup> Oregon has the oldest comprehensive state growth management program in the United States.<sup>226</sup> Rather than relying on direct state or regional supervision of major projects or critical areas, Oregon's statute involves oversight of local planning and zoning by the state.<sup>227</sup> In addition, like Florida and Vermont, Oregon demonstrated several features motivating environmental reform, such as an exceedingly increasing population growth and development, abundant natural resources, and dependence upon tourism and outdoor entertainment.<sup>228</sup>

Oregon is one of the legislatures to approve a state planning commission ("SPC") or advisory council.<sup>229</sup> A primary function of the SPC is to serve in an advisory capacity to the state government to formulate growth management goals.<sup>230</sup> Through distinctive membership of the SPC, success in achieving state planning laws was also realized.<sup>231</sup> Aiding further in Oregon's success of its SPC was a local advocacy group called 1000 Friends of Oregon which furnished vital public support.<sup>232</sup> This was accomplished by promoting growth management goals by applying political pressure and engaging in litigation.<sup>233</sup>

In contrast, Florida has a state planning agency ("SPA") called the Department of Community Affairs which answers to the governor.<sup>234</sup> Its current productivity is largely due to a slate of governors who can take personal credit for contributing to various planning issues.<sup>235</sup> Oregon's SPC serves as an example of achieving success because it does not impose

223. *Id.*

224. *Id.* at 523 (citing Oregon State Land Use Act, 1973 Or. Laws 80 (codified as amended at OR. REV. STAT. § 197 (1993))).

225. DeGrove, *supra* note 3, at 450.

226. *Id.* at 453.

227. Wickersham, *supra* note 14, at 522-23.

228. *Id.* at 523.

229. *Id.* at 526.

230. *Id.* at 527.

231. *Id.*

232. Wickersham, *supra* note 14, at 527.

233. Johnstone, *supra* note 2, at 420 n.149.

234. Wickersham, *supra* note 14, at 527.

235. *Id.*

an administrative and financial hardship upon the state.<sup>236</sup> As previously mentioned, Florida also has a state growth management “watchdog” group called 1000 Friends of Florida which has survived due to exuberant support from a broadly representative board of corporate, developmental, and environmental groups.<sup>237</sup> Even with a severe recession and the failure of the state to finance its share of the implementation effort, this “stakeholder” affiliation remains strong.<sup>238</sup>

Furthermore, Oregon may be viewed as an effective model for both environmental protection and financial prosperity.<sup>239</sup> The “jobs-vs.-owls debate” concentrated on whether significant decreases in jobs for loggers would result from preservation of the northern spotted owl’s habitat.<sup>240</sup> However, in April 1993, a forest plan was revealed by President Clinton which provided \$1.2 billion in federal resources.<sup>241</sup> The purpose of this plan was to retrain forest workers during a five-year period in order to shift the economic burden away from distressed areas.<sup>242</sup> As a result, there has been a “quantum leap in forest management” in Oregon.<sup>243</sup>

For example, clear-cutting has diminished and “no-cut buffer areas around streams are commonplace.”<sup>244</sup> This has resulted in Oregon’s industry becoming more productive and resourceful.<sup>245</sup> However, the continued economic stability will be dependent upon individuals protecting the environment as opposed to sacrificing it.<sup>246</sup> Summarily, the time has come for communities to consider the accessible resources and devise alternatives for the good of the environment.<sup>247</sup>

Recently, Florida engaged in an unprecedented conservation agreement with a timber company.<sup>248</sup> The purpose was to permanently enjoin fifty

236. *Id.*

237. DeGrove, *supra* note 3, at 448.

238. *Id.*

239. Daniel Glick, *Having Owls and Jobs Too*, NAT’L WILDLIFE, Aug.-Sept. 1995, at 9, 13.

240. *Id.* at 12.

241. *Id.*

242. *Id.*

243. *Id.* at 13.

244. Glick, *supra* note 239, at 13.

245. *Id.*

246. *Id.*

247. *Id.* at 11.

248. Michael Browning, *A Forest Forever: Deal Protects Woodland from Development*, MIAMI HERALD, Aug. 23, 1995, at 1A.

square miles of woodland in North Central Florida from development.<sup>249</sup> The above-mentioned area includes other parcels of land known as Alachua County's Payne's Prairie and an expansive tract of wet hammocks in Volusia County's Tomoka Wildlife Management Area.<sup>250</sup> These "large patches of near-wilderness will be preserved forever, both as scenery and as vital catchment areas for water flow and purification."<sup>251</sup>

Although logging is still permitted, the restrictions involve limiting clear-cutting to 2000 acres on each plot of land yearly and in 200-acre portions at a time.<sup>252</sup> Also, timber contained on wetlands may be clear-cut in fifty-acre sized portions exclusively.<sup>253</sup> Since these areas contain wildlife such as bald eagles, deer, wild turkeys, and various songbirds and wading birds,<sup>254</sup> this deal also stimulates preservation of endangered or threatened species.

The PC model introduced in Oregon requires that individual development projects be approved to conform with local plans.<sup>255</sup> Therefore, the state continues to supervise and oversee major projects.<sup>256</sup> This is also true of the smaller scale development patterns which escape the MLDC model.<sup>257</sup> In line with Oregon's statute, Florida and Vermont enacted their planning consistency statutes in the late 1980s.<sup>258</sup> The Oregon statute has persisted, in spite of three repeal attempts, and continues to prevail today<sup>259</sup> because of ample public support.<sup>260</sup> Therefore, a change in development patterns is suggested in order to satisfy environmental protection goals while still promoting economic development.<sup>261</sup>

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249. *Id.*

250. *Id.* at 17A.

251. *Id.*

252. *Id.*

253. Browning, *supra* note 248, at 17A.

254. *Id.*

255. Wickersham, *supra* note 14, at 547.

256. *Id.*

257. *Id.*

258. *Id.* at 522.

259. *Id.* at 524.

260. DeGrove, *supra* note 3, at 453.

261. Wickersham, *supra* note 14, at 546.

## VII. EMERGENCE OF GROWTH MANAGEMENT STATUTES ACROSS THE UNITED STATES

Throughout the 1980s and 1990s, various states looked to both Florida and Oregon for approaches in fashioning their growth management strategies.<sup>262</sup> The following six states have recently passed growth management statutes:<sup>263</sup> Georgia, Maine, Maryland, New Jersey, Rhode Island, and Washington.<sup>264</sup> A total of nine state growth management statutes, including local planning provisions compatible with statewide goals, further exhibit the superiority of the Oregon model for state growth management laws.<sup>265</sup> Together, these states represent a wide array of techniques used in managing urban development through state guidance and intergovernmental coordination.<sup>266</sup>

Growth management programs encounter a myriad of difficulties in such areas as funding, goal coherence, division of power, and coordination of governmental entities.<sup>267</sup> Urban land control programs are intergovernmental in nature because governmental economic assistance is a necessity.<sup>268</sup> Participation from all levels of government is considerable.<sup>269</sup> Such intergovernmental endeavors have been successful in Oregon and favored, in terms of "operational structures," in Florida, New Jersey, and Vermont.<sup>270</sup>

Although the particulars of growth management statutes vary, it is a standard requirement of local governments and, in most cases, regional and state agencies, to provide plans that comply with state goals and procedures.<sup>271</sup> This is true in every state except New Jersey and Rhode Island.<sup>272</sup> Moreover, the legislation that Oregon passed in 1973 included fourteen goal statements with a subsequent addition of five coastal management goals.<sup>273</sup> Florida passed legislation ordering the preparation of a

262. DeGrove, *supra* note 3, at 447.

263. Wickersham, *supra* note 14, at 525.

264. See sources cited *supra* notes 15-20.

265. Wickersham, *supra* note 14, at 525. These nine states include: Florida, Georgia, Maine, Maryland, New Jersey, Oregon, Rhode Island, Vermont, and Washington.

266. Douglas R. Porter, *State Growth Management: The Intergovernmental Experiment*, 13 PACE L. REV. 481, 481 (1993).

267. Johnstone, *supra* note 2, at 434.

268. *Id.* at 437.

269. *Id.*

270. *Id.* at 434.

271. Porter, *supra* note 266, at 482.

272. *Id.* at 484.

273. *Id.*

comprehensive statewide plan encompassing twenty-five topic areas comprised of goal and policy statements.<sup>274</sup> Also, the Maryland statute exemplifies seven “visions” which serve as guiding policies to be achieved.<sup>275</sup>

Some states require consent of local plans, such as New Jersey which includes specified procedures for the negotiation of growth management agreements between the state and local governments.<sup>276</sup> The failure of local governments to observe such requirements may result in sanctions involving denial of specific state grants.<sup>277</sup> In Rhode Island, the state will provide a comprehensive plan if a local government declines to do so.<sup>278</sup>

In Georgia, “[t]he governing bodies of municipalities and counties are authorized . . . [t]o develop . . . a comprehensive plan”<sup>279</sup> which executes regulations of land use compatible with such a plan.<sup>280</sup> Maine’s statute also asserts that each municipality should provide a local growth management program.<sup>281</sup> In addition, participation by the citizens is encouraged by inviting public examination and commentaries in an unbiased manner.<sup>282</sup> This subsection aimed at obtaining a broad distribution of the following: recommendations and options, written communication of observations, public debates, dissemination of information, and interest in and rebuttal to suggestions by the public.<sup>283</sup>

The Washington statute requires each county to select an urban growth area or areas in order to stimulate such growth.<sup>284</sup> Currently, in Washington, voters are confronted with a “race against the clock and government regulations” involving the “property rights referendum.”<sup>285</sup> In what has been called a “veiled attempt to further the Republican agenda to dismantle government,” the proposed legislation would establish national standards increasing landowners’ rights and decreasing governmental regulatory

274. *Id.* at 484-85.

275. *Id.* at 485.

276. Johnstone, *supra* note 2, at 424.

277. *Id.*

278. *Id.*

279. GA. CODE ANN. § 36-70-3(1) (1995).

280. *Id.* § 36-70-3(2).

281. ME. REV. STAT. ANN. tit. 30-A, § 4324(1) (West 1994).

282. *Id.*

283. *Id.*

284. WASH. REV. CODE ANN. § 36.70A.110(1) (West 1994), amended by 1995 Wash. Legis. Serv. 400 (West).

285. Vincent J. Schodolski, *Property Vote Causes Split in Northwest Owners’ Rights at Issue in Washington State Initiative*, CHI. TRIB., Aug. 20, 1995, at 17.



control.<sup>286</sup> Therefore, individuals would be able to seek reimbursement for any ensuing property loss.<sup>287</sup>

Specifically, state agencies, in attempting to restrict the ability of landowners to use their property as they desire, would be administered demanding tests.<sup>288</sup> In addition, government would have to recognize that no less burdensome alternatives exist and that the regulation is in the public's best interest.<sup>289</sup> However, critics state the proposal would injure all levels of government in their ability to effectively manage environmental protection.<sup>290</sup>

As illustrated, there is often a tug of war between the objectives of the state and local governments. This struggle combined with inherent problems tends to make the growth management process more difficult. However, it has been suggested that if the various states can minimize significant problems, they may develop into the most influential bodies of American government in their attempts to manage urban land.<sup>291</sup>

### VIII. CONCLUSION

In summary, the future success of growth management rests upon the individual states. While growth itself is not the root of the problem, the quality of life must be maintained through concurrency requirements. It must also be emphasized that there is a drastic need for uniformity of HCPs across the United States. In working together, both environmentalists and landowners can maintain a firm grip on growth management with careful consideration placed upon the numerous threatened species. Finally, these endangered species cannot be adequately protected if we allow the degradation of their habitat to continue.

While the environmental pendulum has swung to and fro, it is sufficiently clear that time cannot be wasted in resolving the problem of growth

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286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. Schodolski, *supra* note 285, at 17.

291. Johnstone, *supra* note 2, at 434.

management in Florida and other states. By studying and applying the principles and guidelines which have proven to be effective, reliable, and successful, Florida can avoid the dirge of disaster. Time is of the essence.

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