

# PRIVATE PROPERTY RIGHTS IN FLORIDA: IS LEGISLATION THE BEST ALTERNATIVE?

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## I. INTRODUCTION

Suppose Joe, a property owner, is developing a tract of land. One day an eagle makes its home on Joe's property. Society has expressed concern over the dwindling eagle population, and the political community has responded by enacting regulations for the protection of eagles. One such regulation bans all development within twenty-four acres of the eagle's nest.<sup>1</sup> Although Joe understands the eagle's predicament and does not challenge the regulation, he feels that he is bearing the full financial burden of protecting this particular eagle. Joe meets with the agency that promulgated the eagle regulation and asks if they would mind buying his twenty-four acres that surround the eagle's nest. The government declines the offer and explains that Joe's loss does not rise to the level of a taking because the loss of developing his

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1. The bald eagle enjoys federal protection as an endangered species under the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (1982 & Supp. 1984) and the Bald Eagle Protection Act, 16 U.S.C. §§ 668(a)-(d) (1982). Section 372.0725, *Florida Statutes* also protects eagles as a threatened species. See FLA. STAT. § 372.0725 (1995).

twenty-four acres did not cause a complete diminution in the value of Joe's property. Joe leaves feeling that society is asking him to do more than his part to protect this eagle.<sup>2</sup>

This hypothetical illustrates the tension between private property rights and government regulatory power. The issue was foreshadowed in *Pennsylvania Coal v. Mahon*<sup>3</sup> which noted that when a "regulation goes too far it [is] recognized as a taking."<sup>4</sup> Since *Pennsylvania Coal*, courts have struggled with balancing the liberty interest of the private property owner and the government's need to protect the public's best interest. Over time, courts have developed a regulatory takings analysis, finding that a regulatory taking occurs when: (1) the property owner is denied the economically viable use of property due to the regulatory imposition; (2) the property owner has an investment-backed expectation; (3) and the property owner's interest is not subject to the state's regulation under the common law nuisance doctrine.<sup>5</sup> Florida has adopted these concepts in forming its takings analysis.<sup>6</sup>

Prior to the 1970s, the use of private property was largely unregulated except for zoning laws and prohibitions against nuisance activities.<sup>7</sup> In the 1970s, the public became aware of the undesirable consequences of unregulated land use, such as disorganized development and the destruction of natural habitats.<sup>8</sup> Political actions ensued, authorizing the application of greater governmental regulatory power.<sup>9</sup> This government action was generally approved by the courts.<sup>10</sup> Following the direction set in the 1970s, federal and state laws were enacted and have

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2. See generally *Florida Game and Fresh Water Fish Comm'n v. Flotilla, Inc.*, 636 So. 2d 761 (Fla. 2d DCA 1994) (discussing a factually similar situation).

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

4. *Id.* at 415; see U.S. CONST. amend. X ("[N]or shall private property be taken for public use, without just compensation.").

5. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994).

6. See discussion *infra* Part III.A (examining the *Graham* case which incorporates many aspects of the federal takings analysis).

7. See Michael L. Rosen & Richard E. Davis, *A Question of Balance* 1 (1996) (unpublished manuscript) (on file with author).

8. See *id.*

9. See *id.*

10. See *id.*

accomplished many positive results for the environment.<sup>11</sup> However, these laws have resulted in unanticipated costs and consequences that are increasingly viewed as excessive where they arguably inhibit economic growth and infringe on private property rights.<sup>12</sup>

Florida recently responded to this issue by passing legislation aimed at enhancing private property rights.<sup>13</sup> Part II examines this property rights legislation. Since no case law exists at the time of this writing that interprets Florida's private property rights legislation, Part III analyzes the operative aspects of the legislation in the context of existing federal and state takings case law and compares the results of the cases with the anticipated results under the new legislation. Part IV examines the anticipated effect of the legislation from the perspective of property rights proponents as well as opponents. Part V discusses how the legislation might affect Florida takings law. Finally, Part VI concludes that since the private property rights issue continues to evolve, legislation is the most viable vehicle during this evolutionary process with which to address the subject. Consequently, more permanent alternatives, such as a constitutional amendment, are premature at this time.

## II. EXAMINING FLORIDA'S NEW PROPERTY RIGHTS LEGISLATION

On October 1, 1995, the Florida Legislature enacted the Bert J. Harris, Jr. Private Property Rights Protection Act (Act)<sup>14</sup>. The Act creates a cause of action that provides judicial relief for landowners who are restricted by government laws and regulations from using their land.<sup>15</sup> Essentially, the new legislation was enacted to provide real property owners with protection from laws and regulations in situations that do not rise to the level of a taking under the traditional takings analysis.<sup>16</sup> The mechanism for this

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11. *See id.*

12. *See id.*

13. *See* FLA. STAT. § 70.001 (1995); *see also* David L. Powell, et al., *Florida's New Law to Protect Private Property Rights*, 69 FLA. B. J., Oct. 1995, at 12, 12-15 (interpreting the Act).

14. Act effective Oct. 1, 1995, ch. 95-181, 1995 Fla. Laws 181 (codified at FLA. STAT. § 70.001 (1995)).

15. *See* FLA. STAT. § 70.001(1) (1995).

16. *See id.*

protection is the Act's requirement that governmental entities compensate landowners when a government regulation causes an "inordinate burden" on an owner's property.<sup>17</sup>

The Act is intended to protect either a landowner's existing use of land or a vested right to a specific use of land from an action by a state, regional, or local government that amounts to an inordinate burden.<sup>18</sup> An existing use is defined as an actual present use.<sup>19</sup> However, the definition also includes reasonably foreseeable land uses that have created an existing fair market value in the property that exceeds the value of the actual present use.<sup>20</sup> For example, if commercially zoned property were currently used as the location of a single family residence, the existing use may be deemed commercial if it results in a higher fair market value for the property. Thus, compensation would be based on the commercial value of the property rather than its value as a residence.

A vested right is established by applying common law principles of equitable estoppel.<sup>21</sup> Equitable estoppel is applied to land use regulations if a landowner, in good faith, relies on some act or omission of the government and suffers a substantial change in position or incurs extensive obligations and expenses.<sup>22</sup> Typically, this situation arises when an owner relies on the statement of a governmental official or on a law or regulation that is subsequently changed.

### III. THE OPERATIVE ASPECTS OF THE LEGISLATION

#### A. *Inordinate Burden*

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17. *Id.* § 70.001(2).

18. *See id.* The Act does not apply to actions by the federal government, to governmental actions that involve operating, maintaining, or expanding transportation facilities, or to specific actions of a government entity which occurred prior to May 11, 1995. *See id.* § 70.001(3)(c)(10); *see also* Fla. H.R. Comm. on Judiciary, CS for HB 863 (1995) Staff Analysis 6 (May 23, 1995) (on file with comm.).

19. *See* FLA. STAT. § 70.001(3)(b) (1995).

20. *See id.* ("The term 'existing use' means an actual, present use . . . which [is] normally associated with . . . such reasonably foreseeable, nonspeculative land uses which are suitable for the subject . . . property and compatible with adjacent land uses . . .").

21. *See id.* § 70.001(3)(a).

22. *See id.*

The concept of an inordinate burden is perhaps the element of the Act that has created the most speculation among local governments, planners, landowners, and the legal community. According to the Act, an inordinately burdened landowner is one whose use of real property has been restricted or limited to a certain extent by a government action.<sup>23</sup> Two independent conditions are evaluated to determine what constitutes an inordinate burden.<sup>24</sup> To satisfy the first condition, the effect of the action must permanently restrict the use of real property to the extent that the landowner is unable to realize reasonable, investment-backed expectations.<sup>25</sup> To satisfy the second condition, a regulation must leave the owner with an unreasonable use of property such that the “owner bears permanently a disproportionate share of a burden imposed for the good of the public.”<sup>26</sup>

Although the Act clearly identifies situations where the Act is inapplicable,<sup>27</sup> its provisions are less specific in describing conditions in which the Act is applicable.<sup>28</sup> Consequently, depending on how a reasonable, investment-backed expectation is defined and the determination of when a landowner permanently bears a disproportionate share of the burden imposed for the good of the public, a court may interpret an inordinate burden to be easier for a property owner to meet than satisfying the elements required to obtain compensation for a regulatory taking.

### 1. *Analyzing Traditional Takings Concepts: Graham v. Estuary Properties*

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23. *See id.* § 70.001(3)(e).

24. *See id.*

25. *See id.*

26. *Id.* However, a property owner is not inordinately burdened by government action that precludes the noxious use of real property or a use that constitutes a public nuisance. *See id.* Finally, temporary impacts to land do not rise to the level of an inordinate burden. *See id.* For example, a valid, time-limited moratorium is not actionable under the Act.

27. *See id.* § 70.001(10),(13). For example, the Act does not apply to actions commenced more than one year after a law or regulation is first applied to the property at issue. *See id.* § 70.001(11).

28. For example, the Act only applies to regulations, laws, and ordinances of the state or a political entity of the state. *See id.* § 70.001(1).

A substantial body of case law exists that addresses the concepts within the Act in the context of the traditional takings analysis.<sup>29</sup> Florida courts will perhaps look to the reasoning of these cases in determining whether a landowner's property is restricted or limited to a degree compensable under the Act. In fact, the Florida Supreme Court utilized traditional takings case law in its decision in *Graham v. Estuary Properties*.<sup>30</sup> In *Graham*, the plaintiff, Estuary, owned 6,500 acres of land on the southwest coast of Florida.<sup>31</sup> The topography of the land included extensive wetlands and mangroves that separated the portion of the land suitable for development from various bays and inlets along the coast.<sup>32</sup>

Estuary sought a permit to clear the mangroves and build an "interceptor waterway" in their place.<sup>33</sup> Estuary planned to increase the amount of land suitable for development by using the fill coming out of the waterway to elevate areas of the property that were otherwise too low for development.<sup>34</sup> On the recommendation of the Southwest Florida Regional Planning Council, the Board of County Commissioners denied the permit.<sup>35</sup> As a result, Estuary appealed on the basis that the permit denial constituted a taking without just compensation.<sup>36</sup> The court recognized the following factors in its decision: (1) whether there was a physical invasion of the property; (2) whether the regulation precluded all economically reasonable use of the property; (3) whether the government action conferred a public benefit or prevented a public harm; (4) whether the government action promoted the health, safety, welfare, or morals of the public; (5) whether the regulation was arbitrarily or capriciously applied to

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29. See e.g., *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

30. 399 So. 2d 1374 (Fla. 1981).

31. See *id.* at 1376.

32. See *id.*

33. See *id.*

34. See *id.* Estuary contended that the waterway would replace the ecological function of the mangroves. See *id.*

35. See *id.* at 1376-77.

36. See *id.* at 1380.

the property; and (6) the extent to which the regulation curtailed Estuary's investment-backed expectations.<sup>37</sup>

The fourth factor, which addresses whether the government action promotes the health, safety, welfare or morals of the public, is like a threshold factor because it questions the viability of the government action. This factor examines whether the state constitutionally used its police power. States enjoy the power to regulate under their police power.<sup>38</sup> Florida delegated this power to local governments through its constitution.<sup>39</sup> If a regulation does not promote the health, safety, or welfare of the public, it is not a valid exercise of police power.<sup>40</sup> Thus, if the permit denial in *Graham* had not advanced these goals, then the government's denial would have been declared invalid. Estuary's permit request would have been approved without Fifth Amendment takings having been at issue.<sup>41</sup> However, the *Graham* court held that the permit denial was a valid exercise of the police power.

Under the fifth factor, even if the government action was a valid exercise of police power, the action may have still been applied improperly to the property at issue.<sup>42</sup> For example, had the governmental entity in *Graham* denied Estuary's permit but granted permits to other property owners similarly situated to Estuary, then Estuary would have had a strong argument against the arbitrary application of the regulation at issue. However, Estuary did not

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37. See *id.* at 1380-81. This article discusses the *Graham* factors in the order in which they were addressed in the *Graham* case itself.

38. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.").

39. See FLA. CONST. art. VIII, § 2(b) ("Municipalities shall have . . . [the] powers to . . . conduct municipal government . . . and may exercise any power for municipal purposes except as otherwise provided by law.").

40. See *Graham*, 399 So. 2d at 1380. *Contra* *Newman v. Carson*, 280 So. 2d 426, 428 (Fla. 1973).

41. See U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

42. See *Varholy v. Sweat*, 15 So. 2d 267 (Fla. 1943). If the regulation is arbitrarily or capriciously applied, it is an invalid exercise of the police power. See *id.* at 269-70.

base its argument on either of the above-discussed factors of the *Graham* test.<sup>43</sup>

Instead, the case turned on a Fifth Amendment claim for just compensation.<sup>44</sup> Under the Fifth Amendment, governmental entities may appropriate private property for a government purpose as long as the government justifiably compensates the property owner.<sup>45</sup> Courts recognize two types of government appropriations under the Fifth Amendment. First, an appropriation or “taking” of private property occurs when government action results in the government’s physical occupation of the property.<sup>46</sup> This situation typically arises when the government uses its power of eminent domain to take private property for a public purpose but fails to compensate the landowner.<sup>47</sup> Second, courts recognize that a government regulation may result in such a deprivation of value that the property at issue is deemed taken for the purpose of awarding compensation.<sup>48</sup>

The first factor of the *Graham* test considered whether the government physically invaded Estuary’s property.<sup>49</sup> Since no physical invasion of Estuary’s property occurred, Estuary had no Fifth Amendment takings claim under this theory. Nevertheless, in an attempt to characterize the government’s action as a physical invasion, Estuary argued that if the denial of the dredge and fill permit conferred a benefit to the public, it was like an exercise of eminent domain which required compensation.<sup>50</sup> Estuary contended that retaining the mangroves created a public benefit by providing a source of recreational fishing, so the permit denial was

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43. Although the *Graham* decision did not turn on these two elements, they help illustrate these particular aspects of the takings issue.

44. See *Graham*, 399 So. 2d at 1380-83.

45. See U.S. CONST. amend V; see also FLA. CONST. art. X, § 6(a) (“No private property shall be taken except for a public purpose and with full compensation . . .”).

46. See, e.g., *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419, 438-40 (1982) (determining that even television cables permanently attached to the outside of an apartment building constitute a permanent physical invasion).

47. See generally *Joint Ventures, Inc. v. Department of Transp.*, 563 So. 2d 622, 624 (Fla. 1990) (discussing the distinction between a physical occupation taking and a regulatory taking).

48. See *infra* notes 59-61 and accompanying text.

49. See *Graham*, 399 So. 2d at 1380.

50. See *id.* at 1381.

essentially a physical occupation of the mangroves by the government.<sup>51</sup>

The third *Graham* factor addressed this public benefits argument by asking whether the government action conferred a public benefit or prevented a public harm.<sup>52</sup> The court agreed that the act of regulating property to confer a public benefit is a taking.<sup>53</sup> Further, the court acknowledged the hazy line between the prevention of a public harm and the creation of a public benefit, as the public arguably benefits whenever a harm is prevented.<sup>54</sup>

The *Graham* court noted that preventing the destruction of the mangroves conferred a benefit on the public because the public waterways, protected by the mangrove's natural filtration system, would remain clean.<sup>55</sup> In other words, the status quo was merely maintained by refusing to allow the destruction of the mangroves, which the court distinguished from the creation of a public benefit.<sup>56</sup> Unlike creating a benefit not previously enjoyed by the public, maintaining the status quo did not enhance the public's position.<sup>57</sup> Therefore, the court concluded that the permit denial prevented a public harm and was consequently deemed an exercise of the police power as opposed to a physical invasion.<sup>58</sup>

The *Graham* court then turned its attention to the alternate theory of regulatory takings under the Fifth Amendment. The court's test for a regulatory taking as articulated under the second *Graham* factor inquires whether the governmental action precluded *all* economically reasonable use of the property.<sup>59</sup> Thus, when

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51. *See id.*

52. *See id.*

53. *See id.*

54. *See id.* at 1382.

55. *See id.* at 1379.

56. *See id.* at 1382.

57. However, for example, had the owner been required to change its development plans to improve the public waterways, such a requirement would have been beyond the scope of the police power. *See id.*

58. *See id.* at 1382-83.

59. *See id.* at 1380. *But see Joint Ventures*, 563 So. 2d at 625 (“[C]ompensation must be paid . . . when [governmental] interference deprives . . . [private property] owner[s] of *substantial* economic use of . . . [the] property.” (emphasis added)).

government action renders property useless, this factor mandates that the result to the owner remain the same as if the property were taken by eminent domain.<sup>60</sup> Florida courts agree that such an action is compensable as a regulatory taking.<sup>61</sup> On this point, Estuary argued that denial of the dredge and fill permit made development impracticable, and thus, no economically feasible use of the property remained.<sup>62</sup> In response, the court noted that at least 526 of the total 6,500 acres remained suitable for development.<sup>63</sup> Therefore, the result of the permit denial did not render all of Estuary's property useless.<sup>64</sup>

The court noted that a landowner has no absolute right to change the natural character of the land when the purpose for the proposed change is not suited to the natural state of the land, and the proposed change is injurious to others.<sup>65</sup> As a result, a private property owner is not necessarily entitled to the highest and best use of the property if that use creates a public harm.<sup>66</sup> Since Estuary's total parcel was not rendered virtually useless by the permit denial and the portion of the property that was adversely affected had no independent development potential, the court held that no regulatory taking had occurred.<sup>67</sup>

Finally, the court considered the sixth *Graham* factor which addressed the effect of the government action on a landowner's expected return on investment.<sup>68</sup> Essentially, this factor required the court to analyze whether Estuary had a vested right to dredge and fill the property.<sup>69</sup> Such a right must exist at the time the land is

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60. See *Graham*, 399 So. 2d at 1380-82.

61. See, e.g., *City of Pompano Beach v. Yardarm Restaurant*, 641 So. 2d 1377, 1384 (Fla. 4th DCA 1994); *Tampa-Hillsborough Co. Expressway Auth. v. A.G.W.S.*, 640 So. 2d 54 (Fla. 1994); *Askew v. Gables-By-The-Sea*, 333 So. 2d 56, 61 (Fla. 1st DCA 1976).

62. See *Graham*, 399 So. 2d at 1382.

63. See *id.* at 1376.

64. See *id.* at 1381-82 (noting that Estuary's property was not "entirely submerged" and that Estuary purchased the property "with full knowledge that part of it was totally unsuitable for development.").

65. See *id.*

66. See *id.*

67. See *id.*

68. See *id.* at 1383.

69. See *id.*

purchased and be supported by some type of government acknowledgment, such as a statute.<sup>70</sup> The court noted that no such support was present in Estuary's case, and deemed Estuary's investment-backed expectation as mere speculation.<sup>71</sup> Consequently, the court ruled in favor of the Board in its denial of Estuary's dredge and fill permit.<sup>72</sup>

## 2. *Applying the Graham Facts to the Act*

The *Graham* court's treatment of Estuary's traditional takings claim is instructive because it illustrates that a landowner must show virtually a complete diminution in value of the property at issue to prevail on the regulatory takings claim.<sup>73</sup> In contrast to the complete diminution in value requirement of regulatory takings, the Act substitutes the concept of an inordinate burden.<sup>74</sup> How would Estuary have fared under the Act? The Act utilizes essentially two tests<sup>75</sup> and that under either test, Estuary would first have to survive the Act's "existing use" requirement.<sup>76</sup> Since development was not underway, Estuary would fail the primary existing use analysis.

However, the Act's alternative definition of an existing use may apply to Estuary if the type of development sought was reasonably foreseeable.<sup>77</sup> In other words, the relevant query is whether the land was suitable for such development even though it was not currently under development. The *Graham* court addressed this question and determined that the type of development Estuary sought was not suitable for the property at issue.<sup>78</sup> Consequently, even the Act's alternative definition of existing use may not have changed the result in *Graham*.

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70. *See id.*

71. *See id.*

72. *See id.*

73. *See supra* note 59 and accompanying text.

74. *See discussion supra* Part II.

75. *See supra* note 24-26 and accompanying text.

76. FLA. STAT. § 70.001; *see discussion supra* Part II.

77. *See* FLA. STAT. § 70.001; *see also discussion supra* Part II.

78. *See Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1383 (Fla. 1981).

Since the *Graham* court determined that the land was not suitable for development in its present condition and that Estuary had no justifiable reason to expect a dredge and fill permit to be granted, Estuary's investment-backed expectation to develop may have been deemed unreasonable. The Act's first test for an inordinate burden requires frustration of the property owner's reasonable investment-backed expectation.<sup>79</sup> If the owner's expectation is not reasonable, the Act does not provide for compensation. Thus, even if Estuary survived the Act's existing use requirement, Estuary would have likely failed the Act's requirement of an inordinate burden.

The Act's second inordinate burden test is broader. If Estuary's investment-backed expectation was unjustified, Estuary would still have a claim under this test if Estuary bore a disproportionate share of a burden that was required for the good of the public.<sup>80</sup> The perceived burden born by Estuary was the denial of the dredge and fill permit and ultimately the inability to develop the property to its fullest potential. The public benefit was the prevention of public harm to the adjacent waterway that would potentially result from Estuary's development plans.<sup>81</sup> However, the *Graham* court noted that preventing a public harm merely maintains the status quo.<sup>82</sup> Thus, using the *Graham* analysis, requiring a property owner to maintain the status quo may not be a compensable burden under the Act. As a result, in addition to not finding relief under the Act's first test, Estuary may have fallen short under the second test as well.

### 3. *Other Traditional Takings Cases: Further Potential Interpretations of the Inordinate Burden Concept*

In contrast to the "all or nothing" takings analysis utilized by the Florida Supreme Court in *Graham*, the Federal Circuit has held that a taking may occur even when a regulation prohibits the

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79. See *supra* note 25 and accompanying text.

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

81. See *Graham*, 399 So. 2d at 1382.

82. See *supra* note 57 and accompanying text.

landowner from less than all economically beneficial use.<sup>83</sup> In *Florida Rock Industries*, Florida Rock purchased a 1,560 acre parcel of wetlands to be used for limestone mining, which would have effectively destroyed the surface wetlands.<sup>84</sup>

Subsequent to the purchase and prior to the commencement of mining, the Army Corps of Engineers (Corps) enacted regulations requiring owners of wetlands to obtain permits under section 404 of the Clean Water Act before engaging in dredging or filling.<sup>85</sup> Florida Rock sought such a permit for ninety-eight of the 1,560 acres but was denied the permit on the basis of anticipated damage to the wetlands.<sup>86</sup> The validity of the Corps' actions was conceded, and Florida Rock filed suit alleging that the permit denial was an uncompensated regulatory taking.<sup>87</sup>

The court noted that the regulatory taking analysis is a subject of continuing debate.<sup>88</sup> One test utilized by the Supreme Court involves balancing several considerations, including the economic impact of the regulation on the claimant, the extent to which the regulation interferes with the claimant's investment-backed expectations, and the character of the government's action.<sup>89</sup> However, the *Florida Rock* court ruled that economic impact alone may be determinative when a regulation categorically prohibits all economically beneficial use of land.<sup>90</sup> The court found that such a regulation has an effect equivalent to a permanent physical occupation and amounts to a compensable taking.<sup>91</sup>

When a regulation prohibits less than all economically beneficial use of land and causes only a partial deprivation of value, the Supreme Court's categorical taking test is not necessarily satisfied.<sup>92</sup> As a result, the Federal Circuit focused on when, if

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83. See *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1570 (Fed. Cir. 1994).

84. See *id.*

85. See *id.*

86. See *id.* at 1563.

87. See *id.*

88. See *id.* at 1564.

89. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

90. See *Florida Rock*, 18 F.3d at 1564-65.

91. See *id.* at 1565.

92. See *id.*

ever, a partial reduction in value results in a compensable taking under the Fifth Amendment.<sup>93</sup> In addressing this question, the court examined what percentage of a property's economic use must be destroyed by a regulation before a compensable taking occurs and how to determine that percentage.<sup>94</sup>

The focal point of the court's primary inquiry concentrated on whether the government acted in a responsible way by "limiting the constraints on property ownership to those necessary to achieve the public purpose, and not allocating to some number of individuals, less than all, a burden that should be borne by all."<sup>95</sup> An *ad hoc* test emerged from this inquiry that focused on the owner's loss of economic use of the property resulting from the regulation and if the owner received compensating benefits from the regulation.<sup>96</sup> The court also considered whether other economically realistic uses for the property remained available to the owner.<sup>97</sup>

The court approached the issue from the perspective that simply because a regulation serves a legitimate public purpose, government liability is not necessarily precluded.<sup>98</sup> Under the Fifth Amendment, the government may take any interest in property in an eminent domain proceeding and is not limited to fee interests.<sup>99</sup> Consequently, the court reasoned that the same was true in cases of inverse condemnation resulting from a regulated action.<sup>100</sup>

The Federal Circuit noted that the record did not clearly establish that Florida Rock was deprived of all economic use of its

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93. *See id.* at 1568-71. As a result of this inquiry, the court acknowledged the concept of a partial taking. *See id.*

94. *See id.* at 1569.

95. *Id.* at 1571. The *Florida Rock* court's inquiry is similar to the Act's second test. *See supra* note 26 and accompanying text.

96. *See id.*

97. *See id.*

98. *See id.*

99. *See id.* at 1572.

100. *See id.* A claim for inverse condemnation is actually the type of claim that arises from a regulatory taking. *See Joint Ventures, Inc. v. Department of Transp.*, 563 So. 2d 622, 627 (Fla. 1990). Typically the issue involved is whether the government action has risen to the level of a taking.

land.<sup>101</sup> However, the court remanded the case to find the value of the land after imposition of the regulation to determine the extent of the owner's deprivation of value to decide whether the deprivation was enough to constitute a taking.<sup>102</sup> The *Florida Rock* court's decision signifies that even though the Corp's action did not completely diminish the value of Florida Rock's property, a partial taking may have occurred and compensation may be required.<sup>103</sup>

The Act echoes the reasoning of *Florida Rock* in that compensation may be required even when government action does not amount to a full diminution in value.<sup>104</sup> However, the Act remains subject to judicial interpretation. The court's interpretation of what constitutes an inordinate burden will ultimately determine the extent to which the Act will affect property rights in Florida.

Although the Act creates a new cause of action and remedy for landowners separate from takings law, the remedy resembles existing takings law remedies in several ways.<sup>105</sup> Each case involves an *ad hoc* fact intensive inquiry to determine whether a particular government action encroaches too far on private property rights.<sup>106</sup> The Act defines "too far" as when the property owner is inordinately burdened by governmental action.<sup>107</sup> Although the Act defines inordinate burden, quantifying the burden remains unclear.<sup>108</sup> The burden must be quantified to set damages for lost value and thresholds of loss, above which causes of action accrue.<sup>109</sup> Otherwise, differentiating between reasonable and inordinate burdens will be difficult.<sup>110</sup>

Property rights advocates interpret the Act to provide relief beginning with the loss of the first dollar of fair market value.<sup>111</sup>

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101. See *Florida Rock*, 18 F.3d at 1572-73.

102. See *id.* at 1573.

103. See *id.* at 1572-73.

104. See FLA. STAT. § 70.001(1)(1995).

105. See *id.*

106. See *id.*

107. *Id.* § 70.001(2).

108. See *id.* § 70.001(3)(e).

109. See Robert C. Downie, II, *Property Rights: Will Exceptions Become the Rule?*, 69 FLA. B. J., Nov. 1995, at 69, 70.

110. See *id.*

111. See *id.* at 71.

This position is diametrically opposed to the traditional state court evaluation of whether government action has resulted in a regulatory taking.<sup>112</sup> The Federal Circuit came closest to accommodating the property rights advocates' argument in *Florida Rock*. However, *Florida Rock* only acknowledged that something less than a complete diminution of value caused by government action could result in a compensable taking of private property but did not determine exactly how much diminution is necessary.<sup>113</sup> While the Act incorporates the concept of partial takings, the judicial interpretation of Florida courts of how much diminution constitutes a compensable part remains to be seen. If diminution starts with the first dollar, the Act is obviously a victory for private property rights.

Conversely, courts may establish a threshold that does not award compensation unless there is a substantial diminution in value. In some Florida state courts, such as *Graham*, a substantial diminution effectively means a complete diminution.<sup>114</sup> Critics of this all or nothing approach argue that such an approach allows compensation for an owner whose property value is diminished 100% but offers no relief for the owner whose diminution in value is only 95%.<sup>115</sup>

Property rights advocates hope the Act will change the all or nothing test applied in *Graham*.<sup>116</sup> Advocates assert that just compensation should be "proportional to the value of the interest taken as compared to the total value of the property."<sup>117</sup> However, if partial regulatory takings are recognized, the question becomes,

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112. See *id.*

113. See *Florida Rock*, 18 F.3d at 1570.

114. See *supra* note 59 and accompanying text.

115. See *Florida Rock*, 18 F.3d at 1569. This problem does not exist when a taking is by physical occupation. See *id.* For instance, if the government takes 50 acres of an owner's 100 acre tract, the owner is undoubtedly entitled to just compensation for the 50 acres. The issue only arises when a regulation deprives the owner of property value, even though the land is not physically invaded. In the first instance, the owner gave up actual land. In the second instance, the owner gave up value. Under *Graham*, land is compensable, but value is not. See *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1382 (Fla. 1981).

116. See discussion *supra* Part III.A.1 (*Graham* analysis).

117. Toby P. Brigham, *The Property Rights/Regulation Struggle* 16 (unpublished manuscript) (on file with author).

“[H]ow much must be taken before compensation is required?” Where is the line between a mere diminution in value and a compensable taking? If the line is too close to the first dollar of diminution, can government still operate effectively? In light of these concerns, some propose a percentage in diminution as the threshold at which a landowner has a cause of action under the Act.<sup>118</sup>

Property rights have received substantial commentary in recent years, and the Act represents another step in the search for a resolution of the inherent tension between property owners and governmental regulations. Various theories of property and social responsibilities have received consideration. Some contend that state and federal governments maintain complete control over usage of property.<sup>119</sup> Opponents of this view contend that owners have a right to use their property in any manner they choose, and damages must be paid for any governmental interference.<sup>120</sup> The Act presents an opportunity for courts to consider these forces in a context outside of traditional takings law. Although uncertainties remain regarding what constitutes an inordinate burden, at a minimum the Act provides courts with the forum to establish an inordinate burden at less than a complete diminution in value.

### *B. Property Rights at Issue*

In addition to the concept of an inordinate burden, the Act addresses the particular property rights at issue. The Act describes

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118. See generally Downie, *supra* note 109, at 70-71. However, this approach has its own drawbacks. For example, if the threshold of an inordinate burden is drawn at a 30% diminution in value, the owner would receive no compensation if the government passed two different laws at different times that each caused a 20% diminution in value. See *id.* at 71. Furthermore, suppose one owner has 50 acres of property and another has 100 acres. See generally *id.* (providing a similar illustration). Each of their properties include 25 acres of habitat for a newly named endangered species. See generally *id.* If the regulation protecting the endangered species diminishes the value of that acreage to zero, the owner of the 50 acres would be compensated but the owner of the 100 acres would not be because the 100 acre value is diminished less than the required 30%. See *id.*

119. See *Florida Rock*, 18 F.3d at 1580 (Nies, C.J. dissenting).

120. See *id.* at 1573.

these rights as (1) the right to the continued existing use of the property; and (2) vested rights.<sup>121</sup>

Limiting or restricting either of these rights creates an inordinate burden on the landowner. The term "existing use"<sup>122</sup> is well defined in the Act, but the concept of vested rights is not. However, the vested rights concept is no stranger to the property rights issue in Florida as the concept is often analyzed by applying the doctrine of equitable estoppel.<sup>123</sup>

Equitable estoppel applies when a property owner, in good faith, makes such a substantial change in position or incurs such extensive obligations and expenses that it would be highly inequitable to destroy the right acquired.<sup>124</sup> For example, suppose a developer seeks a zoning change to develop property for multi-family use.<sup>125</sup> If the proposed zoning is approved and the developer spends money for development costs in reliance on this approval, the Board may be estopped from subsequently changing its position.<sup>126</sup> Put simply, a governmental entity may not invite a property owner onto a welcome mat and then snatch the mat away to the detriment of the property owner.<sup>127</sup>

However, in order to enjoy the protection of equitable estoppel, the property owner must carefully comply with any conditions attached to the development permit.<sup>128</sup> For example, a Board may approve construction of a landfill with conditions requiring the owner to submit certain engineering plans and state permits prior

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121. See FLA. STAT. § 70.001(2) (1995).

122. See *supra* notes 18-22 and accompanying text.

123. See, e.g., *Orange County v. Seay*, 649 So. 2d 343 (Fla. 5th DCA 1995); *Equity Resources, Inc. v. County of Leon*, 643 So. 2d 1112 (Fla. 1st DCA 1994); *City of Key West v. R.L.J.S. Corp.*, 537 So. 2d 641 (Fla. 3d DCA 1989). The Act states "[t]he 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." FLA. STAT. § 70.001(3)(a) (1995).

124. See *Sakolsky v. City of Coral Gables*, 151 So. 2d 433, 436 (Fla. 1963). Later courts have commented that the concepts of vested rights and equitable estoppel have been employed interchangeably by Florida courts. See *R.L.J.S. Corp.*, 537 So. 2d at 644 n.4.

125. See, e.g., *Hollywood Beach Hotel v. City of Hollywood*, 329 So. 2d 10 (Fla. 1976).

126. See *id.* at 15.

127. See *Town of Largo v. Imperial Homes*, 309 So. 2d 571, 573 (Fla. 2d DCA 1975).

128. See, e.g., *Hernando County Bd. of County Comm'rs v. S.A. Williams Corp.*, 630 So. 2d 1155 (Fla. 5th DCA 1993).

to operation.<sup>129</sup> If the owner does not comply, the Board is in a position to withdraw its approval of the permit. Such non-compliance compromises an owner's position of relying in *good faith* on the board's decision.<sup>130</sup>

Likewise, a municipality is not estopped from assessing impact fees on the developer of a condominium even after the building permit is issued and some of the units are sold.<sup>131</sup> Courts view such an imposition of a new tax or an increase in the rate of an existing tax as simply one of the usual hazards of business.<sup>132</sup> As a result, an owner is not likely to have a vested right in the current tax policy of a governmental entity.

Consequently, owners may have vested rights in situations where governmental entities are estopped from denying those rights. Notably, the Act does not modify the test<sup>133</sup> required to determine whether a right is vested. It merely says that if an owner has a vested right, the Act offers a remedy not previously available. The same is true for existing rights. Consequently, while the Act offers hope for property owners, owners only gain access to the Act's pro-property rights provisions through either the door that says "inordinately burdened existing use" or the door that says "inordinately burdened vested right."<sup>134</sup> As a result, while the Act is intended to enhance property rights, the thresholds determining access remain subject to existing takings analysis.

### C. Ripeness

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129. *See id.*

130. *See id.*

131. *See, e.g.,* City of Key West v. R.L.J.S. Corp., 537 So. 2d 641, 647 (Fla. 3d DCA 1989).

132. *See id.* (citing John McShain, Inc. v. District of Columbia, 205 F.2d 882, 883 (D.C. Cir. 1953)).

133. The doctrine of vested rights limits local governments in the exercise of their powers when a "property owner (1) in good faith (2) upon some act or omission of the government (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right he acquired." Hollywood Beach Hotel v. Hollywood, 329 So. 2d 10, 15-16 (Fla. 1976); *see R.L.J.S. Corp.*, 537 So. 2d at 644.

134. FLA. STAT. § 70.001(2) (1995).

A regulatory takings claim is not ripe for judicial consideration until the government entity authorized to implement the regulation makes a final decision applying the regulation to the property.<sup>135</sup> Therefore, the ripeness doctrine requires that an owner exhaust all available administrative remedies before judicial consideration. Consequently, the issue of ripeness stands at the threshold of regulatory takings claims.<sup>136</sup>

The ripeness doctrine serves two functions.<sup>137</sup> First, the doctrine recognizes that land use decisions are subject to change and compromise based on input from opposing interests involved.<sup>138</sup> Thus, given time, the parties will reach a political or administrative resolution. Second, by requiring a final administrative decision, "the doctrine enables a court to determine whether a taking has occurred and if so, its extent."<sup>139</sup> Without such a final decision, courts cannot judge whether the land retains any reasonable beneficial use or if the owner's expectation interests have been eradicated.<sup>140</sup>

Recently, *Tinnerman v. Palm Beach County*<sup>141</sup> illustrated the operation of the ripeness doctrine. In *Tinnerman*, the landowner petitioned Palm Beach County to rezone property from agricultural to commercial, consistent with the county's comprehensive plan.<sup>142</sup> The county commission approved the rezoning with one caveat: The owner could not build until construction commenced to widen the access road to the property.<sup>143</sup> The commission imposed this condition in response to concerns that the increased traffic flow

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135. See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981).

136. See *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 189-91 n.11 (1985) (finding takings claim not ripe where landowner had not requested variances from regulations forming the basis of objections raised by land use authority).

137. See *Tinnerman v. Palm Beach County*, 641 So. 2d 523, 525 (Fla. 4th DCA 1994).

138. See *id.*

139. *Id.*

140. See *id.*

141. 641 So. 2d 523 (Fla. 4th DCA 1994).

142. See *id.* at 524.

143. See *id.* at 525.

caused by the proposed development would diminish the level of road service below an acceptable level.<sup>144</sup>

The owner chose not to ask the commission to reconsider its decision, modify the restrictive condition, or pursue other possible uses for the property potentially consistent with the code.<sup>145</sup> Instead, the owner filed a claim for inverse condemnation in circuit court.<sup>146</sup> The court heard whether the commissioner's conditional approval of the owner's requested rezoning was a final action for ripeness purposes.<sup>147</sup> Although the zoning regulations stated that the commission's decision was a final action, the court noted that "the ripeness requirement of a final decision requires more than procedural finality . . . ."<sup>148</sup>

Procedural finality merely sets the stage for further negotiations. To obtain ripeness, the owner must pursue other less intense uses of the subject property before establishing that all administrative remedies are exhausted.<sup>149</sup> For example, suppose property is zoned for twenty units per acre, and the owner proposes to build a twenty unit per acre project. However, because of wetlands on the property, the land use authority board denies the permit. Using the *Tinnerman* standard, before the owner can file a claim in circuit court, the land use authority must make a final determination of the number of units per acre it will allow. If the land use authority would approve a project of fifteen units per acre, the actual extent of any diminution in value is established by comparing the value of the project at twenty units per acre with fifteen units per acre.

To have a viable claim under the Act, a claim must be presented to the government entity within one year after the application of the regulation to the owner's property.<sup>150</sup> The claim must be

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144. *See id.* at 524.

145. *See id.* at 525.

146. *See id.*

147. *See id.*

148. *Id.*

149. *See id.* at 526. The court in *Tinnerman* noted that the owner also had temporary uses for the land, such as a nursery or newsstand, and failed to demonstrate that such uses were not economically viable. *See id.*

150. *See* FLA. STAT. § 70.001(11) (1995).

accompanied by a bona fide appraisal that demonstrates the loss in property value.<sup>151</sup> The circuit court may hear the claim 180 days after it is filed.<sup>152</sup> Within the 180 days of the filing period, the government entity must make a written settlement offer to resolve the claim.<sup>153</sup>

The settlement offer procedure provides the government an opportunity to offer a compromise or alternative use for the property at issue. However, the Act does not require that the government offer a compromise but allows a statement asserting no change in the original government action giving rise to the claim.<sup>154</sup> In any event, unless the owner accepts the settlement offer, the government must also provide a written ripeness decision identifying the allowable uses of the property.<sup>155</sup> The required ripeness decision effectively eliminates the necessity for the landowner to exhaust all administrative remedies before being heard in circuit court.<sup>156</sup>

In *Tinnerman*, the appellate court ruled the claim not ripe even after a full year had passed because the plaintiff's permit request was denied.<sup>157</sup> The Act would have effectively reduced this time to no more than 180 days. Additionally, the owner's only expense would probably have been the cost of the required appraisal.<sup>158</sup>

Thus, the Act lowers or at least defines the ripeness hurdle by establishing a definite time period within which a case is heard. The Act will have the biggest impact on property rights in the ripeness area. Many property rights cases have gone unheard because they were not ripe in the traditional sense of the doctrine.<sup>159</sup> Before the Act, the standard for ripeness was an

151. See *id.* § 70.001(4)(a).

152. See *id.* § 70.001(5)(a).

153. See *id.* § 70.001(4)(c) ("During the 180-day-notice period . . . the governmental entity shall make a written settlement offer . . .").

154. See *id.*

155. See *id.* § 70.001(5)(a).

156. See *id.* ("The failure of the governmental entity to issue a written ripeness decision . . . shall be deemed to ripen the prior action . . .").

157. See *Tinnerman v. Palm Beach County*, 641 So. 2d 523, 524 (Fla. 4th DCA 1994).

158. See FLA. STAT. § 70.001(4)(a) (1995).

159. See, e.g., *Glisson v. Alachua County*, 558 So. 2d 1030, 1038 (Fla. 1st DCA 1990) (owners failed to apply for approval of development proposal under newly enacted

uncertain moving target as demonstrated by the “at least one meaningful attempt” standard set forth in *Tinnerman*.<sup>160</sup> The Act clarifies and gives certainty to the ripeness standard that a property owner must meet to establish ripeness by eliminating the need to define vague terms, such as a “meaningful attempt.”

*D. The Act’s Settlement Offer and Attorney’s Fees and Costs*

Another important aspect of the Act, related to its ripeness provisions, is its inducement to settle cases.<sup>161</sup> The Act’s ripeness provision also provides attorney’s fees and costs to the prevailing party in an action, creating a powerful incentive for careful consideration of the government’s settlement offer.<sup>162</sup> The landowner is entitled to fees and costs if the court determines that the settlement offer was not substantial enough to settle the claim.<sup>163</sup> Similarly, the government is entitled to fees and costs if the court determines that the owner rejected a viable settlement offer.<sup>164</sup>

With the prospect of paying an opponent’s fees and costs, governments will undoubtedly make realistic offers, and owners will carefully consider those offers.<sup>165</sup> Governmental fiscal restraints will also make settlement an attractive option, and such settlements may constitute exceptions to the challenged regulation.<sup>166</sup> After a settlement is reached with one landowner, other similarly situated owners may expect the same treatment, resulting in exceptions essentially replacing the new regulation.<sup>167</sup> Consequently, land use

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comprehensive plan); *City of Deland v. Lowe*, 544 So. 2d 1165, 1168 (Fla. 5th DCA 1989) (owner failed to exhaust administrative remedy of appeal prior to filing claim); *Department of Env’tl. Regulation v. MacKay*, 544 So. 2d 1065, 1066 (Fla. 3d DCA 1989) (owner failed to apply for building permit and never sought building permit or zoning variance).

160. *Tinnerman*, 641 So. 2d at 526.

161. See FLA. STAT. § 70.001(4)(c) (1995).

162. See *id.* § 70.001(6)(c). The settlement offer at issue is the last best offer made by the government entity, and it is on this offer that the jury makes its determination of whether the landowner is inordinately burdened. See *id.* § 70.001(4)(c).

163. See *id.* § 70.001(4)(c).

164. See *id.*

165. See Downie, *supra* note 109, at 71, 72.

166. See *id.* at 72.

167. See *id.*

regulation may be reduced to the first step in a process in which the real lawmaking occurs during the settlement process.<sup>168</sup>

Due to this scenario involving similarly-situated property owners demanding settlements, governments may feel compelled to raise taxes to retain the option of compensation. Increased taxes are a consequence society must consider when embracing enhanced property rights. Since a relatively small percentage of property owners are adversely affected by government regulations,<sup>169</sup> the majority may not see the need for protection from an event that is perceived as unlikely. The reality is that the decision is ultimately political, and politicians heed the concerns of voters.

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168. *See id.*

169. *See* Sylvia R. L. Vargas, *Florida's Property Rights Act: A Political Quick Fix Results in a Mixed Bag of Tricks*, 23 FLA. ST. U. L. REV. 315, 400 (1995) (viewing the Act as a windfall to owners of large undeveloped parcels and stating that timber companies, agribusiness, and developers will be the chief beneficiaries of the Act's provisions).

## IV. DETERMINING THE BEST ANSWER TO FLORIDA PROPERTY RIGHTS

A. *The Act Does Not Go Far Enough*

Advocates of property rights see the Act as a first step in the right direction. However, the Act's limitations and ambiguities preclude the declaration of a complete victory. Property rights advocates prefer a standard that establishes a threshold that triggers compensation at a point more definable than an inordinate burden.<sup>170</sup> Consequently, the Act is perceived as giving courts too much discretionary power.<sup>171</sup> Ideally, advocates would prefer a percentage similar to the one contained in the federal Private Property Rights Restoration Act (PPRRA) proposed by Senator Phil Graham of Texas.<sup>172</sup> The PPRRA provides a cause of action against the federal government if government action causes a temporary or permanent diminution in value of the affected portion of real property of at least 25% or \$10,000.<sup>173</sup> The Act does not specifically address whether an inordinate burden is measured by the investment-backed expectations for an entire parcel or just for an affected portion.<sup>174</sup> A plain language interpretation of the Act arguably favors the former.

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170. Such property rights bills have been introduced in the Florida Legislature since the 1970s. See, e.g., Fla. HB 571 (1977); Fla. CS for SB 1055 (1977); Fla. HB 1165 (1977); Fla. SB 261 (1978); Fla. HB 438 (1978); Fla. HB 889 (1978). However, these bills all died in committee. See generally Kent Wetherell, *Private Property Rights Legislation in Florida: The "Midnight Version" and Beyond*, 22 FLA. ST. U. L. REV. 525, 537-47 (1994). During the 1994 Legislature Session, a property rights bill was introduced that proposed that any government regulation causing a diminution of value of 25% be deemed a taking. See Fla. CS for HB 485 & 1967 (1994).

171. See Editorial, *The Property Appraisers Series*, ST. PETE. TIMES, July 9, 1995, at 2D.

172. See S. 2410, 104th Cong. (1994). Senator Graham reintroduced this bill in 1995. See S. 343, 104th Cong. (1995); see also 141 CONG. REC. S10011-12, S10037 (daily ed. July 14, 1995).

173. See S. 343, 104th Cong. § 2 (1995). Under the PPRRA, the 25% threshold applies to the "affected portion" of a landowner's property. This essentially lowers the compensation threshold for the overall property because it is easier to establish a 25% diminution in value of a fraction as opposed to the whole. For example, if an entire parcel has a fair market value of \$100,000, but the affected portion's value is only \$40,000, the landowner would be compensated as long as the diminution in value exceeds \$10,000. See *id.* § 2(A)-(B).

174. See FLA. STAT. § 70.001(2)(1995).

Perhaps the most important area of concern for those in favor of enhanced property rights in Florida is that legislation is subject to change with time. An amendment to the state constitution would provide a more permanent vehicle for increased property rights in Florida. In 1994, over 45, 996<sup>175</sup> signatures were gathered in favor of an amendment by initiative to article I, section 2 of the Florida Constitution.<sup>176</sup> The initiative sought to expand these rights by adding the following language:

Any exercise of the police power, excepting the administration and enforcement of criminal laws, which damages the value of a vested private property right, or any interest therein, shall entitle the owner to full compensation determined by jury trial with a jury of not fewer than six persons and without prior resort to administrative remedies.<sup>177</sup>

The initiative was challenged and the Florida Supreme Court reviewed it in *League of Women Voters of Florida v. Smith*.<sup>178</sup> Opponents argued, and the court agreed, that the proposal violated the single subject rule.<sup>179</sup> The single subject rule acts as a constraint on the initiative process whereby a proposed amendment or revision may “embrace but one subject and matter directly connected therewith.”<sup>180</sup> The drafters of the constitution imposed this rule to prevent logrolling.<sup>181</sup>

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175. See FLA. DEP'T OF STATE, DIV. OF ELECTIONS, SUMMARY OF SIGNATURES NEEDED AND CERTIFIED FOR REVIEW PURSUANT TO SECTION 15.21, FLORIDA STATUTES 8 (1994) (listing the number of signatures obtained per district for a property rights amendment).

176. See FLA. CONST. art I, § 2. The power to propose a revision or amendment to Florida's constitution may be invoked by filing a copy of the amendment, signed by 8% of the voters in each district and in the state as a whole, with the secretary of state. See FLA. CONST. art. XI, § 3.

177. Petitioner's Initial Brief at 1, *League of Women Voters, Inc. v. Smith*, No. 83967 (Fla. 1994).

178. 644 So. 2d 486 (Fla. 1994).

179. See *id.* at 490-91.

180. FLA. CONST. art. XI, § 3; see also *Smith*, 644 So. 2d at 490-95 (discussing the factors considered in determining whether the single subject rule is violated).

181. Logrolling occurs when an unpopular measure is combined with one or more popular measures in an amendment, in hopes that voters will conclude that they must take the bad with the good and approve all the measures as a result. See *Smith*, 644 So. 2d at 490.

In *Smith*, the court's inquiry focused on whether the proposed amendment affected multiple branches of government.<sup>182</sup> Since an initiative more than likely will affect several branches of government to a small degree, "no single proposal can substantially alter or perform the functions of those branches . . . ." <sup>183</sup> Here, the court noted "that the initiative transfers all administrative remedies for police power actions that damage private property interests from the executive branch to the judicial branch."<sup>184</sup> The initiative was also viewed as affecting the ability of local governments to pass zoning laws and to plan in general.<sup>185</sup>

Consequently, the court noted that the initiative affected the legislative branch by discouraging the enactment of laws necessary to protect the public interest.<sup>186</sup> Since the initiative potentially altered the ability of multiple governmental entities to perform their functions, it violated the single subject rule.<sup>187</sup> As a result of this violation, the initiative was stricken from the November 1994 ballot.<sup>188</sup>

Apparently, drafting a broadly-worded property rights initiative that does not violate the single subject rule by affecting multiple governmental entities is difficult. Advancing property rights by initiative may be futile unless the initiative addresses a very narrow issue that would not be seen by the court as hindering a local government's ability to plan. However, such a narrow initiative may only satisfy a small part of the agenda of property rights proponents.

The constitution can also be amended through a revision commission that meets every twenty years.<sup>189</sup> The next meeting is in 1998, and property rights are a likely area of consideration.<sup>190</sup> Amendments proposed by the revision commission are not subject

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182. See *id.* at 494-95.

183. *Id.* at 494.

184. *Id.* at 495.

185. See *id.*

186. See *id.*

187. See *id.*

188. See *id.* at 497.

189. See FLA. CONST. art. XI, § 2.

190. See Julie Hauserman, *Hazard on the Horizon*, ST. PETE. TIMES, Feb. 23, 1997, at 1D.

to single subject scrutiny.<sup>191</sup> Thus, the revision commission is an alternative vehicle for proposing an amendment that broadly affects property rights. The revision commission is composed of thirty-seven members appointed by the Attorney General, the Governor, the Speaker of the House, the President of the Senate, and the Chief Justice of the Florida Supreme Court.<sup>192</sup> However, since appointees may be chosen because they share similar views as their appointers, amending the constitution may be a viable political option but difficult to achieve in reality.

### B. *The Act Goes Too Far*

Opponents of the Act and expanded property rights have several concerns. Primarily, opponents fear an explosion of litigation.<sup>193</sup> Before the Act, owners essentially had no cause of action unless a regulation deprived them of all economically reasonable use of their property.<sup>194</sup> Even when owners could prove a compensable taking had occurred, they were not heard until they had exhausted all administrative remedies, making their case ripe.<sup>195</sup> Consequently, despite whether these doctrines were justified, they operated like a fine screen to filter a substantial portion of cases from the circuit court.<sup>196</sup> The Act essentially circumvents this by creating a new cause of action that recognizes what arguably amounts to partial takings.<sup>197</sup> Thus, depending on how courts define an inordinate burden, the potential for increased litigation exists.

Planners and local governments are particularly concerned that the Act may inhibit their ability to effectively plan the growth of

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191. The Florida Constitution contains no provision requiring changes or additions made by the revision commission to be subject to the single subject rule. See FLA. CONST. art. XI, § 2. *But see* FLA. CONST. art. XI, § 3.

192. See FLA. CONST. art. XI, § 2(a).

193. See David Spohr, *Florida's Takings Law: A Bark Worse Than Its Bite*, 16 VA. ENVTL. L. J. 313, 322-23, 333-35 (1997) (describing the anticipated litigation explosion resulting from the Act).

194. See *supra* note 59 and accompanying text.

195. See *supra* note 135 and accompanying text.

196. See discussion *supra* Part III.C (describing how the ripeness doctrine prevents some cases from ever reaching the circuit court).

197. See discussion *supra* Part III.A-C.

their communities.<sup>198</sup> Their concerns are brought to light in the context of the concurrency requirement mandated by Florida's Local Government Comprehensive Planning and Land Development Regulation Act (Planning Act).<sup>199</sup> The Planning Act requires that development be concurrent with infrastructure necessary to sustain the development.<sup>200</sup> For example, suppose land is zoned ten units per acre but the local government will only allow four units because of concerns that traffic would exceed the level for which the access roads were designed. Thus, the owner's development request is denied for not being concurrent with the infrastructure. Depending on the adopted definition of inordinate burden, the owner may have a claim under the Act for the difference in the fair market value of the land after the unit restriction is applied. If the local government and the landowner do not reach a compromise, the government is left to choose between granting the owner's request for ten units per acre or compensating the owner under the Act. Thus, the concerns of local governments may be warranted.

The Planning Act also requires local governments to address concerns regarding sanitary sewers and septic tanks.<sup>201</sup> Septic tanks are only suitable in soils that have a high rate of percolation.<sup>202</sup> Environmental concerns have restricted the use of septic tanks in recent years.<sup>203</sup> If this trend continues, it may constrain the development of private property. Arguably, the owners of such property could have a cause of action under the Act if development would have been permitted but for the increased restrictions on the use of septic tanks. Local governments are caught between the Planning Act and the Act. They are

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198. See Robert Perez, *Land-Rights Law Worries Planners*, ORLANDO SENT., Mar. 3, 1996, at K1.

199. See FLA. STAT. §§ 163.3161-.3243 (1995).

200. See FLA. STAT. § 163.3180 (1995). See generally David L. Powell, *Managing Florida's Growth: The Next Generation*, 21 FLA. ST. U. L. REV. 223, 293 (1993).

201. See FLA. STAT. § 163.3180(1)(a) (1995).

202. See FLA. ADMIN. CODE ANN. r. 9J-5.011(1)(f)4 (1994).

203. See, e.g., *Ferguson v. Department of Env'tl. Protection*, 1994 WL 286382 at \*3 (Fla. Dep't Env'tl. Reg. June 8, 1994).

compelled by state law to comply with their adopted plans.<sup>204</sup> However, if compliance requires additional regulation that is enacted after the Act, local governments are exposed to the Act's potential liability.<sup>205</sup> This potential for liability is directly dependent on how courts ultimately interpret the threshold of an inordinate burden beyond which governmental regulatory action is compensable.<sup>206</sup> The lower the threshold, the greater the potential is for local government liability.<sup>207</sup>

#### V. WHAT ARE FLORIDA LANDOWNERS' PROPERTY RIGHTS TODAY?

Prior to the Act, many landowners simply ran out of time or money before they were ever heard by a court. The Act creates an inducement for settlement.<sup>208</sup> While this is not a pure victory for property rights proponents, the Act creates a vehicle for meaningful dialogue between governmental entities and landowners affected by government action due to the obligation to pay the prevailing party's attorney's fees and costs,<sup>209</sup> forcing both sides to critically evaluate their respective positions before proceeding.

The Act also compels the parties to pursue settlements quickly because of the Act's ripeness provision.<sup>210</sup> Now, property owners have some degree of control over how quickly their claim is processed. The Act replaces an open-ended common law ripeness doctrine that offered no incentive for the government to address a landowner's claims on the merits with a legislative set of instructions designed to expedite the proceedings. No longer are

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204. See FLA. STAT. § 163.3231 (1995). Local plans must be consistent with the regional plan, which must be consistent with the state comprehensive plan. See *id.*

205. See FLA. STAT. § 70.001 (1995).

206. See discussion *supra* Part III.A.

207. See discussion *supra* Part III.A.

208. See FLA. STAT. § 70.001(4)(c) (1995) (“[T]he governmental entity shall make a written settlement offer [to the property owner]. . . .”); see also Downie, *supra* note 109, at 70, 71 (commenting that if the government does not make a bona fide settlement offer, the property owner is entitled to attorney's fees and costs, and if a property owner rejects a bona fide offer, the government is entitled to attorney's fees and costs).

209. See FLA. STAT. § 70.001(6)(c) (1995).

210. See *supra* notes 150-153 and accompanying text.

landowners forced to litigate whether all administrative measures have been exhausted.<sup>211</sup>

While the Act appears to have streamlined the procedural aspects of property rights confrontations, the extent to which property rights have been substantially enhanced remains unclear. Even if courts establish the compensable threshold at something less than a complete diminution in value, landowners must still meet the existing use requirement. Existing uses must be compatible with adjacent property and suitable for the property at issue.<sup>212</sup> This uncertain standard allows courts to avoid examination of how much of a diminution in value is necessary before compensation is required.

Even when the existing use requirement of the Act is met, landowners are still faced with such nebulous concepts as reasonable investment-backed expectations and whether the property owner bears a disproportionate burden imposed for the good of the public.<sup>213</sup> These concepts have been debated in the context of takings in the same courts that will hear claims under the Act.<sup>214</sup> Consequently, these same courts may continue applying traditional takings jurisprudence and reach the same conclusions for claims under the Act.

## VI. CONCLUSION

The questions under the Act that remain unanswered are the same ones that would have been subject to judicial interpretation under the proposed constitutional amendment that failed in 1994.<sup>215</sup> Property rights advocates may prefer a constitutional remedy because the Act is subject to change through subsequent litigation. However, the flexibility of legislation may prove to be the greatest ally to property rights.

A constitutional amendment is a very permanent option without much room for error. On the other hand, legislation

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211. See *supra* notes 141-149 and accompanying text.

212. See FLA. STAT. § 70.001(3)(b) (1995).

213. See *supra* notes 24-26 and accompanying text.

214. See *supra* notes 29-30 and accompanying text.

215. See *supra* note 176 and accompanying text.

provides a laboratory in which property rights issues may continue to be distilled. A constitutional amendment may go too far in one direction or the other. Consequently, legislation is the best vehicle with which to address the property rights issue at this time.

The Act provides an alternative to traditional takings analysis. However, its actual effect on private property rights depends on the courts' interpretation of an inordinate burden. At the extremes lie the all or nothing approach taken by Florida state courts and the position advocating compensation for the first dollar of diminution in value supported by some property rights proponents. Clearly, the answer lies somewhere in between.

Politicians as well as the general public are concerned about the erosion of property rights over the past thirty years. Consequently, the courts will likely interpret the Act's compensable threshold at a point closer to the first dollar than to complete diminution. However, society will have to ask itself what it is willing to pay for the protection received from land use regulations enacted in the public interest. When faced with the increased taxes that may result from compensating individual landowners, society may take a critical look at the benefits it receives in return for its payments.

In any event, the judiciary continues to be faced with reaching a workable balance on property rights. Currently, the Act merely answers some questions while raising others. The Act is part of an evolving process that will continue to find property rights proponents and opponents looking to the courts for the answers.

Just as the Supreme Court was left to decide how far is too far when deciding *Pennsylvania Coal* in 1922,<sup>216</sup> Florida courts are still left with the same question under the Act due to the unclear compensable threshold of an inordinate burden. However, now Florida courts have a clean slate. No longer are they constrained by the all or nothing takings analysis that developed in the wake of *Pennsyl-*

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216. See *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994) (describing division of a larger property into parcels); see also *supra* notes 3-5 and accompanying text.

*vania Coal*.<sup>217</sup> The Act clearly sets itself apart from traditional takings analysis by declaring a separate and distinct cause of action.<sup>218</sup>

Courts must heed this opportunity to discard *Pennsylvania Coal's* all or nothing approach that is arguably responsible for the excessive regulatory climate that fanned the fires of the contemporary property rights movement. However, courts also should not award compensation for the first dollar of diminution. Instead, courts should seek a point far enough above the first dollar of diminution to establish that the property has unquestionably been harmed. The first dollar of diminution in value as well as the second and third, for that matter, do not suffice to make this determination. At the same time, the 45,995 Florida citizens who signed the petition for the proposed 1994 property rights amendment to the constitution certainly will not tolerate a compensable threshold far above the first dollar of diminution.

Courts will likely respond to these public concerns and set the diminution threshold in the area of 10% to 25% before a landowner may be compensated under the Act.<sup>219</sup> However, the answer is not this simple since the use of a percentage will cause collateral issues such as whether the diminution in value is measured by individual regulations or an aggregate of multiple regulations.<sup>220</sup> Other issues may arise concerning the actual property against which the percentage is applied: either the entire parcel or only a portion.<sup>221</sup>

These issues are not necessarily new nor insurmountable. The difference is that today the Act allows courts to forge new doctrines to address them in a way that is responsive to current societal concerns. Instead of being constrained by precedent, courts must take this opportunity to address these issues in a new light outside the shadow of traditional takings law.

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217. See *supra* note 59 and accompanying text.

218. See *supra* note 15 and accompanying text.

219. These percentages are approximations based on the concepts utilized in the PPRRA. See *supra* notes 172-173 and accompanying text.

220. See *supra* note 118 and accompanying text.

221. See *supra* note 118 and accompanying text.