

THE TERMINOLOGY OF FLORIDA'S NEW PROPERTY RIGHTS LAW: WILL IT ALLOW EQUITY TO PREVAIL OR GOVERNMENT TO BE "TAKEN" TO THE CLEANERS?

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I. INTRODUCTION

In May of 1995, Florida became one¹ of approximately three dozen states² to adopt legislation that compensates private property owners when the value of their land is diminished inordinately by government actions that fall short of a constitutional taking.³ Even the United States Congress has jumped on the bandwagon with its Contract With America, vowing to force the federal government to pay for property unjustly taken from landowners through environmental, land use and other regulations.⁴

Florida's new private property rights law took effect on October 1, 1995,⁵ and speculation continues about the extent to which the new legislation will affect local and state governments' ability to regulate⁶

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1. 1995, Fla. Laws ch. 95-181. The text of the law is reprinted at the end of this comment as Appendix 1. The law was adopted as Fla. CS for HB 863 (1995). The first section of the bill is entitled The Bert J. Harris, Jr., Private Property Rights Protection Act. 1995, Fla. Laws ch. 95-181, § 1. The second part of the bill creates the Florida Land Use and Environmental Dispute Resolution Act. 1995, Fla. Laws ch. 95-181, § 2. Because the Florida Legislature did not intend for these two sections of Fla. CS for HB 863 to be construed *in pari materia*, this article will examine only the property rights act found in section one. *Id.* For the purposes of this article, the terms "property" and "land" will mean real property.

2. See, e.g., Texas Private Real Property Rights Preservation Act, 1995 Tex. Sess. Law Serv. Ch. 517 (S.B. 14) (Vernon) (to be codified at TEX. GOV'T CODE § 2007); Protection of Private Property Act, WASH. REV. CODE § 36.70A.370 (Supp. 1992).

3. Larry Morandi, *Takings for Granted*, STATE LEGISLATURES, June 1995, at 22 (examining the conflicts between environmental protection and private property rights in states from coast to coast).

4. S. 503, 104th Cong., Reg. Sess. (1995); S. 145, 104th Cong., Reg. Sess. (1995); H.R. 490, 104th Cong., Reg. Sess. (1995). See also Bob Benenson, *GOP Sets the 104th Congress on New Regulatory Course*, 24 CONG. Q. WKLY. REP. 1693; Charles McCoy, *Private Matter: The Push to Expand Property Rights Stirs Both Hopes and Fears*, WALL ST. J., Apr. 4, 1995, at A1; Morandi, *supra* note 3.

5. 1995, Fla. Laws ch. 95-181, § 6.

6. See, e.g., David Hackett, *Property Rights? Save Your Pity for Home Buyers*, ST. PETERSBURG TIMES, Mar. 12, 1995, at B2; Bob LaMendola, *Law Allows Suits Over Land Rules; Frivolous Claims for Government Compensation Ahead*, Foes Say, FT. LAUDERDALE SUN-SENTINEL, May 10, 1995, at B7.

One commentator has called the law a “bugaboo” for the “big boys,” insinuating that it will benefit large landowners like mining, sugar and phosphate companies, while small property owners will see little of its merit.⁷ Others have heralded the legislation as a shield for private property owners, regardless of wealth, to fend off excessive governmental regulation of their land.⁸

Regardless of the side of the issue on which people fall, no one, including the lawmakers who adopted the bill, knows how the new law will affect private property rights.⁹ The text of the law provides a cause of action to any private property owner whose existing or vested land use is “inordinately burdened” by a local or state governmental regulation adopted or amended after the close of the 1995 legislative session.¹⁰ The stated intention of the law is to provide a cause of action separate and distinct from a compensable taking.¹¹

Under the new statute, government agencies are required to compensate private property owners for the loss in fair market value caused by a permanent inordinate burden¹² placed on their land by a government action.¹³ However, regulations that seek to control

7. Hackett, *supra* note 6, at B2. (“The property rights bugaboo is for the benefit of the big boys, the ones who don’t need our help. Mining companies, pipeline companies, sugar producers and a host of bottom-liners would all cash in on this mindless regulatory rollback.”).

8. See LaMendola, *supra* note 6, at B7.

9. *Id.*

10. 1995, Fla. Laws ch. 95-181, §1(12). The 1995 legislative session ended on May 11, 1995, and therefore the law applies to any new state or local regulation, or amendment to an existing regulation, adopted after that date. “A subsequent amendment to any such law, rule, regulation, or ordinance gives rise to a cause of action under this section only to the extent that the application of the amendatory language imposes an inordinate burden apart from the law, rule, regulation, or ordinance being amended.” *Id.* The law applies only to state, regional, and local actions that affect Florida landowners, thus excluding actions of federal agencies. *Id.* § 1(3)(c).

11. *Id.*; see *infra* note 17. Takings causes of action are based on the Fifth Amendment of the United States Constitution. U.S. CONST. amend. V. The complexity of this constitutional litigation makes it less attractive to property owners than statutory causes of action such as that set out in the new private property rights act.

12. The governmental action must be such that “the property owner is permanently unable to attain the reasonable, investment-backed expectation” for the existing use or vest right in that property. 1995, Fla. Laws ch. 95-181, § 1(3)(e). Or the regulation must make the property owner bear a “disproportionate share of a burden imposed for the public good.” *Id.* In takings analysis, if a taking is found by a court, and the government lifts the regulation, the government must still compensate the landowner for the time the property was taken. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987). Apparently, the law would not provide similar compensation if the government lifts a regulation found to inordinately burden the landowner. 1995, Fla. Laws ch. 95-181, § 1(3)(e).

13. Loss of fair market value is the difference between the market value of the property before imposition of the regulation and the market value of the property after application of the regulation. 1995, Fla. Laws 95-181, § 1(6)(b). “In determining the award of compensation, consideration may not be given to business damages relative to any development, activity, or use that the action of the governmental entity or entities . . . has restricted, limited, or prohibited.”

activities that are public nuisances at common law, or noxious uses of private property, are exempt.¹⁴

In effect, the new law provides landowners with a remedy when they sustain some unacceptable burden due to a governmental action that may not constitute a constitutional taking. Fifth Amendment constitutional takings actions often are complex and present many obstacles for landowners seeking compensation.¹⁵ It has been noted that:

[T]he continuing misty nature of takings cases through the decades led Charles Haar to comment: "The attempt to distinguish 'regulation' from 'taking' is the most haunting problem in the field of contemporary land-use law—one that we have encountered many times already, one that may be the lawyer's equivalent of the physicist's hunt for the quark."¹⁶

The new law is an attempt to lessen the hardship on a landowner who wishes to bring suit over an alleged burden placed by government on his or her property,¹⁷ and to expressly provide relief in those instances where a property owner has suffered an injury that falls short of a constitutional taking.¹⁸ Although the new law provides a separate and presumably less burdensome cause of action for the landowner to prove than a taking, it borrows its language from takings cases. Given this, takings jurisprudence can provide foresight about how courts may interpret the language of the law. This is not to imply that the substance of takings jurisprudence will simply be substituted for the

Id. The compensation award also must include prejudgment interest from the date the claim was filed to the conclusion of the matter. *Id.*

14. 1995, Fla. Laws ch. 95-181, § 1(3)(e). *Cf.* *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2897 (1992). The law also specifically exempts those regulations that relate to operation, maintenance, or expansion of transportation facilities and do not affect existing law regarding eminent domain actions involving transportation. 1995, Fla. Laws ch. 95-181, § 1(10).

15. As Supreme Court Justice Thomas explained, "[t]he lower courts should not have to struggle to make sense of this tension in our case law. In the past, the confused nature of some of our takings case law and the fact specific nature of takings claims has led us to grant certiorari in takings cases without the existence of a conflict." *Parking Assoc. of Georgia v. City of Atlanta*, 1995 WL 136847 (U.S. May 30, 1995) (Thomas, J. dissenting).

16. Richard J. Grosso & David J. Russ, *Takings Law in Florida: Ramifications of Lucas and Reahard*, 8 J. LAND USE & ENVTL. L. 431, 432-33 (1993) (quoting CHARLES M. HAAR, LAND-USE PLANNING 766 (3d ed. 1976), *cited in* *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 199 n.17 (1985) (Blackmun, J., concurring)).

17. The staff analysis of the bill discusses the law of takings and then concludes:

In any case, the constitutional right to a jury trial in eminent domain cases is not available in inverse condemnation [regulatory takings] cases. In addition, a property owner must exhaust all administrative remedies before a takings claim will be ripe for judicial review.

Fla. H.R. Comm. on Judiciary, HB 863 (1995) Staff Analysis 3 (final May 23, 1995) (on file with comm.).

18. 1995, Fla. Laws ch. 95-181, § 1(1).

new law, but rather that an understanding of takings law can provide guidance for understanding the language of the new law and, subsequently, how courts will apply it.

Part II of this article will examine the statutory term "inordinate burden," using Florida cases and United States Supreme Court jurisprudence in an attempt to predict judicial interpretation of the language.¹⁹ Part III will analyze the essential elements of nuisance in common law, as well as the requirements for a noxious use of private property under current Florida law, in an attempt to point to regulations that may be exempt from the new law.²⁰ Finally, Part IV will discuss the issue of burden of proof under the new law.²¹ That section will explore the issue of who bears that burden and will examine the level of proof necessary in establishing whether an "inordinate burden" has been caused by a governmental action.

Although Florida's Private Property Rights Protection Act claims to create a cause of action distinct from a taking under the Florida and United States Constitutions,²² it is not yet clear whether the law will be entirely distinct. While the Legislature has created a separate cause of action, its use of takings terminology may lead judicial interpretations and applications of the law to become intimately wed to the use of similar terms in takings cases.²³ Statutory interpretation will be the key element in determining how the new law is implemented. Under Florida law, if the language of a statute is clear on its face, courts must confine themselves to the plain meaning unless such an interpretation

19. See *infra* notes 30-106 and accompanying text.

20. See *infra* notes 107-128 and accompanying text.

21. See *infra* notes 129-149 and accompanying text.

22. 1995, Fla. Laws ch. 95-181, § 1(1). "The Legislature recognizes that some laws, regulations, and ordinances of the state and political entities in the state, as applied, may inordinately burden, restrict, or limit private property rights without amounting to a taking under the State Constitution or the United States Constitution." *Id.* The Fifth Amendment of the United States Constitution states that private property cannot be taken for public purposes without just compensation. U.S. CONST. amend. V. This amendment is applicable to the states through the Due Process Clause of the 14th Amendment. U.S. CONST. amend. XIV. The Florida Constitution has a provision similar to the Fifth Amendment of the United States Constitution. "No private property shall be taken except for a public purpose and with full compensation therefore paid to each owner . . ." FLA. CONST. art. X, § 6. However, Article Two of the Florida Constitution also requires protection of the state's natural resources: "It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provisions shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise." FLA. CONST. art. II, § 7.

23. Although the law states that "[t]his section may not necessarily be construed under the case law regarding takings if the governmental action does not rise to the level of a taking," it is uncertain to what level the courts will borrow from takings jurisprudence in interpreting the new law. 1995, Fla. Laws ch. 95-181, § 1(9). Even the above quoted section seems to suggest that courts can adopt the reasoning utilized in current takings jurisprudence and leaves open the possibility that they will do so.

would lead to a ridiculous result.²⁴ Consequently, if courts determine that the language of the property rights law is clear on its face, they will be confined to using the plain meaning of the law in deciding claims filed by affected private property owners for compensation.

However, the inherently vague terms used in the statute will inevitably lead courts to determine that the language of the property rights law is ambiguous,²⁵ and therefore requires judicial interpretation.²⁶ Any judicial interpretation is likely to borrow heavily from current takings jurisprudence, since the language of the statute itself reiterates many of the well-known phrases that have been established in this area of the law.²⁷ Under this scenario, the new property rights law could become intertwined with takings law—lost in the fog of uncertainty that currently engulfs that area of jurisprudence—rather than establishing a new cause of action as the Legislature intended. Alternately, if the courts choose to devise new tests for analyzing cases under the property rights law, it will be some time before such analyses become established as precedent.

In short, courts soon will be called upon to analyze claims under the new law. It will be several years before enough decisions have been rendered to determine whether Florida's private property rights act is an extension of current property law or just a rehashing of regulatory takings jurisprudence.²⁸

24. *City of Miami Beach v. Galbut*, 626 So. 2d 192, 193 (Fla. 1993) (holding that a statute's ordinary meaning must be used unless it would lead to a ridiculous or unreasonable result); *Johnson v. Presbyterian Homes, Inc.*, 239 So. 2d 256, 262 (Fla. 1970) (holding that ordinary meaning must be given to statutory language unless such meaning would lead to a ridiculous or unreasonable result).

25. If the language of a statute is not so clear as to "fix the legislative intent and leave no room for interpretation and construction," then the statute is ambiguous. *Osborne v. Simpson*, 114 So. 543, 544 (Fla. 1927). "Where the language used in a statute has a definite and precise meaning, the courts are without power to restrict or extend that meaning." *Graham v. State*, 472 So. 2d 464 (Fla. 1985); see also *Fine v. Moran*, 77 So. 533 (Fla. 1917).

26. *Id.*

27. "The primary guide to statutory interpretation is to determine the purpose of the legislature." *Tyson v. Lanier*, 156 So. 2d 833, 836 (Fla. 1963). Legislative use of phrasing that appears in takings cases can by extension be interpreted as legislative approval of the rationales used in those cases. For an analysis of the language used in the bill, see discussion *infra* at part II; Sylvia R. Lazos, *Florida's Property Rights Act: A Political Quick Fix Results in a Mixed Bag of Tricks*, 23 FLA. ST. U. L. REV. (forthcoming 1996).

28. Although the law purports to provide a cause of action separate and distinct from constitutional takings, it adopts the terminology used in takings jurisprudence. See 1995, Fla. Laws ch. 95-181. Thus, the Legislature may have condemned landowners to litigation over the same terms disputed in takings claims.

II. WHEN IS A LANDOWNER "INORDINATELY BURDENED?"

Florida's property rights law allows landowners to be compensated when government regulations place "inordinate burdens" on their property.²⁹ The statute establishes a disjunctive definition of inordinate burden: a government action that keeps landowners from attaining their reasonable, investment-backed expectation for the existing or future use of the real property;³⁰ or an action that puts a "disproportionate share of a burden imposed for the good of the public" on landowners.³¹ Since the statutory definition is disjunctive, each part alone constitutes an inordinate burden, and therefore, each part of the definition must be analyzed separately to determine the meaning of "inordinately burdened."

A. *The Loss of Reasonable, Investment-Backed Expectations*

The first inordinate burden definition contained in the property rights law states that government agencies cannot directly restrict or limit the use of real property in a way that permanently prevents the landowner from attaining "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 with respect to the real property as a whole."³² The law defines "existing use" as an actual, present use or a reasonably foreseeable, nonspeculative use of the land that is suitable for the property and compatible with adjacent land uses,³³ and states that "vested rights" in land should be determined by applying principles of equitable estoppel or substantive due process under the common law or state statute.³⁴

29. 1995, Fla. Laws ch. 95-181, § 1(2).

30. 1995, Fla. Laws ch. 95-181, § 1(3)(e). The statute states that an existing use is "an actual, present use or activity on the real property; including periods of inactivity which are normally associated with, or are incidental to, the nature or type of use or activity or such reasonably foreseeable, nonspeculative land uses . . ." *Id.* § 1(3)(b). The existence of a vested use is to be determined by applying the principles of equitable estoppel or substantive due process under the common law or by applying Florida law. *Id.* § 1(3)(a). For an analysis of when rights vest in Florida, see *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So. 2d 10 (Fla. 1976); *Sakolsky v. City of Coral Gables*, 151 So. 2d 433 (Fla. 1963); *City of Key West v. R.L.J.S. Corp.*, 537 So. 2d 641 (Fla. 3d DCA 1989); *Smith v. City of Clearwater*, 383 So. 2d 681 (Fla. 2d DCA 1980).

31. 1995, Fla. Laws ch. 95-181, § 1(3)(e).

32. *Id.*

33. *Id.* § 1(3)(b). Although "existing uses of property" may be relatively easy to define, there can be several interpretations of the meaning of "reasonably foreseeable, nonspeculative land uses." Examining the varying interpretations the courts have put on this phrase is beyond the scope of this article.

34. *Id.* § 1(3)(a); see also *supra* note 30 for cases analyzing vested rights in Florida.

1. "Going Too Far:" *Pennsylvania Coal Co. v. Mahon*³⁵

The United States Supreme Court first addressed the issue of investment-backed expectations in *Pennsylvania Coal Co. v. Mahon*,³⁶ when it attempted to determine to what extent land value must be diminished in order for a state regulation to constitute a regulatory taking.³⁷ The Court recognized the need for the exercise of police power by local or state governments in order to prevent certain undesirable activities, but it also held that these powers were limited.³⁸ "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."³⁹

Pennsylvania Coal offers very few specifics to aid a court in determining whether a regulation "goes too far."⁴⁰ "As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions."⁴¹ The Private Property Rights Protection Act appears to remedy this problem by affording property owners a cause of action where land is inordinately burdened "without amounting to a taking."⁴² Yet the same problems inherent in determining whether a regulation has gone "too far" may be found in determining if the same regulation places an "inordinate burden" on property. Thus the analysis enunciated in *Pennsylvania Coal* is useful in determining whether compensation is due when the land has lost some market value but no per se taking of private property has occurred.⁴³

35. 260 U.S. 393 (1922).

36. *Id.*

37. *Id.*

38. *Id.* at 415-16. The controversy arose when the state enacted legislation barring the mining of coal in such a way as would cause the subsidence of a house. *Id.* at 412-13; see also Peter F. Neronha, *A Constitutional Standard of Review for Permit Conditions, Exactions, and Linkage Programs*: Nollan v. California Coastal Commission, 30 B.C.L. REV. 903 (1989). The coal company had sold the surface rights to a parcel of property, while retaining the mineral rights. Thus, if the company could not mine, it had no other use for the retained mining rights. Justice Holmes, writing for the majority, held that this regulation went "too far" and must be compensated. *Pennsylvania Coal*, 206 U.S. at 416.

39. *Id.* at 415 (holding that a government regulation that prohibited exploitation of mineral rights under certain circumstances went too far and constituted a diminution in value great enough to be a regulatory taking of land).

40. "[T]he question at bottom is up on whom the loss of the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought." *Id.* at 416.

41. *Id.*

42. 1995, Fla. Laws ch. 95-181, § 1(1).

43. The United States Supreme Court has identified two instances in which per se takings occur. The first is when there is a permanent, government-authorized, physical invasion of property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982) (holding

2. “Investment-Backed Expectations:” *Penn Central Transportation Co. v. New York City*⁴⁴

The language used in *Penn Central Transportation Co. v. New York City*⁴⁵ also is echoed in the Florida private property law. The “rational basis” test set forth in *Penn Central* requires courts to review three factors, in an *ad hoc* analysis, to determine if a taking has occurred: (1) the character of the government action; (2) the regulation’s economic impact on the landowner; and (3) the extent to which the regulation interferes with distinct investment-backed expectations.⁴⁶

The Court in *Penn Central* added an economic-based rationale to traditional nuisance and reciprocal public/private benefits tests to determine whether a regulatory taking had occurred.⁴⁷ The Court observed that the government regulation would still allow the landowners to use their property as it had been used for the past 65 years—as a railway terminal—and that Penn Central would still be able to obtain a “reasonable return” on its investment.⁴⁸ The Court also noted that the regulation’s stated rationale would benefit the owners of the terminal in that it “benefit[s] all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole.”⁴⁹

The language of Florida’s property rights law owes a great deal to *Penn Central*. The “reasonable, investment-backed expectation” term was incorporated into the Florida law’s definition of inordinate burden.⁵⁰ While *Penn Central* set out a three part inquiry, Florida’s legislators apparently chose to use only the language of the third inquiry in defining what type of government action would violate the law: Property is inordinately burdened when government agencies directly restrict or limit the use of real property in a way that permanently prevents the landowner from attaining “the reasonable,

that a government could not authorize a cable television company to permanently place cable lines on an apartment building without paying the owner compensation). The second is when a regulation deprives the landowner of all economically beneficial use of his or her property. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2895 (1992) (holding that a state commission could not completely prohibit development of a beachfront parcel without paying compensation for a taking).

44. 438 U.S. 104, 138 (1978) (holding that no taking occurred when New York City refused to approve a proposed addition to Grand Central Terminal, because the building’s continued use as a railroad terminal would not be impaired and any financial burdens imposed on the owners were mitigated by a transferable development rights program).

45. *Id.*

46. *Id.* at 136-38.

47. *Id.*

48. *Id.* at 136.

49. *Id.* at 134.

50. 1995 Fla. Laws ch. 95-181, § 1(3)(e).

investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole.”⁵¹ Although takings cases use more inquiries than those required by this new law, *Penn Central*'s analysis of reasonable investment-backed expectations, the third inquiry, is instructive of how Florida courts may interpret “inordinate burden.” Quite different from diminution of value analysis, which looks at the economic loss, reasonable investment-backed expectation analysis looks at what property rights, both economic and non-economic, the regulation takes away.⁵² Florida's property rights law prohibits the award of business damages,⁵³ yet the idea of investment-backed expectations is generally the same as that established in *Penn Central*: property owners may have well-thought-out plans for their land that are thwarted by government regulation.

51. 1995, Fla. Laws ch. 95-181, § 1(e).

52. Illustrative of this distinction is *Pennsylvania Coal*, where the property owner sold the surface rights to his property, *but expressly reserved the right to remove the coal thereunder*. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). After these transactions, the state passed a statute which forbade any mining of coal that caused the subsidence of a house, unless the house was the property of the owner of the underlying coal and was more than 150 feet from the improved property of another. *Id.* This statute was found invalid as effecting a taking without just compensation because the statute made it commercially impracticable to mine the coal, and thus had nearly the same effect as *the complete destruction of rights* the property owner had reserved from the owners of the surface land. *Id.* at 414-15.

A further illustration of the difference between the diminution in value analysis and the reasonable investment-backed expectation analysis is borne out in *Penn Central*, 438 U.S. 104 (1987), in which the landowner wanted to build a structure on top of Grand Central Station. The surrounding buildings were already built up, but these structures had been finished before the municipality extended its landmark preservation law to include the station and thus prohibited the landowner from further development.

The landowner argued that the municipality had taken his land because it deprived him of the economic viable use in the space above his existing structure, space which surrounding landowners were able to use in an economically beneficial manner. The Court stated that a landowner may not establish a taking *simply by showing* that he has been denied the ability to “exploit a property interest that [he] heretofore had believed was available for development.” *Id.* at 130. In holding that no taking occurred, the Court stated that “[t]aking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.” *Id.* The Court went on to state that “[i]n deciding whether a particular governmental action has effected a taking, this Court focuses . . . both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.” *Id.* at 130-31 (emphasis added). However, in a footnote, the Court stated that to believe the landowner's argument would be to suggest that deprivation of investment-backed expectations, “irrespective of the impact of the restriction on the value of the parcel as a whole,” is the sole inquiry of takings analysis. *Id.* at 130 n.27. Thus, if deprivation of investment-backed expectations was the sole inquiry in takings analysis, the government in *Penn Central* would have taken the landowner's land. Since this is the sole inquiry under “inordinate burden,” a case similar to *Penn Central* under the property law would come out opposite to that of the famous case.

53. 1995, Fla. Laws ch. 95-181, § 1 (6)(b).

Legislators have said that Florida's property rights law is aimed at easing the economic impacts of government regulations on private landowners whose reasonable expectations for the use of their property are thwarted by such regulations.⁵⁴ However, legislators made exceptions in the law to allow government regulation of nuisances and noxious uses.⁵⁵ It is apparent that Florida lawmakers borrowed key language and rationales from *Penn Central* for their property rights bill. Yet the law expressly addresses only one part of the Supreme Court's three part test. The maxim *expressio unius est exclusio alterius* dictates that the inclusion of one thing in a statute is the exclusion of another.⁵⁶ Hence, under the new law, if a governmental action has too great an impact on permanent reasonable investment-backed expectations, compensation is due, regardless of diminution in value.⁵⁷

3. A Landowner's "Reasonable Expectations:" *Lucas v. South Carolina Coastal Council*⁵⁸

While *Lucas v. South Carolina Coastal Council*⁵⁹ centers around a taking of all economically beneficial use of land, which is not necessary under the property rights law, the case nonetheless provides instructive analogies for analyzing the language of the law. The *Lucas* Court recognized that compensation for a landowner may not be available where a valid use of the government police power does not take all of the property's value, or where a property owner did not have the right to undertake the proposed use.⁶⁰ "The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property."⁶¹

54. "Under this new remedy, you can receive compensation for regulatory actions which lessen your property values even if you retain some profitable uses." Rep. Ken Pruitt, (R., Port St. Lucie) (May 11, 1995) (on file with the Florida House of Representatives Judiciary Committee).

55. 1995, Fla. Laws ch. 95-181, § 1(3)(e).

56. *TVA v. Hill*, 437 U.S. 153, 188 (1978).

57. Although not explicitly part of the test, courts may consider the diminution in value resulting from the regulation in order to further the equitable principles of the law; i.e., if a regulation interferes with a property owner's reasonable investment-backed expectations, but only diminishes the value of the property by one percent, the court may find the law not violated.

58. 112 S. Ct. 2886 (1992) (holding that a South Carolina statute deprived a landowner of all economically viable use of his ocean-front property).

59. *Id.*

60. *Id.* at 2894, n.7 & 2901-02.

61. *Id.* The Court defined this issue as "whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land." *Id.* For further discussion of this issue, see notes 128-129 and accompanying text.

The “reasonable expectations” language of *Lucas* also is used in the definition of “inordinately burdened” in Florida’s property rights law.⁶² In the law, the term “existing use” means

an actual, present use or activity on the real property, including periods of inactivity which are normally associated with, or are incidental to, the nature or type of use or activity to 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.⁶³

In determining reasonably foreseeable, nonspeculative land uses, courts may look to those uses that “have been shaped by [Florida’s] law of property.”⁶⁴ Therefore, courts that hear cases under Florida’s property rights law should use the same analysis hinted at in *Lucas*⁶⁵ to determine whether property has been inordinately burdened.

4. *Florida’s Take on Takings: Graham and Reahard*

Lawmakers also apparently borrowed language from the landmark Florida case *Graham v. Estuary Properties, Inc.*⁶⁶ to draft the property rights law. The *Graham* court enunciated a six-part test to determine whether a taking had occurred: (1) whether there is a physical invasion of the property; (2) the degree to which there is a diminution in value of the property; (3) whether the regulation confers a public benefit or prevents a public harm; (4) whether the regulation promotes the health, safety, welfare, or morals of the public; (5) whether the regulation is arbitrarily and capriciously applied; and (6) the extent to which the regulation curtails investment-backed expectations.⁶⁷ Although the six-part test need not be applied for compensation under the new property rights law, the elements of public harm, i.e., nuisance and noxious uses, valid and invalid

62. 1995, Fla. Laws ch. 95-181, § 1.

63. 1995, Fla. Laws ch. 95-181, § 1(3)(b).

64. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2894 n.7 (1992).

65. *Id.* at 2895, n.8. The Court noted that “restrictions that background principles of the State’s law of property and nuisance already place upon land ownership” should be considered. *Id.* at 2900.

66. 399 So. 2d 1374 (Fla. 1981) (holding that a county commission’s requirement that a developer not develop half of its property did not constitute a compensable taking).

67. *Id.* at 1380-81.

regulations, and investment-backed expectations set forth in *Graham*, are reflected in the law.⁶⁸

The reasoning in *Graham*⁶⁹ and its subsequent application may be used in interpreting the property rights law to determine whether a government regulation deprives a property owner of a reasonable, investment-backed expectation. Therefore, courts that decide cases under the new law may borrow parts of the analysis used by the *Graham* court to determine whether a government agency must pay compensation.

Florida courts also may borrow from the eight-part test set forth in *Reahard v. Lee County*⁷⁰ in reviewing cases under the new law. The *Reahard* court said that a proper takings analysis should include the following factors: (1) the history of the property; (2) the history of the development; (3) the history of zoning and regulation; (4) how, if any, the development changed when title passed; (5) the present nature and extent of the property; (6) the reasonable expectations of the landowner under state common law; (7) the reasonable expectations of the neighboring landowners under state common law; and (8) the diminution in the investment-backed expectations of the landowner, if any, after passage of the regulation.⁷¹

The Legislature apparently borrowed many ideas and terms from *Reahard* in drafting the property rights law. The themes of investment-backed expectations, diminutions in value, and existing and vested uses of property and their relation to past, present, and future government regulations are interspersed throughout the law.⁷² Therefore, the interpretation of such language under the new law is likely to be somewhat similar to the analysis in *Reahard*.

5. Summary

68. 1995, Fla. Laws ch. 95-181. The law seeks to compensate landowners whose "investment-backed expectations" for their property are "inordinately burdened" by regulations. However, the law does not provide compensation for any diminution in property value caused by a government regulation that seeks to curb or eliminate a noxious use or public nuisance. *Id.* § 1(1)(e).

69. The Court held that where the landowner has only a subjective expectation that the land could be developed in the manner proposed, the landowner's expectations were not properly backed. 399 So. 2d at 1382. *Cf.* *Zabel v. Pinellas County Water & Navigation Control Auth.*, 171 So. 2d 376 (Fla. 1965) (holding that a property owner's expectation to fill the lands in question was properly backed by a statutory right to fill).

70. 968 F.2d 1131, 1136 (11th Cir. 1992) (involving a challenge to a local government's decision to allow a landowner to build only one single-family home on a 40-acre tract comprised mostly of wetlands).

71. *Id.*

72. 1995, Fla. Laws ch. 95-181.

Florida courts that hear cases under the new property rights law likely will borrow from the analyses that have been used in takings cases to determine whether a government regulation constitutes an inordinate burden under the first definition. In the cases discussed above, courts have borrowed language and rationales from one another in deciding takings claims. Florida courts will be hard-pressed to come up with alternate ways to sort out future claims under the property rights law than those laid out in takings jurisprudence. While Florida property owners are not required to jump through as many hoops under the new law as they would have with constitutional takings law, their cases will be decided in much the same way.⁷³

B. The Disproportionate Share of a Public Burden

The second part of the disjunctive definition of “inordinate burden” states that a regulation imposes too great a burden on the land if the property owner is left with unreasonable uses and bears a “disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large.”⁷⁴ To determine whether compensation should be paid under this section of the “inordinate burden” definition, courts will need to determine what a disproportionate share of a public burden is and what portion of an affected parcel should be used in deciding whether the landowner is bearing too great a public burden.

The underlying basis for this second prong of the test appears to be equity. The Legislature has mandated that property owners should only be responsible for bearing their “fair share” of the burden that regulatory limitations place on their property to promote the public good. Although there are a multitude of ways in which courts may engage in this balancing test, it is yet uncertain which method the courts will adopt. One issue that the courts may consider in

73. Fla. H.R. Comm. on Judiciary, HB 863 (1995) Bill Analysis & Economic Impact Statement (final May 23, 1995) (on file with comm.). The committee report states: “In any case, the constitutional right to a jury trial in eminent domain cases is not available in inverse condemnation cases. In addition, a property owner must exhaust all administrative remedies before a takings claim will be ripe for judicial review. The theory underlying this condition precedent is that government must reach a final decision regarding the use of the property at issue before the courts may accurately assess whether a takings has occurred and the amount of compensation for that taking.” *Id.* The property rights law deviates from the standing and ripeness problems of inverse condemnation cases by allowing landowners to file suit in circuit court without first exhausting administrative remedies and giving them a jury trial. 1995, Fla. Laws ch. 95-181.

74. 1995, Fla. Laws ch. 95-181. This prong will be referred to as the public burden definition.

determining if a landowner is bearing a disproportionate share is the essential nexus and rough proportionality requirements of takings jurisprudence. Another issue that may arise is whether to assess the entire property, or just a portion of the tract, in considering whether the property owner is bearing a disproportionate share. Accordingly, both of these issues will be explored below.

1. "Essential Nexus" and "Rough Proportionality"

To determine what a disproportionate share of a public burden would constitute under the property rights law, Florida courts might look to the rationales behind *Nollan v. California Coastal Commission*⁷⁵ and *Dolan v. City of Tigard*⁷⁶ to determine whether a regulatory condition placed on a landowner is a legitimate exercise of police power or an attempt to force a property owner to concede to an unfair demand for the public's benefit.

In *Nollan*, the Supreme Court held that in order for a government to make a permit approval contingent upon the granting of a public easement by a property owner, there must be an "essential nexus" between the condition placed on the landowner and the purpose of the restriction: that is, the condition must "further the end advanced as the justification for the prohibition."⁷⁷

If no nexus exists, the regulation will be held invalid as an unreasonable exercise of police power. A regulation found to be invalid is void. However, the remedy for the property owner in such an instance is an order enjoining the governmental agency from enforcing the regulation. The result is that no property right or interest is lost by the property owner. Therefore, under *Nollan*, a governmental regulation that does not bear a rational nexus to advancing a legitimate governmental interest will entitle the property owner to compensation.⁷⁸ Alternately, if a nexus does exist, the regulation will be upheld.⁷⁹

75. 483 U.S. 825 (1987).

76. 114 S. Ct. 2309 (1994).

77. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836-37 (1987).

78. However, under current takings jurisprudence, courts can order the government to pay compensation for temporary takings. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987) (holding that a government must pay for a temporary taking when a regulation deprived a church of the use of its property for a short period of time). The property rights bill does not allow compensation for temporary takings. However, it does allow local and state governments to make settlement offers to rescind or amend development orders or permits to avoid paying compensation under the new law. 1995, Fla. Laws ch. 95-181.

79. *Nollan*, 483 U.S. at 837.

The holding in *Nollan* was expanded seven years later. In *Dolan*, the Supreme Court held that in addition to an “essential nexus,” a government must make some sort of individualized determination that the condition requested by the agency is related “in both nature and extent to the impact of the proposed development.”⁸⁰ This determination need not be precise, but it must be sufficient to establish that the proposed development will occasion a need for the concessions required.⁸¹

The rationale behind the essential nexus⁸² and rough proportionality⁸³ tests is the same as that of the property rights law: to prevent government agencies from demanding unreasonable concessions from private landowners for the public good.⁸⁴ However, a property owner filing suit under the Private Property Rights Protection Act still may be entitled to compensation where a governmental action, such as an exaction placed on a permit, bears a rational nexus to a legitimate governmental end and is roughly proportional to that end. Since the spirit of the new property law and that of takings jurisprudence is similar—to ensure that a private landowner is not forced to carry a disproportionately high burden—the analysis used in those takings cases may be utilized in determining whether compensation is due under the new law. Therefore, Florida courts hearing cases under the property rights law likely will look to the rationales of *Nollan* and *Dolan* to determine whether a property owner “bears permanently a disproportionate share of a burden imposed for the good of the public.”⁸⁵

80. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2319 (1994).

81. *Id.* “The distinction, therefore, which must be made between an appropriate exercise of the police power and an improper exercise of eminent domain is whether the requirement has some reasonable relationship or nexus to the use of which the property is being made or is merely being used as an excuse for taking property simply because, at that particular moment, the landowner is asking the city for some license or permit.” *Id.* at 2139, quoting *Simpson v. North Platte*, 292 N.W. 2d 297, 301 (Neb. 1980).

82. *Nollan*, 483 U.S. at 837. The Court said that unless the permit condition serves the same purpose as the requirement of the building restriction, the condition is nothing “but an out-and-out-plan of extortion.” (quoting *J.E.D. Associates, Inc. v. Atkinson*, 432 A.2d 12, 14 -15 (N.H. 1981)).

83. *Simpson v. North Platte*, 292 N.W. 2d 297, 301 (Neb. 1980). To quantify a finding that an exaction is necessary to protect a public interest, the government must prove that:
the requirement has some reasonable relationship or nexus to the use to which the property is being made [rather than that the requirement] is merely being used as an excuse for taxing property simply because at that particular moment the landowner is asking the city for some license or permit.

Id.

84. 1995, Fla. Laws ch. 95-181, 1651. “The Legislature determines that there is an important state interest in protecting the interests of private property owners from such inordinate burdens.” *Id.* at 1652.

85. 1995, Fla. Laws ch. 95-181, § 1(3)(e).

2. *The Denominator Problem*

Florida's private property law affords landowners compensation if government restricts use of property such "that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of the burden imposed for the good of the public."⁸⁶ Although the basic consideration under this prong of the inordinate burden definition seems to be one of equity, balancing the burden of the regulation against the proportion of the burden that the landowner ought to bear, the law fails to indicate what portion of the property must be looked at in making such a determination. Other parts of the bill discuss the parcel "as a whole,"⁸⁷ yet this part of the definition offers no guidance.

The law defines "real property" as land and any improvements made to it, including any other relevant property in which the owner has an interest.⁸⁸ However, the public benefit section of the "inordinate burden" definition does not say whether courts assessing such governmental actions should look at the entire parcel or just the section affected by the regulation to determine whether the burden is disproportionate and, therefore, if compensation is due.⁸⁹ Federal and state courts have, in the last decade, sought to resolve this dilemma, which is often called the denominator problem.

The Supreme Court addressed the denominator problem in *Keystone Bituminous Coal Association v. DeBenedictis*.⁹⁰ "Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'"⁹¹ The Court determined that the denominator in *Keystone* must be the entire quantity of coal owned by the association's members, not the two percent required by state statute to be left underground.⁹²

86. 1995, Fla. Laws ch. 95-181, § 1(3)(e).

87. For example, the first prong of the inordinate burden definition instructs courts to look to the property as a whole, and yet the second prong of the definition is silent on that point.

88. 1995, Fla. Laws ch. 95-181, § 1(3)(e).

89. *Id.*

90. 480 U.S. 470 (1987) (holding that a state regulation that required coal mines to leave support pillars of coal in place to prevent subsidence did not constitute a taking because the pillars represented only two percent of the impacted coal).

91. *Id.* at 497 (quoting Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of Just Compensation Law*, 80 HARV. L. REV. 1165, 1192 (1967)).

92. *Id.* "When the coal that must remain beneath the ground is viewed in the context of any reasonable unit of petitioners' coal mining operations and investment-backed expectations, it is plain that petitioners have not come close to satisfying their burden of proving that they have been denied the economically viable use of their property." *Id.* at 499.

Although the decision in *Lucas v. South Carolina Coastal Council* involved a per se taking, the Court mentioned but failed to resolve the question of when the regulation of a portion of property that does not constitute a categorical taking either takes a section of the tract or, alternately, the entire tract.⁹³ “Regrettably, the rhetorical force of our ‘deprivation of all economically feasible use’ rule is greater than its precision, since the rule does not make clear the ‘property interest’ against which the loss of value is to be measured.”⁹⁴

In *Graham v. Estuary Properties, Inc.*, the Florida Supreme Court held there was no taking when Lee County refused to permit the filling of 1800 acres of wetlands, forcing a developer to scale back a proposed project from 26,500 to 12,968 residences.⁹⁵ The court found that when Estuary bought the property, “it did so with no reason to believe that the conveyance carried with it a guarantee from the state that dredging and filling the property would be permitted.”⁹⁶ Thus, the court based its takings decision on the entire tract, not just the portion affected by the county’s regulation.⁹⁷

Another Florida court stated that “the focus is on the nature and extent of the interference with the landowner’s rights in the parcel as a whole in determining whether a taking of private property has occurred. Prohibition of development on certain portions of the tract does not in itself effect an unconstitutional taking.”⁹⁸ In *Florida Department of Environmental Regulation v. Schindler*, the Second District Court of Appeal held that the entire 3.5-acre parcel should be considered in determining whether the DER’s refusal to allow Schindler to develop a 1.85-acre portion of the tract, which contained wetlands, constituted a taking.⁹⁹

Although many courts have held that all economically viable uses of an entire parcel should be considered in determining whether a

93. 112 S. Ct. 2886, 2894-95 nn.7-8.

94. *Id.* at 2894 n.7. The Court continued: “When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole” *Id.*

95. 399 So. 2d 1374, 1382 (Fla. 1981).

96. *Id.* at 1379 (footnote omitted). The court also said that “[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others.” *Id.* at 1382 (quoting *Just v. Marinette County*, 201 N.W.2d 761, 768 (Wis. 1972)).

97. *Id.*

98. *Florida Dep’t of Env’tl. Regulation v. Schindler*, 604 So. 2d 565, 568 (Fla. 2d DCA 1992) (quoting *Fox v. Treasure Coast Regional Planning Council*, 442 So. 2d 221, 225 (Fla. 1st DCA 1983)) (emphasis added).

99. 604 So. 2d 565, 568 (Fla. 2d DCA 1992).

regulatory taking has occurred,¹⁰⁰ some have ruled otherwise.¹⁰¹ In *Loveladies Harbor, Inc. v. United States*, the court held that only the portion of Loveladies' property affected by a federal government regulation should be considered in determining whether a taking had occurred.¹⁰²

It would seem ungrateful in the extreme to require Loveladies to convey to the public the rights in the 38.5 acres in exchange for the right to develop 12.5 acres, and then to include the value of the grant [to the public] as a charge against the givers. This leaves the conclusion that the relevant property for the takings analysis is the 12.5 acres¹⁰³

Florida courts have come to similar conclusions. In *Vatalaro v. Florida Department of Environmental Regulation*, the court held that denial of a permit took all economically viable use of Vatalaro's land because virtually *no* use could be made of the property.¹⁰⁴ "Generally, the denial [of a permit] will not render the land useless in the economic sense. Although development of one segment of rights or uses has been precluded, other uses may continue to exist On the other hand, where the owner is left with no viable economic use of the land, a taking has occurred."¹⁰⁵

While the denominator problem has yet to be resolved, it seems that courts consider all economically viable uses of the whole tract as

100. See *Deltona Corp. v. United States*, 657 F.2d 1184, 1193 (1981), *cert. denied*, 455 U.S. 1017 (1982) (holding that a developer did not suffer an uncompensated taking when the U.S. Army Corps of Engineers refused to grant permits for the company to develop two of its three tracts); *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1382 (Fla. 1981); *Florida Game and Fresh Water Fish Comm'n v. Flotilla, Inc.*, 636 So. 2d 761, 765 (Fla. 2d DCA 1994) (holding that restriction on development of 48 acres of a 173-acre parcel to protect bald eagle nesting sites did not constitute a compensable taking); *Florida Dep't of Env'tl. Regulation v. Schindler*, 604 So. 2d 565, 568 (Fla. 2d DCA 1992); *Namon v. Florida Dep't of Env'tl. Regulation*, 558 So. 2d 504 (Fla. 3d DCA 1990) (holding that a person who purchases land that cannot be built upon without approval under state regulations that existed at the time of the purchase cannot claim a taking based on a permit denial under the regulation).

101. See *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (D.C. Cir. 1994) (holding that a federal government regulation constituted a taking because the landowner had been deprived of all economically beneficial use of a portion of the land); *Vatalaro v. Florida Dep't of Env'tl. Regulation*, 601 So. 2d 1223 (Fla. 5th DCA 1992) (holding that a government regulation deprived a landowner of all economically viable use of her property).

102. 28 F.3d 1171, 1180 (D.C. Cir. 1994) (holding that a portion of the land that would be deeded to the government could not be included in the denominator used in the takings analysis).

103. *Id.* at 1181.

104. 601 So. 2d 1223, 1229 (Fla. 5th DCA 1992) (holding that because the permit denial meant Vatalaro could not build anything other than a boardwalk on her land, she was entitled to compensation for a regulatory taking). For a discussion of *Vatalaro* see Valerie A. Collins, *Vatalaro v. Department of Environmental Regulation: The Mysterious Takings Rule*, 8 J. LAND USE & ENVTL. L. 612 (1993).

105. *Id.* (construing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)).

the base of the takings fraction unless: (1) the government has required some portion of the property be deeded to the public in exchange for a permit;¹⁰⁶ or (2) there is a per se taking of all economically viable use of the land. Florida courts are likely to follow precedent and use the whole parcel as the denominator in analyzing most claims made under the state's new property rights law. If courts use the entire tract as the denominator of the fraction, they are less likely to find that a regulation has "inordinately burdened" a landowner than if the denominator were only a portion of the tract. Therefore, there will be fewer successful claims under the property rights law if the entire parcel is used as the denominator.

3. Summary

The second section of the definition of inordinate burden in the Private Property Rights Protection Act is first and foremost a balancing test, under which the court should employ notions of equity and fairness. Although the approach courts will take in answering the question of how to determine whether a landowner has been called upon to bear a disproportionate share of the burden caused by a regulation that seeks to promote the public good is yet uncertain, several issues may be considered. First courts may look to the essential nexus and rough proportionality standards set out by the United States Supreme Court to determine if such a burden placed on a landowner is disproportionate. Second, courts may grapple with the issue of whether to look at the property as a whole to determine if the burden is disproportionate.

Hence, Florida courts are likely to look to the rationales behind two distinct types of takings analyses in deciding whether a regulation inordinately burdens private property for the public good. For the last eight years, courts have reviewed cases in which government agencies imposed conditions on property owners for the public good with an eye toward whether those contingencies were closely and logically related to the impact of the proposed development. Because regulations that benefit the public at large often help affected landowners as well, courts are likely to determine that if there is a logical relationship between the imposed condition and the development impact, the condition does not cause a disproportionate burden

106. For discussion of the constitutionality of governments' power to put conditions on issuance of permits for land development, see *supra* notes 75-82 and accompanying text; see also J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 *ECOLOGY L.Q.* 89 (1995); Theodore C. Taub, *Exactions, Linkages, and Regulatory Takings: The Developer's Perspective*, 20 *URB. LAW.* 515 (1988).

on the property owner. If, however, courts find no nexus between the condition and the impact, they are likely to find an inordinate burden and award compensation.

The public burden portion of the definition does not state whether courts must look at the entire parcel or just the portion impacted by a regulation in determining whether there is an inordinate burden. Most courts that have dealt with the denominator problem in takings cases have used the entire parcel as the denominator of the takings fraction because the whole tract was impacted by a regulation. Florida courts are likely to do the same in suits filed under the property rights law, especially given that other language in the law indicates that the property should be looked at as a whole. For instance, the first portion of the "inordinate burden" definition explicitly states that courts should look at the parcel "as a whole" in determining whether to award compensation. The public burden portion of the definition contains no such language. Although the sections of the "inordinate burden" definition are disjunctive, courts likely will construe the public benefit portion of the definition to include the entire parcel as well. Therefore, decisions made under the second part of the "inordinate burden" definition are likely to be based on the whole parcel, not just the portion affected by an ordinance or regulation.

III. WHAT ARE NOXIOUS USES AND PUBLIC NUISANCES UNDER FLORIDA'S COMMON LAW?

The property rights law does not provide compensation for land that is inordinately burdened by local or state regulations aimed at abating common law public nuisances or noxious uses of private property.¹⁰⁷ A nuisance is an unprivileged interference with a person's use of his or her land.¹⁰⁸ Nuisances that interfere with the private enjoyment of land are private nuisances. Nuisances that interfere with a common right general to the public are public nuisances.¹⁰⁹ There are two types of nuisances that are premised on the amount of harm they create. A nuisance per se is a nuisance no matter

107. 1995, Fla. Laws ch. 95-181.

108. RICHARD R. POWELL, *POWELL ON REAL PROPERTY* 64-40 (Patrick R. Rohan et al. eds., 1993); *Jacobs v. City of Jacksonville*, 762 F. Supp. 327 (M.D. Fla. 1991) (holding that a public nuisance is an activity which violates public rights, subverts public order, decency or morals, or causes inconvenience or damage to the public generally); *Beckman v. Marshall*, 85 So. 2d 552 (Fla. 1956) (holding that a nuisance in law consists in so using one's property as to injure the land or some incorporeal right of one's neighbor).

109. POWELL, *supra* note 108 at 40-64; *Beckman*, 85 So. 2d 552.

how reasonable the defendant's conduct.¹¹⁰ A nuisance per accidens, or a nuisance in fact, is an activity that is unreasonable under certain circumstances.¹¹¹ The issue is to determine what activities constitute public nuisances and noxious uses under Florida's common law.

Courts nationwide have long held that states have the authority, under their police powers, to protect their populations from harm by prohibiting public nuisances and noxious uses.¹¹² Even the Supreme Court reaffirmed recently that states can control or abate certain actions as common law nuisances, even if they deprive a landowner of all economically viable use of his or her property.¹¹³

Florida common law has, for nearly eighty years, given state and local governments police powers to regulate private property to prevent public harm.¹¹⁴ One of the earliest cases to discuss the theory behind Florida's nuisance law was *Cason v. Florida Power Co.*¹¹⁵ "All property is owned and used subject to the laws of the land. Under our system of government property may be used as its owner desires within the limitations imposed by law for the protection of the public and private rights of others."¹¹⁶

Some 25 years later, the Florida Supreme Court provided some examples of a state's police powers:

Organic rights "to acquire, possess and protect property" are subject to the lawful exercise of the inherent sovereign police power of the State to provide for and to conserve the safety, health, morals, comfort and general well being of human life and activities. Private rights may be regulated and restricted for the public welfare and without compensation when not done arbitrarily, needlessly or oppressively. Nuisances caused by the possession or use of property may be abated as provided by valid law without violating organic

110. POWELL, *supra* note 108, at 40-64; *Jacobs*, 762 F. Supp. 327.

111. *Id.*

112. See *Hadacheck v. Sebastian*, 239 U.S. 394, 414 (1915) (holding that the city of Los Angeles had the right, under its police powers, to prohibit the operation of an existing brick yard in a residential neighborhood); *Mugler v. Kansas*, 123 U.S. 623 (1887) (holding that the state could prohibit the operation of a brewery because it was a public nuisance).

113. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2901 (1992) (holding that states must identify background principles of nuisance and property law to prohibit all economically viable uses of land).

114. See *Hav-A-Tampa Cigar Co. v. Johnson*, 5 So. 2d 433 (Fla. 1941); *Sheip Co. v. Amos*, 130 So. 699 (Fla. 1930); *Pompano Horse Club, Inc. v. Bryan*, 111 So. 801 (Fla. 1927).

115. 76 So. 535 (Fla. 1917) (recognizing that one landowner cannot interfere with another landowner's property by creating a nuisance).

116. *Id.* at 536.

property rights, when that remedy is necessary to protect public welfare.¹¹⁷

Similar language was used in a more modern case, *Graham v. Estuary Properties, Inc.*,¹¹⁸ to explain why both public harms and benefits may legitimately be controlled by state and local governments:

As previously stated, the line between the prevention of a public harm and the creation of a public benefit is not often clear. It is a necessary result that the public benefits whenever a harm is prevented. However, it does not necessarily follow that the public is safe from harm when a benefit is created.¹¹⁹

The court in *Graham* also reaffirmed the rule that exercise of the state's police power must relate to the health, safety, welfare or morals of the public and may not be arbitrarily and capriciously applied.¹²⁰

The rationales of the cases stated above lay a firm foundation for the state to regulate and abate a gamut of public nuisances and noxious uses at common law. In *National Container Corp. v. State ex rel. Stockton*, one of the state's earliest environmental cases, the Florida Supreme Court stopped a paper mill from polluting a local river.¹²¹ In *Pompano Horse Club, Inc. v. Bryan*, the court enjoined the operation of a horse track and betting parlor because it was a nuisance to surrounding residents.¹²² The court upheld the Legislature's ability to tax the storage of gasoline because of its noxious and highly flammable properties in *Sheip Co. v. Amos*.¹²³ In *Philbrick v. City of Miami Beach*, the court upheld the enjoining of the operation of a funeral parlor in a residential district in violation of a zoning ordinance as a public nuisance.¹²⁴ In *Demetree v. State ex rel. Marsh*, the court enjoined a house of prostitution as a public nuisance.¹²⁵ There are

117. *Hav-A-Tampa Cigar*, 5 So. 2d at 437 (holding that the state's prohibition of advertising billboards near highways was a valid exercise of its police power because the statute was aimed at motor vehicle safety).

118. 399 So. 2d 1374 (Fla. 1981).

119. *Id.* at 1382.

120. *Id.* at 1381.

121. 189 So. 4, 10 (Fla. 1939) (recognizing a citizen's right to bring suit based on private and public nuisance law theories to prevent an environmental nuisance from a paper mill polluting the St. Johns River).

122. 111 So. 801 (Fla. 1927) (recognizing the state Legislature has great leeway in declaring certain activities or uses that were not nuisances at common law to nevertheless be public nuisances).

123. 130 So. 699, 708 (Fla. 1930) (recognizing that there is no inherent right to use property if the use is adverse to the public welfare).

124. 3 So. 2d 144 (Fla. 1941).

125. 89 So. 2d 498 (Fla. 1956).

dozens more cases decided by Florida courts in the last eight decades that have upheld the state's power to regulate and abate nuisances.¹²⁶

The United States Supreme Court said recently in *Lucas v. South Carolina Coastal Council* that if a state could prove that a particular use of property was a nuisance under background principles of state nuisance law, then the state could regulate the use, regardless of whether it worked a taking of all economically viable use of the property.¹²⁷ Therefore, it could be argued that Florida has the right, under its police powers, to regulate as public nuisances new activities or practices that courts have never specifically determined were noxious uses of property. However, the state will likely be required to prove that the common law nuisance principle existed prior to the enactment of the property rights act.¹²⁸ If that is the case, then agencies could regulate new technologies or activities as public nuisances, even though they have never been deemed public nuisances by courts.

Although it will be up to Florida courts to ultimately decide what state and local governmental actions can be justified as legitimate exercises of police power under the property rights law, clearly a wide variety of activities have been regulated as nuisances and noxious uses. Because the Legislature excluded regulations that seek to control public nuisances at common law and noxious uses of private property from the purview of the private property rights law, lawmakers must have intended that the state retain its traditional police powers to control some uses of private property. Ultimately, it will be up to the courts to decide how liberally or conservatively they will construe common law nuisance cases in reviewing compensation claims under the new law.

IV. WHO MUST PROVE THAT A REGULATION IMPOSES AN "INORDINATE BURDEN" AND BY WHAT EVIDENCE?

The property rights law allows landowners to be compensated for the loss of fair market value if government regulations "inordinately burden" their property.¹²⁹ The law requires a property owner who files an action in circuit court to also provide the court with a "bona fide, valid appraisal that supports the claim and demonstrates the loss

126. See, e.g., *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374 (Fla. 1981); *Orlando Sports Stadium, Inc. v. State ex rel. Powell*, 262 So. 2d 881 (Fla. 1972); *Cason v. Florida Power Co.*, 76 So. 535 (Fla. 1917).

127. 112 S. Ct. 2886 (1992) ("Any limitation so severe cannot be newly legislated or decreed [without compensation], but must inhere in the title itself, in the restrictions and background principles of the State's law of property and nuisance already in place upon land ownership.").

128. *Id.*

129. 1995, Fla. Laws ch. 95-181.

in fair market value to the real property.”¹³⁰ The law then allows the government to issue a ripeness decision identifying allowable uses of the property under the contested regulation¹³¹ and to make an offer of settlement to the property owner.¹³² The law lists eleven possible settlement offers: (1) adjustments of land development or permit standards controlling the development or use of land; (2) increases or modifications in the density, intensity, or use of areas of development; (3) transfers of development rights; (4) land swaps or exchanges; (5) mitigation, including payments in lieu of on-site mitigation; (6) location on the least sensitive portion of the property; (7) conditions on the amount of development or use permitted; (8) requirements that issues be addressed on a more comprehensive basis than a single proposed use or development; (9) issuance of a development order, a variance, special exception or other extraordinary relief; (10) purchase of the real property, or an interest therein, by an appropriate government agency; and (11) no changes to the action of the government agency.¹³³

If one of the parties rejects the settlement offer or a counter-offer, then the claim goes to circuit court in the county in which the property that is the subject of the suit is located.¹³⁴ During the hearing, both the landowner and the government present evidence.¹³⁵ This is when the issue of which party will bear the burden of proof becomes a factor.

In most Florida civil trials, the plaintiff bears the burden of proof, or in other words, has the duty of establishing the truth of a given proposition.¹³⁶ The term “burden of proof,” however, also means the duty of a party to produce evidence at the beginning or a subsequent

130. *Id.* § 1(4)(a).

131. *Id.* § 1(5)(a). If the government agency fails to issue a ripeness decision within 180 days of the landowner filing the action, the issue automatically becomes ripe for judicial review, notwithstanding the availability of other administrative remedies. *Id.*

132. *Id.* § 1(4)(c). If there is a settlement agreement, the relief granted “shall protect the public interest served by the regulations at issue and be the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property.” *Id.* § 1(4)(d)(1).

133. *Id.* § 1(4)(c).

134. *Id.* § 1(5)(b). If the court determines that a regulation has inordinately burdened the property that is the subject of the suit, the court must empanel a jury to determine how much compensation is to be awarded. Compensation is limited to the difference in the fair market value of the property before and after enactment of the regulation. *Id.* §§ 1(6)(a)-(c)

135. *Id.* The law allows for the party who prevails in court to collect attorney’s fees if the losing party’s reason for going to court is unreasonable. *Id.* §§ 1(6)(c)(1)-(2).

136. See *Estate of Ziy v. Bowen*, 223 So. 2d 42, 43 (Fla. 1969) (holding that “burden of proof” can mean both the plaintiff’s duty of establishing the truth and the shifting duty of producing evidence at certain stages of the a trial, which can shift from plaintiff to defendant and back).

stage of the trial.¹³⁷ Under the second definition of burden of proof, the burden can shift from plaintiff to defendant and back again.¹³⁸

Both uses of the term “burden of proof” were addressed by the Florida Supreme Court in *Board of County Commissioners of Brevard County v. Snyder*.¹³⁹ In *Snyder*, the court held that a landowner who seeks to rezone property has the burden of proving that the proposal is consistent with the comprehensive plan and complies with all procedural requirements of the zoning ordinance. Once the plaintiff establishes that the proposed rezoning is consistent with the comprehensive plan, the burden shifts to the government to show with competent substantial evidence that maintaining the existing zoning classification with respect to the property accomplishes “a legitimate public purpose” and is not “arbitrary, discriminatory, or unreasonable.”¹⁴⁰ If the government carries its burden, then the application should be denied.¹⁴¹

Prior to *Snyder*, the property owner bore the burden of proof throughout a trial.¹⁴²

In order to sustain its zoning decision, the local government need only present enough substantial competent evidence to place the validity of its decision in reasonable dispute or controversy. On the other hand, the rule places a heavy burden on the challenger of a local zoning decision. In order to show that the zoning decision is not fairly debatable, the challenger must “conclusively” show or present clear and convincing evidence that the zoning decision is not valid.¹⁴³

While the *Snyder* decision applies to zoning matters, it is instructive as to what burden of proof courts might require in cases heard under the property rights law. Florida courts may determine that a property owner should bear the entire burden of proof in showing that a regulation or ordinance “inordinately burdened” land because it is the landowner who is seeking compensation for a loss in market value of his or her property. Under that scenario, the government would not carry a heavy burden of proving that its regulations do not

137. *Id.*

138. *Id.*

139. 627 So. 2d 469 (Fla. 1993) (involving an application to rezone a one-half acre tract on Merritt Island from zoning that permitted one single-family residence to zoning that allowed a density of fifteen units per acre).

140. *Id.* at 476.

141. *Id.*

142. Thomas G. Pelham, *Quasi-judicial Rezoning: A Commentary on the Snyder Decision and the Consistency Requirement*, 9 J. LAND USE & ENVTL. L. 243 (1994).

143. *Id.* at 258 (construing *Watson v. Mayflower Property, Inc.*, 177 So. 2d 355, 372 (Fla. 2d DCA 1965)).

“inordinately burden” a landowner’s property. The government would only have to rebut the landowner’s evidence.

However, courts might determine that property owners should bear only the initial burden of showing that their land has been affected in some way by a governmental action. Then the courts could shift the burden of proof to the government to prove that such action was not unfair or unreasonable. Under that scenario, the government would bear the heavy burden of proving that its regulations did not “inordinately burden” the landowner’s property.

The property rights law seems to give deference to landowners in deciding if compensation is due. The law begins with a statement about the existence of an important state function in “protecting the interests of private property owners” from “inordinate burdens” placed upon them by local or state government regulations.¹⁴⁴ It continues by stating that:

it is the intent of the Legislature that, as a separate and distinct cause of action from the law of takings, the Legislature herein provides relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity of the state, *as applied*, unfairly affects real property.¹⁴⁵

In its discussion of judicial review of settlement offers, the law states “the relief granted shall protect the public interest served by the regulations at issue and be the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property.”¹⁴⁶

The Florida House of Representatives Judiciary Committee’s fiscal analysis of the property rights bill is telling of what impact lawmakers think the property rights law will have. The analysis states:

Section 1 [the government regulation portion] of the bill may have a significant fiscal impact upon state agencies and state funds and on local governments on both a non-recurring and recurring basis. Whether the government’s response to the bill is to halt all actions which could possibly affect property values, to grant all requests for the use of property, or to take a middle position and deny some and grant others, it may have to pay compensation to the property owners. In addition, section 1 of the bill would likely have a fiscal impact upon the judicial branch. The bill would increase the class of cases for which there must be jury trial. The cost to the state and

144. 1995, Fla. Laws ch. 95-181, § 1(1).

145. *Id.* (emphasis added).

146. *Id.*

local governments as a result of the increased jury trials and potential increase in litigation is unknown.¹⁴⁷

Based on the discussion above, Florida courts are likely to shift the burden of proof to local and state government agencies, requiring them to prove that their regulations are not inordinately burdensome.¹⁴⁸ That shifting of the burden of proof may make government agencies more wary of going to court under the new law, thereby forcing them to make settlement offers they might not otherwise have made to avoid a lawsuit. On the other hand, government agencies could begin amassing evidence in every action they take under regulations enacted or amended after May 11, 1995,¹⁴⁹ thereby preparing in advance for any court challenge to their decisions filed under the new law. Either way, agency officials will have to change the way they conduct day-to-day business in anticipation of being sued under the property rights law.

V. CONCLUSION

Florida's new private property rights law will have a mixed impact on local and state governments' ability to regulate land use. Courts that hear cases under the law likely will borrow from takings analysis to determine whether private property has been "inordinately burdened" by a regulation. Although the Legislature intended the law to provide a separate cause of action from present takings jurisprudence, it is unlikely that courts will be able to draw a bright line between the new cause of action and takings jurisprudence. Takings jurisprudence has evolved a great deal over the last 70 years, and while it is still fairly muddy, it is clearer than decades ago. The age and logic of takings jurisprudence will make it impossible for courts hearing cases under the property rights law to ignore when determining whether property has been "inordinately burdened" by government regulations.

The courts also have grappled with the denominator problem of takings law for years, and Florida judges will be hard-pressed to ignore such precedent in deciding cases under the public benefit part of the "inordinate burden" definition. In most cases, courts will look at the entire parcel in deciding whether property has been "inordinately burdened" by a regulation. As a result, there may be fewer successful

147. Fla. H.R. Comm. on Judiciary, HB 863 (1995) Staff Analysis 10 (final May 23, 1995).

148. Board of County Comm'rs of Brevard County v. Snyder, 627 So. 2d 469, 474 (Fla. 1993).

149. 1995, Fla. Laws ch. 95-181, § 1(12). The law applies to any regulation adopted or amended after the last day of the 1995 legislative session, which ended May 11, 1995.

claims under the new law than if courts looked only at portions of a parcel in making their judgments.

The state's wide and varied history of regulating and abating nuisances and noxious uses also will allow state courts to refuse to award compensation for many claims under the property rights law. The wording of the law suggests that the Legislature intended for the state to be allowed to continue using its traditional police powers to regulate uses of property that are public nuisances at common law and noxious uses of private property. Lawmakers specifically prohibited landowners from being compensated for regulation of nuisances and noxious uses under the new law, and courts likely will defer to the state's extensive nuisance abatement precedent in deciding cases under the law.

Agencies will likely be required to bear the substantial burden of proof in cases filed under the property rights law. They will deal with that burden either by succumbing to property owners' settlement demands or by amassing large quantities of evidence in every action they take in anticipation of fighting lawsuits filed under the new law.

In summary, Florida's new private property rights law will have a moderate impact on local and state government regulation of land. The courts will use established takings analyses to determine whether a regulation is inordinately burdensome and compensation should be awarded. However, a heavy burden may be placed on governments to prove that regulations do not "inordinately burden" real property. The courts' decision regarding which party will bear the burden of proof ultimately will determine how great an impact the law will have on environmental, land use and other types of private property regulations.

APPENDIX 1
CHAPTER 95-181

Committee Substitute for House Bill No. 863

An act relating to real property; creating the “Bert J. Harris, Jr., Private Property Rights Protection Act”; providing legislative intent; providing remedies for real property owners whose property has been inordinately burdened by governmental action; providing definitions; providing requirements for a property owner who seeks compensation; requiring the governmental entity to provide notice of the claim; authorizing certain settlement offers; requiring that the governmental entity and property owner file a court action if a settlement agreement contravenes the application of state law; providing for judicial review, notwithstanding the availability of administrative remedies; authorizing the property owner to file a claim of compensation upon rejection of a settlement offer; requiring the court to determine the percentage of responsibility for an inordinate burden imposed by multiple governmental entities; providing for a jury to determine the amount of compensation to the property owner; providing for costs and attorney fees; providing that the right for which compensation is paid is a transferrable development right; providing exceptions; providing application of the act; creating the Florida Land Use and Environmental Dispute Resolution Act; providing definitions; providing procedures that a property owner may take when the property owner believes that a development order has inordinately burdened use of the property; providing for a special master to conduct a hearing on the request for relief; specifying parties that may participate in the proceeding; authorizing the special master to subpoena witnesses; providing notice requirements; providing for the conduct of the hearing; requiring the special master to file a recommendation; providing for a governmental entity to accept, modify, or reject the recommendation; requiring governmental entities to adopt rules; providing for construction of the act; providing application; amending s. 163.3181, F.S.; providing for mediation or other dispute resolution upon denial by a local government of an owner’s request for an amendment to a comprehensive plan; amending s. 163.3184, F.S.; providing for mediation or other dispute resolution upon issuance of a notice by the state land planning agency that a comprehensive plan or plan amendment is not in compliance with the Local Government Comprehensive Planning and Land Development Regulation Act; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. (1) This act may be cited as the “Bert J. Harris, Jr., Private Property Rights Protection Act.” The Legislature recognizes that some laws, regulations, and ordinances of the state and political entities in the state, as applied, may inordinately burden, restrict, or limit private property rights without amounting to a taking under the State Constitution or the United States Constitution. The Legislature determines that there is an important state interest in protecting the interests of private property owners from such inordinate burdens. Therefore, it is the intent of the Legislature that, as a separate and distinct cause of action from the law of takings, the Legislature herein provides for relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity in the state, as applied, unfairly affects real property.

(2) When a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property, the property owner of that real property is entitled to relief, which may include compensation for the actual loss to the fair market value of the real property caused by the action of government, as provided in this section.

(3) For purposes of this section:

(a) The existence of a “vested right” is to be determined by applying the principles of equitable estoppel or substantive due process under the common law or by applying the statutory law of this state.

(b) The term “existing use” means an actual, present use or activity on the real property, including periods of inactivity which are normally associated with, or are incidental to, the nature or type of use or activity 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.

(c) The term “governmental entity” includes an agency of the state, a regional or a local government created by the State Constitution or by general or special act, any county or municipality, or any other entity that independently exercises governmental authority. The term does not include the United States or any of its agencies, or an agency of the state, a regional or a local government created by the State Constitution or by general or special act, any county or municipality, or any other entity that independently exercises governmental authority, when exercising the powers of the United States or any of its agencies through a formal delegation of Federal authority.

(d) The term “action of a governmental entity” means a specific action of a governmental entity which affects real property, including action on an application or permit.

(e) The terms “inordinate burden” or “inordinately burdened” mean that an action of one or more governmental entities has directly 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 with respect to the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large. The terms “inordinate burden” or “inordinately burdened” do not include temporary impacts to real property; impacts to real property occasioned by governmental abatement, prohibition, prevention, or remediation of a public nuisance at common law or a noxious use of private property; or impacts to real property caused by an action of a governmental entity taken to grant relief to a property owner under this section.

(f) The term “property owner” means the person who holds legal title to the real property at issue. The term does not include a governmental entity.

(g) The term “real property” means land and includes any appurtenances and improvements to the land, including any other relevant real property in which the property owner had a relevant interest.

(4)(a) Not less than 180 days prior to filing an action under this section against a governmental entity, a property owner who seeks compensation under this section must present the claim in writing to the head of the governmental entity. The property owner must submit, along with the claim, a bona fide, valid appraisal that supports the claim and demonstrates the loss in fair market value to the real property. If the action of government is the culmination of a process that involves more than one governmental entity, or if a complete resolution of all relevant issues, in the view of the property owner or in the view of a governmental entity to whom a claim is presented, requires the active participation of more than one governmental entity, the property owner shall present the claim as provided in this section to each of the governmental entities.

(b) The governmental entity shall provide written notice of the claim to all parties to any administrative action that gave rise to the claim, and to owners of real property contiguous to the owner's property at the addresses listed on the most recent county tax rolls. Within 15 days after the claim being presented, the governmental entity shall report the claim in writing to the Department of Legal Affairs, and shall provide the department with the name, address, and telephone number of the employee of the governmental entity from whom additional information may be obtained about the claim during the pendency of the claim and any subsequent judicial action.

(c) During the 180-day-notice period, unless extended by agreement of the parties, the governmental entity shall make a written settlement offer to effectuate:

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.

If the property owner accepts the settlement offer, the governmental entity may implement the settlement offer by appropriate development agreement; by issuing a variance, special exception, or other extraordinary relief; or by other appropriate method, subject to paragraph (d).

(d)1. Whenever a governmental entity enters into a settlement agreement under this section which would have the effect of a modification, variance, or a special exception to the application of a rule, regulation, or ordinance as it would otherwise apply to the subject real property, the relief granted shall protect the public interest served by the regulations at issue and be the appropriate relief necessary to

prevent the governmental regulatory effort from inordinately burdening the real property.

2. Whenever a governmental entity enters into a settlement agreement under this section which would have the effect of contravening the application of a statute as it would otherwise apply to the subject real property, the governmental entity and the property owner shall jointly file an action in the circuit court where the real property is located for approval of the settlement agreement by the court to ensure that the relief granted protects the public interest served by the statute at issue and is the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property.

(5)(a) During the 180-day-notice period, unless a settlement offer is accepted by the property owner, each of the governmental entities provided notice pursuant to paragraph (4)(a) shall issue a written ripeness decision identifying the allowable uses to which the subject property may be put. The failure of the governmental entity to issue a written ripeness decision during the 180-day-notice period shall be deemed to ripen the prior action of the governmental entity, and shall operate as a ripeness decision that has been rejected by the property owner. The ripeness decision, as a matter of law, constitutes the last prerequisite to judicial review, and the matter shall be deemed ripe or final for the purposes of the judicial proceeding created by this section, notwithstanding the availability of other administrative remedies.

(b) If the property owner rejects the settlement offer and the ripeness decision of the governmental entity or entities, the property owner may file a claim for compensation in the circuit court, a copy of which shall be served contemporaneously on the head of each of the governmental entities that made a settlement offer and a ripeness decision that was rejected by the property owner. Actions under this section shall be brought only in the county where the real property is located.

(6)(a) The circuit court shall determine whether an existing use of the real property or a vested right to a specific use of the real property existed and, if so, whether, considering the settlement offer and ripeness decision, the governmental entity or entities have inordinately burdened the real property. If the actions of more than one governmental entity, considering any settlement offers and ripeness decisions, are responsible for the action that imposed the inordinate burden on the real property of the property owner, the court shall

determine the percentage of responsibility each such governmental entity bears with respect to the inordinate burden. A governmental entity may take an interlocutory appeal of the court's determination that the action of the governmental entity has resulted in an inordinate burden. An interlocutory appeal does not automatically stay the proceedings; however, the court may stay the proceedings during the pendency of the interlocutory appeal. If the governmental entity does not prevail in the interlocutory appeal, the court shall award to the prevailing property owner the costs and a reasonable attorney fee incurred by the property owner in the interlocutory appeal.

(b) Following its determination of the percentage of responsibility of each governmental entity, and following the resolution of any interlocutory appeal, the court shall impanel a jury to determine the total amount of compensation to the property owner for the loss in value due to the inordinate burden to the real property. The award of compensation shall be determined by calculating the difference in the fair market value of the real property, as it existed at the time of the governmental action at issue, as though the owner had the ability to attain the reasonable investment-backed expectation or was not left with uses that are unreasonable, whichever the case may be, and the fair market value of the real property, as it existed at the time of the governmental action at issue, as inordinately burdened, considering the settlement offer together with the ripeness decision, of the governmental entity or entities. In determining the award of compensation, consideration may not be given to business damages relative to any development, activity, or use that the action of the governmental entity or entities, considering the settlement offer together with the ripeness decision has restricted, limited, or prohibited. The award of compensation shall include a reasonable award of prejudgment interest from the date the claim was presented to the governmental entity or entities as provided in subsection (4).

(c)1. In any action filed pursuant to this section, the property owner is entitled to recover reasonable costs and attorney fees incurred by the property owner, from the governmental entity or entities, according to their proportionate share as determined by the court, from the date of the filing of the circuit court action, if the property owner prevails in the action and the court determines that the settlement offer, including the ripeness decision, of the governmental entity or entities did not constitute a bona fide offer to the property owner which reasonably would have resolved the claim, based upon the knowledge available to the governmental entity or entities and the property owner during the 180-day-notice period.

2. In any action filed pursuant to this section, the governmental entity or entities are entitled to recover reasonable costs and attorney fees incurred by the governmental entity or entities from the date of the filing of the circuit court action, if the governmental entity or entities prevail in the action and the court determines that the property owner did not accept a bona fide settlement offer, including the ripeness decision, which reasonably would have resolved the claim fairly to the property owner if the settlement offer had been accepted by the property owner, based upon the knowledge available to the governmental entity or entities and the property owner during the 180-day-notice period.

3. The determination of total reasonable costs and attorney fees pursuant to this paragraph shall be made by the court and not by the jury. Any proposed settlement offer or any proposed ripeness decision, except for the final written settlement offer or the final written ripeness decision, and any negotiations or rejections in regard to the formulation either of the settlement offer or the ripeness decision, are inadmissible in the subsequent proceeding established by this section except for the purposes of the determination pursuant to this paragraph.

(d) Within 15 days after the execution of any settlement pursuant to this section, or the issuance of any judgment pursuant to this section, the governmental entity shall provide a copy of the settlement or judgment to the Department of Legal Affairs.

(7)(a) The circuit court may enter any orders necessary to effectuate the purposes of this section and to make final determinations to effectuate relief available under this section.

(b) An award or payment of compensation pursuant to this section shall operate to grant to and vest in any governmental entity by whom compensation is paid the right, title, and interest in rights of use for which the compensation has been paid, which rights may become transferrable development rights to be held, sold, or otherwise disposed of by the governmental entity. When there is an award of compensation, the court shall determine the form and the recipient of the right, title, and interest, as well as the terms of their acquisition.

(8) This section does not supplant methods agreed to by the parties and lawfully available for arbitration, mediation, or other forms of alternative dispute resolution, and governmental entities are encouraged to utilize such methods to augment or facilitate the processes and actions contemplated by this section.

(9) This section provides a cause of action for governmental actions that may not rise to the level of a taking under the State Constitution or the United States Constitution. This section may not necessarily be construed under the case law regarding takings if the governmental action does not rise to the level of a taking. The provisions of this section are cumulative, and do not abrogate any other remedy lawfully available, including any remedy lawfully available for governmental actions that rise to the level of a taking. However, a governmental entity shall not be liable for compensation for an action of a governmental entity applicable to, or for the loss in value to, a subject real property more than once.

(10) This section does not apply to any actions taken by a governmental entity which relate to the operation, maintenance, or expansion of transportation facilities, and this section does not affect existing law regarding eminent domain relating to transportation.

(11) A cause of action may not be commenced under this section if the claim is presented more than 1 year after a law or regulation is first applied by the governmental entity to the property at issue. If an owner seeks relief from the governmental action through lawfully available administrative or judicial proceedings, the time for bringing an action under this section is tolled until the conclusion of such proceedings.

(12) No cause of action exists under this section as to the application of any law enacted on or before the date of adjournment sine die of the 1995 Regular Session of the Legislature, or as to the application of any rule, regulation, or ordinance adopted, or formally noticed for adoption, on or before that date. A subsequent amendment to any such law, rule, regulation, or ordinance gives rise to a cause of action under this section only to the extent that the application of the amendatory language imposes an inordinate burden apart from the law, rule, regulation, or ordinance being amended.

(13) This section does not affect the sovereign immunity of government.

[Section 2, the "Florida Land Use and Environmental Dispute Resolution Act," and Sections 3-5 omitted].

Section 6. This act shall take effect October 1, 1995.

Approved by the Governor May 18, 1995.

Filed in Office Secretary of State May 18, 1995.