

September 1996

Property Rights and Growth Management in Florida: Balancing Opportunity and Responsibility in a Changing Political Climate

Michael Murphy

Follow this and additional works at: <https://digitalcommons.pace.edu/pelr>

Recommended Citation

Michael Murphy, *Property Rights and Growth Management in Florida: Balancing Opportunity and Responsibility in a Changing Political Climate*, 14 Pace Envtl. L. Rev. 269 (1996)

DOI: <https://doi.org/10.58948/0738-6206.1377>

Available at: <https://digitalcommons.pace.edu/pelr/vol14/iss1/18>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Environmental Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

NOTES AND COMMENTS

Property Rights and Growth Management in Florida: Balancing Opportunity and Responsibility in a Changing Political Climate

MICHAEL MURPHY*

A working growth management system can and will separate urban and rural areas in a way that protects open space, farmland, water recharge areas, wetlands and our sensitive coastal areas, and yet provide the land, density, and infrastructure needed for residential, commercial and industrial development.¹

The private property rights movement is about freedom and fairness; just as we have the responsibility to protect and preserve our environment, the right to own and use property must be protected in order to preserve individual liberty from the capricious actions of powerful government bureaucrats.²

* The author would like to thank his wife, Margie, for her love and support. Special thanks to Professor John R. Nolon and Professor Jayne E. Daly for sharing their knowledge of land use law. Also special thanks to Caryn E. Gerst and Andrea Herbst and her group for making this a better article.

1. Gil Klein, *Florida Officials Search for the 'Missing Pieces' in Plan to Manage State's Growth*, CHRISTIAN SCIENCE MONITOR, Sept. 14, 1984, at 1 (quoting John DeGrove, then head of Florida's Department of Community Affairs) [hereinafter Klein, *Missing Pieces*].

2. Rep. Ken Pruitt, *Squaring Off On Property Rights: Respect Private Property*, FLORIDA TREND, Mar. 1992, at 62. Rep. Pruitt is a member of the Florida House of Representatives and one of the sponsors of the Bert J. Harris, Jr. Private Property Rights Protection Act. *Id.*

I. Introduction

Florida's new property rights law has cast a long shadow over its growth management system. Growth management seeks to preserve the quality of life for present and future generations by: (1) requiring all levels of state government to work together to achieve common goals, (2) calling upon individual landowners to forego some of their economic opportunities to preserve opportunities for future generations, and (3) mandating continuous assessment and revision of the growth management process itself to meet constantly changing conditions.³ Touted as a compromise between property rights advocates and growth management advocates, the new property rights law may shake the very foundations of the most comprehensive growth management system in the United States.⁴

The controversy surrounding an individual's real property rights can be reduced to one issue: whether an individual property owner or the general public should bear the cost of economic impacts of governmental laws or regulations. Although the issue is clear, the answer is ambiguous. This ambiguity arises from the conflict inherent in the land user's attempt to maximize economic opportunity while concurrently exercising both responsibility and restraint.⁵ However, this has always been an uneasy balance and, most recently, the property rights debate has arrived at the forefront of the political landscape.⁶

Since the early 1990s, legislatures of all fifty states and the federal government have considered measures to bolster private property rights.⁷ Most property rights advocates want to reign in government regulation involving land use

3. See *infra* part II. B.

4. See Larry Kaplow, *Property Rights Bill Readied*, PALM BEACH POST, Apr. 16, 1995, at 1A, 8A; *The Good, the Bad and the Ugly*, PALM BEACH POST, May 7, 1995, at 1A.

5. See *infra* part II. A.

6. See David Foster, *Property Rights Soars to New Heights*, CHICAGO TRIBUNE, Aug. 19, 1995, at 1; Neal R. Peirce, *Second Thoughts About Takings Measures*, BALTIMORE SUN, Dec. 18, 1995, at 13A.

7. See Peirce, *supra* note 6, at 13A.

and environmental protection to preserve "one of the great American Freedoms."⁸ To date, eighteen states have enacted various property rights protection laws.⁹ Amongst these states, Florida has enacted one of the strongest measures.¹⁰

In May, 1985, Florida's legislature overwhelmingly passed the Growth Management Act of 1985,¹¹ creating a framework to handle a rapidly increasing population and development that was destroying much of the State's unique natural resources.¹² Ten years later, in 1995, Florida enacted a new property rights bill, H. 863,¹³ allowing a landowner to receive compensation when he demonstrates that a govern-

8. *Private Property Rights, Hearings on S. 605 "The Omnibus Property Rights Act of 1995"* before the Senate Comm. on the Judiciary, Fed. Doc. Clearing House, Inc., Apr. 6, 1995 available in LEXIS, News Library, Curraws File (statement of Senator Orrin Hatch, Chairman of the Senate Committee on the Judiciary). Testifying at the same hearing, Senator Bob Dole said:

There is perhaps no greater foundation for a successful free society than private property. Private property rights are the rights to enjoy the fruits of our labor and our ideas and deservedly enjoy special protections in the U.S. Constitution A regulatory state that seems only to grow and grow — that is increasingly intrusive — has provided the means for a sustained assault on private property rights in America. It is our duty to ensure that we limit the arbitrary exercise of government power and pursue worthwhile goals in ways that also protect the rights of our citizens.

Id. (prepared testimony of Senator Bob Dole, co-sponsor of S. 605).

9. See Peirce, *supra* note 6, at 13A. See, e.g., ARIZ. REV. STAT. ANN. §§ 37-221 to -223 (West 1993) (the citizens of Arizona rejected this property rights measure in a public referendum on November 8, 1994); DEL. CODE ANN. tit. 29, § 605 (Supp. 1994); FLA. STAT. ANN. §§ 70.001 to .080 (West Supp. 1996); IDAHO CODE §§ 67-8001 to -8004 (1994); IND. CODE ANN. §§ 2-5-18-1 to -11, 4-22-2-29, -32, -40 (Michie Supp. 1995); KAN. STAT. ANN. §§ 77-701 to -711 (Supp. 1996); LA. REV. STAT. ANN. §§ 3:3601 to 3624 (West Supp. 1996); MO. REV. STAT. § 536.017 (1994); N.D. CENT. CODE § 28-32-02.5 (Supp. 1995); TENN. CODE ANN. §§ 12-1-201 to -206 (Supp. 1995); TEX. GOV'T CODE ANN. §§ 2007.001 to .045 (West

Supp. 1996); UTAH CODE ANN. §§ 63-90-1 to -4 (Supp. 1995); VA. CODE ANN. § 9-6.14:7.1 (Michie Supp. 1996); WASH. REV. CODE ANN. § 36.70A.370 (West Supp. 1996); W. VA. CODE §§ 22-1A-1 to -6 (1994).

10. See Peirce, *supra* note 7, at 13A. See also *infra* notes 183-85 and accompanying text.

11. H 287, Florida Legislature, Reg. Sess. 1985 History of House Bills 41.

12. See Gil Klein, *Florida*, CHRISTIAN SCIENCE MONITOR, Apr. 2, 1985, at 32 [hereinafter Klein, *Florida*].

13. H 863, Florida Legislature, Reg. Sess. 1995 History of House Bills 268.

ment action "inordinately burdens" the use of his property.¹⁴ Believing that the intensity of the property rights movement would lessen as a result of their efforts, numerous growth management supporters endorsed this compromise bill.¹⁵ However, unconvinced the law will protect their interests, property rights advocates promise further action to amend the state constitution to reflect their goals.¹⁶

Far from being static, growth management is a process for dealing with conditions that are constantly changing.¹⁷ When the growth management process itself becomes unpredictable, it is ineffective.¹⁸ Arguably, the effects of H. 863 on

14. FLA. STAT. ANN. §§ 70.001-.80 (West Supp. 1996). It is unclear what constitutes an "inordinate burden" in this context. See *infra* note 228 and accompanying text.

15. See Tax Cap Committee, 1995-1996 Campaign Prospectus, section V [hereinafter Tax Cap Committee]. See also Ron Bartlett, *More Tax-Limit Amendments Are Planned*, TAMPA TRIBUNE, Nov. 17, 1995, at 6; Jim Sloan, *Group Seeking Help to Amend the Constitution; Changes Include Proposals that Deal with Taxes, Compensation*, TAMPA TRIBUNE, Dec. 14, 1995, at 1.

16. See *supra* note 15.

17. See *The Property Appeasers*, ST. PETERSBURG TIMES, July 9, 1995, at 2D (referring to comments made by Tom Pelham, former Secretary of the State Department of Community Affairs in Florida).

18. Several writers describe how processes and systems operate, survive and evolve surrounded by ever changing conditions. See MURRAY GELL-MANN, *THE QUARK AND THE JAGUAR* (1994); ILYA PRIGOGINE & ISABELLE STENGERS, *ORDER OUT OF CHAOS: MAN'S NEW DIALOGUE WITH NATURE* (1984); W. Brian Arthur, *Complexity in Economic Theory: Inductive Reasoning and Bounded Rationality*, 84 AEA PAPERS & PROCEEDINGS 406 (1994).

Research on the sciences of simplicity and complexity . . . naturally includes teasing out the meaning of the simple and the complex, but also the similarities and the differences among complex adaptive systems, functioning in such diverse processes as the origin of life on Earth, biological evolution, the behavior of organisms in ecological systems, the operation of the mammalian immune system, learning and rethinking in animals (including human beings), the evolution of human societies, . . .

The common feature of all these processes is that in each one a complex adaptive system acquires information about its environment and its own interaction with that environment, identifying regularities in that information, condensing those regularities into a kind of "schema" or model, and acting in the real world on the basis of that schema.

MURRAY GELL-MANN, *THE QUARK AND THE JAGUAR*, 17 (1994) (emphasis added).

[T]he faster the communication takes place within a system, . . . the more stable the system . . . [T]he more complex the system, the

growth management will be negligible because it only acts prospectively. However, this prospective characteristic frustrates the dynamic nature of a successful growth management system since state and local governments will become hesitant in responding to changing circumstances.

The State's growth management framework represents a tremendous commitment towards preserving a quality of life and opportunity for future generations of Floridians.¹⁹ This commitment requires both the individual landowner and present generations to exercise restraint and responsibility.²⁰ Yet, the impact of this property rights law shifts responsibility

more numerous are the types of fluctuations that threaten its stability. How then, it has been asked, can systems as complex as ecological or human organizations possibly exist? How do they manage to avoid permanent chaos? The stabilizing effect of communication, of diffusion processes, could be a partial answer to these questions. In complex systems, where species and individuals interact in many different ways, diffusion and communication among various parts of the system are likely to be efficient. There is competition between stabilization through communication and instability through fluctuations. The outcome of that competition determines the threshold of stability.

ILYA PRIGOGINE & ISABELLE STENGERS, *ORDER OUT OF CHAOS: MAN'S NEW DIALOGUE WITH NATURE* 187-89 (1984).

How do we humans reason in situations that are complicated or ill-defined? [W]e are superb at seeing or recognizing or matching patterns-behaviors that confer obvious evolutionary benefits. In problems of complication then, we look for patterns; and we simplify the problem by using these to construct temporary internal models or hypotheses or schemata to work with [W]hen we cannot fully reason or lack full definition of the problem, we use simple models to fill the gaps in our understanding.

W. Brian Arthur, *Complexity in Economic Theory: Inductive Reasoning and Bounded Rationality*, 84 AEA PAPERS & PROCEEDINGS 406, 406-07 (1994).

19. See *infra* note 56. Three years after the growth management act was passed in Florida one writer described growth management as:

nothing more than basic common sense. Don't build where there's already too much built. Don't develop without decent roads, enough water, and ways to get rid of everybody's garbage and sewage. That such an elementary standard has created such an uproar only reveals the depth of crisis in this growing state.

Jon East, *Florida's Balancing Act: Growth Law Begins to Pinch*, ST. PETERSBURG TIMES, Mar. 13, 1988, at 1D.

20. The application of growth management necessarily requires the imposition of some restrictions on the use of land. Land use restrictions are not new, but growth management attempts to integrate them to ensure that land will

ity for land resource protection from the individual landowner to the general public.²¹ At a minimum, the public must accept this added responsibility if growth management is to remain effective. On a more significant level, it unfairly shifts the burden of preserving the quality of life from the present generation to future generations because it is the future generations who must pay for the compromise of today.

Finally, a healthy growth management framework requires a cooperative approach by all levels of government. However, since limited financial resources are available, especially at the local government level, this property rights law will pit state and local governments against one another, thereby destroying any integrated effort towards growth management. Numerous local governments have already decided not to amend local regulations because of such financial constraints.²²

This Article examines the practical and legal consequences of the Property Rights Act in relation to Florida's growth management system. Part II describes the land ethics of opportunity and responsibility in the context of sustainable development and as the guiding principles behind the growth management and property rights movements. It then assesses growth management in Florida by focusing on efforts to control development prior to 1985 and the Growth Management Act of 1985. Part III examines property rights law in Florida, including current takings law and the recently enacted property rights law. Part IV analyzes the possible effects of the new legislation on Florida's growth management system. The Article concludes that the property rights

develop in an integrated fashion. See *infra* notes 172, 308 and accompanying text.

21. By requiring compensation to be paid to landowners who are inordinately burdened by a government regulation, the general public, rather than the landowner, will bare the "cost" of that regulation. See *infra* part IV.

22. See Rose, *Deland Should Move Ahead*, ORLANDO SENTINEL, Aug. 29, 1995, at A8; *Speculators' Paradise*, PALM BEACH POST, June 11, 1995, at 2F; Nanette Woitas, *New Law Angers Commission; The Property Rights Act Could Cost County Millions, Force a Tax Increase*, TAMPA TRIBUNE, May 31, 1995, at 1. Other vague provisions also have the potential of driving the wedge further between state and local governments as time goes by. See *infra* part IV. C.

bill, in fulfilling its mandate, will necessarily frustrate Florida's efforts to achieve its growth management goals.

II. Background

A. Placing the Land Use Ethics of Opportunity and Responsibility into an Inter-generational Context.

During his life, Aldo Leopold, a renowned conservationist, called upon Americans to embrace a new land ethic.²³ Prompted by the unchecked decline and disappearance of many of the country's natural resources, he wrote that:

[a]ll ethics so far evolved rest upon a single premise: that the individual is a member of a community of interdependent parts. His instincts prompt him to compete for his place in the community, but his ethics prompt him also to cooperate The land ethic simply enlarges the boundary of the community to include soils, waters, plants, and animals, or collectively: the land.²⁴

However, his hope of a unified land use ethic has not been realized.²⁵ Instead, land use decisions are founded on a variety of apparently conflicting land use ethics.²⁶ For exam-

23. See Fred Bosselman, *Four Land Ethics: Order, Reform, Responsibility, Opportunity*, 24 ENVTL. L. 1439, 1440 (1994).

24. ALDO LEOPOLD, *A SAND COUNTY ALMANAC* 238 (1949).

25. See Bosselman, *supra* note 23, at 1440.

26. See *id.* at 1441. Professor Bosselman has identified four land ethics, each having strong historical roots, which have influenced "the way people regard the land in the United States." *Id.* They are order, reform, responsibility, and opportunity. See *id.*

Those who embrace the ethic of order seek stability in the social structure. See *id.* at 1506. In the past, followers have justified their decisions by pointing to the hardship and misery created by disorder. See Bosselman, *supra* note 23, at 1446. Today, deed restrictions and local zoning are modern examples of land use decisions that seek to preserve social order. See *id.* at 1506.

Reformers, on the other hand, seek to achieve "greater equity" in society and object to many of the privileges enjoyed by landowners at the expense of those who do not own land. *Id.* at 1458. For example, reformers challenge the notion of agricultural subsidies and the low cost of mining on federal lands. See *id.* at 1507.

ple, two land ethics, opportunity and responsibility, seem wholly irreconcilable.²⁷

The land ethic of opportunity has its roots in Utilitarianism where "an action is [considered] good if it contributes to maximizing the happiness of the greatest number of human beings."²⁸ Followers believe an individual should be afforded the widest practical range of choices with minimal limitations.²⁹ Thus, Utilitarians believe the government's role should be restricted to penalizing "bad actions" to deter similar actions in the future.³⁰

The ethic of opportunity is a driving force behind today's property rights movement challenging the validity of regulations which restrict the use of property.³¹ Yet, against that movement, it is quite clear that the right to use one's land as one sees fit is not absolute. Jurisprudential thinking has long held that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."³²

27. See *id.* at 1485. Although Bosselman identifies four land ethics, this article addresses only the ethics of opportunity and responsibility because their unique significance in an inter-generational context. See *infra* notes 44-51 and accompanying text for a discussion of sustainable development and the role of the ethics of opportunity and responsibility in the context of growth management. Certainly, the other two ethics are relevant also. Growth management embraces the ethic of order in that it introduces an element of predictability to our patterns of land use. Reformers can properly support growth management because, although the rights of landowners are respected, the needs of the entire community are served.

28. See Bosselman, *supra* note 23, at 1486.

29. See *id.* at 1490 n.227.

30. See *id.* at 1487.

31. See Pruitt, *supra* note 2, at 63.

32. *Mugler v. Kansas*, 123 U.S. 623, 665 (1887) (citing *Beer Co. v. Massachusetts*, 97 U.S. 25, 32 (1877)). The preceding ideas do not necessarily conflict. The issue is not whether landowners should be compensated every time a governmental action adversely impacts the use of their land; the answer is no. Neither is the issue whether government should be free of the requirement to compensate landowners adversely impacted by its actions; again, the answer is no. The fundamental task is where to draw the dividing line between those actions that should require the payment of compensation and those that should not. This is not an easy task. An action that prohibits a land use because it is 'injurious to the community' and an action that prohibits a land use because it 'benefits the community' (and, therefore, should be paid for) are often opposite

Conversely, followers of the land ethic of responsibility, who are deeply concerned with the depletion of natural resources, seek to preserve unique natural areas.³³ John Muir, founder of the Sierra Club, is representative of those "for whom land means responsibility."³⁴ Muir viewed land as sacred³⁵ and urged government action to preserve unique habitats and resources.³⁶ Modern Muirists focus their efforts on areas such as wetlands preservation and the responsible use of toxic chemicals on land.³⁷

The search for a single consistent land ethic appears futile; certainly, the ethics of opportunity and responsibility seem wholly irreconcilable in the context of society's present needs and desires. For example, a landowner who either decides to or is forced to preserve a natural resource on his land ordinarily forgoes some economic opportunity to exploit the resource itself or uses the land for some other purpose.³⁸ Thus, it has been suggested that each ethic individually

sides of the same coin. Any discussion on the takings issue usually reduces to constitutional semantics.

33. See Bosselman, *supra* note 23, at 1476-77.

34. *Id.* at 1441. During his life, Muir wrote about many of the natural areas he encountered on his travels throughout the United States. Coming from a deeply religious background, his writings abounded with religious themes in his description of what he saw. His writings increased public awareness about natural resources depletion. See *id.* at part IV.

35. See *id.* at 1479.

36. See *id.* at 1482-83. For example, his efforts greatly influenced the creation of the national park system. See Bosselman, *supra* note 23, at 1481. Muir once described Yosemite as "a grand page of mountain manuscript that I would gladly give my life to be able to read." *Id.* (quoting JOHN MUIR, *MY FIRST SUMMER IN THE SIERRA* 102 (Gretel Ehrlich ed., 1987)).

37. See *id.* at 1508.

38. The wetlands protection program under the Clean Water Act and the Endangered Species Act are seen as the most intrusive of current federal programs. See *Property Rights, Regulatory Takings, and Environmental Protection: Proposals for Statutory Compensation. Hearings Before the Senate Committee on the Environment and Public Works*, Fed. Doc. Clearing House, Inc., July 12, 1995, available in LEXIS, News Library, Curnws File (statement of Jonathon H. Adler, Director of Environmental Studies for the Competitive Enterprise Institute).

For two decades, federal land-use control has been the dominant means of achieving many environmental objectives. As a result, the federal government has denied countless landowners the reasonable use land in the name of environmental protection; property

should be considered as factors in any decision having an impact on land.³⁹

Leopold's vision of a broader "community" appears impossible to achieve on a practical level.⁴⁰ However, the historical understanding of property ownership in this country is that its expectations must consider the public welfare.⁴¹ During the time when the landscape appeared endless, this perspective must have been easily embraced because any impact on the landowner's autonomy was negligible.⁴² It is not surprising then that the property rights movement would gain momentum at the same time that the reality of a finite land resource emerged, the preservation of which requires sacrifice.⁴³ However, such a sacrifice becomes necessary and understandable when land use decisions consider future gen-

owners are finding their land effectively taken from them without compensation.

The two federal laws responsible for the lion's share of regulatory takings are the Endangered Species Act and Section 404 of the Clean Water Act The primary reason that current approaches to environmental protection engender conflict and opposition is that they trample on the property rights of individual Americans, often bankrupting them in the process.

Id.

39. See Bosselman, *supra* note 23, at 1441.

40. Leopold sought to include responsibility into man's relationship with the land. He saw the existing "land-relation [as] . . . strictly economic, entailing privileges but not obligations." LEOPOLD, *supra* note 24, at 239. Economic reality for a landowner is such that the preservation of a natural resource will usually weigh less than a present need or desire to take advantage of an economic opportunity.

41. See Jerry L. Anderson, *Takings and Expectations: Toward a 'Broader Vision' of Property Rights*, 37 U. KAN. L. REV. 529 (1989).

42. See John A. Humbach, *Law and the New Land Ethic*, 74 MINN. L. REV. 339, 340 (1989).

43. To gain an appreciation of this shrinking resource, consider the following estimates of population in the United States in the past:

YEAR	POPULATION
1790	3.9 million
1840	17 million
1890	62 million
1940	132 million
1990	250 million

Historical Statistics: Distribution of U.S. Population (1790 to 1990), available in WESTLAW, CENDATA database.

erations. In fact, this is the hallmark of sustainable development.

Sustainable development, which applies equally to developed and developing nations,⁴⁴ calls upon present generations to meet their needs without compromising the needs of future generations.⁴⁵ In essence, as this writer points out, sustainable development links opportunity and responsibility:

[s]ustainable development implies that future generations have as much right as the present generation to a robust environment with which to meet their own needs and preferences As members of the present generation, we are both trustees of the environment with obligations to care for it for future generations, and beneficiaries entitled to use it for our own well-being. In brief, each generation has both rights and obligations in relation to the environment.⁴⁶

Exercising responsibility in land use is not necessarily about destroying opportunity; rather, it preserves opportunity for those who follow. In this inter-generational context, a tremendous responsibility attaches to the ownership and use of land.

As a principle, sustainable development seems an obscure guide to individuals making a mundane decision about how to use their land.⁴⁷ However, this concept becomes more concrete when "associated with a given geographical area."⁴⁸ Further, sustainability has two basic requirements: a general consensus on the concept of sustainable development,

44. See U.N. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *OUR COMMON FUTURE* 43 (1987).

45. See *id.*

46. Edith Brown Weiss, *Environmentally Sustainable Competitiveness: A Comment*, 102 YALE L.J. 2123, 2123 (1993).

47. See, e.g., Christopher D. Stone, *Deciphering Sustainable Development*, 69 CHI.-KENT L. REV. 977 (1994).

48. Jayne E. Daly, *Toward Sustainable Development: In Our Common Interest*, Commemorative Edition PACE L. REV. 153, 159 (1995).

and a strategic framework for achieving it.⁴⁹ Florida is a "geographical area" that lends itself to sustainable development, and growth management⁵⁰ certainly provides the "framework" for Floridians to develop their land in a manner that preserves opportunity and maintains a preferred quality of life for future generations.⁵¹ In this context, the ethics of opportunity and responsibility are no longer contradictory; instead, and quite the opposite, they become inseparable.

Jurisprudential thinking corresponds with this conceptual background. There is no absolute right for an owner to use his property as he sees fit.⁵² Presently, the government may legitimately restrict land use to protect the public health, safety, and welfare.⁵³ At some point, however, the exercise of this power can go "too far" and give rise to a claim for just compensation (i.e. a "taking") under the Constitution.⁵⁴

Generally, those who believe a taking results from any non-nuisance governmental restriction on the use of privately

49. See U.N. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *supra* note 44, at 43.

50. See *infra* note 56 and accompanying text for an explanation of growth management.

51. In 1985 there was a general consensus in Florida that something needed to be done about future land development. See *infra* Part II B.2. However, the enactment of the property rights bill and the debate that continues to surround it indicates that there is no longer a general consensus as to how Floridians see their future.

52. See *supra* notes 28-32 and accompanying text for a discussion on the placement of the land ethic of opportunity within the context of private property rights.

53. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 125 (1978).

54. Interestingly, this "point" is not readily determined. The Supreme Court has dismissed the idea that there is any "set formula" for determining whether or not there is a taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. at 124). Instead, courts have held that there must be a factual inquiry to see if the regulation goes "too far." See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995) (reasoning that the original understanding of just compensation mandated compensation only in those cases where the political process failed to adequately consider affected property rights). But see Michael DeBow, *Unjust Compensation: The Continuing Need for Reform*, 46 S.C. L. REV. 579 (1995) (concluding that current takings law and practice at the federal and state level are inconsistent with the original meaning of the Fifth Amendment).

owned land support legislatively created causes of action for compensation because it will offset the "injustices" that occur under current judicial interpretations of constitutional takings law.⁵⁵ Because there are two opposing, and arguably rational, interpretations of the takings clause, it becomes necessary to rely on ethical considerations to analyze Florida's new cause of action and its possible implications for the State's growth management system.

B. Growth Management in Florida

Growth management systems embrace careful planning processes in an attempt to balance the need for further development in the future with the impact of such development.⁵⁶ To date, ten states have embraced a variety of growth management frameworks.⁵⁷ Florida, however, is the only "large"

55. See Randy Schultz, *Yum, Yum, A Tax Cap; Don't Bite*, PALM BEACH POST, Dec. 10, 1995, at 1F; Sloan, *supra* note 15, at 1. Both articles describe the platform of the Tax Cap Committee, considered to be one of the leading groups behind the property rights movement in Florida. See also *infra* notes 176-85 and accompanying text for the perspective of current property rights advocates.

56. See JOHN M. DEGROVE, *THE NEW FRONTIER FOR LAND POLICY: PLANNING AND GROWTH MANAGEMENT IN THE STATES 1* (1992) (hereinafter *THE NEW FRONTIER*).

Properly defined and understood, growth management . . . has central to its meaning a commitment to plan carefully for the growth that comes to an area so as to achieve a responsible balance between the protection of natural systems . . . and . . . development. . . . It is deeply committed to a responsible "fit" between development and the infrastructure needed to support the impacts of development Thus growth management is closely linked to, and necessary for, the achievement of "quality of life," a concept that has emerged as a powerful, if somewhat elusive, framework for . . . growth management systems.

Id.

57. See, e.g., FLA. STAT. ANN. §§ 163.3161-.3243 (West 1990 & Supp. 1996); FLA. STAT. ANN. §§ 186.001-911 (West 1987 & Supp. 1996); FLA. STAT. ANN. §§ 187.101-.201 (West 1987 & Supp. 1996); FLA. STAT. ANN. §§ 380.012-.515 (West 1995); GA. CODE ANN. §§ 36-70-1 to -5 (1993); GA. CODE ANN. §§ 50-8-1 to -222 (1994 & Supp. 1996); ME. REV. STAT. ANN. tit. 30-A, §§ 4311-49 (West 1996) (amending and repealing the Comprehensive Planning and Land Use Regulation Act, 1989 Me. Laws 104); MD. ANN. CODE art. 66B, §§ 3.05, 3.06, 4.09, 7.03 (Supp. 1994); MD. CODE ANN., STATE FIN. & PROC. §§ 5-402, 5-701 to 5-7A-032, 8-403 (1995 & Supp. 1995); N.J. STAT. ANN. §§ 52:18A-196 to -207 (West Supp. 1996); OR. REV. STAT. §§ 197.005-.860 (1995); R.I. GEN. LAWS §§ 45.22.2-1 to -14 (1991 & Supp. 1995); VT. STAT. ANN. tit. 24, §§ 4301-95 (1992

state to enact such a system.⁵⁸

1. Efforts to Deal with Florida's Growth Problem before 1985

Florida never seriously considered controlling development until the early 1970s when population growth, once viewed as essential to ongoing prosperity, was recognized as one of the State's most serious problems.⁵⁹ Florida's population had grown from 2.7 million in 1950, to 4.5 million by 1960, to nearly 7 million by 1970.⁶⁰ With an ever increasing population came an increasing demand for land and development which, in turn, created employment.⁶¹ However, with few land use controls in place, development occurred in a haphazard fashion.⁶² By the late 1960s into the early 1970s, the negative impacts of this uncontrolled development, such as salt water intrusion into drinking water supplies in southern Florida, became apparent.⁶³

In the midst of one of the harshest droughts to ever hit Florida, Governor Askew convened the South Florida Water Management Conference in 1971, where he questioned the value of future uncontrolled growth.⁶⁴ The following year, the Governor appointed the Task Force on Resource Manage-

& Supp. 1995); VT. STAT. ANN. tit. 10 §§ 6001-6108 (1993 & Supp. 1995); WASH. REV. CODE ANN. §§ 36.70A.010 - .902 (West 1991 & Supp. 1996). *See generally* JOHN M. DEGROVE, *THE NEW FRONTIER FOR LAND POLICY: PLANNING AND GROWTH MANAGEMENT IN THE STATES* (1993); David L. Callies, *The Quiet Revolution Continues: A Quarter Century of Progress*, 26 URB. LAW. 197 (1994); John H. Wickersham, Note, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489 (1994).

58. *See THE NEW FRONTIER*, *supra* note 56, at 7. Florida is currently fourth in population size after California, New York and Texas, none of which has a growth management system in place. *Id.*

59. *See* 1000 FRIENDS OF FLORIDA, *GROWTH MANAGEMENT 2000: MAKING IT WORK 1* (1992) [hereinafter *GROWTH MANAGEMENT 2000*].

60. *See THE NEW FRONTIER*, *supra* note 56, at 8.

61. *See id.*

62. *See id.*

63. *See id.*

64. *See* H. Glenn Boggs & Robert C. Appgar, *Concurrency and Growth Management: Lawyer's Primer*, 7 J. LAND USE & ENVTL. L. 1, 3 (1991) [hereinafter *Boggs*].

ment⁶⁵ whose efforts resulted in the Legislature passing four bills geared towards protecting the environment while accommodating future development.⁶⁶ Specifically, under the Environmental Land and Water Management Act,⁶⁷ both the Critical Area⁶⁸ and Development of Regional Impact (DRI)⁶⁹ programs were created and still remain the law today.⁷⁰

In 1975, on the recommendation of the Environmental Land Management Study Committee (ELMS I), the Florida Legislature enacted the Local Government Comprehensive Planning Act in response to the continuing lack of appropriate development.⁷¹ Although local governments were required to adopt comprehensive plans to deal with future growth under the new law, the state had no effective legal means to ensure compliance.⁷²

Despite some successes,⁷³ it became clear by the early 1980s that more controls were needed. In 1983, Florida's

65. *See id.*

66. *See* THE NEW FRONTIER, *supra* note 56, at 9. The four laws were: the Environmental Land and Water Management Act (FLA. STAT. ch. 380 (1972)); the State Comprehensive Planning Act (FLA. STAT. ch. 23 (1972)); the Water Resources Act (FLA. STAT. ch. 373 (1972)); and the Land Conservation Act (FLA. STAT. ch. 259 (1972)).

67. FLA. STAT. ANN. ch. 380 (Harrison 1972).

68. *See* FLA. STAT. ANN. § 380.05 (West 1988). Under the current program, areas of critical concern to the state are recommended by the state land planning agency to the Administration Commission along with "recommendations with respect to the purchase of lands situated within the boundaries of the proposed area as environmentally endangered lands and outdoor recreation lands under the Land Conservation Act of 1972." *Id.* § 380.05(1)(a). Within 45 days, the Commission must either reject the recommendation or adopt the recommendation with or without modification and by rule designate the area of critical state concern. *See id.* § 380.05(1)(b).

69. *See id.* § 380.06. The DRI program requires an extensive review of major developments whose "character, magnitude or location would have a substantial effect upon the safety, or welfare of citizens of more than one county." FLA. STAT. ANN. § 380.06(1) (West 1988). The Department of Community Affairs (DCA) was also established at that time to implement both of these programs. *See id.* § 380.0031(18).

70. *See* Boggs, *supra* note 64, at 4.

71. FLA. STAT. ANN. ch. 163 (Harrison 1975).

72. *See* Boggs, *supra* note 64, at 5.

73. *See* THE NEW FRONTIER, *supra* note 56, at 9. Florida was leading the nation in its efforts to manage its water resources (Water Resources Act). Significant public land acquisition also took place (Land Conservation Act). Under

population reached 9.7 million and was predicted to reach 17.4 million by the end of the century.⁷⁴ In just over thirty years, Florida grew from the twenty-seventh to the seventh most populous state.⁷⁵

There were two significant problems with the existing scheme: (1) there was insufficient funding⁷⁶ for infrastructure improvements and for the creation of local comprehensive plans,⁷⁷ and (2) there was inadequate state approval authority over local comprehensive plans which were created.⁷⁸ Moreover, existing laws did not require an adequate infrastructure to be in place before development occurred.⁷⁹ Thus, development proceeded without any assurance that adequate supporting facilities such as water and sewer would follow.

In response, then Governor, Bob Graham, established the Environmental Land Management Study Committee II (ELMS II) whose task was to develop "clear and strong language . . . for an integrated policy framework to shape and guide the future of Florida into the twenty-first century."⁸⁰ Most legislation involving growth management enacted over the following three years reflected the recommendations of ELMS II.⁸¹

the DRI program, large exaction fees ensured that the necessary infrastructure to support the DRI developments were put in place. *Id.*

74. See Wayne Snow, *DCA Secretary Says State Must Act Now to Manage Growth*, UPI, Nov. 22, 1983 (AM cycle), available in LEXIS, News Library, Curnws File.

75. See Klein, *Missing Pieces*, *supra* note 1, at 1. Increasing population pressures prompted one leading Floridian economist to declare that "[t]he train of population growth has already left the station." Klein, *Florida*, *supra* note 12, at 32.

76. See THE NEW FRONTIER, *supra* note 56, at 10.

77. See Klein, *Missing Pieces*, *supra* note 1, at 1. For example, it was predicted that an eight lane highway, a year away from completion, would be unable to deal with the traffic from anticipated development. *See id.*

78. See THE NEW FRONTIER, *supra* note 56, at 10-11. As a result, local plans were constantly changed at the whims of local councils. *See id.*

79. See GROWTH MANAGEMENT 2000, *supra* note 59, at 3.

80. THE NEW FRONTIER, *supra* note 56, at 10.

81. *See id.* at 11.

2. The Growth Management Act of 1985

Traditionally at odds with each other, developers and environmental groups united to support the proposed growth management legislation in 1985.⁸² One year earlier, Florida enacted the State and Regional Planning Act of 1984.⁸³ The Act mandated both the creation of a state plan to be presented to the Legislature the following year⁸⁴ and the creation of regional planning councils⁸⁵ which were assigned the responsibility of developing regional policy plans.⁸⁶ The following year, the Legislature adopted the Comprehensive State Plan (Plan)⁸⁷ early in the legislative session.⁸⁸ The Plan focused on processes and end goals rather than specific details.⁸⁹ However, the Plan itself was intended to be passive and could only be implemented through other legislative acts.⁹⁰

This set the stage for the introduction of H. 287, the Growth Management Act of 1985.⁹¹ The bill, which originated in the Florida House of Representatives, contem-

82. See *id.* Developers must have been partly motivated to get involved in the legislative process because it was inevitable that some growth management legislation would pass that year. See William Cotterell, *Graham and Legislative Leaders Talking Tough on Growth*, UPI, Jan. 27, 1985 (BC cycle), available in LEXIS, News Library, Curnws File.

83. FLA. STAT. ANN. ch. 186 (Harrison 1988).

84. See *id.* § 186.007(1).

85. See *id.* § 186.504.

86. See *id.* § 186.505.

87. FLA. STAT. ANN. ch. 187 (Harrison 1988).

88. See THE NEW FRONTIER, *supra* note 56, at 12.

89. See *id.* The plan established goals and policies in numerous areas including education, families, housing, health, public safety, water resources, coastal marine resources, land use, transportation, and governmental efficiency. See Fla. Stat. Ann. § 187.201 (West 1988). For example, with regards to land use, the plan established the following goal:

In recognition of the importance of preserving the natural resources and enhancing the quality of life of the state, development shall be directed to those areas which have in place, or have agreements to provide, the land and water resources, fiscal abilities and service capacity to accommodate growth in an environmentally acceptable manner.

Id. § 187.201(16)(a).

90. See *id.* § 187.101(1).

91. See THE NEW FRONTIER, *supra* note 56, at 12.

plated extensive amendments to the Environmental Land and Water Management Act (ELWMA)⁹² and the Local Government Comprehensive Planning Act of 1975⁹³ (renamed as the Local Government and Comprehensive Planning and Land Development Regulation Act),⁹⁴ and the creation of the Coastal Zone Protection Act of 1985.⁹⁵ Offering H. 287 to the House floor, Representative Jon Mills asserted:

growth management is really [about] whether we are going to decide to protect the longest coastline in the South Eastern United States, whether we are going to be able to have our kids fishing in some of the most pristine rivers in the nation, and whether we are going to take care of some very important lake systems [T]here is no more important issue you are going to deal with People are a little concerned about the end of this book This book has been written for almost fifteen or sixteen years and we are coming to a very important point [P]eople want to turn to the last page but this is a process and the process is not over yet.⁹⁶

The guiding principles behind the Growth Management Act were: (1) the control of development along Florida's fragile coastline, (2) the encouragement of compact urban development rather than urban sprawl development, and (3) the mandate that development should only take place when adequate infrastructure is in place, a concept which later became known as concurrency.⁹⁷ To accomplish these goals, all levels of governments within the state were asked to cooperate and coordinate their land use regulatory efforts. This combined effort necessarily required local governments to yield some of their local autonomy in the planning process.⁹⁸

92. FLA. STAT. ANN. ch. 380 (Harrison 1988).

93. *Id.* ch. 163.

94. *Id.* § 163.3161(1).

95. *Id.* §§ 161.52-58.

96. Recording of the House Debate on H. 287, The Growth Management Act of 1985 (May 14, 1985) [hereinafter Recording, H. 287] (recording available from the Florida State Archives).

97. See THE NEW FRONTIER, *supra* note 56, at 14.

98. See *infra* notes 172-73 and accompanying text for an explanation of the erosion of "home rule" under a growth management system.

a. Environmental Land and Water Management Act⁹⁹

The Environmental Land and Water Management Act amendments concentrated primarily on the DRI program which subjected certain large developments to an extensive review process and the subsequent imposition of impact fees.¹⁰⁰ The bill mandated the creation of statewide guidelines and standards to provide a consistent and coherent process for determining whether or not a particular development should undergo DRI review.¹⁰¹ Triggering thresholds and rebuttable presumptions were created to direct the application of those guidelines and standards.¹⁰²

Prior to 1985, developers were entitled to obtain a binding letter from the Department of Community Affairs (DCA) indicating whether or not a proposed development was a DRI.¹⁰³ However, many developers who had been issued such a binding letter frequently did not commence development for years, if at all. Consequently, a developer could rely on that letter years later, even though surrounding conditions may have changed considerably. Although binding letters were still available to developers after the 1985 legislation, a provision was added providing for their expiration if "substantial development" had not taken place within three years of the date of issuance.¹⁰⁴

The Environmental Land and Water Management Act contains several other significant changes. One such change is the establishment of the "conceptual agency review" process, the purpose of which was to improve coordination between the DRI process and various other permitting

99. FLA. STAT ANN. ch. 380 (Harrison 1988).

100. *See id.* § 380.06. *See infra* note 106.

101. *See id.* § 380.06(2).

102. *See id.* § 380.06(2)(d). Developments below 80% of *all* numerical thresholds established by guidelines and standards do not have to undergo DRI review. A development that is at or above 120% of *any* established numerical threshold is required to undergo DRI review. *See id.* The numerical thresholds are based on guidelines and standards recommended by the DCA which are used to characterize the development. *See id.* § 380.06(2)(a),(b).

103. *See id.* § 380.06(4).

104. *See* FLA. STAT. ANN. § 380.06(4)(g) (West 1988).

requirements for development proposals.¹⁰⁵ The amended Act also allows credits against local impact fees¹⁰⁶ to avoid "double impact fees" when a developer is required to contribute funds to a public facility.¹⁰⁷ Upon request by the local government and certification by the Administration Commission,¹⁰⁸ the DRI review may be transferred to local governments.¹⁰⁹

Another ELWMA provision created the Florida Quality Developments program, which was designed to encourage carefully planned development by considering the costs to local government of infrastructure improvements, the protection of Florida's natural resources, and the quality of life of local residents.¹¹⁰ Designation of a proposed development under the new program was conditioned on several requirements including donating fees for the protection of certain natural resources such as wetlands, or entering into a binding agreement to set aside property for open space.¹¹¹ As an incentive, a development was exempted from the DRI review process upon designation.¹¹²

b. Local Government and Comprehensive
Planning and Land Development Regulation
Act¹¹³

Although local governments were required under the original act to adopt and implement comprehensive plans,¹¹⁴

105. *See id.* § 380.06(9).

106. Impact fees are payments required of developers by local governments to offset any adverse impacts of the developer's project. The goal of imposing impact fees is to internalize the costs of a development as much as possible.

107. *See* FLA. STAT. ANN. § 380.06(16)(a),(b) (West 1988).

108. The Administration Commission is composed of the Governor and the Cabinet. *See* FLA. STAT. ANN. § 163.3164(1) (West 1988).

109. *See id.* § 380.065.

110. *See id.* § 380.061.

111. *See id.* § 380.061(3)(a)(1)(a).

112. *See id.* § 380.061(5)(b).

113. FLA. STAT. ANN. ch. 163.

114. *See id.* § 163.3167(1). To meet the requirements of the original act, specific elements were required to be included in the comprehensive plans. The bill added several required elements such as a capital improvements element to encourage efficient utilization of public facilities. Other elements were made more specific. For example, as part of the conservation element local govern-

there was no mechanism in place forcing local governments to do so.¹¹⁵ A comprehensive plan is a strategy which guides future local development, consisting of various written and graphic materials, and includes certain required and optional elements such as traffic flow, local economy, and coastal management.¹¹⁶ The amendments established a schedule for local governments to prepare and submit its comprehensive plans to both the appropriate regional planning agency¹¹⁷ and the DCA for approval.¹¹⁸ If the DCA determined that a plan was not in compliance, DCA was authorized to return the plan to the local body with objections and recommendations to bring the plan into compliance.¹¹⁹ The State was also given authority to withhold funds for infrastructure improvements from any local government refusing to bring its plan into compliance.¹²⁰

At the heart of the comprehensive plan program was the requirement that plans be both internally and externally consistent on several levels.¹²¹ Internal consistency requires that all elements of the plan be consistent with each other,¹²² while external consistency requires the plan to be consistent with both the state comprehensive plan and the appropriate

ments were required to assess current and future water needs and identify and depict resources such as wetlands, rivers and beaches on their land use maps. *See id.* § 163.3177.

115. *See supra* notes 72 and 78 and accompanying text.

116. *See* FLA. STAT. ANN. §§ 163.3164(4), .3177, .3178 (West 1988). *See also infra* notes 121-24 and accompanying text for an explanation of the consistency requirements.

117. One of the functions of the regional planning agencies was to develop regional plans consistent with the state comprehensive plan. *See* FLA. STAT. ANN. § 186.508 (West 1988). Regional planning agencies help to bridge the gap between the DCA at the state level and planning agencies at the local level. *See infra* notes 123-24 and accompanying text.

118. *See* FLA. STAT. ANN. §§ 163.3167(2),(3), .3184 (West 1988). The deadlines established in the 1985 bill were extended in 1987, which scheduled the last local plan to be submitted by July 1, 1991. *See* Boggs, *supra* note 64, at n.33. Interestingly, where a local government refused to develop a plan, the appropriate regional planning agency was authorized to do so. *See* FLA. STAT. ANN. § 163.3167 (West 1988).

119. *See* FLA. STAT. ANN. § 163.3184(6) (West 1988).

120. *See id.* § 163.3184(8).

121. *See id.* § 163.3177(9).

122. *See id.*

regional plan developed by the regional planning agency.¹²³ This continued consistency was insured by statutory provisions requiring regional and local plans to be reviewed and, if necessary, revised every five years.¹²⁴

Although not explicitly mentioned, the concept of concurrency was also introduced by the 1985 legislation.¹²⁵ Concurrency requires that "all public facilities and services needed to support a development are in place when needed by that development."¹²⁶ The concept developed from two requirements in the 1985 legislation. First, local comprehensive plans were required to contain a capital improvements element,¹²⁷ and second, that element was required to be enforced.¹²⁸ It is interesting to note that what later became one of the most controversial provisions of the Florida Growth Management Act did not raise an eyebrow during the House floor debate.¹²⁹

c. Coastal Protection

The debate over coastal protection under the Growth Management bill foreshadowed much of the controversy existing today regarding property rights.¹³⁰ Prior to 1985, in an effort to control development along Florida's fragile coast, the state established coastal construction control lines, seaward of which construction was strictly regulated.¹³¹ The Growth Management bill required those control lines to be reviewed and updated if necessary.¹³² Furthermore, the DCA was required to establish thirty year erosion projection lines beyond

123. See FLA. STAT. ANN. § 163.3177(9) (West 1988).

124. See *id.* §§ 186.511, 163.3191.

125. See Boggs, *supra* note 64, at 6.

126. GROWTH MANAGEMENT 2000, *supra* note 59, at 30.

127. See FLA. STAT. ANN. § 163.3177(3)(a)(2) (West 1988).

128. See *id.* § 163.3202(1) (requiring each local government to develop regulations to implement the comprehensive plan).

129. See Recording, H. 287, *supra* note 96.

130. See *id.*

131. See FLA. STAT. ANN. § 161.053(2) (West 1988).

132. See *id.* § 161.053(3).

which only single family dwellings were permitted and then, only if certain conditions were met.¹³³

During the House floor debate, some concern was expressed over whether compensation would be provided to those landowners who would be prohibited from developing their land on the seaward side of the thirty year erosion line.¹³⁴ Proponents of the bill admitted that there were no specific provisions dealing with those situations; however, they believed existing land acquisition programs were sufficiently adequate to ameliorate any harsh consequences resulting from the new requirements.¹³⁵

Apart from this one area of contention, the debate in the House went smoothly. On May 14th, 1985, the House approved the Growth Management Act by a vote of 109 to 9 and certified it to the Senate.¹³⁶ Ten days later, the Senate passed the bill as amended and sent it back to the House.¹³⁷ The final version overwhelmingly passed both in the House by a vote of 112 to 4, and in the Senate, by a vote of 27 to 0. The Act was ultimately approved by the Governor on the last day of May.¹³⁸

3. The Growth Management Act in action

By 1986, the population of Florida had reached 12 million, with more than 1,000 people arriving daily.¹³⁹ Accordingly, and recognizing that development pressures were not the same everywhere, the DCA established a four year schedule for local governments to submit its local plans for approval.¹⁴⁰ Between 1988 and 1992, all local governments

133. *See id.* § 161.053(6). The new provision prohibited the thirty year erosion projection line from being landward of the coastal construction control line. *See id.* § 161.053(6)(b).

134. *See* Recording, H. 287, *supra* note 96.

135. *See id.*

136. *See* H 287, Florida Legislature, Reg. Sess. 1985 History of House Bills 41.

137. *See id.*

138. *See id.*

139. *See* Jon Nordheimer, *Florida, Battling History, Tries to Rein in Growth*, N.Y. TIMES, July 15, 1986, at A22.

140. *See* THE NEW FRONTIER, *supra* note 56, at 15.

were required to submit a comprehensive plan for approval.¹⁴¹ However, as submittal dates for the first counties loomed, the enormous challenge ahead became apparent.¹⁴² Issues relating to the "levels of service" and concurrency were the hardest to manage as they threatened to create self-imposed moratoria on development.¹⁴³ However, the consequences of not submitting plans on time proved to be severe as well. The state reduced funding to three small communities when they refused to submit their plans on schedule.¹⁴⁴ Initially, about half the plans submitted were not in compliance.¹⁴⁵ As of 1992, 302 local plans out of a possible 457 were in compliance, and another forty-three were almost in compliance.¹⁴⁶

Concurrency was probably the hardest issue to resolve at the local level because of the fear of moratoria.¹⁴⁷ In 1986, the Legislature recognized the power of the concept of concurrency, and decided to formally introduce the term into the language of the statute.¹⁴⁸ Faced with citizen revolt over increased taxes, many local governments viewed the imposition of impact fees on developers, to be used for funding infrastructure improvements, as the best course of action.¹⁴⁹

141. *See id.*

142. *See* John Koenig, *The Hidden Cost of Controlling Growth*, FLORIDA TREND, Apr. 25, 1988, at 30.

143. *See id.*

144. *See* Michael Bane & Joe O'Neill, *Will We Get There From Here?* FLORIDA BUSINESS, Dec. 1989, at 14. The three communities were Pembroke Park, Virginia Gardens, and Creek Village, which lost \$83,255, \$54,817, and \$1,455 respectively in state funding. *See id.*

145. *See* THE NEW FRONTIER, *supra* note 56, at 15.

146. *See id.*

147. For example, in 1989, local county commissions in Pinellas County and Hillsborough were forced to impose temporary moratoria on development along some of their major highways because existing roads were unable to deal with existing levels of traffic. *See* Bane, *supra* note 144, at 14.

148. *See* Boggs, *supra* note 64, at 7. The language was amended as follows: "it is the intent of the legislature that the public facilities and services needed to support development shall be available concurrent with the impacts of such development." FLA. STAT. ANN. § 163.3177(10)(h) (West 1988).

149. *See* Koenig, *supra* note 142, at 30. Impact fees can add anywhere from \$3,700 to \$6,000 per 1,000 square feet of office space in some cases and up to \$3,000 to the price of a house valued at \$100,000. *See* Bane, *supra* note 144, at 14.

Two of the primary state goals of the growth management system are concurrency and compact urban development.¹⁵⁰ Yet, as the bill began to be implemented, situations arose where the concurrency requirement actually frustrated the goal of compact urban development.¹⁵¹ In many areas, local governments were forced to either impose temporary moratoria or severely restrict development in and around urban areas.¹⁵² As a result, concurrency actually promoted urban sprawl rather than compact urban development, since development was now forced to "leapfrog" into rural areas where adequate infrastructure already existed.¹⁵³ In response, the DCA introduced flexibility into the concurrency process by encouraging local governments to develop compact development patterns.¹⁵⁴

Insufficient funding fueled many of the problems arising out of the concurrency requirement. Over the years, the state government fell well short of its responsibility in funding local government efforts.¹⁵⁵ In turn, local governments increased taxes and imposed further impact fees on developers.¹⁵⁶ However, one bright spot relating to funding at the state level has been in the area of land acquisition of fragile habitat areas.¹⁵⁷

Between 1985 and 1990, due to an unhelpful administration, state agencies failed to properly integrate their func-

150. See *THE NEW FRONTIER*, *supra* note 56, at 15.

151. See Bane, *supra* note 144, at 14.

152. This was usually due to inadequate road infrastructure. See *id.*

153. See *id.* However, many of the concurrency shortfalls were not at the local level but on state and county roads. See Boggs, *supra* note 64, at 11.

154. See *THE NEW FRONTIER*, *supra* note 56, at 15.

155. See *id.* at 23.

156. See *id.* at 24. At the local level, some counties imposed sales tax increases; others refused. One report put the state's infrastructure deficit at \$52.9 billion. See Bane, *supra* note 144, at 14.

157. See *THE NEW FRONTIER*, *supra* note 56, at 25. Since 1970, Florida has spent more than \$2 billion on the acquisition of environmentally sensitive land. See *Meanwhile, in Florida, Laws, Not Extremists, Help*, *PALM BEACH POST*, Apr. 22, 1995, at 2A. During the 1990s, over \$4 billion is expected to be spent on vulnerable lands though various government programs, the Preservation 2000 program being the most prominent one today. See *THE NEW FRONTIER*, *supra* note 56, at 25.

tions in order to promote growth management.¹⁵⁸ However, under the direction of the Chiles Administration, agency policies and functions have become more integrated.¹⁵⁹ In 1991, Governor Chiles established the third Environmental Land Management Study Committee (ELMS III) to assess the growth management system and make recommendations to the Legislature by December, 1992.¹⁶⁰ The 1992 Legislature was unwilling to wait for these recommendations, however, and introduced several bills which were aimed at weakening rather than strengthening the existing system.¹⁶¹

The 1993 Legislature was quite active in the area of growth management.¹⁶² Mainly responding to the recommendations of ELMS III, they enacted three laws: (1) the 1993 Planning and Growth Management Act, (2) the 1993 Florida Environmental Reorganization Act, and (3) the 1993 Florida Job Siting Act.¹⁶³ Areas addressed by the 1993 Planning and Growth Management Act included intergovernmental coordination,¹⁶⁴ regional planning councils,¹⁶⁵ concurrency,¹⁶⁶ state and local comprehensive plans,¹⁶⁷ and

158. See THE NEW FRONTIER, *supra* note 56, at 26.

159. See *id.* at 27. The focus has been on seven state agencies: Community Affairs; Environmental Regulation; Transportation; Natural Resources; Labor and Employment; Commerce; and the Game and Freshwater Fish Commission. See *id.*

160. See *id.* at 28.

161. See THE NEW FRONTIER, *supra* note 56, at 28. Bills were introduced to attempt to weaken the consistency requirement, to prevent the DCA from considering cumulative environmental effects of agency permitting, and to "sunset" the regional planning councils in 1993 unless re-authorized. The last was the only bill to pass and become law. One promising bill was also enacted which fine-tuned several parts of the system including the encouragement of innovative planning. See *id.*

162. See John M. DeGrove, *State and Regional Planning Activity: The Florida Experience and Lessons for Other Jurisdictions*, 930 ALI-ABA 397 (1994) [hereinafter DeGrove, *State and Regional Planning*].

163. See *id.* at 400-01.

164. Generally regarded as the weak point in the growth management system, the act made procedural changes to increase intergovernmental coordination. See *id.* at 405.

165. Regional planning councils, which came under attack in 1992, were reestablished with their roles somewhat redefined. See *id.* at 406.

166. Concurrency requirements were extended to additional public facilities. Exceptions from the transportation requirements were allowed under certain circumstances. See *id.* at 415.

land acquisition.¹⁶⁸ The 1993 Florida Environmental Reorganization Act streamlined permitting processes and merged the Department of Natural Resources and the Department of Environmental Regulation into the Department of Environmental Protection.¹⁶⁹ Finally, the 1993 Florida Job Siting Act integrated economic development policies and environmental protection policies.¹⁷⁰

To summarize, Florida's growth management system represents a tremendous commitment by all levels of government, by property owners and the general public to deal with the State's growth problems.¹⁷¹ It mandates that development only take place when adequate supporting facilities and infrastructure are in place. It seeks a balance between allowing development and protecting the environment. It requires state and local governments to form a partnership and plan consistently with one another. Consequently, growth management represents an erosion of traditional local government home rule.¹⁷² "Home rule" advocates, who believe decisions which affect local communities "are best handled lo-

167. The legislation expanded the focus of the State Comprehensive Plan to include areas such as public health and safety, community redevelopment, and historic preservation. Local Plan provisions were amended to reduce pre-compliance review periods. See DeGrove, *State and Regional Planning*, *supra* note 162, at 410-13.

168. See *id.* at 400.

169. See *id.* at 420-22.

170. See *id.* at 422.

171. For an complete overview of the chronological development of growth management in Florida see GROWTH MANAGEMENT 2000, *supra* note 59, at 69-73.

172. See John R. Nolon, *The Erosion of Home Rule Through the Emergence of State-Interests in Land Use Control*, 10 PACE ENVTL. L. REV. 497 (1993). Since the decision in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), when the U.S. Supreme Court upheld the validity of local zoning, courts have deferred to local legislative judgement as long as it is "fairly debatable" that the regulation advances a legitimate governmental interest. *Id.* at 388. See also *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 56 (1976) (Powell, J., concurring). Home rule has long been considered an essential ingredient of individual rights because it places government as close as possible to the citizens. Growth management necessarily has required a sacrifice of some of that local autonomy. For an understanding of the role of home rule in the political structure, see Michael Libonati, *Home Rule: An Essay On Pluralism*, 64 WASH. L. REV. 51 (1989); George D. Vaubel, *Toward Principles of State Restraint Upon the Exercise of Municipal Power in Home Rule*, 20 STETSON L. REV. 5 (1990).

cally and without state interference," would disagree with this shift in authority.¹⁷³ Yet, by 1985, the pressures in Florida were such that the state, in order to maintain the quality of life for its citizens, could no longer allow local governments to go their own way without considering conditions beyond their political boundaries. Florida's growth management system is reminiscent of Leopold's 'community of interdependent parts' with the land as the thread which links those parts together.¹⁷⁴

As the amendments over time suggest, growth management is a process that requires constant revision in the face of unforeseen problems and changing circumstances.¹⁷⁵ Growth management in Florida is a complex system which took decades to create. Through regulations used to implement planning policies, it requires individual landowners to forego many opportunities they might have otherwise had. However, one important question remains: who should pay for these lost opportunities?

III. Property Rights in Florida

The birth of the modern property rights movement can be traced back to the early 1980s when dissatisfaction among rural landowners in western states resulted in a rebellion prompted by the federal government's management of public land.¹⁷⁶ Followers of what became known as the Sagebrush Rebellion had one simple solution to what they viewed as federal incompetence and mismanagement of public lands: turn title to those lands over to the states, thereby giving control of the lands to a body closer to local citizens.¹⁷⁷ The rebels were

173. See Nolon, *supra* note 172, at 505.

174. See *supra* note 26 and accompanying text.

175. See *supra* notes 165-73 and accompanying text.

176. See Foster, *supra* note 6, at 1. See Bruce Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 ENVTL. L. 847 (1982). The rebels were not merely made up of small rural landowners. It has been suggested that much of the funding for the Rebellion came from corporate pockets. See Harvey M. Jacobs, *The Anti-Environmental 'Wise Use' Movement in America*, LAND USE L. 3, 4, Feb. 1995.

177. See Babbitt, *supra* note 176, at 848.

supported by a sympathetic Reagan Administration;¹⁷⁸ however, the movement was disorganized and made little progress.¹⁷⁹

In recent years, the property rights movement, renamed the Wise Use movement, has become more organized, gaining nationwide support.¹⁸⁰ In the wake of a world wide economic recession, Wise Users focus their attack on environmental laws and regulations alleging that these laws destroy jobs and are too costly to local economies.¹⁸¹ Moreover, local Wise Use organizations feel that the current takings law provides inadequate protection for landowners burdened by regulation. These organizations lead the charge in the present spate of "compensation" bills at the state level.¹⁸²

Since 1990, all fifty state legislatures have considered some form of property rights legislation, with eighteen states enacting bills.¹⁸³ These bills vary greatly as to their requirements. At one end of the spectrum is legislation requiring government agencies to engage in takings impact analysis before promulgating regulations; other bills either require compensation to be paid when a landowner's property is affected by regulations (under certain circumstances only) or place a landowner beyond the reach of regulations that would

178. *See id.* at 847.

179. *See Jacobs, supra* note 176, at 4.

180. *See id.* Jacobs suggests that while many of the same corporate backers who supported the Sagebrush Rebellion are now supporting the Wise Use movement, it would be a mistake to compare the two. Wise Use followers are highly organized and have spread their wings to all fifty states with an expanded agenda. *Id.*

181. *See id.* at 3. *See also* Adam Pertman, *Wise Use Endangers Nation's Environmental Rules*, ORANGE COUNTY REGISTER, Nov. 21, 1994, at A10. Wise Use claims that environmental regulations hurt jobs and the economy are not supported by recent studies which suggest the opposite. *See* Ronald Smothers, *Study Finds Environmental and Economic Health Compatible*, N.Y. TIMES, Oct. 19, 1994, at A18; David J. Russ, *How the 'Property Rights' Movement Threatens Property Values in Florida*, 9 J. LAND USE & ENVT'L. L. 395, n. 77-87 and accompanying text (1994) (discussing evidence that shows Florida's growth management system has had a positive rather than a negative impact on the economy); Daniel Glick, *Having Owls and Jobs Too*, NATIONAL WILDLIFE, Aug.-Sept. 1995, at 8 (describing a booming economy in Oregon where anti-environmentalists claimed protection of the spotted owl would destroy jobs).

182. *Jacobs, supra* note 176, at 3.

183. *See Peirce, supra* note 6, at 13A.

reduce the value of his land by a certain percentage.¹⁸⁴ It is interesting to note, however, that when similar measures were submitted directly to voters recently, those measures were firmly defeated.¹⁸⁵

A. Takings Case Law in Florida

Modern takings jurisprudence can be traced to Justice Holmes' announcement in *Pennsylvania Coal Co. v. Mahon*¹⁸⁶ that the general rule under the Fifth Amendment¹⁸⁷ is that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."¹⁸⁸ However, courts have struggled over the precise meaning of that language and have invariably declined to declare a "set formula" for takings analysis, relying instead on an ad hoc factual inquiry.¹⁸⁹ In *Penn Central Transportation Co. v. City of New York*,¹⁹⁰ the Supreme Court announced a three pronged balancing test to determine if a taking occurred.¹⁹¹ The court weighed (1) the economic impact of the regulation, (2) the extent to which the regulation has interfered with distinct investment-backed expectations of the property owner, and (3) the character of the governmental action.¹⁹² How-

184. See Jonathan E. Rinde, "Take Me, Take Me' Can There Be A Property Rights Bill That Environmentalists Can Support?", PENNSYLVANIA L. WKLY., Aug. 14, 1995, at S6; See Foster, *supra* note 6, at 1; See Peirce, *supra* note 6, at 13A. Texas passed a bill that would allow landowners to be exempt from any regulation that reduces the value of their land by more than 25 percent. See *id.*

185. See *Property Rights - And Wrongs*, ROANOKE TIMES & WORLD NEWS, Jan. 3, 1996, at A8. Voters in the States of Washington and Arizona turned down property rights measures by a margin of 60-40 percent. See *id.*

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

187. U.S. CONST. amend. V. The relevant clause reads: "nor shall private property be taken for public use without just compensation." *Id.*

188. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 415.

189. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (citations omitted).

190. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

191. See *id.* at 124.

192. See *id.* In *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), the Supreme Court held that there must also be an "essential nexus" between the effect of the regulation and the public interest being served. *Id.* at 837. The Court expanded on this requirement somewhat in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), when it held that exactions imposed on property owners as

ever, the Court took a more categorical approach in *Lucas v. South Carolina Coastal Council*,¹⁹³ declaring that a taking occurs when a regulation deprives a property owner of all economically beneficial or productive use of his property¹⁹⁴ unless the regulation prohibits a use that offends the background principles of the state's common law.¹⁹⁵

Takings analysis under Florida's Constitution generally follows federal analysis. The relevant constitutional provision reads: "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner"¹⁹⁶ As under federal law, there is "no set formula" for determining if a taking has occurred.¹⁹⁷ Instead, courts engage in a factual inquiry to determine whether the regulation "denies substantially all economically beneficial or productive use of land."¹⁹⁸ Additionally, courts are required to look to the property as a whole rather than only the portion specifically affected by the regulation.¹⁹⁹ Finally, Florida now follows federal law²⁰⁰ in that, under certain circumstances, a temporary taking can occur which will require compensation.²⁰¹

conditions on development approval must be "roughly proportional" to the impact of the proposed development. *See id.*

193. 505 U.S. 1003 (1992).

194. *See id.* at 2893. This categorical approach is reminiscent of the test announced in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), where the Court held that a taking occurs when a regulation does not advance a legitimate state interest or denies an owner of all economically viable use of his land. 447 U.S. at 260. Furthermore, the court in *Lucas* did not overturn the *Penn Central* decision suggesting that either test may be used depending upon the circumstances presented by the case.

195. *See Lucas*, 505 U.S. at 1030.

196. FLA. CONST., art. X, § 6(a) (1968).

197. *Vatalaro v. Dept. of Env'tl. Regulation*, 601 So.2d 1223, 1227 (Fla. 1992).

198. *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So.2d 54, 58 (Fla. 1994).

199. *See Department of Env'tl. Regulation v. MacKay*, 544 So.2d 1065, 1066 (Fla.3d DCA 1989). *But see* David K. Thulman, *Takings Law in Florida: The Whole is Greater than the Sum of the Parts*, 8 J. LAND USE & ENVT'L. L. 595 (1993) (suggesting that while Florida courts continue to look to the entire property, the *Lucas* footnotes have thrown some doubt on that approach).

200. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

201. *See Tampa-Hillsborough County*, 640 So.2d at 58.

B. Property Rights Action Before the 1995 Legislation

The issue of property rights is not new to Florida. In the mid-1970s, both the Legislature and the Administration established panels to study the issue.²⁰² Eventually, in 1978, their recommendations resulted in legislation passing which set forth "remedies available to property owners 'substantially affected by a final action of any agency with respect to a permit.'"²⁰³ However, this legislation failed to resolve the uncertainty that has plagued this area.²⁰⁴

In the early 1990s, the Florida property rights debate emerged again. In 1993, the Legislature passed a bill which required the appropriate agency, when one of its regulations reduces the value of a parcel of land by more than forty percent, to either compensate the landowner or exclude that landowner from the regulation.²⁰⁵ Governor Chiles vetoed that bill.²⁰⁶ However, in an effort to appease property rights advocates, he established the Governor's Property Rights Study Commission II which was charged with assessing the property rights issue.²⁰⁷

The following year, the property rights campaign continued with the introduction of several bills.²⁰⁸ Two of the most prominent bills, H. 485 and S. 630, mirrored the 1993 effort, requiring compensation or rescission of the regulation (as applied) where the property's value was reduced by more than forty percent.²⁰⁹ Property rights advocates wanted to stop what they viewed as a "runaway regulatory bureaucracy."²¹⁰

202. See Kent Wetherell, *Private Property Rights Legislation: The Midnight Version and Beyond*, 22 FLA. ST. U. L. REV. 525, 538 (1994). Those panels were known as the Governor's Property Rights Study Commission and the Senate Select Committee on Property Rights and Land Acquisition. See *id.*

203. *Id.* at 538 (citing 1978 Fla. Laws chs. 78-85).

204. See *id.* at 543.

205. See *id.* at 544.

206. See Wetherell, *supra* note 202, at 544.

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

208. See The Neighborhood Safety & Health Association, *Seizing the Middle Ground: The Defeat of Florida's 1994 'Takings' Legislation*, Sec. A.

209. See *id.*

210. *Id.* at sec. B (reprinting article by Booth Gunter, *Backlash*, Dec. 12, 1993).

Other landowners saw excessive government regulation as a "trend toward a socialist society where government interest takes precedence over private interest."²¹¹ However, through the efforts of a broad based coalition of groups known as the Neighborhood Safety and Health Association (NSHA),²¹² these bills never went before the Legislature for a vote.²¹³ Also in 1994, the Tax Cap Committee, perhaps the most prominent property rights group in Florida, launched a petition for a constitutional amendment.²¹⁴ This amendment was eventually removed from the ballot by Florida's Supreme Court.²¹⁵

C. The Property Rights Act of 1995

1995 continued where 1994 left off with property rights at the forefront of the political agenda. Faced with another drive for a constitutional amendment,²¹⁶ Governor Chiles brought environmentalists and property rights advocates together to create a compromise bill.²¹⁷ On May 2, 1995, after

211. Victor Hull, *Fencing in Landowners*, SARASOTA HERALD-TRIBUNE, Feb. 5, 1994.

212. See The Neighborhood Safety & Health Association, *supra* note 208, at Sec. A. The coalition included 1000 Friends of Florida, The Nature Conservancy, the Florida League of Women Voters, the Florida Chapter of the American Planning Association, the Florida League of Cities, the Florida Consumer Action Network, the Florida Public Interest Research Group, the Florida Association of Counties, the Florida Sierra Club, and the Florida Audubon Society. A compromise bill based on the recommendations of the Governors Property Rights Study Commission also died when provisions were added that would fund the bill from a parkland acquisition program. See *id.*

213. See Russ, *supra* note 181, at n.111 and accompanying text.

214. See *id.* at n.11. The Tax Cap Committee claims to be a grass roots organization which has two main goals; to increase property rights and reduce taxes. See Tax Cap Committee, *supra* note 15. Yet most of the funding for the Tax Cap Committee comes from large corporations. For example, in 1994, the U.S. Sugar Corp. contributed over \$1.6 million to the Committee whose total contributions for that year came to over \$3.4 million (from materials prepared by 1000 Friends of Florida based on the Tax Cap Committee's tax return).

215. See Powell, *supra* note 207, at 12. The petition had gathered over 800,000 signatures to put the issue on the ballot. However, the state Supreme Court removed the proposed amendment from the ballot stating that it was improperly written. See Kaplow, *supra* note 4, at 8A.

216. See *The Property Appeasers*, *supra* note 15, at 2D.

217. See Kaplow, *supra* note 4, at 1A, 8A; *The Good, the Bad and the Ugly*, *supra* note 4, at 1A.

several technical amendments were added, the compromise bill, H. 863, went before the House and passed by a vote of 111 to 0.²¹⁸ The next day, the Senate voted on the bill and passed it by a vote of 38 to 1.²¹⁹ On May 18, 1995, the Governor signed H. 863²²⁰ into law.²²¹

H. 863 created two separate acts.²²² First, the Bert J. Harris Private Property Rights Protection Act creates a new cause of action for landowners seeking compensation when a regulation inordinately burdens their land.²²³ Second, the Florida Land Use and Environmental Dispute Resolution Act allows a property owner, who believes that a governmental action unreasonably or unfairly burdens the use of his land, to ask for an informal dispute resolution before a special master.²²⁴

1. The Bert J. Harris Private Property Rights Protection Act

The Bert J. Harris Private Property Rights Protection Act (Property Rights Act), which became effective on October 1, 1995, provides a new cause of action entitling landowners to relief when an action by a governmental entity²²⁵ "has inordinately burdened an existing use of real property or a vested right to a specific use of real property."²²⁶ Three questions immediately emerge from this language.²²⁷ When does

218. H 863, Florida Legislature, Reg. Sess. 1995 History of House Bills 268.

219. *See id.* The bill's easy passage may be somewhat deceiving. Sen. Rick Dantzler said of the measure, "I think we have to do something this year or we are going to be facing a constitutional amendment in 1996." He went on to say: "If we do this the wrong way, we will change forever the face of Florida." Vickie Chachere, *Proposal Would Aid Landowners; Property Rights Bill Seeks Common Ground*, TAMPA TRIBUNE, Apr. 10, 1995, at 1.

220. FLA. STAT. ANN. §§ 70.001-.80 (West Supp. 1996).

221. H 863, Florida Legislature, Reg. Sess. 1995 History of House Bills 268.

222. *See* FLA. STAT. ANN. § 70.001-.80 (West Supp. 1996).

223. *See id.* § 70.001.

224. *See id.* § 70.51.

225. A government entity includes state, regional or local government agencies. *See id.* § 70.001(3)(c).

226. FLA. STAT. ANN. § 70.001(2) (West Supp. 1996).

227. *See* Tom Pelham, *Coping with the New Property Rights Act*, GROWTH MANAGEMENT REP., Fall 1995 [hereinafter Pelham, *Coping*].

an inordinate burden occur? What is an existing use? What is a vested use?

An inordinate burden occurs when:

an action of one or more governmental entities [which] has restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property.²²⁸

Following established takings case law, the property must be taken as a whole.²²⁹ Furthermore, an inordinate burden does not include any temporary impacts on property or any government action relating to a public nuisance.²³⁰ Thus, the definition is reminiscent of the language used by courts engaging in takings analysis;²³¹ however, the Act expressly provides that an inordinate burden occurs without rising "to the level of a taking under the State Constitution or the United States Constitution."²³² It may take years before a clear picture emerges of what constitutes an inordinate burden but courts have received a clear message from the Legislature that an inordinate burden arises before a constitutional taking occurs.

The term "existing use" is:

an actual, present use or activity on the real property . . . or such reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property.²³³

228. FLA. STAT. ANN. § 70.001(3)(e) (West Supp. 1996).

229. *See id.*

230. *See id.*

231. *See supra* part III. A.

232. FLA. STAT. ANN. § 70.001(9) (West Supp. 1996).

233. *Id.* § 70.001(3)(b).

Interestingly, this controversial section was amended the day before the bill was passed.²³⁴ The definition explicitly states that the reasonably foreseeable use must be non-speculative; however, the rest of the language is so broad that it begs the inclusion of speculative uses when the court determines the scope of coverage.²³⁵

Finally, a vested right is determined by established principles of "equitable estoppel or substantive due process under the common law or . . . [state] statutory law."²³⁶ While the common law regarding a vested right under equitable estoppel is fairly clear in Florida, it is less so for substantive due process.²³⁷ Further, the Property Rights Act now allows a landowner to be compensated under equitable estoppel which previously provided only injunctive remedies.²³⁸

This Act can only operate prospectively in that a cause of action may only arise under any law enacted after May 12, 1995.²³⁹ Therefore, any existing laws, including those relating to growth management, are exempted. However, any existing law, rule or regulation amended after that date gives rise to a cause of action to the extent that the amended portion inordinately burdens the property.²⁴⁰

Procedurally, the landowner is required to notify the government entity involved in writing of his claim 180 days prior to filing suit.²⁴¹ During this period, the governmental entity is required to respond with a written settlement offer which may include:

234. See Tom Pelham, *Florida Legislature Enacts Private Property Rights Protections Act*, FLORIDA PLANNING, May/June 1995 [hereinafter Pelham, *Florida Legislature*]. The amendment expanded the definition of existing use to include "reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property." FLA. STAT. ANN. § 70.001(3)(b) (West Supp. 1996).

235. See Pelham, *Florida Legislature*, *supra* note 234.

236. FLA. STAT. ANN. § 70.001(3)(a) (West Supp. 1996).

237. See Pelham, *Coping*, *supra* note 227, at 4.

238. See *id.*

239. See Fla. Stat. Ann. § 70.001(12) (West Supp. 1996).

240. See *id.*

241. See *id.* § 70.001(4)(a).

- (1) An adjustment of land development or permit standards or other provisions controlling the development or use of land.
- (2) Increases or modifications in the density, intensity, or use of areas of development.
- (3) The transfer of developmental rights.
- (4) Land swaps or exchanges.
- (5) Mitigation, including payments in lieu of onsite mitigation.
- (6) Location on the least sensitive portion of the property.
- (7) Conditioning the amount of development or use permitted.
- (8) A requirement that issues be addressed on a more comprehensive basis than a single proposed use or development.
- (9) Issuance of the development order, a variance, special exception, or other extraordinary relief.
- (10) Purchase of the real property, or an interest therein, by an appropriate governmental entity.
- (11) *No changes to the action of the governmental entity.*²⁴²

If the landowner decides to accept the offer, it may be implemented through an appropriate development agreement by issuing a variance, special exception, or other extraordinary relief; or by another appropriate method.²⁴³ However, the relief granted under the settlement offer must protect the public interest and may only be used to the extent that it removes the inordinate burden from the landowner.²⁴⁴

If the settlement offer is not accepted, the government entity must issue a written ripeness decision specifying allowable uses for the property.²⁴⁵ Upon expiration of the 180 day notice period, the landowner is free to file suit seeking compensation in circuit court.²⁴⁶ Compensation is to be determined by calculating the difference in fair market value before and after the imposition of the law or regulation.²⁴⁷

242. *Id.* § 70.001(4)(c) (emphasis added).

243. *See* FLA. STAT. ANN. § 70.001(4)(c) (West Supp. 1996).

244. *See id.* § 70.001(4)(d).

245. *See id.* § 70.001(5)(a).

246. *See id.* § 70.001(5)(b).

247. *See* FLA. STAT. ANN. § 70.001(6)(b) (West Supp. 1996).

Finally, the prevailing party is entitled to recover "reasonable costs and attorney fees."²⁴⁸

2. The Florida Land Use and Environmental Dispute Resolution Act

The Florida Land Use and Environmental Dispute Resolution Act (Dispute Resolution Act)²⁴⁹ is based on the recommendations of the Governor's Private Property Rights Study Commission II.²⁵⁰ It creates a mediation proceeding overseen by a special master²⁵¹ for any landowner "who believes that a development order . . . or an enforcement action of a governmental entity, is *unreasonable or unfairly burdens* the use of his real property."²⁵² Unlike the Property Rights Act, the application of the Dispute Resolution Act is not restricted to prospective governmental actions. However, the landowner is required to exhaust all "nonjudicial local government administrative appeals" which do not take longer than four months before requesting a "special master proceeding."²⁵³

The special master must hold a hearing within forty-five days from the request for relief.²⁵⁴ The purpose of the hearing is to "focus attention on the impact of the governmental action . . . and to explore alternatives to the development order or enforcement action and other regulatory efforts by the governmental entities in order to recommend relief, when appropriate, to the owner."²⁵⁵ If the hearing does not produce a resolution, the special master is required to produce a written recommendation regarding the dispute within fourteen days after the hearing.²⁵⁶

If the special master finds that the government action is unreasonable or it unfairly burdens the owner, the governmental entity must either accept, modify, or reject the recom-

248. *Id.* § 70.001(6)(c).

249. *Id.* § 70.51.

250. See Pelham, *Florida Legislature*, *supra* note 234.

251. See FLA. STAT. ANN. § 70.51(2)(c) (West Supp. 1996).

252. *Id.* § 70.51(3) (emphasis added).

253. *Id.* § 70.51(10)(a).

254. See *id.* § 70.51(15)(a).

255. FLA. STAT. ANN. § 70.51(17) (West Supp. 1996).

256. See *id.* § 70.51(19).

mendation.²⁵⁷ The special master must recommend that the government action remain undisturbed if he determines it to be reasonable without unfairly burdening the owner.²⁵⁸ Regardless of the special master's recommendation, the owner may file suit against the government entity once the government entity has acted on the special master's recommendation.²⁵⁹ Finally, an owner is not required to go through the dispute resolution process before filing a civil suit.²⁶⁰ Thus, nothing in the Dispute Resolution Act prevents a property owner from pursuing a remedy under the Property Rights Act at the outset.²⁶¹

To restate, Florida's growth management seeks to preserve the quality of life for all individuals, present and future. Supporters of growth management recognize the worth of certain resources such as open space and a diverse ecosystem as part of a healthy "community" even though the value of these resources cannot be easily quantified. The success of growth management rests on three foundations. First, different levels of government must integrate their land use efforts. Second, the growth management system must be constantly reviewed and changed to embrace new ideas and changing conditions. Finally, the private landowners must recognize their ethical obligation to the "broader community" in using their land.²⁶²

257. See *id.* § 70.51(21). Failure to act within forty-five days is deemed a rejection. See *id.* § 70.51(21)(c).

258. See FLA. STAT. ANN. § 70.51(19)(a) (West Supp. 1996).

259. See *id.* § 70.51(24).

260. See *id.*

261. See *id.* § 70.80.

262. Leopold wrote:

a system of conservation based solely on economic self interest is hopelessly lopsided. It tends to ignore, and thus eventually eliminate, *many elements* in the land community that lack commercial value, but that are (as far as we know) essential to its healthy functioning. Its assumes, falsely, I think, that economic parts of the biotic clock will function without the economic parts. It tends to relegate government to many functions eventually too large, too complex, or too widely dispersed to be performed by government. An ethical obligation on the part of the private owner is the only visible remedy for these situations.

LEOPOLD, *supra* note 24, at 251 (emphasis added).

The property rights law seeks to cushion the blow of governmental intrusion into the use of privately owned land. The legislation was born of compromise between growth management and environmental advocates seeking to ward off harsher measures, and property rights advocates seeking to enhance the rights of the individual landowner. While the exact meaning of an "inordinate burden" is unclear, the legislature has made it clear that the threshold for showing an inordinate burden is lower than that for a constitutional taking.

IV. Analysis

Years of implementation and judicial interpretation will pass before the full impact of the Property Rights Act emerges. Despite defining such terms as "inordinately burdens," "existing use," and "vested use,"²⁶³ the law remains vague and uncertain in many respects. Logically, there are two possible outcomes. The law may become another "lame duck" statute, adding little to remedies already available under a constitutional takings claim. If this occurs, this bill will do little to appease the appetite of property rights advocates. On the other hand, the measure may turn out to have some sharp teeth, thereby jeopardizing Florida's entire growth management system which took decades to build.

Growth management experts disagree over the impact of the new law. Some are already convinced that the bill achieves the correct balance on an "emotional issue."²⁶⁴ Jim Murley, a participant in the negotiation process and at the time, head of the 1000 Friends of Florida,²⁶⁵ viewed the bill as a compromise which is "not going to cause unnecessary damage to environmental or growth [management] laws."²⁶⁶ On the other hand, Tom Pelham, former Secretary of the

263. See *supra* notes 228-38 and accompanying text.

264. Powell, *supra* note 207, at 12.

265. 1000 Friends of Florida is a broad based group that has led growth management efforts in Florida over the years. See 1000 FRIENDS OF FLORIDA, *supra* note 52.

266. Cindy Harger, *Law Complicates Property Rights*, TAMPA TRIBUNE, June 11, 1995, at 1.

DCA, saw the bill as "a one-sided equation" reflecting "extreme, selfish indifference at the expense of the greater good of the community."²⁶⁷ Notwithstanding these discordant views, the Property Rights Act expressly states that the threshold for finding an inordinate burden is lower than that for a constitutional takings.²⁶⁸ This indicates that the new law will have a measurable effect and, thus, must be analyzed accordingly.

As discussed above, a successful growth management system has at least three fundamental requirements: (1) an ongoing review of the system to ensure that it meets current conditions and reflects current ideas, (2) an acceptance of responsibility to the community by the individual landowner, and (3) a coordinated, cooperative effort by all levels of government within the state.²⁶⁹ This property rights measure, if it is to fulfill its mandate, will adversely impact, either directly or indirectly, all three of these foundational bases of sound growth management.

First, as growth management is a dynamic process, many state, regional and local laws and regulations must be amended over time. Once amended, actions under these provisions will be subject to compensation claims under the Property Rights Act.²⁷⁰ However, given the strained financial resources of governmental agencies today, necessary changes or actions may simply not be undertaken.

Second, the Property Rights Act operates as a significant responsibility shifting mechanism. The Act directly shifts responsibility for the preservation of a healthy "community" from the individual landowner to the general public because the landowner must be compensated, using public monies, when a law or regulation inordinately burdens his property.

267. *The Property Appeasers*, *supra* note 17, at 2D.

268. See FLA. STAT. ANN. § 70.001(9) (West Supp. 1996).

269. All three are grounded in the two essential prongs of sustainable development; a general consensus on how to preserve the quality of life and a strategic framework for achieving it. The acceptance of individual responsibility and involvement in a cooperative effort are elements of a general consensus. Constant review and revision are essential to the strategic framework. See *supra* part II. A.

270. See FLA. STAT. ANN. § 70.001(9) (West Supp. 1996).

In a less tangible, but ultimately more significant way, the Property Rights Act also shifts responsibility from the present generation to future generations because only laws enacted or amended in the future will be subject to compensation claims.

Third, the Act has the potential of destroying the common goals and efforts of state and local governments. Action by the state government may ultimately expose local governments to compensation claims. Additionally, other provisions in the Property Rights Act allow the state government and landowners to further erode local government authority over land use within its jurisdiction.

Finally, the future role of the Dispute Resolution Act also seems unclear because, even though it is not restricted to prospective laws or regulations, it seems destined to remain in the shadow of the Property Rights Act. Drafters of the Dispute Resolution Act did not create the law as a support mechanism for the Property Rights Act; however, enacted as part of a property rights package, the Dispute Resolution Act and the bureaucracy it creates have little chance of being effective. Each of the concerns raised here are dealt with in more detail below.

A. The Property Rights Act Obstructs the Dynamic Nature of Growth Management

While it may be somewhat unclear as to the extent of the adverse effect the Property Rights Act will have on growth management in Florida, it seems certain, nonetheless, that some effect will result. Although the law only applies prospectively,²⁷¹ there is little doubt that many growth management laws will eventually come under its umbrella. Growth management is not a static mechanism²⁷² because, as with most processes, it faces conditions and influences which are constantly and, often, unpredictably changing.²⁷³ It is foolish

271. *See id.* § 70.001(12).

272. *See The Property Appeasers*, *supra* note 17, at 2D (referring to comments made by Tom Pelham, former Secretary of the State Department of Community Affairs in Florida).

273. *See supra* note 18.

to think that growth management laws as they stand today constitute the perfect system for dealing with Florida's land use and development issues of tomorrow. Once amended, growth management laws are subject to compensation claims under the new Property Rights Act.²⁷⁴ Furthermore, the system is such that local governments will bear the initial burden of many of these claims. In a responsive growth management system, two situations typically arise that necessitate a local government action.

First, any modification to a state or regional plan must be reflected in local comprehensive plans.²⁷⁵ In addition, if the past is any indication, major changes to the growth management system will be necessary at the state and regional level if Florida is to preserve its quality of life. Even though there was a comprehensive overhaul of Florida's growth management framework in 1985, by 1993, extensive changes and additions were again needed.²⁷⁶ For example, in 1993, the State Comprehensive Plan was amended to include elements such as community redevelopment and historic preservation.²⁷⁷ However, the consistency requirement mandates that changes made at the state level be reflected at the regional and local levels as well.²⁷⁸ Furthermore, statutory provisions require regional and local plans to be reviewed and revised every five years.²⁷⁹ Therefore, any changes to the state comprehensive plan or other laws and regulations which implement that plan must eventually be incorporated into a local comprehensive plan.

Second, a change in a local development condition may also necessitate an amendment to the local zoning ordinance or comprehensive plan. Assume for example, development pressures increase around a particular location of historic in-

274. See FLA. STAT. ANN. § 70.001(12) (West Supp. 1996).

275. Of course, any modification or addition to the list of required elements to be included in local comprehensive plans under section 163.3177 of the Florida statute would certainly require a modification of local laws and regulations. See FLA. STAT. ANN. § 163.3177 (West 1988).

276. See *supra* notes 162-70 and accompanying text.

277. See DeGrove, *State and Regional Planning*, *supra* note 162, at 410-13.

278. See *supra* note 123 and accompanying text.

279. See FLA. STAT. ANN. §§ 186.511, 163.3191 (West 1988).

terest such that the local government considers creating a historic district to sustain tourism or preserve unique structures within its jurisdiction.²⁸⁰ To accomplish this, the comprehensive plan or local zoning ordinance may have to be amended. Further, because internal consistency is required at the local level as part of the comprehensive plan,²⁸¹ elements within the comprehensive plan other than historic preservation, (or at least the laws and regulations that implement them), may also have to be amended. For example, the preservation of a local historic district may necessitate an alteration to implementation of the traffic element in a local comprehensive plan.²⁸² This, in turn, may require zoning changes extending beyond the historic district itself to control traffic access to the historic district. If the historic area attracts a significant amount of tourism, the town may not want any large truck activity nearby and may rezone a nearby industrial area to light industry. An owner of a parcel within the rezoned area, or within the historic district for that matter, may well feel that he or she has been "inordinately burdened" and initiate a claim.

Both of the situations described above subject local government actions to claims under the new law. Where changes at the local level are made, local governments may have to impose a tax increase to meet the costs of compensa-

280. Under the State Comprehensive Plan it is the goal of the state to "increase access to . . . historical and cultural resources . . ." Some of the Plan's policies to achieve that goal are to:

Ensure that historic resources are taken into consideration in the planning of all capital programs and projects at all levels of government and that such programs and projects are carried out in a manner which recognizes the preservation of historic resources;

Encourage the rehabilitation and sensitive adaptive use of historic properties through technical assistance and economic incentive programs.

FLA. STAT. ANN. § 187.201(19) (West 1988 & Supp. 1995).

281. See *supra* notes 121-22 and accompanying text.

282. See FLA. STAT. ANN. § 163.3177(6)(b) (West 1988). This section provides: "the [local] comprehensive plan shall include . . . a traffic circulation element consisting of the types, locations, and extent of existing and proposed major thoroughfares and transportation routes, including bicycle and pedestrian ways." *Id.*

tion claims under the Property Rights Act to avoid reducing funding elsewhere.²⁸³ Unfortunately, the current political and economic environment suggests that the public would be hard pressed to accept any tax increase. Thus, faced with the mandate that local plans be consistent with state and regional plans, local governments are more likely to meet the consistency requirement technically but not in the spirit that growth management requires. The tragedy is that the detrimental effect will be so gradual that it will go largely unnoticed and, therefore, unchecked.

Thus, the Property Rights Act will have a chilling effect on local government initiatives to preserve the local quality of life. There is evidence that this has already taken place.²⁸⁴ Officials in Palm Beach County and the City of Deland have scrapped plans to create regulations to protect open space near the Everglades and to establish an historic district respectively.²⁸⁵ With limited financial resources, local governments are likely to avoid making needed changes for fear of what it might cost.²⁸⁶ Even property rights advocates agree

283. It is interesting to note that the most likely tax increase at the local level would be a property tax which has never been embraced with open arms. The fact that courts are directed to apportion the compensation costs according to responsibility among governmental entities does not negate this point. See *id.* § 70.001(6)(b). Litigation costs alone can be extremely high. So, even if the court determines the state bares the entire responsibility for inordinately burdening the landowner, the litigation costs require the expenditure of much needed financial resources. The law does, however, allow government entities to recover costs when they prevail. See *id.* § 70.001(6)(c).

284. See George Bennett, *New Law Foils Plan to Cut AG Reserve Development*, PALM BEACH POST, May 25, 1995, at 1B; Woitas, *supra* note 22, at 1; *Speculators' Paradise*, *supra* note 22, at 2F; Bill Lambrecht, *Florida's Property Rights Law; Born of Fear, Worries Officials*, ST. LOUIS POST-DISPATCH, July 9, 1995, at 6A; Rose, *supra* note 22, at A8; Robert Perez, *Land-Rights Law Worries Planners*, ORLANDO SENTINEL, Mar. 3, 1996, at K1; Steve Liewer, *Developer to Petition for Site on Ag Reserve*, SUN-SENTINEL, Apr. 15, 1996, at 3B.

Of course, a chilling effect is exactly what some people want. Scott Butler, staff attorney for the Florida Farm Bureau put it: "When you say 'a chilling effect,' that sounds like a negative thing. But for Florida farmers, it's a positive thing." Jerry Jackson, *Property Rights Law 1st Step for Farmers*, ORLANDO SENTINEL, Nov. 13, 1995, at 17.

285. See Bennett, *supra* note 284, at 1B; Rose, *supra* note 22, at A8.

286. Raising taxes to "finance" new regulations in the current economic climate is unlikely. In fact, as its name suggests, the other major objective of the Tax Cap Committee is to reduce taxes. See Tax Cap Committee, *supra* note 15.

that the bill will have the effect "of enshrining the existing statutes."²⁸⁷ When needed changes are not acted upon, the very essence of the growth management process is weakened.

B. The Property Rights Act has Shifted Responsibility Towards the Land from the Individual Landowner to the General Public and from the Present Generation to Future Generations

All burdens relating to land use are traditionally shared by the general public and the individual property owner. Typically, these burdens include restrictions on the land use and public access to certain areas to preserve the character of the community and the natural resource involved, or taxes collected to provide and maintain supporting facilities and infrastructure for the community and for the use of land itself.²⁸⁸ The individual property owner's burden can be justified by the long standing notion that there is a certain obligation arising out of the ownership of land that extends to the surrounding community.²⁸⁹ The Property Rights Act shifts some of that burden (although not all landowners will benefit from that shift) from individual property owners to the general public. Simply put, the landowner's commitment to the broader community is now reduced because the public will ultimately pay for compensation claims under the new law.²⁹⁰

Since the Property Rights Act is prospective in nature, it essentially breaches the trust between present and future generations. The concept of sustainable development reminds us that each generation has "both rights and obligations in relation to the environment."²⁹¹ Growth

If the Tax Cap Committee succeeds in meeting both of its objectives, growth management would be destroyed and it would represent a breach of the commitment by Florida's citizens to future generations.

287. Chachere, *supra* note 219, at 1.

288. At the local level, taxes usually come in the form of property taxes aimed at the landowner and sales taxes aimed at the general public.

289. See *supra* notes 52-53 and accompanying text.

290. Even unsuccessful claims will result in significant legal fees for the local municipality.

291. See *supra* note 46 and accompanying text.

management represents a commitment by the present generation to future generations to preserve the quality of life.²⁹² Thus, because of its prospective nature, the law decreases the overall exposure of environmental and growth management laws to compensation claims. However, this compromise primarily satisfies the needs of present generations, thereby placing a heavy burden on those who follow.²⁹³ In this regard, the compromise allows the current growth management system to remain intact. However, it jeopardizes any further evolution of the system. This hardly fulfills the present generation's obligation to future generations.²⁹⁴

C. The Property Rights Act Will Potentially Pit State and Local Governments Against Each Other

Cooperation and coordination are vital to the survival of a growth management system. To succeed, growth management requires all levels of government to work together to achieve the shared goals of preserving both the environment and quality of life. Under the new Property Rights Act, two possible situations can arise where state and local governments have adverse interests.

First, a conflict may arise between state, regional, and local governments when the state makes a change to a growth management law or regulation.²⁹⁵ An amendment to the State Comprehensive Plan will require amendment at both the regional and local levels.²⁹⁶ In addition, regional planning agencies are required by statute to review their

292. See *supra* part II. A. Florida's population may double over the next 25 years. Craig Quintana, *Growth Problem Hits Close to Home*, ORLANDO SENTINEL, Sept. 5, 1994, at A1.

293. In this sense, the law is reminiscent of NIMBY (not in my backyard); i.e., NIMG (not in my generation).

294. Supporters of the Property Rights Act might argue that the alternative to this law might be worse. They contend that all growth management laws may have been subject to compensation claims under the law. The argument might have some merit had this law appeased property rights advocates. Thus far, this has not occurred. See also *infra* part V.

295. See *supra* part IV. A.

296. See FLA. STAT. ANN. §§ 163.3177, 186.507(1) (West 1988).

plans every five years for any necessary changes.²⁹⁷ Thus, local governments are left with no choice but to amend their regulations, thereby exposing them to compensation claims. Who pays? The Property Rights Act contains a provision which allows a court to determine the relative percentage of responsibility of each government entity where more than one is determined to be responsible.²⁹⁸ However, it is not clear whether this provision would address the situations described above. If it does, then each governmental party will argue that the others are primarily responsible, and therefore, must pay the lion's share of a compensation claim by a property owner. If it does not, the local government is left to pay the full compensation amount for an action it was required to take by the state. Ultimately, each level of government is cast against the other to the detriment of growth management.

The second situation that could potentially cause hostility between the local and state entities can arise when a state agency is deemed to be the responsible government entity in a compensation claim under the Property Rights Act.²⁹⁹ Under the Act, a state agency, as the responsible government entity, is required to make a written settlement offer to the land owner.³⁰⁰ The settlement offer may include: (1) a transfer of development rights, (2) the issuance of a variance or special exception, or (3) an increase in the density or intensity of the development.³⁰¹ Nothing in the Act indicates that a state agency is precluded from using these land use tools. However, traditionally, these tools are used by local, not state or regional, governmental agencies in regulating land use.

The creation of Florida's growth management framework had already required local governments to relinquish some of their autonomy in the area of land use.³⁰² However, the new

297. Also, regional planning agencies are required to review and revise their plans, if necessary, every five years. *See id.* § 186.511.

298. *See* FLA. STAT. ANN. § 70.001(6)(a) (West Supp. 1996).

299. *See id.* § 70.001(6)(b).

300. *See id.* § 70.001(4)(c).

301. *See id.* *See supra* note 248 and accompanying text.

302. *See supra* notes 178-79 and accompanying text.

Property Rights Act has the potential of further eroding 'home rule' in Florida, thus, creating friction between state and local governments.³⁰³ The definition of "existing use"³⁰⁴ will potentially weaken local government authority over land use which, in turn, will only further erode the cooperative effort between state and local governments. Under the Property Rights Act, an owner is entitled to compensation when a government action inordinately burdens an existing use of his land.³⁰⁵ However, existing uses include any "reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and *compatible with adjacent land uses* and which have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property."³⁰⁶ This definition of "existing use" is so broad that it includes uses not even contemplated by a landowner at the time of the government action.³⁰⁷ It allows such an owner to present to the court an argument of what he or she believes to be a compatible use. From this statutory language, it appears that as long as a reasonable basis supports the landowner's notion of a "compatible use," and that use is inordinately burdened, the property owner will prevail.

Such a prospect flies in the face of traditional local authority. Since the U.S. Supreme Court decision in *Village of Euclid v. Ambler Realty Co.*,³⁰⁸ upholding the validity of zoning, courts have deferred to local legislative judgment as long as it is "fairly debatable" that the regulation advances a legitimate governmental interest.³⁰⁹ As a result, a presumption of validity is afforded to local land use decisions. This presumption allows local governments to create long term plans regarding the use of property within its jurisdiction by placing compatible uses adjacent to one another. Thus, decisions

303. *See id.*

304. *See* FLA. STAT. ANN. § 70.001(3)(b).

305. *See* FLA. STAT. ANN. § 70.001(2) (West Supp. 1996).

306. *Id.* § 70.001(3)(b) (emphasis added).

307. *See* Pelham, *Florida Legislature*, *supra* note 234.

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

309. *See* *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 56 (1976) (Powell, J., concurring).

on compatibility have rested firmly with the local legislature. Under the new Property Rights Act, the property owner merely has to present a rational argument in support of his proposed land use, establishing its compatibility with adjacent land uses, in order to be compensated. Once again, poorly financed local governments are more likely to forego the regulation than pay compensation.³¹⁰ Thus, the new Property Rights Act frustrates the local legislative body's traditional authority, adding to the tension already existing between state and local governments.

D. The Dispute Resolution Act Seems Destined to be a 'White Elephant'

The Dispute Resolution Act also represents uncharted territory. Logically, any process designed to resolve land use disputes between government and private land owners should be welcomed. That said, the adoption of this portion of the bill cannot be divorced from the context within which it is introduced. Despite a provision stating the opposite,³¹¹ the Dispute Resolution Act is part of a property rights package. The fact that the separate parts operate independently only compounds the problem because the Property Rights Act pits property owners against governmental agencies.

In addition, the Act creates a bureaucracy extensive enough to turn any potentially interested party away.³¹² For example, the landowner is required to exhaust all local government administrative remedies that do not go beyond four months.³¹³ Furthermore, the entire process may take up to 165 days, and even longer, if the parties agree.³¹⁴ This may not seem a long time when compared to litigation in court, but it does when one considers that the law does not create a new cause of action and is not binding on any of the parties.

The viability of the Dispute Resolution Act may ultimately depend on how the Property Rights Act fares. Cer-

310. See *infra* part IV. A.

311. See FLA. STAT. ANN. § 70.80 (West Supp. 1996).

312. See Pelham, *Florida Legislature*, *supra* note 234.

313. See FLA. STAT. ANN. § 70.51(10)(a).

314. See *id.* § 70.51(23).

tainly, if courts place the threshold for showing an inordinate burden low enough below that for a takings, there will be little incentive for a landowner to consider dispute resolution. If the opposite is true, where there is little difference between a takings and an inordinate burden, then the dispute resolution process becomes an attractive process because a civil suit is still available in the end.³¹⁵ The fact that the law is not restricted to prospective governmental actions works in its favor because, initially, most growth management laws will not be subject to claims under the Property Rights Act.³¹⁶ Yet, the passion surrounding the property rights debate will surely dampen any positive impacts emerging from the dispute resolution process.

V. Conclusion

It is worth noting that what many had hoped would satisfy property rights advocates has not come to pass. Many environmental and growth management supporters pursued this compromise bill in the hope that its passage would take the steam out of the property rights movement.³¹⁷ However, the Tax Cap Committee is determined to place a proposed constitutional amendment before the voters on the 1998 ballot.³¹⁸ The proposed amendment would entitle private property owners who are challenging a government regulation to a jury trial and money damages for any reduction in the value of land except for a public nuisance.³¹⁹ Property rights

315. See *id.* § 70.51(24).

316. Of course, a constitutional takings claim remains available to the property owner.

317. See Chachere, *supra* note 219, at 1.

318. Telephone Interview with a member of the *Tax Cap Comm.* (August 19, 1996). See also Randy Schultz, *supra* note 55, at 1F; Sloan, *supra* note 15, at 1.

319. The proposed amendment reads:

When any action of regulation by the state, its agencies or political subdivisions restricts the use (other than nuisances at common law) of part or all of private real property causing a loss in fair market value of the affected real property for the public good, which in fairness should be borne by the public as a whole, full compensation should be paid to the owner thereof. All issues shall be determined by jury trial in circuit court without prior resort to administrative remedies. This provision shall apply to actions taken and regula-

advocates are far from satisfied, indicating that the adoption of this law accomplished little.

The property rights law was enacted to have an impact. Viewing constitutional "taking" protection as inadequate, the Florida Legislature established a new cause of action for individual property owners and mandated that the threshold necessary for compensation be lower than that required under a constitutional claim. Growth management, at its purest, embraces a common vision for realizing a worthwhile future and asks all of us to forego opportunity today to preserve opportunity for tomorrow. The Property Rights Act does little to further that cause. Nobody would argue that irresponsible government actions should go unpunished. However, that is not the focus of this law; responsible governmental efforts at protecting Florida's quality of life will run afoul of this law. As an ideal, it suggests that the common vision of Florida's future is fractured. As an expression of the substantive rights of landowners, it attacks the fundamental bases of a sound growth management system.

The repeal of the Property Rights Act cannot be expected any time in the near future. Thus, the new law imposes a responsibility on all Floridians to pay the cost of compensation claims. Certainly, Florida's growth management, even if somewhat hampered, will continue to survive if the general public is willing to accept this added responsibility. Unfortunately, the current political and economic environment suggests that the public will not bear this added burden. The ultimate victims of the Property Rights Act are the land and the community surrounding it. In this regard, Leopold's vision of a broader "community" seems further away than ever. "That land is a community is the basic concept of ecology, but that land is to be loved and respected is an extension of eth-

tions enacted after the effective date of this amendment as well as to applications after the effective date of this amendment of regulations enacted on or before the effective date of this amendment without abrogating any other remedy lawfully available.

FLORIDA CONSTITUTIONAL AMENDMENT PETITION FORM, TAX CAP COMMITTEE (1995).

ics. That land yields a cultural harvest is a fact long known, but latterly often forgotten.”³²⁰

320. LEOPOLD, *supra* note 24, at xix.