Regulating for Sustainability: The Legality of Carrying Capacity-Based Environmental and Land Use Permitting Decisions

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I. INTRODUCTION

As applied to the issue of land use and environmental regulation, this article does not attempt to precisely define the terms "sustainability" or "carrying capacity," but borrows loosely from a variety of available definitions. The United States Bureau of Reclamation defines carrying capacity as: "[T]he ability of a resource to accommodate a user population at a reasonable threshold without the user population negatively affecting the resource sustainability." 1

A prevalent definition emanating from a 1987 U.N. conference (Sustainable developments are those that "[meet] the needs of the present without compromising the ability of future generations to meet their own needs") 2 or that of Rosenbaum, 1993 ("Sustainable means using methods, systems and materials that won’t deplete resources or harm natural cycles") 3 may be most useful. For purposes of this article, sustainability is viewed as the level of development and land use impacts that impacted ecosystems can tolerate without unacceptable impacts. The government has been regulating development based on these concepts for decades. Few would argue with the basic constitutionality of zoning—assuming it does not result in a "taking" of private property—to prevent undue crowding or incompatible land uses, or the denial of an environmental permit to prevent an unacceptable impact to wetlands or endangered species.

As past and current losses and impacts to the nation’s ecosystems and farmlands continue to mount, the need for more aggressive land use and permitting protection of land becomes apparent. Florida’s environmental laws, and the federal laws commonly impacting the use of land in Florida, provide the government with the legal tools to protect diminishing natural and financial resources. Legal authority exists to ensure that development only proceed to the extent that it is fiscally and environmentally sustainable.

The applicable standards for governmental approval of land use plans and development permits require the government to prevent scientifically unacceptable impacts to the state’s ecosystems. Agencies can, and should, exercise their discretion using the precautionary principle as they apply and implement pre-existing legal authorities and requirements to requests for planning, zoning, and permitting approval. 4 Most, if not all, land use and

2. See WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 43 (Oxford University Press 1987).
4. See discussion infra pp. 767-75.
environmental laws provide a legal basis to prevent development that “goes too far” and causes or contributes to an unacceptable environmental or other public impact. Our entire system of environmental and land use laws is based upon the premise that some environmental degradation must be allowed in favor of property rights and population growth. Yet, each of those laws sets standards, or thresholds, beyond which adverse impacts are not to be allowed. Environmental permitting agencies should not issue permits that could result in unsustainable individual or cumulative impacts. Planning agencies should not approve land use plans that are not financially or environmentally sustainable.

Land use plans now commonly restrict the timing of new development to the availability of public facilities and services. As public service and ecological capacity limits become more apparent, land use plans may increasingly need to restrict the overall number of approvals that can be granted, in terms of annual or total amounts. Such planning efforts are controversial and are likely subject to legal challenge by landowners and developers unenthused about the denial or strict limitation on whether, how much, or when they can develop, and of course lend themselves to strong political debate.

The most stringent land use and environmental regulations—those which facially preclude or severely limit development or intensive uses of land, and those which, as applied, allow a landowner little or no such uses—face acute property rights limitations. Yet, government regulations necessary to ensure sustainability are not inherently invalid in the face of constitutionally protect private property rights, the right to travel, or other rights. Such regulations raise those issues, as well as those related to “fair share” affordable housing responsibilities, basic substantive due process considerations, and just plain uneasiness on the part of some judges and courts. But government’s right to require full mitigation for public impacts, regulate to prevent unacceptable impacts to human health and ecosystems, and limit development stringently without violating private property rights is clear. The most effective approach begins with large scale land use planning and ecosystem preservation, and implements permitting programs to prevent significant adverse fiscal and ecological impacts resulting from planned development.

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5. This is the standard enunciated in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922), for determining when a regulation amounts to a taking of private property.
6. See id. at 415–16.
8. Id. at 123.
Rhetoric such as "We can’t put up a gate; we have to put them somewhere," is inadequate to describe the reality of the government’s options in the face of population growth, or the importance of exercising those options. There is no basic constitutional or human right for all who might want to live in Florida to have their home in (a rapidly degraded or paved-over) paradise subsidized by the government or the ecosystem. At the same time, there will be continued population growth, and important decisions need to be made about where, when, and how that growth takes place, and government can and must make those decisions. Constitutional and statutory law do not render government helpless to sit back and allow land use impacts to reduce the amount of ecosystem or farmlands beyond their essential thresholds and overload its public facilities beyond acceptable limits. Environmental and land use laws may validly preclude environmental impacts that are not sustainable.

Section II of this article will provide a brief summary of the major land use and environmental laws in Florida, including applicable federal law, and how they authorize, and in most cases require, planning and permitting decisions based upon the limits of ecosystems or public facilities to accommodate the expected impacts. Section III will explore in more depth the details of Florida’s land use planning law—the Community Planning Act as it addresses the role of population projections, environmental and other impacts, and the provision of infrastructure and service demands of development. Next, the article will discuss cases around the country and Florida that have ruled upon the legality of limited growth and moratoria ordinances and discuss the property-rights-related implications of such ordinances. Finally, the article will discuss the application of judicial standards of review to land use and environmental permitting laws and individual actions that spring from or require the application of scientific or technical professional judgment in fields that are inherently subject to professional debate.

II. LEGAL FRAMEWORK IN FLORIDA LAW FOR ECOLOGICAL AND FISCAL SUSTAINABILITY

Florida’s natural resources are severely threatened by development, roads, mines, and other impacts. Florida’s water resources are suffering significant harm, water quality continues to degrade, wetland loss has been

9. See id. at 132–35. See infra pp. 755–56, for a discussion of the constitutional “right to travel.”
dramatic, and rare and endangered wildlife habitat continues to dwindle. Its wildlife face dreary prospects in a long, narrow peninsula fragmented by roads, development, mines, large-scale active agriculture, and other uses conducive to the movement patterns of large and small wildlife. “As in the rest of the world, the loss of habitat quality and quantity is the biggest threat to listed species in Florida.” “Florida has been identified as the state at greatest risk of losing its native habitats.”

Achieving sustainability requires the combined exercise of land use planning authority by local governments and the state, and permitting decisions by regional and state agencies, as well as the federal government. It starts with land use decisions of local governments about potential maximum use and intensity based on the inherent suitability of the land under Chapter 163 of the Florida Statutes. The most fundamental questions about sustainability must first be asked at the planning stage where the big picture is in focus and where land use impacts can be evaluated in conjunction with the broad array of issues that are relevant under Chapter 163. Planning decisions determine the type and intensity of land use and development, and therefore set the course for sustainability or not. Bad planning decisions which create inappropriate development expectations and corresponding property values can render the permitting process little more than window-dressing. Good planning allows environmental laws to effectively protect the public interest at the detailed development approval level, allowing permitting agencies, based on the standards applicable to environmental permits, to ensure that the end result of development that is potentially suitable to the natural character of the land and other characteristics does not result in unacceptable environmental impacts. As to fiscal sustainability, the law provides ample

13. See id. at 183, 189.
15. Id. (citing U.S. Fish & Wildlife Serv., Introduction, in Multispecies Recovery Plan for South Florida 1:1, 1:16 (1999)).
support, particularly for local governments, for requiring that the fiscal impacts of new development are fully mitigated by the developer. 17

A. The Florida Constitution

"It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made for the abatement of air and water pollution and of excessive and unnecessary noise." 18

B. Private Property Rights

The Supreme Court of Florida, in Graham v. Estuary Properties, Inc., 19 held that a landowner does not possess an inherent property right to substantially change the essential natural character of land and put it to a use for which it is not inherently suitable: "An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injuries [sic] the rights of others." 20

In 1995, the Supreme Court of Florida upheld a local land-use ordinance, which precluded the erection of fences around single-family lots, enacted to allow the endangered Florida Key deer to roam freely around its spatially-diminished natural habitats. 21 Reversing the Third District Court of Appeal’s ruling that a landowner’s property rights always trump the rights of the public in environmental protection, the Supreme Court of Florida ruled that, under the Florida Constitution, one does not trump the other and that private property rights and the public interest are to be balanced. 22

The Court held, "Landowners do not have an untrammelled right to use their property regardless of the legitimate environmental interests of the State." 23 Citing Article II, Section 7 of the Florida Constitution—the natural

17. See discussion of the Community Planning Act’s provisions concerning the provision of adequate infrastructure, concurrency, and the efficient provision of public facilities and services, infra p. 754.
18. FLA. CONST. art. 11, § 7.
19. 399 So. 2d 1374 (Fla. 1981). In this case, the Supreme Court of Florida upheld a development order that required half of the owner’s property (a large mangrove forest) to remain in its natural state. Id. at 1382. Because the action served a legitimate governmental purpose and allowed the landowner to enjoy an economically viable use, the court rejected the takings claim. Id.
20. Id.
21. Dep’t of Cmty. Affairs v. Moorman, 664 So. 2d 930, 932, 934 (Fla. 1995).
22. Id. at 933.
23. Id.
resource protection clause—the Court found that “the State has a legitimate interest in protecting the natural habitat of the Keys and most especially of the Key deer,”24 which the Court observed was “perilously close to extinction.”25

Citing the natural resource provision of the Florida Constitution,26 the Court observed: “The clear policy underlying Florida environmental regulation is that our society is to be the steward of the natural world, not its unreasoning lord.”27

Citing Sarasota v. Barg,28 the Court remarked: “There is an obvious public interest in such a policy, given the fact that environmental degradation threatens not merely aesthetic concerns vital to the State’s economy but also the health, welfare, and safety of substantial numbers of Floridians.”29

C. Florida Law Protecting Wetlands and Water Quality and Quantity

Florida’s Water Resources Development Act governs the use of Florida’s water resources.30 “Under the Act, the Florida Department of Environmental Protection (DEP) supervises five ‘water management districts’ . . . [which] have the responsibility for entire watersheds, which enhances their ability to address ecosystemwide problems.”31

1. Environmental Resource Permit Laws: Chapter 373 of the Florida Statutes

Florida’s Environmental Resource Permitting laws—combined wetland and storm water permitting—protect water resources from development impacts by precluding permitting authorization for ecological harm, which goes beyond a point of acceptability.32

24. Id. at 932. The Court stated, “The fact the land in question sits in an area of critical state concern is crucial to the result in this case, because it identifies an environmental concern unique to Big Pine Key.” Id. at 932 n.1.

25. Moorman, 664 So. 2d at 931.

26. “It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made for the abatement of air and water pollution and of excessive and unnecessary noise . . . .” FLA. CONST., art. II, § 7.

27. Moorman, 664 So. 2d at 932.

28. 302 So. 2d 737 (Fla. 1974).

29. Moorman, 664 So. 2d at 932.

30. Totoiu, supra note 14, at 10307 (citing FLA. STAT. ANN. § 373 (2009)).

31. Id. (citing FLA. STAT. § 373.044 (2010)).

32. FLA. STAT. § 373.016.
a. The Environmental Resource Permit Public Interest Standard

The statutory “Public Interest” criteria for the approval of an Environmental Resource Permit, which emphasizes the protection of natural systems, requires cumulative and secondary impact analysis and mitigation for unavoidable impacts, and requires projects to be not contrary to or clearly in the public interest, protecting the state against unacceptable impacts to wetlands and other water resources. On their face, these criteria support a determination that a proposed project is not in the public interest if, based on a preponderance of the evidence, its adverse environmental impacts exceed those which the affected ecosystem can handle.

Section 373.414, Additional Criteria for Activities in Surface Waters and Wetlands, provides:

(1) As part of an applicant's demonstration that an activity regulated under this part will not be harmful to the water resources or will not be inconsistent with the overall objectives of the district, the governing board or the department shall require the applicant to provide reasonable assurance that state water quality standards applicable to waters as defined in s. 403.031(13) will not be violated and reasonable assurance that such activity in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), is not contrary to the public interest. However, if such an activity significantly degrades or is within an Outstanding Florida Water, as provided by department rule, the applicant must provide reasonable assurance that the proposed activity will be clearly in the public interest.

(a) In determining whether an activity, which is in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), and is regulated under this part, is not contrary to the public interest or is clearly in the public interest, the governing board or the department shall consider and balance the following criteria:

1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;

2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;

3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;

4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;

5. Whether the activity will be of a temporary or permanent nature;

6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and

7. The current condition and relative value of functions being performed by areas affected by the proposed activity. 34

These criteria are to be considered and balanced. 35 While a negative affect on any particular criteria does not necessarily render a project contrary to the public interest, in any given case, one criterion may well be more critical than the other six. 36 An applicant must also prove compliance with the public interest test on the whole. 37

The law supports a denial of a wetland permit in cases of extreme damage to environment that cannot be mitigated. 38 Florida's Department of Environmental Protection Water Management Districts, when given authority by the Legislature, can heighten permit requirements. 39 For example, the St. Johns River Water Management District has authority to adopt proposed rules defining areas within the district as hydrologic basins and establishing more restrictive standards for issuing permits and development requirements within those basins, where the Legislature provided "authority to identify

34. FLA. STAT. § 373.414(1), (1)(a) (emphasis added).
36. Id. at 5048.
37. Id. (applying the test to a proposal that would adversely impact the habitat of endangered and threatened wildlife species).
39. See id. at 955.
geographic areas that require greater environmental protection and to impose more restrictive permitting requirements in those areas.\textsuperscript{40}

In \textit{Florida Power Corp. v. Department of Environmental Regulation},\textsuperscript{41} the court upheld the Department's rejection of a hearing officer's recommendation that a power company's project would have no adverse impact and was not contrary to the public interest.\textsuperscript{42} The court found competent, substantial evidence to support the Department's emphasis on the lack of type-for-type mitigation and the importance of ensuring actual offset for the proposed destruction of six acres of forested wetlands for the benefit of the plants and animals solely dependent on forested wetlands.\textsuperscript{43} One of the factors the court considered was the "edge effect," referring to the negative or positive influences one ecosystem may have on adjacent ecosystems.\textsuperscript{44} The court noted that the Department properly determined that the extent of the impact on the environment from the destruction of the forest was a policy matter and not a question of fact to be resolved by a hearing officer.\textsuperscript{45}

\subsection*{Minimization and Avoidance}

State ERP rules emphasize requiring a permit applicant to make all practicable modifications to the development proposal that would avoid or eliminate wetland impacts.\textsuperscript{46} These rule requirements that try to avoid wetland impacts altogether, and then require full mitigation to offset unavoidable impacts are policy decisions to ensure the sustainability of wetland and water resources.\textsuperscript{47}

\begin{flushleft}
\textsuperscript{41} 638 So. 2d 545 (Fla. 1st Dist. Ct. App. 1994).
\textsuperscript{42} \textit{Fla. Power Corp.}, 638 So. 2d at 561.
\textsuperscript{43} \textit{Id.} at 561–62.
\textsuperscript{44} \textit{Id.} at 560.
\textsuperscript{45} \textit{Id.} at 561.
\textsuperscript{47} The Rules of the South Florida Water Management District state, "[P]rotection of wetlands and other surface waters is preferred to destruction and mitigation due to the temporal loss of ecological value and uncertainty regarding the ability to recreate certain functions associated with these features." \textit{BASIS OF REVIEW FOR ENVIRONMENTAL RESOURCES PERMIT APPLICATIONS}, SFWMD § 4.3 (2010).
\end{flushleft}
c. Mitigation Requirements to "Offset" Wetland Impacts

Florida’s statutory approach to wetland mitigation fosters the sustainability of wetlands and water resources. If an application does not meet the public interest test, the Department must consider mitigation.\(^{48}\) The Department “shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects that may be caused by regulated activity.”\(^{49}\) “Mitigation must offset the adverse effects caused by the regulated activity.”\(^{50}\) The rules require that the mitigation offset the impacts to the specific functions of the specific wetlands being impacted.\(^{51}\) The mitigation must address the negative factors in the public interest test which tipped the balance against the public interest.\(^{52}\)

In *Florida Power Corp. v. Florida Department of Environmental Regulation*,\(^{53}\) the Department held that, although there is no absolute “no net loss” standard for mitigation, the avoidance or minimization of net loss is an important guiding principle of mitigation.\(^{54}\) Since mitigation by preservation necessarily results in loss of jurisdictional wetlands, the Department generally accepts preservation mitigation only after on-site wetland creation and/or enhancement is shown to be not feasible or not sufficient to tip the public interest balancing test “scales” in favor of permit issuance.\(^{55}\)

Florida law recognizes that some wetlands cannot be mitigated because they are particularly unique or provide functions that cannot be re-created.\(^{56}\) As Section 4.3 of the South Florida Water Management District’s Basis of Review makes clear:

> In certain cases, mitigation cannot offset impacts sufficiently to yield a permittable project. Such cases often include activities which significantly degrade Outstanding Florida Waters, adversely impact habitat for listed species, or adversely impact those wet-

\(^{49}\) Id.
\(^{50}\) Id. (emphasis added).
\(^{54}\) Id. at 20 (remanding for determination on the adequacy of proposed mitigation).
\(^{55}\) Id. at 17.
\(^{56}\) Basis of Review for Environmental Resource Permit Application § 4.3 (2010).
lands or other surface waters not likely to be successfully re-created.\textsuperscript{57}

In these instances, water management districts and the DEP have the discretion to reject a mitigation plan and deny a permit for any project that otherwise does not eliminate or reduce harm to wetlands.\textsuperscript{58}

d. \textit{Cumulative Impact Analysis}

The cumulative impact analysis required for Florida wetland permitting agencies is a sustainability threshold requirement for the wetland, water, and related resources that would be impacted by proposed development projects.\textsuperscript{59} Environmental Resource Permitting agencies must consider the cumulative impacts of their permitting decisions.\textsuperscript{60}

Section 373.414 (8)(a): Additional criteria for activities in surface waters and wetlands:

The governing board or the department, in deciding whether to grant or deny a permit for an activity regulated under this part shall consider the cumulative impacts upon surface water and wetlands, as delineated in s. 373.421(1), within the same drainage basin as defined in s. 373.403(9), of:

1. The activity for which the permit is sought.

2. Projects which are existing or activities regulated under this part which are under construction or projects for which permits or determinations pursuant to s. 373.421 or s. 403.914 have been sought.

\textsuperscript{57} Id.

\textsuperscript{58} See Brown v. So. Fla. Water Mgmt. Dist., DOAH Case No. 04-000476 (Final Order Sept. 13, 2004) (denying an ERP where it was determined that the proposed mitigation for a dock project would not adequately offset impacts to a listed species of seagrass); Charlotte Cnty. v. IMC-Phosphates Co., 4 E.R. F.A.L.R. 20 (Final Order Sept. 15, 2003) (denying an application for an ERP where the applicant failed to provide reasonable assurances that its mitigation proposal would maintain or improve the natural functions of the diverse types of wetland systems present at the site prior to commencement of the project); Kramer v. Dep’t of Envtl. Prot., 2 E.R. F.A.L.R. 225, 236 (Final Order Feb. 26, 2002) (denying an ERP where the mitigation plan was found inadequate and "experimental").


\textsuperscript{60} Id. at 689.
3. Activities which are under review, approved, or vested pursuant to s. 380.06, or other activities regulated under this part which may reasonably be expected to be located within surface waters or wetlands, as delineated in s. 373.421(1), in the same drainage basin as defined in s. 373.403(9), based upon the comprehensive plans, adopted pursuant to chapter 163, of the local governments having jurisdiction over the activities, or applicable land use restrictions and regulations. 61

Reported cases amply support the view that this consideration of cumulative impacts is designed to prevent an end result for the impacted environment that exceeds its tolerance thresholds. In Florida Power Corp. v. Department of Environmental Regulation, 62 the First District rejected an asserted "de minimis exception" to the cumulative impact analysis requirement, finding that such an exemption "would completely undercut the purpose of the cumulative impact analysis required by section 403.919." 63

In McCormick v. City of Jacksonville, 64 Florida’s Governor and Cabinet, sitting as the Florida Land and Water Adjudicatory Commission (FLWAC), recognized that cumulative impact analysis is necessary to "prevent piecemeal destruction of the environment." 65 FLWAC stated, "without the ability to consider the long term impacts of a project in combination with past and reasonably likely similar projects in the area, the [] permitting agency would be helpless to prevent the gradual elimination of environmental resources through [] permits." 66

Perhaps the most explicit "sustainability" discussion is found in the case of Broward County v. Weiss & South Florida Water Management District, 67 which defined unacceptable cumulative impacts as those which would place the fish and wildlife dependant on the functions to be lost in jeopardy of collapse. 68 "Collapse would occur when the population no longer is sustainable . . . [and] could lead to extirpation of the population from the Basin." 69

63. Id. at 561.
66. Carroll, supra note 65.
67. DOAH Case No. 01-3373 (SFWMD Final Order No. 2002-184 FOF ERP, Nov. 14, 2002).
68. Id.
69. Id.
2. Coastal Permitting

Florida also has a special dredge and fill permitting process for coastal development. Among other things, it is the intent of Florida's coastal development permitting process "to preserve and protect them from imprudent construction which can jeopardize the stability of the beach-dune system, accelerate erosion, ... or interfere with public beach access." The statute also expresses a legislative finding and intent that "[d]evelopment of coastal areas should be both economically and environmentally sustainable, and inappropriate growth in ecologically fragile or hazard-prone areas should be discouraged." The Legislature recognizes that the sand resources are an "exhaustible resource."

In order for a coastal permit to be issued, the application must meet the Chapter 62B-33 design and siting requirements, which include a review of the potential impacts to the beach dune system, adjacent properties, native salt resistant vegetation, and marine turtles. An applicant for a coastal permit must "provide the Department with sufficient information ... to show that [any] adverse and other impacts associated with the construction have been minimized and that the construction will not result in a significant adverse impact."

Florida Administrative Code Rule 62B-41.003(2) prohibits coastal construction resulting in a "significant adverse impact." Florida Administrative Code Rule 62B-41.005(2) provides that coastal construction shall be "limited" and requires the applicant to state the necessity and justification for coastal construction and the potential benefits or impacts to the coastal system.

"Adverse Impacts" are impacts to the coastal system that may cause a "measurable interference with the natural functioning of the coastal system." "Significant Adverse Impacts" are impacts of such magnitude that they may:

1. Alter the coastal system by:
   a. Measurably affecting the existing shoreline change rate;

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71. Id. § 161.72(m).
72. Id. § 161.144.
73. See FLA. ADMIN. CODE ANN. r. 62B-33.005(4)(a)-(h) (2010).
74. Id. r. 62B-33.005(2).
75. Id. r. 62B-41.003(2).
76. Id. r. 62B-41.005(2).
77. Id. r. 62B-41.002(19)(a).
b. Significantly interfering with its ability to recover from a coastal storm;

c. Disturbing topography or vegetation such that the dune system becomes unstable or suffers catastrophic failure. 78

In *Leto v. Florida Department of Environmental Protection*, 79 construction permits were denied because, among other reasons, “the structure, as designed, failed to adequately protect local marine turtles.” 80

In *Surfrider Foundation, Inc. v. Town of Palm Beach*, 81 the Department of Environmental Protection denied a coastal permit for a proposed beach renourishment project based on several findings of adverse environmental impact to the nearshore coastal resources. 82 Among the findings supporting the denial was that:

In the final revision of the Permit, Palm Beach and DEP removed the monitoring requirements for the offshore reef. The uniqueness of this resource has been detailed above. Because of the rare confluence of conditions required for its creation, the Florida Reef Tract cannot be replaced in any timeframe short of geologic time, so its protection, even from remote risks, must be a matter of exceptional regulatory concern. 83

3. Water Quality

Florida Law states that “[e]xisting uses and the level of water quality necessary to protect the existing uses shall be fully maintained and protected.” 84

Chapter 403 of the *Florida Statutes*—Florida Air and Water Pollution Control Act—recognizes that water bodies serve multiple beneficial uses that must be protected to promote the public welfare, and established a policy to “conserve the waters of the state and to protect, maintain, and improve the quality thereof for public water supplies, for the propagation of wildlife and fish and other aquatic life, and for domestic, agricultural, industrial, recreational, and other beneficial uses.” 85 The Act empowers the Department of

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78. id. r. 62B-33.002(33)(A)-(B).
79. 824 So. 2d 283 (Fla. 4th Dist. Ct. App. 2002).
80. id. at 284.
82. id.
83. id. at 231.
84. FLA. ADMIN. CODE ANN. r. 62-302.300(14) (2010).
85. FLA. STAT. § 403.021(2) (2010).
Environmental Protection to "[d]evelop . . . a grouping of the waters into classes . . . in accordance with the present and future most beneficial uses," and to "[e]stablish . . . water quality standards for the state as a whole or for any part thereof."  

The administrative rule that identifies five classes of waterbodies is Florida Administrative Code Rule 62-302.400. Most waters are listed as Class III on the basis of the designated uses "Recreation, Propagation and Maintenance of a Healthy, Well-Balanced Population of Fish and Wildlife." Others are classified as either Class I Potable Water Supplies, Class II Shellfish Propagation or Harvesting, Class IV Agricultural Water Supplies, or Class V Navigation, Utility, and Industrial Use. Most water quality criteria are set as quantitative concentration standards, established based on a determination of the level of pollution that can be accommodated by such water bodies while protecting their designated uses. One criteria—for nutrients—is stated qualitatively: "Nutrients—in no case shall nutrient concentrations of a body of water be altered so as to cause an imbalance in natural populations of aquatic flora and fauna."

The rules identify a special category for waters of special recreational or ecological significance, known as "Outstanding Florida Waters" (OFWs). Under Rule 62-302.700(1), "No degradation of water quality, other than that allowed in subsections 62-4.242(2) and (3)," is permitted. The rules prohibit permits from being issued "for any proposed activity or discharge within an [OFW], or which significantly degrades" an OFW, unless the permit applicant can affirmatively demonstrate that the proposed discharge is "clearly in the public interest" and that "existing ambient water quality . . . will not be lowered." "Existing ambient water quality" is defined as "the better . . . quality of either (1) that which could reasonably be expected to have existed for the baseline year of an [OFW] designation or (2) that which existed during the year prior to the date of [the] permit application."
Rule 62-302.300(14) provides, "Existing uses and the level of water quality necessary to protect the existing uses shall be fully maintained and protected."96

d. Consumptive Use Permit (CUP) Standards

The standard for the approval of a Consumptive (Water) Use Permit unambiguously precludes the allowance of harm to the state’s water resources:

The governing board or the department may require such permits for consumptive use of water and may impose such reasonable conditions as are necessary to assure that such use is consistent with the overall objectives of the district or department and is not harmful to the water resources of the area.97

"To obtain a permit pursuant to the provisions of this chapter, the applicant must establish that the proposed use of water: (a) [i]s a reasonable-beneficial use as defined in [section] 373.019; (b) [w]ill not interfere with any presently existing legal use of water; and (c) [i]s consistent with the public interest."98

According to section 373.019(16), "reasonable-beneficial use" is defined as "the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner which is both reasonable and consistent with the public interest."99

This standard implements the legislative "declaration of policy" set forth in section 373.016 that:

(1) The waters in the state are among its basic resources. Such waters have not heretofore been conserved or fully controlled so as to realize their full beneficial use.

(2) The department and the governing board shall take into account cumulative impacts on water resources and manage those resources in a manner to ensure their sustainability.100

In addition, it is state policy to "promote the conservation, replenishment, recapture, enhancement, development, and proper utilization of surface

96. Id. r. 62-302.300(14).
98. Id. § 373.223(1).
99. Id. § 373.019(16).
100. Id. § 373.016(1)–(2) (2010) (emphasis added).
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and groundwater" and to "promote the availability of sufficient water for all existing and future reasonable-beneficial uses and natural systems."

These standards preclude the issuance of a CUP that would cause or contribute to unacceptable environmental impacts. The St. Johns River Water Management District, for example, requires the applicant to reduce the "environmental or economic harm caused by the consumptive use . . . to an acceptable amount." The South Florida Water Management District requires applicants to demonstrate the proposed water use will not cause significant saline water intrusion, adversely impact offsite land uses, cause pollution or cause adverse environmental impacts. Its rules also emphasize that proposed withdrawals must not cause harm to environmental features such as wetlands or other surface waters that are sensitive to the magnitude, seasonal timing, and duration of inundation. In Pinellas County v. Lake Padgett Pines, the court held that the statute requires the consideration of a proposed well field's environmental effects beyond its impacts on the water resource.

Impacts to water quality resulting from the discharge after water has been used, may provide a basis for denial of a consumptive use permit. The adverse environmental effects of a land use supported by a proposed consumptive use are also relevant. In In re South Dade Agro Homes, Inc., a consumptive use permit was denied for an agricultural operation in undisturbed wetlands that were critical habitat for an endangered species because significant harm to the habitat would result. In Osceola County v. St. Johns River Water Management District, a wellfield permit was denied because of the likelihood of significant harm to wetlands.

101. Id. § 373.016(3)(b).
102. FLA. STAT. § 373.016(3)(d).
104. FLA. ADMIN. CODE ANN. r. 40C-2.301(4)(d) (2010).
105. Id. r. 40E-2.301(1)(a)–(e).
106. BASIS OF REVIEW FOR WATER USE PERMIT APPLICATION WITHIN THE SOUTH FLORIDA WATER MANAGEMENT DISTRICT, § 4.2.2.4 (2010).
108. Id. at 479.
111. Id. at 3647–48.
113. Id. For a more in-depth discussion of Florida’s consumptive use permitting law and cases, see generally Hamann, supra note 109; Hamann & Ankersen, Water, Wetlands and Wildlife: The Coming Crisis in Consumptive Use, 67 FLA. BAR J. 41 (March 1993).
In addition to the criteria that govern individual applications for consumptive use permitting, the State's Department of Environmental Protection and its five water management districts are authorized to affirmatively “reserve” water (make unavailable to consumptive users) to protect fish and wildlife. Section 373.223(4) of the Florida Statutes states: “The governing board or the department, by regulation, may reserve from use by permit applicants, water in such locations and quantities, and for such seasons of the year, as in its judgment may be required for the protection of fish and wildlife or the public health and safety.”

This statute provides the agencies “with a broad grant of authority to reserve water in order to protect fish and wildlife or to protect the public health and safety.” In this case, the District Court upheld an administrative order finding a reservations administrative rule valid. The Order upheld by the Court’s opinion had specifically found that restoring an environmental condition required for the health and sustainability of existing fish and wildlife communities was authorized by the statute.

In Marion County v. Greene, Florida's Fifth District Court of Appeal upheld the issuance of a Consumptive Use Permit, finding that the record supported a determination that the permitting agency had complied with the statutory conditions of approval in section 373.223(1) of the Florida Statutes, which the opinion appears to characterize as requiring the “sustainable use” of water. The court rejected the permit challenger’s claim that the agency “has a duty to manage the water resources . . . to ensure their sustainable use, including future increases in demand, and that the District violated that duty by granting [the permit],” by noting that the evidence demonstrated that the proposed use “would have little or no impact on other wa-

115. Id. (emphasis added).
117. Id.
118. See id.
119. 5 So. 3d 775 (Fla. 5th Dist. Ct. App. 2009).
120. Id. at 779–80. The agency St. Johns River Water Management District’s formally adopted rules stated that “In determining the public interest in consumptive use permitting proceedings, the Board will consider whether an existing or proposed use is beneficial or detrimental to the overall collective well-being of the people or to the water resources in the area, the District and the State.” Id. at 778.
ter users because of the [limited allowable] withdrawal, even taking into account increased future water demand.\footnote{121}

b. \textit{SFWMD Regional Water Availability Rule}

A recent example of a “sustainable” policy decision in the context of Consumptive Use Permit decisions is the adoption by the South Florida Water Management District of a “Regional Water Availability Rule” (RWA) in April 2007. Based on a determination that it was not in the public interest to allow the ecological impacts of additional water withdrawals from the Everglades and the Biscayne Aquifer, the South Florida Water Management District adopted the RWA rule, capping withdrawals from the Biscayne Aquifer, the Lower East Coast’s primary drinking water source.\footnote{122} This cap requires the development of alternative water supplies to accommodate growth in water supply beyond 2006 levels.\footnote{123}

c. \textit{Minimum Flows and Levels}

The statutory requirement for the establishment of “minimum flows and levels” for surface and ground waters in the state to prevent significant harm resulting from additional withdrawals\footnote{124} seems clearly aimed at preventing consumptive use demands that are unsustainable for the natural system. Water management districts are required by the Florida Water Resources Act of 1972 to establish minimum flows and levels for surface waters and aquifers within their respective jurisdictions.\footnote{125} Section 373.042(1) states that:

\begin{quote}
Within each section, or the water management district as a whole, the department or the governing board shall establish the following:

(a) Minimum flow for all surface watercourses in the area. The minimum flow for a given watercourse shall be the limit at which further withdrawals would be significantly harmful to the water resources or ecology of the area.
\end{quote}

\footnote{121. \textit{Id.} at 779.}
\footnote{122. \textsc{Basis of Review for Environmental Resources Permit Applications} § 3.2.1 (2010).}
\footnote{123. Now codified in \textsc{The District’s Basis of Review Section 3.2.1 [Restricted Allocation Areas]; Id.} § 3.2.1E(3).}
\footnote{124. \textsc{Fla. Stat.} § 373.042 (2010).}
(b) Minimum water level. The minimum water level shall be the level of groundwater in an aquifer and the level of surface water at which further withdrawals would be significantly harmful to the water resources of the area.\textsuperscript{126} Each water management district is required to adopt a priority list of waters for the adoption of MFLs, and must address MFLs in their regional water supply plans for any area where water sources are not sufficient over a twenty year period “to supply water for all existing and projected reasonably anticipated future needs and to sustain the water resources and related natural systems.”\textsuperscript{127} These plans must include prevention or recovery strategies if water levels are currently below MFLs or are projected to fall below MFLs within twenty years.\textsuperscript{128}

Minimum flows and levels provide a tool for planning and allocation of water resources by specifying the extent and limits of the availability of the State’s surface and ground water. Minimum flows and levels are just a part of a comprehensive water resources management approach geared toward assuring the sustainability of the water resources. They must be considered in conjunction with all other resource protection responsibilities granted to the water management districts by law, including consumptive use permitting, water shortage management, and water reservations.\textsuperscript{129}

D. Federal Clean Water Act—Water Quality Standards and Section 404 Permits

1. Water Quality Standards

The Clean Water Act (CWA)\textsuperscript{130} is designed “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”\textsuperscript{131} It sets a national goal, “wherever attainable,” to achieve “water quality which provides for the protection and propagation of fish, shellfish, and wildlife and

\textsuperscript{126} \textsc{Fla. Stat.} § 373.042(1) (emphasis added).
\textsuperscript{127} \textit{Id.} § 373.036(2)(b)(4)(b).
\textsuperscript{128} \textit{Id.} § 373.0421(2).
\textsuperscript{129} John J. Fumero, \textit{Florida Water Law and Environmental Water Supply for Everglades Restoration}, 18 \textsc{J. Land Use \\& Envtl. L.} 379, 384 (2003). For a more in depth discussion of water reservations, minimum flows and levels, and other aspects of Florida’s Consumptive Use Permitting program, see Christine A. Klein et al., \textit{supra} note 11, at 445–46.
\textsuperscript{131} \textit{Id.} § 1251(a).
provides for recreation in and on the water.”

The CWA requires states to establish water quality standards for all of their waterbodies. A water quality standard consists of “the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses.” The term “designated use” is defined by EPA’s implementing regulations as “those uses specified in water quality standards for each water body or segment whether or not they are being attained.” The term “criteria” is defined as: “Elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use.”

In order to be approved under the CWA, state water quality standards must include: (1) the designated uses for each body of water; (2) what methods were used and analyses conducted to support the revisions to state water quality standards; (3) water quality criteria, which constitutes specific limits on pollutants that protect the designated uses for each water body and which may be expressed as either a narrative standard or a numeric concentration level; and (4) an anti-degradation policy to protect existing uses of bodies of water and high-quality water. A state may only implement a water quality standard that creates a standard that is as stringent, or more protective, than the federal guidelines. EPA’s duty under the Act “is to ensure that the underlying criteria, which are used as the basis of a particular state’s water quality standard, are scientifically defensible and are protective of designated uses.”

Under EPA regulations, a state’s water quality standards must include an antidegradation policy to ensure that “[e]xisting instream water uses and

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132. Id. § 1251(a)(2).
133. Sierra Club, Inc. v. Leavitt, 488 F.3d 904, 921 (11th Cir. 2007) (citation omitted).
134. Id. § 1313(a)–(c).
135. Id. § 1313(c)(2)(A).
136. 40 C.F.R. §131.3(f).
137. Id. § 131.3(b).
139. Dubois v. U.S. Dep’t of Agric., 102 F.3d 1273, 1300 (1st Cir. 1996) (“[S]tates may not set standards that are less stringent than the CWAs.”).
the level of water quality necessary to protect the existing uses shall be main-

2. Total Maximum Daily Load Requirements (TMDLs)

The CWA requires states to develop Total Maximum Daily Loads for all surface waters within their boundaries that do not meet specified water quality standards, and prohibits the issuance of permits that would cause or contribute to violations of water quality standards.\footnote{33 U.S.C. § 1313(d)(1)(D)(2) (2006); EPA Administered Permit Programs: The National Pollutant Discharge Elimination System, 40 C.F.R. 122.4(d) (2010); Establishing Limitations, Standards, & Other Permit Conditions, 40 C.F.R. § 122.44(d) (2010); Water Quality Planning & Management, 40 C.F.R. §130.7; Friends of Pinto Creek v. U.S. Envtl. Prot. Agency, 504 F.3d 1007, 1011 (9th Cir. 2007).} This approach is intended to keep pollution levels in impacted water bodies to sustainable levels, but is not triggered until a waterbody is impaired.\footnote{See Sierra Club v. Meiburg, 296 F.3d 1021, 1025 (11th Cir. 2002).}

3. Dredge and Fill Activities

Dredged or fill materials are pollutants under the CWA.\footnote{33 U.S.C. § 1362 (2006) (amended by Clean Boating Act of 2008, Pub. L. No. 110-288, § 3, 122 Stat. 2650, 2650).} Section 404 of the CWA authorizes the Corps to issue permits to discharge or place “dredged or fill materials” into waters of the United States, including wetlands, only at specified sites and under prescribed circumstances and conditions.\footnote{33 U.S.C. § 1344.}

Under the Act, the U.S. Army Corps of Engineers is required to give wetlands the highest possible level of protection.\footnote{General Regulatory Policies, 33 C.F.R. § 320.1 (2010).} “[W]etlands constitute a productive and valuable public resource, the unnecessary alteration and destruction of which should be discouraged as contrary to the public interest.”\footnote{Id. § 320.4(b).}

The EPA’s “guidelines” for the issuance of dredge and fill permits articulate a presumption against allowing any damage to wetlands: “From a national perspective, the degradation or destruction of . . . wetlands is considered to be among the most severe environmental impacts.”\footnote{Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 C.F.R. § 230.1(d) (2010).} “The guiding
principle should be that degradation or destruction of [wetlands] may represent an irreversible loss of valuable aquatic resources." 149

The EPA guidelines provide that "dredged or fill material should not be discharged into the aquatic ecosystem [wetlands], unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern." 150 The EPA guidelines further provide that the Corps may not issue a dredge and fill permit "which will cause or contribute to significant degradation of [wetlands]," and that effects "contributing to significant degradation considered individually or collectively, include... loss of fish and wildlife habitat." 151

A permit may not be issued if: (i) there is a practicable alternative which would have less adverse impact and does not have other significant adverse environmental consequences; (ii) the "discharge will result in significant degradation;" (iii) the discharge does not include all appropriate and practicable measures to minimize potential harm; or (iv) there does not exist sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with the Corps' Guidelines for permit issuance. 152 A permit may not be issued "unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem." 153

The EPA’s guidelines also strictly prohibit the Corps from issuing any permit "if there is a practicable alternative... which would have less adverse impact on the aquatic ecosystem." 154 The EPA Guidelines also provide for "advanced identification" by the EPA Administrator of areas not suitable for the disposal of fill due to "unacceptable adverse affects on... water supplies, shellfish beds and fishery areas... wildlife or recreational areas." 155

While commentators and observers have been critical of the implementation by the U.S. Army Corps of Engineers of the Clean Water Act and its implementing regulations, 156 the Act and rules clearly authorize and require

149. Id.
150. Id. § 230.1(c).
151. Id. § 230.10(c)(3).
152. Id. § 230.12(a)(3)(i–iv).
154. Id. § 230.10(a).
155. 33 U.S.C. § 1344(c).
156. The use of mitigation in Florida has resulted in substantial destruction of wildlife and habitat and does not guarantee "no net loss" of wetlands. See Jason Totoiu, Building a Better State Endangered Species Act: An Integrated Approach Toward Recovery, 40 ENVTL. L. REP. 10299, 10307 (2010).
the USACOE to deny permits that would authorize impacts on waters or associated wetlands of the United States that are not sustainable. 157

E. **Federal Endangered Species Act**

The Endangered Species Act (ESA) was enacted in 1973 with the express purpose of "provid[ing] a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" through the development of a program to protect such endangered and threatened species, and through the enforcement of various treaties and conventions within the Act, which set forth national and international standards. 158 The overarching policy of the ESA is that "all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes [of the ESA]." 159

The ESA "represent[s] the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." 160 "[T]he language, history, and structure of the [Endangered Species Act showed] beyond doubt that Congress intended endangered species to be afforded the highest of priorities." 161 The Court observed that "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." 162 The ESA reflects "an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species" and "a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies." 163 The "benefit of the doubt" should be given to an endangered species when deciding what course of action will best conserve such species. 164

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159. Id. § 1531(c)(1); Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781, 785 (9th Cir. 1995) (citing 16 U.S.C. § 1531(b)).


161. Id. at 174.

162. Id. at 184.

163. Id. at 185.

164. See id. at 174.
Two key provisions of the ESA seek to prevent impacts on listed species which go too far. Under the ESA, the Fish and Wildlife Service cannot issue an incidental take permit (ITP) for private land use activities if they will “appreciably reduce the likelihood of the survival and recovery of the species in the wild.”

Next, section 1536(a)(2) commands each federal agency to “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.” If the Fish and Wildlife Service finds a federal agency action will jeopardize a listed species or adversely modify or destroy that species’ critical habitat, the Service must suggest those reasonable and prudent alternatives which it believes would avoid jeopardy or adverse modification of critical habitat. “In response to an opinion finding ‘jeopardy or adverse modification,’ the acting agency must comply with the substantive mandate of section 7(a)(2) and either ‘terminate the action, implement the proposed alternative, or seek an exemption from the Cabinet-level Endangered Species Committee pursuant to 16 U.S.C. § 1536(e).”

The ESA requires government actions that promote sustainability. In Gifford Pinchot Task Force v. United States Fish & Wildlife Services, the Ninth Circuit invalidated a U.S. Forest Service regulation because, although it protected species habitat necessary for “survival” of the spotted owl, it did not provide the additional level of protection needed for “recovery” of the species to the point where it would no longer be considered “endangered.”

In Trout Unlimited v. Lohn, the District Court stated that the purpose of the ESA is to:

[P]romote populations that are self-sustaining without human interference . . . . The protection of the ecosystems upon which endangered and threatened species depend is explicitly recited as the statute’s purpose. . . . If the ESA did not require that species be re-

166. Id. § 1536(a)(2).
167. Id. § 1536(b)(3)(A).
170. 378 F.3d 1059 (9th Cir. 2004), amended by 387 F.3d 968 (9th Cir. 2004).
171. See id. at 1069–70.
turned to a state in which they were naturally self-sustaining, pre-
servation of the habitat of the species would be unnecessary. 173

The Habitat Conservation Planning process under the ESA is perhaps
the best example of a comprehensive regulatory approach to the sustainabili-
ty of ecosystems. A number of examples demonstrate how the HCP process,
when coordinated with the comprehensive land use planning authority of
local governments, can be an extremely effective tool for the preservation of
biodiversity and sustainability, consistent with the property rights of private
landowners. The best example may be the Sonoran Desert Conservation
Plan (Plan), an HCP that has been integrated into Pima County’s comprehen-
sive land use plan. The Plan covers an expansive and biologically diverse
landscape of both public and private land, and prioritizes the biological re-
sources of the county, providing a guidepost for local government in both
short-term and long-term land use actions and decisions in the County.174 By
integrating natural resource protection and land use planning into one com-
prehensive plan, the Plan provides an innovative mechanism for the local
government to regulate the development and sustainability of the commu-
ity.175

Unlike most HCPs that are created for the incidental take of a single
species, the Sonoran Desert Conservation Plan seeks to conserve biodiversi-
ty.176 The Plan requires large areas of land to be dedicated to conservation—includ-
ing private land.177 Integrated HCPs, which affect private property
rights, raise Fifth Amendment regulatory takings issues.178 However, a plan
that is based on science and community involvement, such as the Sonoran
Desert Conservation Plan, can avoid such issues.179

173. Id. at *15.
CMO/SDCP/ (last visited Aug. 1, 2011).
176. See id.
177. See id.
178. Regulations that prohibit development of undeveloped land “carry with them a high
risk that private property is being pressed into some form of public service under the guise of
(permit denial for house construction on undeveloped coastal property based on beach setback
line regulation was treated as a physical taking).
179. Sonoran Desert Conservation Plan Introduction, supra note 174. For a discussion of
why the ultimate impact of the ESA on the conservation and recovery of species remains
uncertain, see Totoiu, supra note 14, at 10308–10.
F. Land Use Planning

Sustainability principles are perhaps most comprehensive and effectively enacted and implemented by government at the comprehensive land use planning stage, where development expectations are created and agencies act with the greatest amount of discretion. "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land, but requires only that, however the land is used, damage to the environment is kept within prescribed limits." Comprehensive planning decisions are legislative, subject to the most deferential standards of judicial review. They will only be overturned if not fairly debatable, and will be upheld when any valid planning rationale supports the decision. Environmental permitting decisions, in contrast, are made pursuant to established legislative criteria, and the denial of permits for land which has previously been designated for such uses in comprehensive plans and or zoning codes can create a heightened potential for private property rights claims.

"In the 1970s and 1980s, several states enacted statutes that provided states with a significant role in land use planning." Under these growth management laws, states require local land use plans to be consistent with larger statewide or regional land use plans. Thirteen states have adopted growth management laws. These states are: California, Delaware, Florida, Georgia, Hawaii, Maine, Maryland, New Jersey, Oregon, Rhode Island, Tennessee, Vermont, and Washington.

"Land use planning and the evolving body of American land use law originates from the notion that cities, towns, and regions must look at the ‘big picture’ to plan adequately for the future." "[M]any states . . . require municipalities to prepare so-called comprehensive, master, or general plans." (citations omitted).

181. Martin Cnty v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997).
182. Id.
183. Totoiu, supra note 14, at 10305 (citations omitted).
184. Id.
City or town planning is a constitutional concept . . . has in view the physical development of the municipality ‘to conserve and promote the public health, safety, morals and general welfare.’ Municipal planning . . . is the accommodation, through unity in construction, of the variant interests seeking expression in the local physical life to the interest of the community as a social unit. Planning is a science and an art concerned with land economics and land policies in terms of social and economic betterment. The control essential to planning is exercised through government ownership or regulation of the use of the locus. But the governmental regulatory power has its limits.

1. Limited or Timed Growth and Carrying Capacity-Based Ordinances

Since the 1970s some local governments across the country have adopted and implemented growth and development-limiting ordinances, typically to address concerns related to the loss or degradation of ecosystems or farmland, the public and social costs of urban sprawl, and limitations on the capacity of public facilities. Some were responding to patterns of “random development” resulting from “unplanned growth,” resulting in “unfettered expansion,” resulting in the “waste of valuable land resources.” Legislation that enacts growth limits or caps come under constant scrutiny as landowners argue that they are unconstitutional, on a variety of grounds.

One method for limiting growth to acceptable levels is to apply a carrying capacity analysis. “A carrying capacity analysis assesses the ability of a built resource (such as roadways, wastewater treatment plants, municipal swimming pools) or natural resource (such as aquifers, surface water bodies, or coastal estuaries) to absorb population growth and related physical development without degradation.” “Understanding the carrying capacity or constraints of these resources can be an effective method for identifying the areas of the community that are suitable for new or expanded development.” By completing a carrying capacity analysis, the government, and

188. Id.
190. 3 LOCAL GOVERNMENT LAW § 16:58 (citing A Zoning Program for Phased Growth: Ramapo Township’s Time Controls on Residential Development, supra note 189, at 724).
191. See Witten, supra note 185, at 584–85.
192. See id. (citing DEVON SCHNEIDER ET AL., THE CARRYING CAPACITY CONCEPT AS A PLANNING TOOL (Am. Planning Ass. 1978)).
193. Witten, supra note 185, at 586.
local governments in particular, gain a powerful and legally defensible tool with which to make decisions, and this analysis may also help local governments to resolve conflicts between competing development and preservation goals. One excellent example of environmental regulation based upon the “carrying capacity” of natural resources is the Tahoe Regional Planning Compact and implementing ordinances, jointly administered by the States of California and Nevada, five counties, several municipalities, and the United States Forest Service. The Compact has developed regional “environmental threshold carrying capacities,” or “thresholds”—environmental standards “necessary to maintain a significant scenic, recreational, educational, scientific, or natural value of the region or to maintain public health and safety within the region” and “shall include but not be limited to standards for air quality, water quality, soil conservation, vegetation preservation, and noise.” The Compact is to regulate development in the region in order to achieve these thresholds “while providing opportunities for orderly growth and development consistent with such capacities.”

One of the earliest and leading cases on the subject of limited growth ordinances is Construction Industry Ass’n of Sonoma County v. City of Petaluma, which reviewed the City of Petaluma’s strict cap on growth, which had been enacted as a response to its rapid development and expansion in the 1970s. The ordinance limited yearly development to 500 housing units, but exempted projects of four units or less, and was limited to a five-year period. Developers and landowners challenged the ordinance as an arbitrary and unreasonable action that was exclusionary, and lacked a legitimate governmental interest. Important to its ultimate validity, the quota was based on a careful study which substantiated the city’s restrictions. The Ninth Circuit upheld the ordinance because “the concept of the public welfare is sufficiently broad to uphold Petaluma’s desire to preserve its small town character, its open spaces and low density of population, and to grow at an orderly and deliberate pace.”

195. Id.
197. Id.
198. 522 F.2d 897 (9th Cir. 1975).
199. Id. at 900.
200. Id. at 901.
201. Id. at 905–06.
202. See id. at 900.
In reaching these conclusions, the court was persuaded by two previous cases in which both it and the Supreme Court of the United States had upheld municipal ordinances that, as a result of prohibitions on land uses other than single-family homes, "had the purpose and effect of permanently restricting growth."  

In another case, the Supreme Court of Nevada upheld, against state law claims of inconsistency with the state's planning law, a citizen-initiated county ordinance which limited the number of new dwelling units in the county to 280 per year. The Court rejected a substantive due process claim because the 2% annual growth rate limit was based on a master plan and "reflects County residents' desire to protect and conserve their natural resources." The Court ruled that:

As stated by the United States Supreme Court, "[t]he police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." Protection of a community's character is substantially related to legitimate state interests.

2. Limited Growth Ordinances in Florida

Limited Growth Ordinances have been upheld by Florida courts. In City of Hollywood v. Hollywood, Inc., the city had adopted an annual cap on density based on its concerns for water and sewage capacities, fire and police protection, hurricane evacuation, ecological and environmental protection, aesthetics, and public access to the ocean. Under the cap, the specific number of permits to be issued each year was based specifically and solely on the calculations concerning traffic capacity, due to the fact that there was

204. Ybarra v. City of Los Altos Hills, 503 F.2d 250, 252 (9th Cir. 1974).
208. Id at 38. Every line drawn by a legislature leaves some out that might well have been included. We cannot say that just because the 280-unit per annum cap leaves some out that might have been included, the 280-unit figure is arbitrary and capricious." Id. (citing Village of Belle Terre v. Boraas, 416 U.S. 1, 6, 9, (1974).
211. Id. at 1334–35.
no existing method that would yield a specific number to represent the limitations that existed relative to the other factors. Upon challenge, the court upheld the density cap even though it found that the traffic study upon which the overall density cap was based was flawed. The court found that the number of permits chosen by the City to be allocated was a reasonable approximation of its actual, but un-quantified growth limits, including aesthetics, and thus the growth cap, even given the flawed traffic numbers, was not unreasonable or arbitrary. In addition, the court gave great weight to the fact that the City Commission had held countless hearings and meetings on the issue before adopting the ordinance. Based on the reports, public meetings, studies, and comprehensive plans, the cap was ruled to be a valid “exercise of police power, which contributed substantially to the public health, morals, safety, and welfare of [its] citizens” and therefore was not arbitrary.

In contrast, where the City of Boca Raton established a cap on permits by referendum, which was not based on any analysis or even consultation with the City Planning Department, it was invalidated by the court. There was no evidence presented by the City that public facilities and infrastructure were insufficient to handle the impacts of future growth. The court found that no substantial competent evidence existed to support a finding that the cap was rationally related to valid municipal purposes of “public health, morals, safety, and welfare.” Thus, the cap was arbitrary and unreasonable.

The “sustainability” arguments raised by the City and rejected by the court in City of Boca Raton v. Boca Villas Corp., can be instructive. The City had argued that its population should be limited by the budget of rain-water falling within city limits. The court found this theory valid as a matter of regional planning, but rejected it as a rational basis for a growth limit in an individual municipality when several governmental agencies were responsi-
ble for providing sufficient water from other sources and were presently
doing so. The court explained that:

Water resources will not depend upon a 'budget' which Boca Ra-
ton or other cities may impose, but rather will depend upon hard
social choices involving agricultural priorities, environmental de-
mands, quantity of water used in various sectors, and the cost
which society is willing to pay. . . . A [c]ap predicated upon pre-
servation of water resources is a preliminary and unnecessarily
drastic solution to an area-water resource issue.

Concerns for air quality and noise levels were raised by the City but al-
so rejected by the court, because the City’s noise and air pollution levels
were "normal for a community of [Boca Raton’s] size and are well within
state and federal standards and regulations." The court found it "unneces-
sary," and insupportable for the City to enact growth caps based on a desire
to have noise and air pollution levels that were superior to averages across
the country.

On each of these issues, the court’s rejection of the ordinance and its
underlying justifications appears to have stemmed from its determination that
the greater the limitation on the use of property, the more specific—as op-
posed to conceptual or abstract—the supporting scientific, technical, or plan-
ning case needed to be to support the measure.

The appellate court was clearly troubled by an ordinance that
limited growth before the city’s facilities and resources were fully
maximized. And, despite twenty-one volumes of testimony taken
at trial, the court felt that Boca Raton depended upon justifications
that were "largely presented in [the] abstract and without [a] spe-
cific factual showing of real necessity."

The court’s analysis has been criticized as a “simplistic” one, inappro-
priately applied to a “complex problem.” Surely, it can be seen as an ex-
ample of how the judicial system in general can be ill-equipped to resolve
complex scientific or technical disputes, and valid to surmise that the court

223. Id.
224. Id.
225. Id.
226. Boca Villas Corp., 371 So. 2d at 158.
227. See id. at 159.
228. Pierce, supra note 7, at 114 (quoting City of Boca Raton v. Boca Villas Corp., 371
So. 2d 154, 157 (Fla. 4th Dist. Ct. App. 1979) (per curiam)).
229. Id. at 114.
over-stepped its judicial role in second-guessing the technical and scientific support for the City’s ordinance.\textsuperscript{230} But it is also reasonable to read this case as simply the result of a court’s determination that there is a sliding scale of support needed to support regulations and in that, on these facts, the City had not shown even the basic rational basis for its specific growth caps. In another situation, with more scientific and technical support for a determination that continued population growth in a certain community, at least cumulatively, had an important adverse impact on regional water supplies, the outcome may well be different. For example, the current water shortage situation in south Florida, with limitations on the regional water supply and municipalities being limited in the amount of water the state will permit them to withdraw from the Biscayne (surficial) Aquifer, which connects to the Everglades, such scenarios are real, and not conceptual. For example, as noted by Pierce, “conserving water would prove important to the public health and safety if the city’s own aquifer became contaminated in the future.”\textsuperscript{231}

Another case that invalidated a land use density cap was \textit{Innkeepers Motor Lodge, Inc. v. City of New Smyrna Beach},\textsuperscript{232} where the Fifth District found a “flat density cap” enacted by a citizens’ referendum, supported by no study or methodology, and allowing of no variances, to be arbitrary and invalid.\textsuperscript{233} The density cap limited multifamily dwellings to twelve dwelling units per acre and hotels/motels to twenty-four dwelling units per acre, which figures, said the Court “apparently materialized ‘out of the air.’”\textsuperscript{234} The density caps applied to the entire city, without regard to any specific planning considerations in any particular regions of the city.\textsuperscript{235} They were invalidated, not because they were too strict, but because they were arbitrarily adopted.\textsuperscript{236}

\section*{3. Florida’s Community Planning Act}

Florida’s modern comprehensive planning law, adopted in 1985, requires each local government to adopt and maintain a comprehensive plan that meets identified standards in state law and which governs all subsequent zoning and development decisions subsequently taken by the local govern-

\begin{flushleft}
\textsuperscript{230} Id. at 117.
\textsuperscript{231} Id. at 114.
\textsuperscript{232} 460 So. 2d 379 (Fla. 5th Dist. Ct. App. 1984).
\textsuperscript{233} Id. at 380.
\textsuperscript{234} Id.
\textsuperscript{235} Id.
\textsuperscript{236} Id. For a discussion of various judicial responses to “no growth” ordinances in general, see generally Pierce, supra note 7.
\end{flushleft}
The Act is controversial and constantly the subject of legislative proposals to reduce state oversight of local planning decisions and/or make the applicable standards more flexible. In general, the Act authorizes and requires local governments to plan for projected growth, ensures the adequate provision of necessary infrastructure and services, and protects environmental resources. The Act’s provisions related to the role of population and growth projections vis-à-vis timing of allowable development are debated and controversial. Its provisions concerning the provision of or payment for necessary infrastructure by developers, and its provisions concerning the factors used to determine the appropriate amount, location and types of development are important legislative requirements for the financial and ecological sustainability of land use plans.

a. **Future Land Use Plan Requirements**

Under the Florida Act, how many people are expected to live and use land in a community is a key issue. Where, and how, they will live and use land are separate questions. At least until the 2011 Legislative session, the law gives the government the ability to not accommodate the full projected population if doing so would have unacceptable impacts on other required planning factors. In 2011, the Legislature made a policy determination to require, with an exception for **Areas of Critical State Concern** under section 380.05 that the “amount of land designated for future land uses should allow the operation of real estate markets to provide adequate choices for permanent and seasonal residents and business and may not be limited solely by the projected population. The element shall accommodate at least the minimum amount of land required to accommodate the medium projections of the [state] for at least a 10-year planning period . . .”

The Act requires that, whatever amount of the projected population is accommodated by the plan, basic land use decisions about the type and intensity or density of development to be allowed are determined by a variety of factors, including, among other things, the character of undeveloped land, the availability of water supplies, public facilities, and services, and the discouragement of urban sprawl. Comprehensive Plans must include a conservation element for the “conservation, use, and protection of natural re-

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238. Id. § 163.3161(4).
240. FLA. STAT. § 163.3177(6)(a)4.
241. FLA. STAT. § 163.3177(6)(a)2.
sources.... including factors that affect energy conservation. A Conservation Element must protect air and water quality, water quantity, minerals, soils, and native vegetation, fisheries, wildlife, wildlife habitat, and marine habitat, and direct incompatible future land uses away from wetlands.

Coastal local governments must include a Coastal Management Element which “[m]aintain[s], restore[s], and enhance[s] the overall quality of the coastal zone environment”, “use[s] ecological planning principles and assumptions in the determination of the suitability of permitted development”, “[l]imit[s] public expenditures that subsidize development in coastal high-hazard areas”, and “[p]rotect[s] human life against the effects of natural disasters”.

G. The Florida Keys Example

Florida’s land use planning laws, when applied in the early 1990s to the local governments making up the Florida Keys, resulted in comprehensive land use plans for Monroe County and its cities which imposed annual and overall caps on new development approvals that are well below population projections. A 1995 Order of the Administration Commission (Florida’s Governor and Cabinet) required and approved the “carrying capacity”—based Monroe County Plan and found that comprehensive plans are not required to accommodate projected population regardless of the impacts to other planning issues, and must be based on a full analysis of all growth limitations.

Originally, those growth caps were the result of hurricane evacuation constraints, but in recent years, the growth rate was reduced in response to ecosystem protection concerns.

This Order resulted from the application of the Act to Monroe County (the Florida Keys) in the early 1990s. The original adopted plan adopted by the county was greatly deficient and was disapproved by the state. The County agreed to completely re-write the plan, based upon an overall “carrying capacity” approach. The amended plan was still deficient, and a second legal challenge resulted in dramatic findings by a state administrative law judge that the carrying capacity of the Keys’ near shore waters to assimilate additional nutrient (wastewater and storm water) pollution had been exceeded. The Order ruled that the amount of development allowed in the ini-

244. Fla. Stat. § 163.3177(6)(g)1, 5-7.
tial Plan was “excessive because of the inability... to evacuate people in the event of a Category 3, 4, 5 hurricane and because the ability of the near shore waters and sea grasses to sustain development had been exceeded.”

The plan was again invalidated and the next re-write limited annual and overall new permitting to that which could meet a “no net nutrient increase” pollution standard, and be accommodated within a 24-hour evacuation time. Because the health of the marine and terrestrial systems were also known limitations on development—but not as easily quantified as hurricane evacuation times—the amendments also conditioned each year’s permit allocations on “substantial progress” on tasks in an annual Work Program, making such progress a condition precedent to maintaining the existing growth rate.

The Order discussed how these provisions were required in order to bring the plan into compliance with the Act.

The approved plan changes required that each year, the Commission “shall determine... whether substantial progress has been achieved toward accomplishing the tasks of the work program.” If “substantial progress has not been made, the unit cap for new residential development shall be reduced by at least 20 percent for the following year.

The Commission found a lack of “substantial progress” in 1999 and reduced the annual permit allocation by 20 percent and extended the five-year Work Program to seven years.

Key among the Work Program requirements was that an overall carrying capacity study be performed and that the land use plan be amended by 2003 to implement the findings of that study.

The specific legal requirement for the study was as follows:


248. Id. at *10. Remedial amendments are required to bring a plan into compliance with Chapter 163.


250. FLA. ADMIN. CODE ANN. r. 28-20.110 (2010). The 1997 Final Order interpreted this provision: “The number of permits authorized [annually] is... conditional.” Abbot, 1997 WL 1052490, at *26. “If the... Commission determines that ‘substantial progress’ has not been achieved, [it] is required to reduce the number of authorized residential permits... by a minimum of 20 [percent].” Id. (emphasis added). “Continued development... is conditioned upon ‘substantial progress’ being made in completing the Work Program.” Id. at *33.

251. Id. at 35.

252. Id. at 37.
The carrying capacity analysis shall be designed to determine the ability of the Florida Keys Ecosystems, and the various segments thereof, to withstand all impacts of additional land development activities. The carrying capacity analysis shall consider aesthetic, socioeconomic (including sustainable tourism), quality of life and community character issues, including the concentration of population, the amount of open space, diversity of habitats, and species richness. The analysis shall reflect the interconnected nature of the Florida Keys' natural systems, but may consider and analyze the carrying capacity of specific islands or groups of islands and specific habitats, including distinct parts of the Keys' marine system.

Upon completion of the study, Monroe County was, by July 2003, to:

Implement the carrying capacity study by, among other things, the adoption of all necessary plan amendments to establish a rate of growth and a set of development standards that ensure that any and all new development does not exceed the capacity of the county's environment and marine system to accommodate additional impacts. Plan amendments will include a review of the County's Future Land Use Map series and changes to the map series and the "as of right" and "maximum" densities authorized for the plan's future land use categories based upon the natural character of the land and natural resources that would be impacted by the currently authorized land uses, densities and intensities.

The Study was completed in late 2002. Among its chief findings were:

'Development in the Florida Keys has surpassed the carrying capacity of upland habitats to maintain [further development].'

'Secondary and indirect impacts of development further contribute to habitat loss and fragmentation' and that "any further development in the Florida Keys would exacerbate secondary and indirect impacts to remaining habitat.'

253. Id.

'Any further encroachment into areas dominated by native vegetation would exacerbate habitat loss and fragmentation.' 255

'Development in the Florida Keys has surpassed the carrying capacity of [several protected species] to maintain [the effects of further development activities].'

... ... ...

'[T]he Lower Keys marsh rabbit [and silver rice rat] are highly restricted and likely could not withstand further habitat loss without facing extinction. It makes a similar finding relative to the Key Deer, and finds that any further habitat loss would place the Stock Island tree snail in jeopardy].' 256

H. Property Rights Implications of the Monroe County Rate of Growth Ordinance

Monroe County’s annual growth caps were upheld against a property rights challenge in Burnham v. Monroe County. 257 Upholding a summary judgment order granted in favor of the County, Florida’s Third District upheld the constitutionality of the ordinance, holding: (1) The county did not affect a taking by denying the owners’ request for building permit based on their failure to incorporate design features that ordinance sought to encourage, and (2) The rate of growth ordinance was constitutional. 258 The court ruled that the “trial court correctly determined that the ROGO ordinance was constitutional, as it substantially advances the legitimate state interests of promoting water conservation, windstorm protection, energy efficiency, growth control, and habitat protection.” 259

There are two key features of the County’s ordinance that likely play an important role in avoiding property rights violations. First, no properties are

255. Id. at 6–12.
256. See Grosso, supra note 33.
As of this writing, the County and the State remain in the process of implementing the Carrying Capacity Study and the rest of the Comprehensive Plan. While the details of the remaining issues and debates are beyond the scope of this article, the key point is that the comprehensive plans adopted in the Keys, an Area of Critical State Concern, limited the total amount of, and strictly regulated the standards for, future development.

Id.
257. 738 So. 2d 471, 472 (Fla. 3d Dist. Ct. App. 1999) (per curiam).
258. Id.
259. Id.
facially precluded from receiving a permit allocation. Instead, allocations are based on a competitive scoring system under which the highest scoring applications (based on a suite of planning considerations related to ecological impacts, infrastructure availability, surrounding development, etc.), and thus, all properties have the potential to receive an award. The Burnham opinion stressed that the landowner had not availed himself of the opportunity to increase the competitiveness of his application by incorporating available design features. Next, the ordinance grants applicants who have been denied an allocation for four years the right to either receive a permit allocation or have their land acquired by the County.

I. The Applicability of the Florida Keys Precedent to Other Communities

A subsequent case under Florida’s Growth Management Act, and involving Palm Beach County, interpreted the Monroe County Orders, making the following observations:

According to expert planning testimony for DCA and the County, the County is obligated to plan for growth in accordance with [the statute and rule] up to its “sustainable carrying capacity,” which has not been reached. Whether or not they believe the County has the option to plan to slow or stop growth before reaching “sustainable carrying capacity,” it is clear from the evidence that the County is not doing so, but instead is planning for continued growth within the framework of its Plan until reaching what it considers to be “build-out” conditions.

The Monroe County orders recognize that the [statute and administrative rule] require a sustainable carrying capacity analysis in appropriate situations. The experts cited in paragraph 63 testified that Palm Beach County is not yet facing such a situation.

In any event, the [Act] accords a local government the flexibility to make a variety of planning decisions regarding how its jurisdiction should grow. Section 163.3177(6)(a), Florida Statutes, recognizes that the future land use plan should be based on a number of factors, including not just population projections, but also

260. See id.
261. See id.
262. Burnham, 738 So. 2d at 472.
The outcome in the Keys springs from the compelling nature of the planning facts—the “surveys, studies and data” under Chapter 163—in the Keys. The extreme ecological and infrastructure limits on growth in the unique and fragile Florida Keys—as evidenced by their status as an Area of Critical State Concern under Chapter 380 of the Florida Statutes were the dominant factor in this outcome. Yet the basic legal principle would apply anywhere in Florida. To the extent that the data and analysis reveals significant natural or other constraints on development and land use impacts in other local governments, a similar outcome—in the context typically of either comprehensive plan updates or the denial of applications for Future Land Use Map or policy amendments—is possible in other jurisdictions. While the Act was amended in 2011 to require comprehensive plans in the most of the state (those areas not designated as Areas of Critical State Concern) to accommodate the minimum population projections for at least a 10-year planning period, the balance of the Acts, provisions, many of which are describe above, allow and require that population to be accommodated in a sustainable manner. A 2003 letter from the Department of Community Affairs (DCA) regarding Palm Beach County’s population forecasts stated:

Local governments are not required to convert agricultural lands based solely on population trends without consideration for other planning objectives and needs.

[Local governments are not compelled to authorize unlimited or unchecked urbanization simply to accommodate past growth trends resulting from rapid urbanization.]

In the clearest example of this principle, the comprehensive plans of Monroe County and its cities impose annual caps on new development approvals that are well below population projections.

In the Keys, the limits are the ability of its fabled marine system to handle more nutrient pollution, its limited evacuation capacity (obviously a compelling public safety issue) and the minimum spatial needs of several endangered and other listed species. On mainland south Florida, there is a minimum spatial extent of land needed to restore the Everglades and maintain a water supply. In other places the issue may be the necessary critical mass of farmland to sustain an agricultural economy, the critical spatial mass, quality or function of ecosystems and natural features, or agricultural industries, the maximum allowable pollution loads in rivers, lakes or springs, minimum flows and levels for water bodies, or habitat needs similar to those in south Florida. Development can also be limited as a result of the inability to provide critical public facilities or services such as evacuation capacity, safe, efficient transportation, wastewater, potable water, flood protection, solid waste, or other necessities. As Florida continues to grow, and forests, swamps, watersheds, wildlife habitats, water bodies, and other natural features grow more degraded or fragmented, as farming acreage falls below the critical mass needed to support long-term investment, and as expansion of key public facilities becomes increasingly constrained or precluded, such circumstances are likely to appear farther up the state.

J. Adequate Public Facilities Requirements

Florida is among the states that statutorily require development be served with “adequate” public facilities. Florida’s “concurrency” law requires all local governments to adopt minimum level of service standards, consistent with state law, for solid waste, storm water, and wastewater, and precludes the approval of a development that will cause a “concurrency standard” to fail to be met. Local governments are authorized to make transportation, parks and recreation, schools and other public facilities the subject of concurrency requirements.

The Act requires that the future land uses allowed in local government comprehensive plan be based upon, among other things, the “availability of

269. See e.g., FLA. STAT. § 163.3178(2)(d) (2011) (requiring a comprehensive plan’s coastal management element to include “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.”).

270. FLA. STAT. §§ 163.3180(1) and (2).

271. Id.
water supply.”. This requirement is key to coordinating land and water planning.

Finally, the Act includes provisions that promote fiscally efficient development. One of the factors to be considered when determining if a land use change would inappropriately promote urban sprawl is whether it “allows for land use patterns or timing 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.”

The Act requires the Capital Improvements Element of comprehensive plans to “[l]imit public expenditures that subsidize development in high hazard coastal areas.” Section 163.3178(1), concerning coastal management, declares “the intent of the Legislature that local government comprehensive 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.”

III. STRICT PLANNING AND DEVELOPMENT ACTIONS, GROWTH CAPS, EXACTIONS AND THE CONSTITUTION

A. Private Property and the Takings Clause

Growth controls are potentially subject to claims that they deprive owners of their property without just compensation. Land use or environmental regulations which “go too far” and require a private landowner to bear a burden that should be borne by the public are a taking of private property. A regulatory taking occurs when the legislation (1) does not advance a legitimate governmental interest or (2) denies the landowner all or virtually all economically viable use of his or her land.

273. See FLA. STAT. §163.3177 (6)(a) 9.a.(VIII)
274. See FLA. STAT. §163.3177 (6)(g)6.
276. The Fifth Amendment Takings Clause states: “[N]or be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.
The most stringent land use and environmental regulations—those which facially preclude or severely limit development or intensive uses of land, and those which, as applied, allow a landowner little or no such uses—face heightened property rights limitations:

Regulations that leave the owner of land without economically beneficial or productive options for its use—typically . . . by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.\(^{279}\)

A landowner who “has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, has suffered a taking.”\(^{280}\)

B. The Right to Travel

In addition to the private property rights implications, the so-called, “right to travel” is arguably implicated by limited or no growth ordinances.\(^{281}\) The Privilege and Immunities Clause of the Constitution states: “The citizens of each state shall be entitled to all privileges and immunities of citizens in the several States.”\(^{282}\) One of the Privileges recognized is the right to travel, held to be the “right of free ingress into other States, and egress from them.”\(^{283}\) This clause protects the right to travel from state infringement.\(^{284}\) The right to travel includes the right of foreign residents to be treated the same as native-born residents,\(^{285}\) so as to preclude unequal licensing fees. A

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280. Id. at 1019. Florida’s statutory Property Rights Act establishes a standard for landowner compensation that is intended to provide relief to landowners in a greater number of cases that would be under the Constitution, but has not been interpreted by commentators and cases as setting the standard for compensation significantly lower than the Constitutional line. See Richard Grosso & Robert Hartsell, Old McDonald Still Has a Farm: Agricultural Property Rights After the Veto of S.B. 1712, Fla. B.J. Mar. 2005, at 41, 43; see also Holmes v. Marion Cnty., 960 So. 2d 828, 829–30 (Fla. 5th Dist. Ct. App. 2007); Citrus Cnty. v. Halls River Dev., Inc., 8 So. 3d 413, 415 (Fla. 5th Dist. Ct. App. 2009).
285. See Baldwin, 436 U.S. at 390.
state could not set a cap on growth which would prohibit non-residents from purchasing land or moving to the state.\textsuperscript{286}

Even if a Comprehensive Plan only allows enough growth for town residents, it does not violate the right to travel so long as out-of-town residents are not banned.\textsuperscript{287} In \textit{York}, a District Court judge upheld a growth cap:

which does not on its face ban or direct reduction in sale or lease of new housing to non-residents and does not impact sale or lease of existing housing, is sharply distinguishable from legislation that has been held to impose a penalty, such as durational residency requirements that flatly deny eligibility for vital benefits or reduce the quantum of benefits available until a person has resided in a state for a certain period of time. \ldots Even granting that such an ordinance discourages migration, it does not penalize it in a constitutional sense. \ldots [The Court is] 'unable to find that a zoning ordinance creates a barrier to interstate migration merely by limiting options and increasing costs for persons wishing to reside in a particular locality.'\textsuperscript{288}

In \textit{Construction Industry Ass'n of Sonoma County v. City of Petaluma},\textsuperscript{289} the Ninth Circuit upheld the City of Petaluma's strict cap on growth against a right to travel argument, because "the concept of the public welfare is sufficiently broad to uphold Petaluma's desire to preserve its small town character, its open spaces and low density of population, and to grow at an orderly and deliberate pace."\textsuperscript{290} The court noted that all land use regulation can have potential exclusionary tendencies and impacts on citizens of surrounding communities, but should be upheld so long as they bear a rational relationship to a legitimate state interest.\textsuperscript{291}

C. \textit{Adequate Public Facility and Other Moratoria}

Ordinances that limit development approvals based on the availability of public services and facilities, or based on appropriately supported annual

\textsuperscript{288} Id. at *23–*25.
\textsuperscript{289} 522 F.2d 897 (9th Cir. 1975).
\textsuperscript{290} Id. at 908–09.
growth caps, are temporary restrictions, or a form of moratoria. Courts will uphold moratoria that are necessary to protect the public health, safety, and welfare. Accordingly, courts have upheld moratoria based on the need to plan to avoid problems caused by future growth, or to cure existing problems caused by prior development.

Moratoria that are reasonably limited in scope and duration, and have a firmly fixed termination point will be upheld. This is to be distinguished from moratoria of excessive or unlimited duration, which are generally held to be unreasonable. Government has a duty to expeditiously take steps to rectify the problem upon which the moratorium is based.

A transportation concurrency moratorium under Florida law was upheld in *WCI Communities, Inc. v. City of Coral Springs*. The City of Coral Springs enacted a nine month temporary moratorium on the processing of site plan applications for townhouse and multi-family development. WCI filed suit claiming that the moratorium constituted procedural and substantive due process, and property rights violations, and that it prevented WCI from using its multi-family parcels for multi-family residential development.

The court held:

> [T]he city's use of zoning in progress and its adoption of a temporary moratorium in the processing of multi-family development applications did not deprive WCI of any substantive due process rights or affect a temporary taking. Under both substantive due process and equal protection, when the legislation being challenged does not target a protected class, the rational basis test is applied. The rational basis standard is highly deferential

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298. 885 So. 2d 912 (Fla. 4th Dist. Ct. App. 2004).
299. *Id.* at 913.
300. *Id.* at 913–14.
such a] court should not set aside the determination of public officers in land use matters 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. The question is only whether a rational relationship exists between the ordinance and a conceivable legitimate governmental objective. If the question is at least debatable, there is no substantive due process violation.\textsuperscript{301}

The court found it to be "well-settled that permissible bases for land use restrictions include concern about the effect of the proposed development on traffic, on congestion, on surrounding property values, on demand for city services, and on other aspects of the general welfare."\textsuperscript{302} The moratoria served the valid purpose of preventing development inconsistent with pending changes in development regulations, and thus was rationally related to city’s attempt to preserve status quo while it formulated regulatory land use scheme and so did not violate due process.\textsuperscript{303}

Cases in which development moratoria have been upheld include Bradfordville Phipps Ltd. Partnership v. Leon County,\textsuperscript{304} which observed that moratoria are a vital, valid part of a Florida local government’s zoning power.\textsuperscript{305} Bradfordville rejected a claim that a court-ordered injunction requiring a moratoria (and the subsequent moratoria enacted by the local government) constituted a taking.\textsuperscript{306} The temporary nature of the restriction, and the fact that the Plaintiff purchased its property with actual or constructive notice of the highly restrictive land use environment that existed, were factors in the court’s decision.\textsuperscript{307}

The court noted that:

The widespread invalidation of temporary planning moratoria would deprive state and local governments of an important land-use planning tool with a well-established tradition. Land-use planning is necessarily a complex, time-consuming undertaking for a community, especially in a situation as unique as this. In several ways, temporary development moratoria promote effective planning. First, by preserving the status quo during the planning

\textsuperscript{301} Id. at 914 (citations omitted).
\textsuperscript{302} Id. at 915.
\textsuperscript{303} WCI Cmtys., Inc., 885 So. 2d at 915–916.
\textsuperscript{304} 804 So. 2d 464 (Fla. 1st Dist. Ct. App. 2001).
\textsuperscript{305} Id. at 470.
\textsuperscript{306} Id. at 471–72.
\textsuperscript{307} Id. at 468.
process, temporary moratoria ensure that a community’s problems are not exacerbated during the time it takes to formulate a regulatory scheme. Relatedly temporary development moratoria prevent developers and landowners from racing to carry out development that is destructive of the community’s interests before a new plan goes into effect. Such a race-to-development would permit property owners to evade the land-use plan and undermine its goals. Finally, the breathing room provided by temporary moratoria helps ensure that the planning process is responsive to the property owners and citizens who will be affected by the resulting land-use regulations.308

D. Strict Planning and Zoning Allowances in Florida

Local governments in Florida can maintain existing planning and zoning designations and deny requested use, density, and intensity increases, as a means of protecting the carrying capacity and sustainability of its natural and public resources.

Decisions to deny requested land use amendments based on these considerations are likely to be upheld if challenged.309 The Supreme Court of Florida has upheld local government authority to decline requested plan amendments to allow an increase in density.310 Such decisions are legislative in character, and will only be overturned if not “fairly debatable,” a highly deferential standard for local governments.311 A local government’s decision not to change its plan will be upheld when any valid planning rationale supports the decision.312

In determining whether a regulation denies a landowner all economically viable use, the focus is on the existence and value of permissible uses.313 There is no right to any level of development land use, such as residential, commercial, or industrial, as long as the allowed uses are economically viable.314 As long as agricultural or some other non-construction use is economically viable, regulations may preclude any substantial, or even all, development.315 In Martin County v. Yusem,316 the Supreme Court of Florida upheld

308. Id. at 470 (quoting Keshbro, Inc. v. Miami, 801 So. 2d 864, 874 (Fla. 2001)).
309. See Bd. of Cnty. Comm’rs of Brevard Cnty. v. Snyder, 627 So. 2d 469, 471 (Fla. 1993).
310. Id. at 475.
311. Id. at 472.
312. Martin Cnty. v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997); Martin Cnty. v. Section 28 P’ship, 668 So. 2d 672, 677 (Fla. 4th Dist. Ct. App. 1996).
315. See generally Yusem, 690 So. 2d 1288 (Fla. 1997).
a county’s decision to deny a request to “up-zone” agricultural lands, finding that the county was not required to amend its comprehensive plan at the landowner’s request. The court held that landowners do not have a right to density increases and ruled that decisions to deny requests for comprehensive plan changes “are legislative decisions subject to the [deferential] fairly debatable standard of review.”

In Martin County v. Section 28 Partnership, the Fourth District rejected a taking claim against Martin County’s decision not to amend its comprehensive plan to change agricultural zoning. The court held that such decisions “will not be considered arbitrary and capricious if [they have] ‘a rational relationship with a legitimate general welfare concern.’” The Court found that “The record contains sufficient evidence establishing that the County’s comprehensive plan policies are based on rational and sound planning principles, designed to preserve agricultural lands, protect wetlands and environmental resources, ensure the efficient use of public resources, and discourage urban sprawl” and that because of the extent of the impact from the proposed density increase, the refusal to amend the plan bore “a substantial relationship to a legitimate governmental interest.”

Thus, if agricultural or other non-intensive development uses are economically viable, local governments will typically be well within their police power and without takings liability if they decline to approve rezoning or comprehensive plan amendments on agricultural lands. Beyond maintaining existing planning and zoning designations, local governments may also reduce allowable uses, densities, and intensities so long as the reductions do not “go too far.” As a matter of constitutional takings law, landowners do not have a vested right to the continuation of current zoning, which can be reduced for valid reasons. Because an owner is not guaranteed the most profitable use of his land but simply some use that can be economically carried out, an action which “down-zones” land or increases legitimate restrictions is not invalid simply because it denies the highest and best use of the property. Regulatory actions have been upheld against takings claims even

316. 690 So. 2d 1288 (Fla. 1997).
317. Id. at 1290.
318. Id. at 1295.
319. 772 So. 2d 616 (Fla. 4th Dist. Ct. App. 2000).
320. Id. at 621.
321. Id. at 620 (quoting Restigouche, Inc. v. Town of Jupiter, 59 F.3d 1208 (11th Cir. 1995)).
322. Id. at 621.
where they dramatically diminished the value of the property, including impacts potentially as great as 95 percent.325

In Florida, so long as the approved zoning allows some economically viable use, a landowner is not entitled to more favorable or economically valuable zoning.326 In *Lee County v. Morales*,327 the Second District rejected a takings claim against a “down-zoning” because the resulting densities were economically viable and the reductions were not made arbitrarily, but for valid planning reasons based on a study.328 The court found that the county acted within its discretion to revise the zoning allowances based upon the new information presently available.329

Changes to local government comprehensive plans that reduce allowable densities have specifically been addressed as potential takings. In *Glisson v. Alachua County*,330 plan amendments that reduced density from one unit per acre to one unit per five acres, were not held to be takings since the change was not arbitrary, and the remaining uses were economically viable.331 The validity of the amendments was strongly supported by the fact that they were adopted pursuant to the authority of Florida’s growth management laws.332 “Down-zoning” or increasing land use restrictions are a viable, legal option for ensuring that the impacts of development or other land uses do exceed the capacity of natural or man-made systems to accommodate their impacts.333

Thus, local governments’ hands are not tied when it comes to changing existing planning and zoning provisions. If existing rules are no longer appropriate, government is not precluded from making changes that reflect current information.334 Planning and zoning is not a perfect science and is

325. Susan L. Trevarthen, *Advising the Client Regarding Protection of Property Rights: Harris Act and Inverse Condemnation Claims*, Fla. B. J. July/August 2004, 61, 61; see Hadacheck v. Sebastian, 239 U.S. 394 (1915) (reducing property value by over 90 percent); Graham v. Estuary Properties, 399 So. 2d 1374, 1382 (Fla. 1981) (75 percent reduction of value not a taking); *Penn Cent. Transp. Co.*, 438 U.S. at 124 (in some cases regulations may result in a 95 percent loss without justifying compensation as a taking).


328. Id. at 655–56.

329. Id. at 656.


331. Id. at 1037–38.

332. Id. at 1036.


334. See, e.g., *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999) (ruling that the denial of a permit under the Endangered Species Act did not interfere with the landowner’s reasonable investment backed expectation, even though the landowner had purchased the land prior to
often dependant on predicting the future and contingent on unknown factors. Government has significant flexibility to reduce use or density or increase restrictions, so long as the resulting rules allow some economically viable use and are not arbitrary.

E. Transferrable Development Rights

Transferrable Development Rights are a potential mechanism that will allow local governments to make substantial areas of ecological importance off limits to development, while still retaining value in the impacted lands. If the enacted regulation permits most existing uses of the property, and provides a mechanism whereby individual landowners may transfer development rights, the regulation does not deny individual landowners all economically viable uses of their property. In *Glisson*, the court acknowledged that the county regulations diminished the economic value of the property; however, diminution in value is not the test. Rather, a challenger must demonstrate denial of all or a substantial portion of the beneficial uses of the property.

F. Growth Caps, Carrying Capacity Planning, and Property Rights

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Supreme Court of the United States upheld a thirty-two month moratorium that temporarily prohibited construction without compensating affected landowners while studying the carrying capacity of the area and formulating a regional plan for development. The Court rejected the claim that “a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a per se taking of property requiring the enactment of the ESA because, the owner could not have been “oblivious” to the rising environmental awareness that occurred during the years between the purchase and the application for a permit.

335. A “TDR” program allows a private landowner to “sever his development rights in an area where development is objectionable and transfer them to an area where development is less objectionable.” Andrew J. Miller, *Transferable Development Rights in the Constitutional Landscape: Has Penn Central Failed to Weather the Storm?*, 39 NAT. RESOURCES J. 459, 465 (1999).
337. *Glisson*, 558 So. 2d at 1037.
338. *Id.* at 1035.
340. *Id.* at 342–43.
compensation under the Takings Clause of the United States Constitution.\footnote{Id. at 306.} The Court held that so long as some future interest remained, the per se rule under \textit{Lucas} did not apply to temporary building restrictions.\footnote{Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1018 (1992) (A taking occurs as a matter of law when the landowner is denied all economic beneficial uses in his land).} The Court refrained from adopting an absolute rule regarding moratorium and instead, suggested that an ad hoc analysis must be conducted using the \textit{Penn Central} factors to determine whether a taking had occurred.\footnote{Id. at 342.}

A number of observations from the reported cases can be made about the property rights implications of growth caps.

First, the contrast between the Florida cases of \textit{Boca Raton} and \textit{Innkeepers Motor Lodge} cases and the \textit{City of Hollywood} case makes clear that the established caps—be they density or intensity-related, or building permit-related—must have resulted from some valid analysis or methodology related to a facility capacity, scientific determination of acceptable impact limits, or other non-arbitrary approach other than pulling numbers “out of the air.”

Next, as noted by Pierce,\footnote{Pierce, \textit{supra} note 7, at 115. Pierce criticized the Court’s analysis as “shallow,” noting that “certain aspects of Florida’s geography and environment might make it suffer more under national air quality standards—possibly because poor air quality affects the production of oranges, or because it deters tourist travel to the city.” \textit{Id}.} courts are likely to strike growth limits that respond to regional concerns beyond the strict limits of local government boundaries unless a demonstration is made as to the important connection of local impacts to the regional issue.

Third, like the Rate of Growth Restrictions in the Florida Keys, the analysis of building permit caps discussed in \textit{Currier Builders v. Town of York},\footnote{146 F. Supp. 2d 71 (D. Me. 2001).} suggests that such annual caps on the number of permits may be viewed as somewhat unlike moratoria (in that they are not temporary), and upheld even if permanent if they are based on an articulated methodology, and provide an owner with some potential to make a viable use of his or her land at some reasonable time in the future. In \textit{Currier Builders}, a local ordinance, enacted by citizen referendum, and limiting the monthly and annual number of building permits (issued under a lottery system) was challenged, among other basis, as a taking of private property.\footnote{Id. at 72.} The case was ultimate-
ly dismissed on ripeness grounds, but its long history included a Magistrate Judge's analysis that rejected the takings challenge.48

Ultimately, a court will look at the overall validity of the growth ordinance in conjunction with whether there is a taking of property from the landowner in making its determination of whether the government entity can limit growth and development. Growth limiting ordinances will remain an important tool for local governments as demand for developable land increases and encroachment on environmentally sensitive lands becomes imminent. Such ordinances should serve to promote infill development and protect our natural resources.

G. Large Scale Rural Planning

Florida's Community Planning Act encourages large-scale rural development planning, expressly providing for two types of projects—Sector Plans349 and Rural Land Stewardship Projects350—which authorize local land use plan amendments for very large parcels which allow substantial urban development in exchange for substantial set-asides of farmland or environmentally sensitive lands.

These provisions are controversial from the standpoint of whether, by its terms or in application, the public benefits in terms of long-term preservation of important resources are equal to the private benefits resulting from substantial increases in development potential on lands typically far from existing urban areas. Yet, they offer an exceptionally useful vehicle for the large-scale preservation of ecosystem lands in locations, amounts and quality that are adequate to ensure the sustainability of ecosystems. The ability to essentially "site plan" a several thousand acre parcel in single ownership, in terms of where development will happen and where preservation will occur, at the development approval stage (a comprehensive land use plan amendment) where government enjoys the greatest amount of discretion351 and landowners have not already been granted substantial development rights, and before land has been parcelled off into small units owned by dozens, hundreds or even thousands of owners, offers the most effective method for governmental decision-making that ensures the sustainability of ecological functions. Surely, as described above, the ability of permitting agencies to deny or limit permits based on ecosystem sustainability requirements exists in the law. Yet, in many instances, the denial or the grant of a very limited

348. Id.
349. FLA. STAT. § 163.3245 (2010).
350. Id. § 163.3177.
351. See discussion at pp. 759–62.
wetland or wildlife "incidental take" permit, for example, for land that is entirely or nearly all wetlands or protected wildlife habitat—as a result, perhaps, of subdivision and sales—and which has already been planned or zoned for urban uses, can be very difficult or impossible as a result of perceived or real property rights violations.

IV. IMPACT FEES AND EXACTIONS: MAXIMIZING THE PUBLIC’S ABILITY TO RECoup ITS COSTS IN THE FACE OF PRIVATE PROPERTY RIGHTS

A. Florida Laws and Programs Designed To Have Development Pay For Itself

Neither constitutional nor statutory law requires Florida to subsidize financially new development and population growth. Government (local, county, municipal, or special district)-imposed impact fees equal to 100 percent of development costs are not constitutionally (Federal or Florida) or statutorily prohibited. Thus, while we may not be able to “build a fence at the state line,” we can build a toll plaza and charge the full amount that it will cost to provide the full range of public facilities and services required to meet the needs of all new population.

1. Impact Fees, the Constitution, and Florida Statutes

No Federal or Florida statute specifically caps, or sets a maximum monetary limit, for impact fees imposed by a counties, municipalities, or special districts. Section 163.31801, the “Florida Impact Fee Act,” does not set a cap on impact fees. Rather, under section 163.31801(3), impact fees are subject to requirements regarding their form of adoption, advance notice, method of calculation (based on the most recent and localized data); accounting and reporting; and other procedural and accountability requirements.

In Florida, the amount of allowable impact fees are governed primarily by case law, rather than by statute. Impact fees are analyzed legally under the Takings Clause as exactions.352 The Takings Clause, Amendment V of the U.S. Constitution, made applicable to the states through amendment XIV of the U.S. Constitution, provides: “[N]or shall private property be taken for public use, without just compensation.”353 The Florida Constitution, under Article X, section 6(a), is essentially the same, but requires “full” compensation.354 Analyzed together, the Supreme Court of the United States’ opinions

353. U.S. Const. amend. V.
in the *Nollan v. California Coastal Commission*\(^{355}\) and *Dolan* cases, require that an exaction, such as a mandated developmental impact fee, must meet two tests: 1) There must be an “essential nexus” between the exaction and a legitimate state interest that it serves; and 2) The exaction must be “roughly proportional” to the nature and extent of the project’s impact.\(^{356}\)

In determining whether the imposition of an impact fee is constitutionally permissible, the Supreme Court of Florida has adopted the “dual rational nexus test,” similar to the Supreme Court of the United States’ “rough proportionality” test, which requires the local government to demonstrate “a reasonable connection, or rational nexus, between the need for additional capital facilities and the growth in population generated by the [development]” and “a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the [development].”\(^{357}\)

Thus, so long as the impact fee or exaction is in fact calculated to offset no more than 100 percent of the development’s public facility and service requirements, government may charge that amount.\(^{358}\) Under Florida law, a municipality, county, or special district does not violate constitutional restraints by levying impact fees equal to 100 percent of development costs.\(^{359}\) The courts, however, must review each assessed impact fee on a case by case basis by applying the “dual rational nexus test” to ensure that the fee charged is proportional to the anticipated impact on jurisdictional resources and services.\(^{360}\)

V. JUDICIAL STANDARDS OF REVIEW SUPPORT PLANNING AND REGULATION BASED ON ECOLOGICAL OR OTHER THRESHOLDS

At least one commentator has concluded that municipalities seeking to implement no-growth controls “must create an irrefutable link between land use management and the science of sustainability so that courts may see sus-
tainability concepts as rational and conclusive. While that author's view on this point may reflect his valid, realistic view of the judiciary's gut-level reactions to such ordinances, an analysis of the standards for judicial review of land use regulations demonstrates that a mere "rational basis" for such regulations, and not an "irrefutable link," is necessary to uphold such land use restrictions in the face of most facial constitutional challenges however. In determining whether regulations are arbitrary, or legitimate subjects of regulations, courts give significant deference to the judgment of the regulating body. Property rights claims, on the other hand, may be the greatest obstacle to the adoption of "no growth" ordinances that truly and permanently prevent any reasonable use of individual parcels of land.

"The State is given wide range in exercising its lawful powers to regulate land use for environmental reasons, and any such land-use regulations thus are valid if supported by a rational basis consistent with overall policies of the State."

As long as an ordinance or regulation bears a substantial relationship to the promotion of the public health, safety, morals, or general welfare, it is constitutional. Local governments have a statutory right and responsibility to enact comprehensive plans and such plans, like legislative acts, will be presumed valid when challenged. Absent a showing that the comprehensive plan is unreasonable and is an arbitrary exercise of police power without any relationship to the public health, safety, morals, or welfare, the courts will not overturn the plan. The burden is on the party challenging an ordinance to make this demonstration.

To resolve this issue, courts utilize the "fairly debatable" test, under which, if reasonable minds could differ as to the reasonableness or rationality of an ordinance, the ordinance will be upheld. A plan will be deemed fairly debatable if there is competent, substantial evidence to support the local

361. See Pierce, supra note 7, at 96.
362. Id.
364. Dep't. of Cmty. Aff. v. Moorman, 664 So. 2d 930, 933 (Fla. 1995)
365. Id.; see also Bd. of Cnty. Comm'rs of Brevard Cnty. v. Snyder, 627 So. 2d 469, 473 (Fla. 1993).
367. Id.; City of Miami Beach v. Lachman, 71 So. 2d 148, 150 (Fla. 1953) (en banc) (per curiam).
369. City of Miami v. Kayfetz, 92 So. 2d 798, 802 (Fla. 1957).
370. Davis, 318 So. 2d at 217.
government’s decision. If the plan is found to be fairly debatable, then its application cannot be disturbed by the courts. Only where a plan is not supported by any substantial evidence and is not fairly debatable, will it be deemed arbitrary, capricious, and a denial of due process. To show that a land use restriction is unreasonable and arbitrary, the challenging party must prove that the restriction has no rational relationship to the public health, morals, safety or general welfare, and is not reasonably designed to correct the adverse condition. Once the plan meets the fairly debatable test, the court may not substitute its judgment for that of the local government.

The essence of these cases is that as long as there is a good reason for the regulation, it will not be struck by the Court because the challenger disagrees with that reason. In Capeletti Bros., the court upheld the denial of a rezoning on the basis that it conflicted with existing land use plans and the concern. Differences of opinion on this matter did not invalidate the ordinance on the basis that conclusive proof of the need to deny the rezoning did not exist. Instead, this demonstrated that the issue was fairly debatable and thus within the Commission’s discretion to decide. Importantly, the court explained that, due to the sensitivity of decisions affecting land use, those decisions should be made by local governments, and unless the decisions are arbitrary, discriminatory, or unconstitutional, the court should let those decisions stand. Similarly, the court in Morales stated that because zoning is a legislative function, the courts should only intervene when the action of the zoning body is so unreasonable and unjustified as to amount to a taking. The Court further held that it is not for the judiciary to determine what would be the proper zoning, but to ascertain whether the zoning body’s decision is fairly debatable.

A. Regulating in the Face of Scientific Uncertainty

Scientific conclusions are, by their nature, subject to uncertainty and / or controversy and debate among experts. Federal courts and Florida courts

372. Davis, 318 So. 2d at 217.
375. Davis, 318 So. 2d at 221.
376. 375 So. 2d at 316.
377. Id.
378. Id. at 315; see also City of Miami v. Kayfetz, 92 So. 2d 798, 801 (Fla. 1957).
380. Id.
give deference to the government on such matters. 381 Deference to an agency’s scientific expertise is mandated when the agency articulates a rational connection between the facts and its conclusion. 382 When an agency decision involves a high level of technical and scientific expertise, a court will defer to the agency’s conclusions, so long as they are reasonable. 383 Where the “analysis of the relevant documents ‘requires a high level of technical expertise,’” [a court] must defer to the “informed discretion of the responsible federal agencies.” 384 A reviewing court should be at its most deferential in reviewing an agency’s scientific determinations in an area within the agency’s expertise. 385

In a Florida case, Island Harbor Beach Club, Ltd. v. Department of Natural Resources, 386 the Florida Department of Natural Resources employed a new scientific methodology, which was allegedly unproven and unaccepted in the scientific community, in reestablishing a coastal construction control line. 387 The court held that “selection and use of new scientific methodology was a matter of agency discretion that should not be set aside absent a showing by a preponderance of evidence that the agency’s action is either arbitrary, capricious, an abuse of discretion, or not reasonably related to the statutory purpose.” 388 The court concluded by stating that the setting of coastal construction control lines for the purpose of adequately protecting the beaches and dunes of this state is not a matter of scientific certainty and thus, the court was compelled to give great deference to DNR. 389


382. Ocean Advocates, 361 F.3d at 1119.

383. Lands Council v. McNair, 537 F.3d 981, 987 (9th Cir. 2008).


386. 495 So. 2d 209 (Fla. 1st Dist. Ct. App. 1986).

387. Id. at 223.

388. Id. at 217–18; see e.g., Balt. Gas & Elec., 462 U.S. at 103 (stating that the uncertainty of science only serves to emphasize the limitation of judicial review and the need for greater deference to policy making entities).

389. Island Harbour Beach Club, Ltd., 495 So. 2d at 223; accord Davis v. Sails, 318 So. 2d 214, 222 (Fla. 1st Dist. Ct. App. 1975); see also Lee Cnty. v. Morales, 557 So. 2d 652, 655 (Fla. 2d Dist. Ct. App. 1990) (The rationality and reasonableness of a downzoning, which was based upon an expert’s study and the planning staff’s assessments and recommendations that the land be rezoned in consideration of environmental, archaeological, and historical protection/preservation, was fairly debatable); see also City of Miami Beach v. Lachman, 71 So. 2d 148, 152 (Fla. 1953) (en banc) (per curiam) (If any logical deduction supports the local government’s contentions, a court may not substitute its judgment for that of the local govern-
In *Ecology Center v. Castaneda*, the court upheld the U.S. Forest Service’s approval of timber sales and restoration projects in a National Forest against a challenge from environmental interests. Upholding the agency action under the Federal Administrative Procedure Act’s “arbitrary and capricious” standard, and the applicable “best available science” rule, the court observed the rule that it should grant “considerable discretion to agencies on matters ‘requir[ing] a high level of technical expertise.’” Addressing the issue of competing scientific positions head-on, the court found that “Though a party may cite studies that support a conclusion different from the one the Forest Service reached, it is not our role to weigh competing scientific analyses.”

Short of proving that the agency’s “analysis is outdated or flawed,” the Plaintiffs could not meet their burden, said the court, by relying on other science that suggested a different scientific determination than was made by the agency.

The Supreme Court of Florida’s opinion in *Haire v. Florida Department of Agriculture & Consumer Services*, which upheld Florida’s citrus canker eradication statute and program against constitutional and scientific challenges, contains an excellent discussion of these principles. The trial court had invalidated the state’s program of destroying all citrus trees within 1900 feet of a canker-infested citrus tree, disagreeing with the study from which the 1900 foot destruction radius was derived. The trial court was

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390. 574 F.3d 652 (9th Cir. 2009).
391.  Id. at 659–60.
392.  Id. at 656. Described by the court, consistent with the prevailing precedent, as “narrow,” under which it could “not substitute [their] judgment for that of the agency.”  Id.
394.  Ecology Ctr., 574 F.3d at 659 (citing Lands Council v. McNair, 537 F.3d 981, 988 (9th Cir. 2008) (noting that it is not the proper role of the court to “act as a panel of scientists that instructs the Forest Service how to validate its hypotheses regarding wildlife viability, chooses among scientific studies in determining whether the Forest Service has complied with the underlying Forest Plan, and orders the agency to explain every possible scientific uncertainty”); Greenpeace Action v. Franklin, 14 F.3d 1324, 1333 (9th Cir. 1992) (“To set aside the Service’s determination in this case would require us to decide that the views of Greenpeace’s experts have more merit than those of the Service’s experts, a position we are unqualified to take.”).
395.  Castaneda, 574 F. 3d at 659–60.
396.  870 So. 2d 774 (Fla. 2004).
397.  Id. at 777.
398.  Id. at 786.
persuaded by the fact that the Legislature had not held fact-finding hearings related to the underlying study. On appeal, the Fourth District, and then the Supreme Court of Florida, reversed, ruling that the trial court "erred in rejecting the legislative choice based on its own view of the scientific evidence and improperly substituted its judgment for that of the Legislature, which determined that the 1900-feet eradication zone was justified by the best available science." The Court noted that the legislation has a rational basis and was not scientifically arbitrary, as it was supported by published, peer-reviewed scientific studies, the recommendation of a technical advisory board, and the state’s practical experience with citrus canker. That this science was disputed did not invalidate the resulting regulation:

The fact that the Legislature did not subject the [report to an adversarial trial or the requirements of courtroom admissibility under the Frye test does not make the Legislature's action in adopting the 1900-foot removal radius arbitrary or capricious, or not reasonably related to the goal of citrus canker eradication. In addition, the fact that the trial court heard testimony during a ten-day hearing, whereas the Legislature did not, is not a significant consideration under rational basis review. That there was conflicting evidence presented to the trial court regarding the appropriateness of [the Study's] methods indicates that the issue of whether to adopt [the Study's] conclusions was a matter of debate for the Legislature.

Citing federal law, the Court unequivocally rejected the notion that government could not regulate in the face of scientific debate or uncertainty: "[L]egislatures are not limited to acting only where there is scientific certainty." "To make scientific precision a criterion of constitutional power would be to subject the state to an intolerable supervision hostile to the basic principles of our government . . . ."

In a case decided under state law, a New Mexico appellate court upheld the state’s adoption of a numeric human health standard for uranium in groundwater, rejecting a challenge to its scientific basis. The standard had been the subject of extensive public hearings and debate, and reflected the

399. Id.
400. Id.
401. Haire, 870 So. 2d at 786.
402. Id. (citing Johnson v. City of Cincinnati, 310 F. 3d 484, 504 (6th Cir. 2002)).
403. Id. (quoting Sproles v. Binford, 286 U.S. 374, 388 (1932)).
opinions of human health experts employed by the relevant state agency.\textsuperscript{405} The Court rejected the challenge to the underlying science:

\[\text{[The agency] is not required to support its finding that a significant risk exists with anything approaching scientific certainty. . . . [The statute] specifically allows the Secretary to regulate on the basis of the ‘best available evidence.’ . . . [T]his provision requires a reviewing court to give [the agency] some leeway where its findings must be made on the frontiers of scientific knowledge. Thus, so long as they are supported by a body of reputable scientific thought, the [a]gency is free to use conservative assumptions in interpreting the data with respect to carcinogens, risking error on the side of overprotection rather than underprotection.}\textsuperscript{406}

The precautionary principle suggested in the \textit{Haire} and \textit{Amend Ground Water Quality Standards}\textsuperscript{407} cases was explicated at length by the Supreme Court of Hawaii in its rulings on challenges to a state agency’s actions regulating the consumptive use of water.\textsuperscript{408} The court upheld the Hawaii Commission on Water Resources Management’s limited grant of water use rights based on its invocation of “\textit{precautionary principles},” which was defined as meaning that: “[W]here there are present or potential threats of serious damage, lack of full scientific certainty should not be a basis for postponing effective measures to prevent environmental degradation. ‘Awaiting for certainty will often allow for only reactive, not preventive, regulatory action.’”\textsuperscript{409}

“Where uncertainty exists,” wrote the Court, “a trustee’s duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource.”\textsuperscript{410} The “absence of firm scientific proof should not tie the Commission’s hands in adopting reasonable measures designed to further the public interest.”\textsuperscript{411}

In language of direct relevance to the setting of environmental standards in several arenas, including water allocations, water quality standards and others, the court found that:

\begin{itemize}
  \item 405. \textit{Id.}
  \item 406. \textit{Id.}
  \item 407. 141 N.M. 41 (N.M. Ct. App. 2006).
  \item 408. \textit{In re Water Use Permit Applications}, 9 P.3d 409, 466 (Haw. 2000).
  \item 409. \textit{Id.} at 466 (quoting Ethyl Corp. v. U.S. Envtl. Prot. Agency, 541 F.2d 1, 29 (D.C. Cir. 1976)).
  \item 410. \textit{Id.} at 466 (citing Lead Indus. Ass’n v. U.S. Envtl. Prot. Agency, 647 F.2d 1130, 1152–56 (D.C. Cir. 1976)).
  \item 411. \textit{Id.} at 467.
\end{itemize}
In requiring the Commission to establish instream flow standards at an early planning stage, the Code contemplates the designation of the standards based not only on scientifically proven facts, but also on future predictions, generalized assumptions, and policy judgments. Neither the constitution nor Code, therefore, constrains the Commission to wait for full scientific certainty in fulfilling its duty towards the public interest in minimum instream flows. . . . Uncertainty regarding the exact level of protection necessary justifies neither the least protection feasible nor the absence of protection.412

The court noted that erring on the side of allowing additional environmental impacts (in this case from additional water allocations) created the potential for "unknown impairment and risk" and "could drain a stream dry incrementally, or leave a diverted stream dry in perpetuity, without ever determining the appropriate instream flows. Needless to say, we cannot accept such a proposition."413

On the other hand, the court did not require the Commission to take an overly-strict approach and allocate no water to private users for the several year period it would take to complete the scientific review necessary to resolve the current uncertainty. Instead, the water commission must apply "a methodology that recognizes the preliminary and incomplete nature of existing evidence, . . . and, indeed, incorporates elements of uncertainty and risk as part of its analysis. Such a methodology, by its nature, must rely as much on policy considerations as on hard scientific 'facts.'"414

In furtherance of its trust obligations, the Commission may make reasonable precautionary presumptions or allowances in the public interest.415 The Commission may still act when public benefits and risks are not capable of exact quantification. At all times, however, the Commission should not hide behind scientific uncertainty, but should confront it as systematically and judiciously as possible—considering every offstream use in view of the cumulative potential harm to instream uses and values and the need for meaningful studies of stream flow requirements. We do not expect

412. Id.
413. In re Water Use Permit Applications, 9 P.3d at 470–71.
414. Id. at 471 (citing Ethyl Corp., 541 F.2d at 29 (The Commission "must act, in part on factual issues, but largely on choices of policy, on an assessment of risks, and on predictions dealing with matters on the frontiers of scientific knowledge.") (brackets and internal quotation marks omitted)).
415. Id. at 466.
this to be an easy task. Yet it is nothing novel to the administrative function or the legal process in general.\textsuperscript{416}

The Supreme Court of Hawaii opinion quoted heavily from \textit{Ethyl Corp.}, where the United States Court of Appeals for the D.C. Circuit upheld the Environmental Protection Agency’s authority under the Clean Air Act to regulate in the face of scientific uncertainty.\textsuperscript{417} The Hawaii Court found the \textit{Ethyl Corp.}'s opinion’s policy discussion, made in the context of human health concerns, relevant to environmental issues:

Regulators . . . must be accorded flexibility, \textit{a flexibility that recognizes the special judicial interest in favor of protection of the health and welfare of people, even in areas where certainty does not exist.}

Questions involving the environment are particularly prone to uncertainty. . . . \textit{Yet the statutes—and common sense—demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable.}

Undoubtedly, certainty is the scientific ideal—to the extent that even science can be certain of its truth. . . . \textit{Awaiting certainty, [however,] will often allow for only reactive, not preventive, regulation.} Petitioners suggest that anything less than certainty, that any speculation, is irresponsible. But when statutes seek to avoid environmental catastrophe, can preventative, albeit uncertain, decisions legitimately be so labeled?\textsuperscript{418}

In Florida, in the context of local government comprehensive planning decisions, local governments are encouraged to use any data necessary so long as methodologies are professionally applied, collected, and accepted. Comprehensive plans should be based on whatever data a local government does have, even if that data is not complete.\textsuperscript{419}

\textsuperscript{416} See Ethyl Corp., 541 F.2d at 28 n.58 (explaining how “assessment of risk is a normal part of judicial and administrative fact-finding”).

\textsuperscript{417} Id. at 28.


"Protection of environmentally sensitive areas and pollution prevention are legitimate concerns within the police power." In Morales, the court upheld a down-zoning, based on an expert study, of a barrier island which was designed to preserve archaeological resources, protect the environment and adjoining aquatic preserve, and to guard against the threat by hurricanes and flooding to development. Florida courts also have recognized a local government's legislation to protect their community's appearance as a legitimate exercise of police power. Likewise, the Supreme Court of the United States has ruled that preservation of open space and protection from urbanization and the consequences of urban sprawl, e.g., water pollution, destruction of scenic beauty, disturbance of the ecology and environment, are valid public interests and legitimate governmental goals.

VI. CONCLUSION

Florida can only sustain itself and avoid economic and ecological crisis if its policies and laws respect and reflect the realities of the laws of nature, the finite (and shrinking) amount of land in this peninsula, and its ability to pay for more growth. Growth management must become, in some places, a growth limitation and where and when development can occur. Certainly, the potential impact of sea-level rise alone constitutes "data and analysis" relative to whether proposed land uses, densities, and locations would meet the terms and intent of Florida's land use planning law.

We must have an honest and frank discussion about Florida's finite amount of land, and financial and practical ability to sustain unlimited land development. In a state whose natural environment, built communities, and infrastructure are being overwhelmed by growth that is not paying for itself, government can and must ensure that the public fiscal and welfare are not harmed by the amount, type, and location of new development. Government can require growth to truly pay for itself. It can also regulate land strictly; even adopt annual growth caps, if important to ecosystem, farmland and community protection. It can maintain a tax system and fiscal policies that

420. Morales, 557 So. 2d at 655.
421. Lee Cnty. v. Morales, 557 So. 2d 652, 653 (Fla. 2d Dist. Ct. App. 1990). The court found that "the Zoning Board was appropriately concerned with limiting the effects of future commercial development . . . in view of legitimate environmental concerns, public safety concerns, and concern for preserving the island's aesthetic, historical, and archeological characteristics." Id. at 655.
work in the same direction as the rules. We must be able to talk about carrying capacity limits in polite company and government buildings.

Ultimately, while the law does not require government to watch helplessly while population growth results in the more loss of the basic life functions provided by the air, land, and water, protecting those necessities will require changes in the individual footprint of development and individuals. Indeed, as population growth continues, more people will need more drinkable water, fishing grounds, features like floodplains and dunes to prevent storm damage, land for growing and raising food, and places to enjoy their lives and the world recreating and relaxing in the great outdoors.

The federal and state laws governing planning and environmental permitting decisions in Florida and elsewhere provide government ample authority to ensure the sustainability of fiscal and ecological resources. Applicable judicial standards of review recognize and defer to the need for legislative and executive branch agencies to regulate and act in response to valid science and methodologies, and do not preclude such action in the face of (almost always present) technical or scientific debate. The discretion granted to agencies allows them to use their best judgment, and decisions that do not zealously ensure the long-term public interest may well be upheld upon challenge because a reviewing court cannot conclude that they are "arbitrary or capricious" or violative of a similarly deferential specific statutory review standard. But decisions that do give the benefit of the doubt to environmental, human health, the protection of taxpayer dollars, and other public interest considerations will just as surely be upheld, and property rights and other constitutional limits would intervene only in rare situations to prevent their implementation. The law allows and usually requires government to plan and regulate to ensure sustainability. Judicial standards of review are much more a limitation on the practical ability of environmental and taxpayers interests to challenge individual action as unsustainable than an impediment to aggressive governmental protection of the public interest. It is the election and appointment of public servants unwilling or unable to act boldly to protect the future of the places over which they have jurisdiction, not the courts and the Constitution, which is the critical impediment to sustainability.