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Florida's Property Rights Act: A Political Quick Fix Results in a Mixed Bag of Tricks

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FLORIDA'S PROPERTY RIGHTS ACT: A POLITICAL QUICK FIX RESULTS IN A MIXED BAG OF TRICKS

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> Protection . . . against the tyranny of the magistrate is not enough: there needs [to be] protection also against the tyranny of prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules. . . . how to make the fitting adjustment between individual independence and social control—is a subject on which nearly everything remains to be done.[1]
>
> John Stuart Mill

1. JOHN STUART MILL, ON LIBERTY 6 (Norton ed. 1975) (1859).

I. INTRODUCTION

They say the third time around is the charm. For backers of Florida's "property rights" bill[2] this was true.[3] After two close tries in as many years,[4] the 1995 Florida Legislature passed the Property Rights

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2. Fla. CS for HB 863 (1995). The bill was enacted as 1995, Fla. Laws ch. 95-181 [hereinafter the Act or the Property Rights Act] and is now codified at FLA. STAT. ch. 70 (1995). The final text of the Property Rights Act was presented on the floor of the House as an amendment to a real estate disclosure bill sponsored by Representative Dean Saunders, Dem., Lakeland. The text of the real estate disclosure bill was deleted *in toto* and replaced by the Property Rights Act, which became the final text of the Committee Substitute for House Bill 863. FLA. H.R. JOUR. 1015-20 (Reg. Sess. May 1, 1995).

3. For the sake of simplicity, I am counting only the three most recent property rights initiatives, beginning with a property rights referendum in 1992. However, property rights initiatives are not new to Florida. In the 1970s, several property rights bills introduced in the Florida Legislature were similar in purpose to the 1995 Property Rights Act. *See* Fla. HB 571 (1977); Fla. CS for SB 1055 (1977); Fla. H.B. 1165 (1977); Fla. SB 261 (1978) ; Fla. HB 438 (1978); Fla. HB 889 (1978). These bills 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, 537-547 (1994): Robert M. Rhodes, *Compensating Police Power Takings: Chapter 78-85, Laws of Florida*, 52 FLA. B.J. 741 (Nov. 1978).

Additionally, two task force studies were completed in the 1970s. In 1975, Governor Askew appointed a 26-member task force to study property rights, regulatory takings, and compensation to landowners [hereinafter 1975 Property Rights Task Force]. *See* GOVERNOR'S PROP. RTS. STUDY COMM'N, FINAL REPORT OF THE GOVERNOR'S PROPERTY RIGHTS STUDY COMMISSION 2 (1975) [hereinafter 1975 PROPERTY RIGHTS REPORT]. The following year, Senate President Dempsey Barron appointed a task force comprised of seven members of the Florida Senate. *See* FLA. S. SELECT COMM. ON PROP. RTS. AND LAND ACQUISITION, FINAL COMMITTEE REPORT ON THE "TAKING ISSUE" (1976) [hereinafter 1976 PROPERTY RIGHTS REPORT]. The Governor's commission issued a report on March 17, 1975, recommending a compensation provision similar to that passed in section 1 of the 1995 Property Rights Act. *See* 1975 PROPERTY RIGHTS REPORT, *supra*, at 12. This report recommended that "compensation [should be] paid for any regulation that unduly diminishes the value of property, even though it does not constitute an unconstitutional taking without compensation." *Id.* at 6.

4. In 1993, property rights advocates succeeded in garnering the signatures necessary for a referendum on a proposed property rights amendment to the Florida Constitution. The proposed text of the constitutional amendment added the italicized text below:

> Basic Rights - All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life[,] liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion or physical handicap. *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. This amendment shall take effect the day after approval by the voters.*

Letter from Robert A. Butterworth, Florida Attorney General, to Stephen Grimes, Chief Justice, and the Justices of the Florida Supreme Court 1-2 (July 8, 1994) (available at Fla. Dept.

Act to protect landowners who have been denied reasonable use of their property due to governmental regulatory actions. The Act, although passed on the next to the last day of the session, represented a compromise painstakingly crafted over weeks of intense negotiations among an ad hoc group of Senators and Representatives who were longtime property rights activists, key executives representing land use agencies, lobbyists for developers and small and large agricultural interests, environmentalists, and state and local governments.[5] The brilliance of this political feat was evidenced by the vote—a

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of State, Div. of Archives, ser. 49, carton 4, Tallahassee, Fla.).

The title for the proposed amendment was "Property Rights: Should Government Compensate Owners When Damaging the Value of Homes or Other Property?" *Id.* The proposed Constitutional amendment's ballot summary provided:

> This amendment entitles an owner to full compensation when government action damages the value of the owner's home, farm, or other vested private property right or interest therein. Excepts administration and enforcement of criminal laws. Owners—including natural persons and businesses—are entitled to have full compensation determined by six-member jury trial without first having to go through administrative proceedings. This amendment becomes effective the day after voter approval.

Id. The Florida Supreme Court found the proposed amendment violative of the Florida Constitution's single-subject requirement, and also found that the ballot summary and title did not adequately apprise voters of the purpose and ramifications of the amendment. League of Women Voters of Florida, Inc. v. Smith, 644 So. 2d 486, 494-495 (Fla. 1994) (advising the Attorney General regarding property rights referendum). During the 1994 Legislative Session, the Legislature tried to pass a property rights bill—the thematic predecessor of the 1995 bill—but the 1994 bill died on the calendar during the waning hours of the session. Fla. CS for HB 485 & HB 1967 (1994); *see generally* Wetherell, *supra* note 3.

5. The ad hoc group worked outside the legislative process. Then Secretary of the Department of Community Affairs (DCA), Linda Loomis Shelly, led the group which was comprised of a broad contingent of interest groups. *See* David Powell et al., *A Measured Step To Protect Property Rights*, 23 FLA. ST. U. L. REV. 255, 263 n.38 (1995).

The final version of the Property Rights Act was never considered by any committee of the House. The ad hoc group presented its "compromise" bill, SB 2912, to the Senate Judiciary Committee on April 19, 1995, less than two weeks before the end of the legislative session. Fla. SB 2912 (1995); Fla. S. Judiciary Comm., tape recording of proceedings (April 19, 1995) (on file with committee) [hereinafter S. Judiciary Comm. tape]. At this committee meeting the bill was vigorously opposed by the Florida Association of Counties and the Florida League of Cities. S. Judiciary Comm. tape, *supra*. On April 24, 1995, one week prior to the conclusion of the legislative session, SB 2912 was heard by the Senate Committee on Community Affairs. Again the bill was opposed by the Florida Association of Counties and the Florida League of Cities. Supporters included Robert M. Rhodes and Jim Murley, then Executive Director of 1000 Friends of Florida and now Secretary of the DCA.

Representative Bert J. Harris, Jr., Rep., Lake Placid, the sponsor of the bill in the House and a property rights proponent since the 1970s, speculated that if the bill had been heard in a House committee it would have died there. Telephone interview with Rep. Bert J. Harris, Jr. (May 24, 1995) (notes on file with author) [hereinafter Harris, Interview One].

Governor Chiles described the Property Rights Act as a "reasonable" solution to a hard problem. Adam Yeomans, *Property-Rights Bill Goes to Chiles*, TALL. DEM., May 4, 1995, at C1. State Senator Rick Dantzler, Dem., Winter Haven, the sponsor of the Senate version of the property rights bill, is cited by Yeomans as stating that the bill "answered the cry from private-property rights without going too far." *Id.*

unanimous voice vote in the House and only one dissenting vote in the Senate[6]—and the pithiness of the floor debates.[7] On May 18, 1995, Governor Lawton Chiles proudly signed into law the property rights legislation[8] consisting of the Bert Harris, Jr., Private Property Protection Act of 1995[9] and the Florida Land Use and Environmental Dispute Resolution Act.[10] The Act became effective on October 1, 1995[11] and applies only prospectively.[12]

As discussed in part II of this Article, the Property Rights Act was the result of a populist movement in which voters demanded more responsiveness and common sense from government officials.[13] As discussed in part III below, this reformist surge was also fueled by a widespread discontent with the procedures and the substance of land use law.[14] The Property Rights Act grants to private property owners an alternative cause of action, outside of takings law,[15] when they are permanently denied reasonable use of their land by regulatory actions.[16] The Act also grants alternative procedures for property owners, outside of the judicial and administrative process.[17] Thus, the Act does not change Florida takings law nor does it alter the substance of Florida's sometimes controversial growth management laws.[18]

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6. FLA. H.R. JOUR. 1050 (Reg. Sess. May 2, 1995) (111 yeas, 0 nays); FLA. S. JOUR. 698, 708 (Reg. Sess. May 3, 1995) (38 yeas, 1 nay).

7. There was virtually no debate in the House and only a 30-minute debate in the Senate. Fla. H.R., tape recording of proceedings (May 1-2, 1995) (on file with Clerk of the House) (floor debate on the "strike-everything" amendment to CS for HB 863); Fla. S., tape recording of proceedings (May 3, 1995) (on file with the Secretary of the Senate) (floor debate on SB 1326).

8. 1995, Fla. Laws ch. 95-181 (codified at FLA. STAT. ch. 70 (1995)).

9. FLA. STAT. § 70.001(1) (1995).

10. *Id.* § 70.51(1). Section 3 of the Act expressly states that sections 1 and 2 are separate and distinct pieces of legislation, and are not to be construed *in pari materia*. 1995, Fla. Laws ch. 95-181, § 3.

11. FLA. STAT. §§ 70.001(30), 70.51(30) (1995).

12. *Id.*

13. *See infra* notes 58-84 and accompanying text.

14. *See infra* notes 94-209 and accompanying text.

15. FLA. STAT. §§ 70.001(2), (3) (1995).

16. Takings law is concerned with governmental actions, either by regulation or by physical action, that are deemed to "take" private property. The Fifth Amendment of the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V. The Fourteenth Amendment of the United States Constitution guarantees that no individual shall be deprived of property without due process of law. *Id.* amend. XIV. The Florida Constitution also guarantees that the government may not take property without just compensation. FLA. CONST. art. X, § 6(a) ("No private property shall be taken except for a public purpose and with full compensation therefor paid."). In addition to the Takings Clause, the Florida Constitution declares that Floridians have "inalienable rights . . . to acquire, possess, and protect property." *Id.* art. I, § (2). *See infra* notes 131-201 and accompanying text.

17. FLA. STAT. § 70.51 (1995); *see infra* notes 35-40, 271-76, 327-414 and accompanying text.

18. *The Wall Street Journal* recently published a series of articles criticizing Florida's

The Act's most notable achievement is to identify areas in which land use law can and should be reformed. Takings law, discussed in part III below, has rightly been described as confusing, unpredictable, and unresponsive to property owners' concerns. But the Act's response to these issues is a mixed bag. Too often, its proposed solutions fall short of solving the identified problems and instead create opportunities for more confusion and arbitrary results. Only one thing is clear: the Act provides many more job opportunities for real estate appraisers, mediators, and arbitrators, and offers additional client counseling and litigation opportunities for lawyers.[19]

The Act provides property owners with a completely new alternative outside of takings law: an independent cause of action that grants a property owner "relief" if a state land use entity "inordinately burdens" real property or vested rights in the use of real property either "directly" or "permanently."[20] The question of precisely which

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growth management laws. *See* Christina Binkley, *Florida Land-Use Laws: A Solution to the Land-Use Law? It Depends on What the Problem Is*, WALL ST. J., March 29, 1995, at F1; Christina Binkley, *Florida Land-Use Laws: How Florida's Land-Use Law Has Failed*, WALL ST. J., March 22, 1995, at F1. Representative Ken Pruitt, Rep., Port St. Lucie, a longtime proponent of property rights, called the growth management laws "a time bomb waiting to explode." Binkley, *Solution to Land Use Law*, *supra*, at F1.

Florida is among the growing number of states that have enacted comprehensive growth management laws. At last count 24 states have authorized some type of regional planning, including all of the states along the east and west coasts. *See* Patricia E. Salkin, *Regional Planning: New Political Magnetism*, 44 LAND USE L. & ZONING DIG., June 1992, at 3. Florida's Environmental Land and Water Management Act of 1972 enacts a regional system of planning designed to manage growth pressures in a coordinated and controlled manner. FLA. STAT. §§ 380.012-.10 (1995). The statute creates regional planning councils, which, among other things, prepare comprehensive regional policy plans, and serve as review agencies for developments of regional impact (DRIs), i.e., developments that may have a substantial regional effect. *Id.* §§ 380.021-.06. The regional plans, in turn, must be consistent with the State Comprehensive Plan and consider existing state, regional, and local plans. *Id.* §§ 186.021, .507, .508. *See generally* JOHN M. DEGROVE, LAND, GROWTH AND POLITICS (1984); Daniel W. O'Connell, *Growth Management in Florida: Will State and Local Governments Get their Acts Together?*, FLA. ENVTL. & URB. ISSUES, Apr. 1984, at 1; THOMAS G. PELHAM, STATE LAND USE PLANNING AND REGULATION (1979).

The growth management planning process itself remains largely a local process. The Local Growth Management Act of 1985, codified at FLA. STAT. ch. 163, requires that local communities prepare a "scientifically based" comprehensive plan, *Id.* § 163.3177, which can be updated twice per year. *Id.* § 163.3187(1). The Department of Community Affairs, in turn, is charged with reviewing and ensuring that local comprehensive plans accord with regional plans, the state plan, and other applicable laws. *Id.* § 163.3187(1). All land development orders issued by local governments, such as zoning, rezoning, and issuance of permits, must be consistent with the comprehensive plan. *See id.* § 163.3194; *see also* Board of County Comm'rs v. Snyder, 627 So. 2d 469, 475 (Fla. 1993).

19. Jim Murley of 1000 Friends of Florida is quoted as calling the Act "one big law firm relief act." *See* Binkley, *Solution to Land Use Law*, *supra* note 18, at F1.

Lawyers, though, would be advised to become well-versed in mediation and other alternative dispute resolution (ADR) techniques since there is clearly a trend to shift land use disputes away from the administrative and judicial processes toward ADR.

20. FLA. STAT. § 70.001(2) (1995).

situations entitle a property owner to a compensation claim for an "inordinate burden" is mostly left unanswered and up to the courts to resolve.[21] In this way, the Act perpetuates the problems of takings law. Like much judge-made takings law, the Act lacks doctrinal clarity and political or theoretical guidance. Instead of clarifying or simplifying an already confusing and complex area of the law, the Act creates another legal remedy and a new set of legal concepts and terms that reference familiar "takings" terms, but which are not necessarily tied to such concepts.[22] Such lack of clarity can only lead to the unsatisfactory results experienced under takings law—inconsistent and apparently arbitrary results, which can undermine public confidence in the legitimacy of government.[23]

Moreover, as discussed in part IV, the lack of clarity as to what should be compensated under the inordinate burden test has the potential to affect substantially and detrimentally those Floridians whose personal wealth is not land-based.[24] The Property Rights Act does not establish any funds or funding mechanism for state agencies and local governments to compensate private property owners or to cover the costs of implementation and administration.[25] One possible

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21. *See infra* notes 289-93, 300-30 and accompanying text.

22. *See infra* notes 219-34 and accompanying text.

23. This "legitimacy" effect has been identified and discussed by leading takings and constitutional process scholars including professors Ackerman, Michelman, Ely, Sax, and Tribe. When the state appears to act in an arbitrary fashion, the legitimacy of the state is questioned. For example, when the exercise of state police power impacts one group disproportionately and the state fails to make necessary compensation, this will diminish citizens' trust in government. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 605-07 (2d ed. 1988); BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

24. James Madison viewed the Takings Clause as an anti-majoritarian device that protects the rights of property owners. *See* THE FEDERALIST No. 10, at 79 (James Madison) (Lester DeKoster ed., 1976) ("The most common and durable source of factions has ever been the unequal distribution of property. Those who hold as opposed to those who are without property have ever formed distinct interests in society.").

Scholars, as well, have directly and indirectly viewed takings law as a political struggle between groups. Frank Michelman views the Takings Clause as a negative restriction protecting the status quo. Frank I. Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1625 (1988). Susan Rose-Ackerman observes that the Takings Clause is an ineffective way of equalizing political power among groups. *See* Susan Rose-Ackerman, *Regulatory Takings: Policy Analysis and Democratic Principles*, *in* TAKING PROPERTY AND JUST COMPENSATION: LAW AND ECONOMICS PERSPECTIVES OF THE TAKINGS ISSUE 25, 34 (Nicholas Mercuro ed., 1992). Rather, she posits that it is most effective as a way of protecting diverse individuals from bearing disproportionate costs of public policy. *See id; see also infra* note 243.

25. Under the Florida Constitution, counties and municipalities do not have to comply with general laws that require expenditure of county or municipal funds, unless the Legislature has

interpretation of the Act would affirm an extreme view of property rights under which any regulatory action that restricts a private property owner's use of her property is deemed compensable.[26] If so interpreted, the Act could redistribute substantial public wealth to an already politically powerful and wealthy landowner group.[27] The estimate is that between twenty-eight and fifty billion dollars could be redistributed to private property owners from state entities, and eventually taxpayers, under the compensation provision of the Act.[28]

The Act also reforms procedure. Under takings law, a claimant must exhaust all administrative remedies and obtain a "final" administrative determination before her claim is ripe for judicial review.[29] According to one study, the application of the ripeness

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determined that such law fulfills an important state interest and the law passes by two-thirds membership of each chamber of the Legislature. FLA. CONST. art. VII, § 18.

The Act was passed unanimously in the House and with only one dissenting vote in the Senate. *See supra* note 6. Section 1 of the Act declares the importance of protecting private property owners from laws, regulations, and ordinances of the state and political entities in the state that inordinately burden, restrict, or limit private property rights, without amounting to a taking. FLA. STAT. § 70.001(1) (1995). The House Report concluded that the Act is not an unfunded mandate. *See* Fla. H.R. Comm. on Judiciary, CS for HB 863 (1995) Staff Analysis (May 23, 1995) (on file with comm.); *see generally* FLORIDA ADVISORY COUNCIL ON INTERGOVERNMENTAL RELATIONS, 1991 REPORT ON MANDATES AND MEASURES AFFECTING LOCAL GOVERNMENT FISCAL CAPACITY (1991); Nancy P. Spyke, *Florida's Constitutional Mandate Restrictions*, 18 NOVA L. REV. 1403 (1994); Kristin C. Rubin, *Unfunded Mandates: A Continuing Source of Intergovernmental Discord*, 17 FL. ST. U. L. REV. 591 (1990); *see also infra* notes 266, 283.

26. From a classical viewpoint, property is a bundle of rights, consisting mainly of possession, use, and the right to exclude and to alienate, which the owner is free to exercise in the manner that she wishes. Professor Epstein advocates an extreme version of this classical view, under which, with limited exceptions, most governmental restrictions on this principal bundle of rights would constitute a taking for which just compensation must be paid for by the government. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 65, 177, 257-59, 297-99 (1985) [hereinafter EPSTEIN, TAKINGS].

27. The Act can be viewed as a windfall to a certain class of property owners. This windfall does not favor Floridians whose property consists of home ownership but does favor owners of large undeveloped parcels—mostly timber companies, agribusinesses, small-and-medium-sized farmers and developers—who will now be entitled to compensation under the Act for government regulatory actions. *See infra* note 234; *see generally* Harold Demsetz, *When Does the Rule of Liability Matter?*, 1 J. LEGAL STUD. 13 (1972). This large landowner group was influential in bringing about passage of the Act. *See infra* notes 64-71 and accompanying text.

28. Taking an asset-based accounting approach using property tax valuations, the Florida Department of Revenue estimated that the value of private land ownership in Florida in 1994 was nearly half a trillion dollars and that nearly $50 billion of that was land that was vacant or substantially unimproved. *See* GOVERNOR'S PROP. RTS. STUDY COMM'N II, REPORT OF THE GOVERNOR'S PROPERTY RIGHTS STUDY COMMISSION II 74-75 (1994) [hereinafter 1994 PROPERTY RIGHTS REPORT]. Of course, property tax valuations tend to be lower than fair market value. Last year, the Florida Consumer Action Network, the Florida Public Interest Research Group, and the Florida Sierra Club estimated that nine of the state's largest landowners, all of which were corporations, stood to gain $28 billion if the law were passed. *See* Binkley, *Solution to Land Use Law*, *supra* note 18, at F1.

29. *See infra* notes 97-112 and accompanying text.

requirement resulted in close to ninety-four percent of takings claims filed in federal court never reaching a neutral arbiter.[30] In addition, a land use entity's delay in making decisions regarding permitted land uses can constitute a hardship in itself.[31] The Act revises this requirement. It requires land use entities, within six months of receiving a written claim from a landowner, to issue a "ripeness decision" which sets forth the permissible uses for the property.[32] If the agency fails to comply with this requirement, the Act provides that the petitioner's claim is deemed to ripen under the Act, and she can proceed, as a matter of law, to obtain judicial review for her compensation claim under the Act.[33] This ripeness modification, if applied as intended, should enable petitioners to have their day in court.

Another procedural reform allows property owners to opt for either negotiation or a special master proceeding simply by making a bona fide written claim, which initiates negotiation under section 1 of the Act,[34] or, alternatively, by filing a "request for relief," which initiates the special master procedure in section 2 of the Act.[35] If the property owner opts for a negotiation procedure, the agency must make a "settlement" offer to the property owner within 180 days, and a negotiation process follows.[36] Alternatively, the property owner can opt instead for the special master process which involves a two-phase process: first, the mediation of the dispute,[37] and second, in the absence of an agreement, a special masters' nonbinding determination of fact and law.[38]

Part V of this Article will apply microeconomic theory to analyze the procedural innovations encouraging decentralized decisionmaking set forth under the "Private Property Rights Protection" portion[39] in section 1 of the Act. This Article will not focus directly on the "Dispute Resolution" portion in section 2 of the Act.[40] These procedural

30. *See infra* note 112.
31. *See infra* note 286 and accompanying text.
32. *See* FLA. STAT. § 70.001(5)(a) (1995); *see also infra* notes 285-86 and accompanying text.
33. *See* FLA. STAT. § 70.001(5)(a) (1995).
34. *Id.* § 70.001(4)(a).
35. *Id.* § 70.51(4).
36. *Id.* § 70.001(4); *see infra* notes 279-84 and accompanying text.
37. FLA. STAT. § 70.51(17)(a) (1995).
38. *Id.* §§ 70.51(17)(b), (19), (21)-(22).
39. 1995, Fla. Laws ch. 95-181, § 1, 1651, 1652 (codified at FLA. STAT. § 70.001 (1995)).
40. *Id.* The Powell et al. article, *supra* note 5, and another recent article, Martin R. Dix, Richard Lee & Alicia M. Santana, *Land Use and Environmental Dispute Resolution: The Special Master*, 69 FLA. B.J. 63 (Nov. 1995), discuss the Florida Land Use and Environmental Dispute Resolution section of the Act in more detail. The main weakness of the dispute resolution mechanism is that there is no incentive nor is there any obligation for local governments to participate

reforms evidence naive assumptions and a lack of sensitivity to the incentives that these reforms will likely create for property owners and land use entities. The Legislature succeeded in identifying an area where reform is needed; negotiation of a settlement order is a notable attempt by the Legislature to improve land use decisionmaking by introducing decentralized decisionmaking in a market-like framework. But results of an individualistic bargaining situation are not always just or efficient for society as a whole.[41] More specifically, assuming self-interested rational behavior, bargaining results will turn on the strategic behavior of the parties, which, in turn, will be influenced by the availability of information, costs (transaction costs, the direct and indirect costs of participating in that type of procedure, litigation costs, and the cost of the compensation award), and each party's assessment of the likelihood of succeeding in litigation.[42] The Act's reforms shift significantly higher costs and risks to land use entities than exist under the status quo.[43] This shift may very well result in risk-averse, cost-conscious land use entities deciding to settle early in the process.[44] Moreover, without funding, political guideposts, and efforts

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in this new dispute resolution process. Although the Act provides that the parties must agree on a special master, the Act does not state what procedure is to be followed or what penalties, if any, ensue if the parties cannot agree on a special master. *See* FLA. STAT. § 70.51(4) (1995). Nowhere does the Act place an absolute obligation on land use entities to use this special master procedure. Therefore, a risk-averse, rational local government would be well-advised not to participate in such a process, since the dispute resolution process markedly favors property owners.

Second, the special master procedure is a hybrid mediation-arbitration process. *Id.* § 70.51(19). The parties first negotiate and, then, if they fail to come to an agreement, the special master is required to make a recommendation that *could* have legal effect. *Id.* §§ 70.51(17)(b), (19), (21)-(22). Mediation techniques which are instrumental in arriving at a settlement, such as consulting privately with each party, are not likely to be used if the special master has the potential to become a trier-of-fact and a trier-of-law.

Third, the results of the special master procedure are nonbinding. *See id.* § 70.51(21)-(22). Even after going through the special master procedure, the land use entity and the property owner are free to reject the findings of the special master. *See id.* §§ 70.51(21)(c), (22). If the parties do not reach an agreement, the landowner is free to pursue other remedies including the compensation remedy under section 70.001 of the statute. *See id.* § 70.51(24). Thus, local governments that are happy with the conclusion of the special master procedure cannot count on preserving the result.

The Florida Growth Management Conflict Resolution Consortium has prepared model ordinances for implementing the special master procedure and is providing training for state and local governments. *See* FLORIDA CONFLICT RESOLUTION CONSORTIUM, MODEL PROCEDURAL GUIDELINES FOR SPECIAL MASTER PROCEEDINGS (1995) [hereinafter MODEL PROCEDURAL GUIDELINES].

41. *See infra* notes 356-417 and accompanying text.

42. *See infra* notes 388-404 and accompanying text. Game theory can be used to predict how the Act will affect decisionmaking. It is based on microeconomic theory that examines the strategic behavior of rational, self-interested actors and how certain factors can influence behavior in negotiations. *See generally* DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW (1994).

43. *See infra* notes 356-78 and accompanying text.

44. *See infra* notes 379-404 and accompanying text.

by government agencies to coordinate results, the Act may have a chilling effect on public officials' decisionmaking, which could erode the effectiveness of Florida's strong growth management and environmental laws.[45]

The Property Rights Act may prove to be the most important legislation enacted by the Florida Legislature this year, and it is certainly the most important land use legislation enacted in Florida during this decade. How Florida, a leader in growth management and environmental conservation, implements the Property Rights Act will have implications not only in Florida, but also in other states struggling with the issue of making land use and environmental regulation more responsive to individual landowners' property rights.

As part of the recommendations for reform made in part VI, this Article proposes that the Act's inordinate burden compensation test not be left entirely to the courts to devise because this will inevitably lead to the differing takings standards of fairness and systemic inconsistency which undermine confidence in land use laws.[46] As part of the statutory analysis of the Act in part VI, this Article proposes an interpretive compass to assist those who must apply the Act. Nonetheless, the interpretive compass cannot answer all of the questions raised by the Act because the text and legislative history provide little guidance.[47] Instead, the compass attempts to respond to some of the fundamental questions left unanswered by the statute. For example, it argues that interpreting the Act to espouse an extreme property rights view would be erroneous.[48] The Act is above all a political compromise, not a consensus, born from the rising political pressure to do "something" to protect property rights and curb the burdens of land use regulation.[49] Accordingly, the Act does not intend a radical shift in the political power balance between groups.[50] Instead, because one of the aims of the Act is to enhance responsiveness to landowners' concerns and address the perceived arbitrariness of governmental actions, the Article proposes an interpretive framework that is procedurally oriented and focuses on the reasonableness of the regulatory action.[51] The proposed analytical framework for inordinate burden determinations, set forth in part IV, will still leave fundamental issues

45. *See infra* note 404 and accompanying text.
46. *See infra* notes 233-34, 418-22 and accompanying text.
47. *See infra* notes 219-66 and accompanying text.
48. *See infra* notes 239-66 and accompanying text.
49. *See infra* notes 58-93 and accompanying text.
50. *See infra* notes 255-66 and accompanying text.
51. *See infra* notes 323-30 and accompanying text.

of fairness and efficiency for courts to sort out on a case-by-case basis.[52]

Most importantly, the economic analysis in part V concludes that the Act's decentralized decisionmaking procedure has a great potential to treat comparably situated Floridians very differently.[53] Disparate treatment could be magnified if decentralization creates a competition for laxity of standards and undermines Florida's enforcement of growth management and environmental laws.[54] These innovative provisions require immediate rethinking by the Legislature and the Executive Branch. The Property Rights Act's potential for unintended results is sufficiently serious that the judiciary and regulatory decisionmakers cannot be left without guidance to work out the difficult implementation issues.[55]

Part II reviews the political climate that made passage of the Act possible and places the property rights initiative in the historical context of populist politics. Part III examines takings law and explains the failures that encouraged passage of the Act. Part IV articulates an interpretive framework for the Act, briefly describes the law, and applies that framework to key issues posed by the Act. Part V explains how the settlement order mechanism is a type of decentralized decisionmaking and explores why decentralized decisionmaking is becoming a trend in regulatory reform. It also examines how information asymmetry, transaction costs, perceived risks, and other factors could affect the strategic behavior of property owners and agencies, thereby skewing incentives in the settlement order process. Part VI suggests reforms that, even at this early stage, need to be considered in order to avoid results not intended by the Act.

II. PROPERTY RIGHTS AS POPULIST POLITICS

> People want to be part of governance, but what they want from government is respect for their ways of living. People wish to participate in government, but they do not wish to be manipulated

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52. See *infra* note 330 and accompanying text.

53. *See infra* notes 410-17 and accompanying text.

54. *See infra* notes 412-14 and accompanying text.

55. *See infra* notes 418-28 and accompanying text. The Department of Community Affairs has already provided guidance in the implementation of the special master procedure. The Department contracted with the Florida Growth Management Conflict Resolution Consortium to provide a set of guidelines and training programs for state and local governments. *See* MODEL PROCEDURAL GUIDELINES, *supra* note 40. I suggest that, in like fashion, the Executive Branch or the Legislature act quickly to provide guidance in the implementation of the Act's decentralized decisionmaking procedure.

> and shaped by some master plan for effective governance. They want the opportunity to have a say in what affects them, but they also wish to be allowed to live their lives, raise their children, and pursue their own vision of happiness—whether in families, friendships, or communities—free from the hand of bureaucratic planning or corporate overreaching.[56]
>
> J. M. Balkin

> People are tired of being trifled with by the government.[57]
>
> Rep. Bert J. Harris, Jr.

The property rights experience in Florida and other states[58] reveals the continuing power and breadth of the populist movement.[59] In Florida, the successful property rights movement was a mixture of

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56. J.M. Balkin, *Populism and Progressivism as Constitutional Categories, Democracy and the Problem of Free Speech*, 104 YALE L.J. 1935, 1946 (1995) (reviewing CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993)).

57. Telephone interview with Rep. Bert J. Harris, Jr. (May 26, 1995) (notes on file with author) [hereinafter Harris, Interview Two].

58. In 1995, six other states passed property rights bills; Idaho, *see* HB 212, 53rd Leg., 1st Sess. (1995); Kansas, *see* HB 2015, 76th Leg., 1st Sess. (1995); SB 231, 54th Leg. (1995); North Dakota, *see* SB 2388, 54th Leg. (1995); Texas, *see* SB 14, 74th Sess. (1995); Wyoming, *see* HB 171, 53rd Leg. (1995). Between 1991 and 1994, numerous states have also passed other similar bills. Delaware, *see* SB 130, 136th Gen. Assembly, 1st Sess. (1991); Indiana, *see* HB 1646, 108th Leg., 1st Sess. (1993); Maine, *see* HB 847, HB 1238, 116th Leg., 2nd Sess. (1993); Missouri, *see* SB 558, HB 1099, 87th Leg., 2nd Sess. (1994); Tennessee, *see* SB 2643, 98th Gen. Assembly, 1st Sess. (1993); Utah, *see* HB 163, 50th Leg., 1st Sess. (1994); Utah, *see* HB 171, 50th Leg., 1st Sess. (1993).

59. Populism is a political movement identified particularly with the South and farm states. Populism reached its zenith during the election of 1891, when farmers suffered economic hardship as a result of dropping crop prices and higher costs due to escalating interest rates and high transportation costs passed on by railroads. The reforms advocated by populists were eventually assimilated into, or co-opted by, the major political parties. Thus, populism as a formal political reform movement became unnecessary. *See* ROBERT C. MCMATH, JR., AMERICAN POPULISM: A SOCIAL HISTORY 1877-1898 19, 44-49 (1993); *see generally* GENE CLANTON, POPULISM: THE HUMANE PREFERENCE IN AMERICA 1890-1900 (1991). Scholars view populism as a continuing political philosophy that manifests itself in contemporary politics, such as when Jimmy Carter, in the 1976 presidential election, had an almost solid victory in the South with the sole exception of Virginia. *See* ROBERT E. BOTSCH, WE SHALL NOT OVERCOME: POPULISM AND SOUTHERN BLUE-COLLAR WORKERS 3 (1980).

Populism is deeply rooted in the social and economic networks of the South and rural communities. One basic tenet of populism is a suspicion of centralized authority, whether the authority is governmental or private, such as industrial cartels or elites which co-opt governmental influence. Populists decry dependency and value individualism. Hence, for populists, the proper role of government is to protect the rights that individuals need to make a decent living. On the other hand, populists view corruption as endemic to the exercise of power. Thus, populists view government bureaucracy with a great deal of suspicion and desire reforms that will make government more accessible and responsive to commonplace people. *See* Balkin, *supra* note 56, at 1946. To achieve this end, populists seek to facilitate participation by citizens in the process of government. *Id.* at 1945.

savvy leadership in the Legislature, big money interests, the right political climate, and the populist ingredient—small- and medium-sized landowners frustrated with the lack of common sense in land use and environmental laws.

Powerful legislative leaders led the charge—some from areas where agriculture, both big and small, is a powerful political force;[60] others from areas experiencing growth pressures from and frustration with Florida's growth management laws.[61] These legislative leaders not only had a long-held commitment to help property owners obtain relief from oppressive governmental interference,[62] but they also had seen victory escape during the last legislative session when a property rights bill died in the session's waning moments.[63]

Monied political interests were also behind the property rights movement. The Florida Legal Foundation, which was heavily involved in the property rights surge beginning with the constitutional

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60. Agriculture is the third largest industry in Florida, consisting of large agribusiness, mostly sugar growers, and small- to medium-sized farmers. Many of the farms in the middle of the state are owned and operated by "family" style farmers. *See* FLORIDA DEPARTMENT OF AGRICULTURE & CONSUMER SERVICES, AGRICULTURE FACTS 1994 3 (1994).

Agriculture has a substantial stake in the property rights movement for two reasons. First, environmental regulations can place significant restrictions on farming operations, thereby increasing operational costs. For example, if a farm is part of an endangered species habitat, regulations will restrict which areas may be farmed and how they can be farmed. Second, for small- and medium-sized farmers, the bulk of their personal wealth is in their land. The land is their savings. If land use regulations significantly influence the fair market value of a parcel, they will also affect the farmers' personal wealth.

There is a perception, not based on evidence, that growth management regulations have affected the value of farmland. One comment submitted to the 1991 Florida Land Value Survey stated that "[t]he comprehensive plan has killed transition land and most farm land sales." DAVID DENSLOW ET AL., BUREAU OF ECONOMIC AND BUSINESS RESEARCH, UNIVERSITY OF FLORIDA, THE ECONOMIC IMPACT OF LOCAL GOVERNMENT COMPREHENSIVE PLANS 51 (1994) (citing an unpublished comment to the 1991 Florida Land Value Survey). Not coincidentally, the Property Rights Act provides that an owner's existing use can be the non-speculative use of neighboring properties. FLA. STAT. § 70.001(3)(b) (1995). This "use" definition will benefit farmlands situated at the fringes of an urban area. *See infra* notes 240, 291.

61. For example, Rep. Ken Pruitt believes that land use laws are too intrusive, complex, and anti-growth. *See* Binkley, *Solution to Land Use Law*, *supra* note 18, at F1.

62. Rep. Bert J. Harris, Jr., after whom the Act was named and a leading advocate of the Act, represents an area of the state where there are many citrus farms, and is himself a citrus farmer. In 1978 he sponsored a Property Owners Protection Act, and 17 years later he sponsored the Property Rights Act in the Florida House of Representatives. Rep. Harris has been a longtime supporter of property rights and has sponsored property rights bills in the 1993 and 1994 legislative sessions as well. *See* Fla. HB 1437 (1993); Fla. HB 485 (1994). Rep. Ken Pruitt, a real estate professional from the rapidly growing area of Port St. Lucie, was the co-sponsor of the 1995 Act, the sponsor of the 1993 property rights bill, Fla. HB 1437 (1993), and a member of the ad hoc group which drafted the 1995 Property Rights Act. Rep. Dean Saunders, who brought the Property Rights Act to the floor of the Florida House of Representatives for a vote, was a co-sponsor of the 1994 Property Protection Act. *See* Fla. HB 1967 (1994).

63. *See generally* Wetherell, *supra* note 3.

amendment petition drive,[64] counts among its supporters some of Florida's largest corporate landowners.[65] But alongside these "big business" interests, which had previously failed to gain the necessary supporters in the fight for property rights,[66] was a populist core—small- and medium-sized farmers frustrated by the limitations placed on their farming operations by environmental and land use laws;[67] small middle class landowners who had purchased parcels many years ago and now could not build a house upon them;[68] and developers forced into substantial concessions by local land use entities.[69] It was

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64. The $3 million drive for the 1994 property rights constitutional amendment was financed largely by U.S. Sugar Corporation and other members of the Florida Legal Foundation. *See* Binkley, *Solution to Land Use Law*, *supra* note 18; David J. Russ, *How the "Property Rights" Movement Threatens Property Values in Florida*, 9 J. LAND USE & ENVTL. L. 395, 399 (1994).

65. These corporations held among them at least 2.1 million acres of undeveloped private land. *See* Russ, *supra* note 64, at 399. St. Joe Paper Company, U.S. Sugar Corporation, Lykes Brothers, Collier Enterprises, and A. Duda & Sons were among the most public of the corporate supporters of the property rights movement in 1994. *See* Mary Ellen Klas, *Powerful Landowners Fuel Property Revolt*, PALM BCH. POST, Mar. 11, 1994, at A1.

66. In 1993 the Florida Legislature attempted to pass a property rights bill but succeeded only in enacting legislation which would have created a commission to study property rights and regulatory takings. *See* Fla. SB 1000 (1993). This bill was vetoed by Governor Lawton Chiles on the ground that it would be the first step toward dismantling the growth management laws. *See* Margaret Leonard, *Effort To Pass Property Law in Florida Is Still Brewing*, TALL. DEM., Jan. 3, 1993, at A7.

67. For example, large portions of farming areas in central Florida are also designated wetlands. Farmers have complained about being forced to reduce the acreage that they cultivate because of wetland regulations or because their land is a habitat to an endangered species. Mickie Valente, *Big Business Big Winner in "Contract,"* TAMPA TRIB., Mar. 25, 1995, at Business and Finance 1; Jeff Klinkenberg, *Showdown in the Everglades*, ST. PETE. TIMES, Sept. 27, 1992, at F1.

68. Representative Harris provided one example of the type of wrong that the Property Rights Act was intended to correct. He cited the situation of one of his constituents, an elderly lady who had purchased a lot 20 years ago with the intent of living there in a mobile home. When she was ready to do this, land use regulations prohibited her from doing so. *See* Harris, Interview One, *supra* note 5.

69. Consider these tales of travail recounted in *Forbes*:

> [The] Horvitz family has fought Florida's land planning bureaucracy for ten years. Their goal: to build a luxury residential community and marina on their 1,600 acres of water-front property, considered by many to be the best big coastal site left in southern Florida. Their development outfit, Hollywood Inc., spent at least $2 million on plans, paperwork and lawyers, and appeared before an assortment of state, city and county agencies and boards. Still the red tape multiplied. The Horvitzes filed thick piles of forms, applications and memoranda. The upshot: The Horvitzes won permission to build apartments home [sic] and warehouses on 300 acres, but no marina. In exchange, they had to agree to sell the remaining 1,300 acres to the state and Broward Country [sic] as part of an effort to preserve a mangrove swamp.
>
> David T. McWilliams . . . spent three years wringing approval from half a dozen local, state and federal agencies to buil[d] a small subdivision on 70 acres near Cape Canaveral. After McWilliams started construction on six houses and 15 condos, the

the addition of these advocates that tipped the scale in favor of the property rights movement. The battle could no longer be characterized as big money interests against the environment.[70] Instead the debate was now framed in populist terms: an interventionist and often arbitrary government dictating to individuals how to use their land and often, as a consequence, how to live their lives. An experienced staff member of the Florida House of Representatives remarked that she was struck by how much emotion the property rights lobby was able to generate by presenting testimony of the oppressed landowner.[71]

The property rights movement was also aided by a new political climate precipitated by a very close 1994 gubernatorial election and unexpected victories in the Legislature that gave the Republican Party control of the Florida Senate for the first time since Reconstruction.[72] As almost the first order of business following the 1995 elections, the Governor officially acknowledged that there were too many government rules that made little sense and that government was too remote from Floridians. At the beginning of the 1995 Legislative Session, Governor Chiles promulgated an executive order directing government agencies to reduce regulations and encouraging them to resolve conflicts with citizens through alternative dispute resolution techniques.[73] Subsequently, he set a goal of reducing government regulations across the board by fifty percent.[74] Governor Chiles cited as reasons for this sharp reduction in government the facts that "citizen frustration with government [is] at an all time high"[75] and that "rules have become increasingly confusing, complicated and expensive."[76] He

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U.S. Army Corps of Engineers abruptly slapped him with a cease-and-desist order and stopped construction cold for six months. Only when McWilliams agreed to plant cordgrass and mangroves along 2 miles of nearby waterfront (at a cost of more than $30,000) did the Corps allow him to resume work.

Thanks to three gopher tortoise sightings on a 4,800-acre planned development north of Tampa, the state's Fresh Water Fish & Game Commission recently ordered Shimberg Cross Co. to cede 600 acres of its project for a preserve. The small land turtle, which is not an endangered species, has prompted similar concessions on more than one large project, including a luxury hotel site in Fort Lauderdale.

James Drummond, *Florida's Great Red Tape Swamp,* FORBES, Oct. 30, 1989, at 193, 193-95.

70. To some extent, big money interests sought to exploit this populist fervor. The Florida Farm Bureau general counsel commented that the property rights movement had to offset the prejudice against industry and exploit stories about the "little guy." *See* Klas, *supra* note 65, at 22.

71. Interview with Carol Gregg, Legis. Analyst, H.R Judiciary Comm. (May 25, 1995) (notes on file with author).

72. *See Democrats' Dominance Drops,* ORLANDO SENT., June 19, 1995, at B1.

73. Fla. Exec. Order No. 95-74 (Feb. 27, 1995).

74. Governor Lawton Chiles, Inaugural Speech (Jan. 3, 1995).

75. Fla. Exec. Order No. 95-74 (Feb. 27, 1995).

76. *Id.* at 1.

characterized this new initiative "as an effort to bring common sense back to government."[77]

The work *The Death of Common Sense*[78] and the responsive chord that it struck in many[79] added fuel to Governor Chiles' initiative. In *The Death of Common Sense*, land use attorney Philip K. Howard describes Americans' disconnection from government.[80] The book, an extended essay that makes its case almost exclusively through colorful anecdotes, condemns the "tyranny of law," the senselessness of government regulations,[81] the remoteness of government and law to real world problems, and the law's lack of common sense solutions.[82] The effect of this movement in bringing common sense back to government is manifested in the procedural reforms that the Property Rights Act attempts. Those reforms include more accessibility by citizens to regulatory agencies, more individualized decisionmaking and discretion so that rules can be applied "common sensibly," and more accountability by land use entities for regulations that place inordinate burdens on property owners.[83]

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77. *Id.*

78. PHILIP K. HOWARD, THE DEATH OF COMMON SENSE (1994).

79. Even Professor Cass Sunstein, a well-known and widely respected constitutional scholar identified with civic republicanism and the legal process movement, acknowledged the validity of the general theme of Howard's book. *See* Cass R. Sunstein, *Land of 4,000 Unreadable Rules*, N.Y. TIMES, Feb. 12, 1995, at 12 (reviewing THE DEATH OF COMMON SENSE). This book made the reading list of the President of the United States, the Governor of Florida, and every agency head of Florida, and, in general, swept the country. In remarks to the Florida Legislature, President William J. Clinton noted a common interest in *The Death of Common Sense* and in regulatory reforms designed to make government regulations simpler and more "common sensible." FLA. S. JOUR. 259-260 (Reg. Sess. March 30, 1995). Governor Chiles gave *The Death of Common Sense* to every agency head and commended each to read it and to be responsive to the concerns expressed in the book. Scott Eyman, *The Death of Common Sense*, PALM BCH. POST, Mar. 8, 1995, at D1.

80. HOWARD, *supra* note 78, at 173 ("It is no coincidence that Americans feel disconnected from government: The rigid rules shut out our point of view. Americans feel powerless because we are not given a choice: Modern law does not allow us . . . .").

81. Mr. Howard states that new housing subdivisions have an empty, open look because 50 years ago traffic engineers wrote a standard code requiring streets to be 50 feet wide, about 50% wider than streets a few decades earlier, since that was the width necessary to allow two fire engines going in opposite directions to pass each other at 50 miles per hour. HOWARD, *supra* note 78, at 5. Another example Howard cites is Mother Theresa's abandoned attempt to open a mission for homeless men in of New York City. Mother Theresa's order was frustrated because the city offered to sell the order an abandoned building for one dollar, as the site of the new mission, but then required the installation of a $100,000 elevator, as required by the city's building code, which the order could not afford. *Id.* at 1-4.

82. *Id.* at 173.

83. *See infra* notes 235-38 and accompanying text. As part of this regulatory reform, the 1995 Florida Legislature enacted other far-reaching reforms of the ways that agencies exercise regulatory power. Governor Chiles vetoed a bill which would have amended the Administrative Procedures Act. *See* Fla. CS for SB 536 (1995). Although Governor Chiles was in agreement

In addition, Governor Chiles had already appointed a diverse seventeen-member task force,[84] the 1994 Property Rights Study Commission II, to examine the concerns of property owners. On February 28, 1995,[85] the task force recommended legislation substantially similar to the Property Rights Act.[86] The task force called for compensation for private property owners affected by state or local land use regulatory action that "inordinately limits the effective and practical use of real property."[87] It also suggested an alternative dispute resolution procedure substantially similar to section 2 of the Act.[88]

Given this joining of political and economic forces as the 1995 Legislative Session opened, the Legislature accepted that land use regulations and state governments had gone too far and that something had to be done.[89] The passage of a property rights bill in some form appeared imminent. Seven property rights bills were introduced in the Senate and House.[90] An informal ad hoc group consisting of members of the Executive Branch, lobbyists, Senators, and Representatives met weekly and then daily to hammer out a compromise outside of the formal legislative process. Only two committee hearings were held on property rights bills two weeks prior to the Legislature's vote on the Property Rights Act.[91] The ad hoc group did most, if not all, of the

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with the overall purpose of the reforms to simplify rulemaking, in his view some of the proposed changes would have burdened agency resources and led to additional administrative hurdles and burdens. *See* Letters from Governor Chiles to Sandra B. Mortham, Sec'y, Dep't of State, and James A. Scott, Senate Pres. (July 12, 1995) (on file with author). Among other things, this legislation would have required agencies to consider the economic cost of regulations, choose the method with the least economic impact, and bear the burden of proof regarding the validity of any new rule the agency promulgated.

84. The executive order creating the task force specified that it was to be made up of four private property owners, one economist, two local government officials, four representatives of environmental organizations, the Secretary of the Department of Community Affairs, the Secretary of the Department of Environmental Protection, a representative from a water management district, as well as members of the House and Senate. The 1994 Property Rights Task Force was chaired by a representative of the Florida Bar. Fla. Exec. Order No. 93-354, § 2 (December 29, 1994).

85. 1994 PROPERTY RIGHTS REPORT, *supra* note 28.

86. The 1994 Property Rights Report contains proposed legislation. *Id.* at 3-31.

87. *Id.* at 5-8. The 1975 Property Rights Task Force also recommended compensation for "any regulation that unduly diminishes the value of property, even though it does not constitute an unconstitutional taking without compensation." 1975 PROPERTY RIGHTS REPORT, *supra* note 3, at 12.

88. 1994 PROPERTY RIGHTS REPORT, *supra* note 28, at 1-2.

89. According to the 1994 Property Rights Report, even environmentalists joined the charge. Bob Wilson (an environmentalist on the 1994 Task Force) was characterized as advocating "almost entirely the . . . position of property owners." *Id.* at 58.

90. Fla. SB 1326 (1995); Fla. SB 2912 (1995); Fla. SB 1868 (1995); Fla. HB 1381 (1995); Fla. HJR 1847 (1995); Fla. SJR 218 (1995); Fla. HB 863 (1995).

91. *See supra* note 5.

work on the bill.[92] The group's political muscle showed; what could have been a bloody political battle became a smooth political compromise.[93]

III. WHAT IS WRONG WITH TAKINGS LAW, OR WHY WOULD FLORIDIANS NEED YET ANOTHER LAW?

> To many [citizens], government was seen as an unresponsive bureaucracy, the workings of which they did not understand. Resort to the judicial system did not seem to present a meaningful opportunity. Judges were perceived as not having the expertise in takings law that would be needed; there is too much delay, and the system is too complex and expensive.[94]
>
> 1994 Property Rights Task Force

> How could it be otherwise [disrespect for regulatory agencies], with the delays, the costs, the manipulations, the hypocrisy, and, perhaps worst, the boasts of fairness that destroys real fairness?[95]
>
> Philip K. Howard

> You do not know the abuse I've been through.[96]
>
> Philip Emmer

Discontent with land use agencies and the common law of takings secured passage of the Property Rights Act. For many, takings law provides illusory and unsatisfactory safeguards; a regulatory takings lawsuit is complex, lengthy, and must overcome many obstacles. Takings law has been criticized for the inadequacy of the formal process and the muddle of substantive takings common law.

A. Inadequacy of the Formal Process

1. The Ripeness Requirement

A property owner who wishes to fight the government over a takings claim must be ready to spend many years in litigation[97] and also

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92. Telephone interview with Daniel Stengle, General Counsel, Dept. of Comm'y Aff., (June 15, 1995) (notes on file with author); interview with Carol Gregg, H. Judiciary Comm., Legis. Analyst (May 25, 1995) (notes on file with author).

93. *See supra* notes 6-7 and accompanying text.

94. 1994 PROPERTY RIGHTS REPORT, *supra* note 28, at 57.

95. HOWARD, *supra* note 78, at 108.

96. Philip Emmer, a Gainesville developer for more than three decades, describes his experience with land use and environmental officials. Binkley, *Solution to Land Use Law, supra* note 18, at F1.

97. The foremost takings cases have all taken many years to wind their way through the

have the capital to pay hefty attorney's fees and costs.[98] The ripeness requirement, which applies to both federal[99] and state[100] constitutional takings claims, has much to do with the length and cost of takings disputes.[101] This requirement has two prongs: a petitioner must 1) obtain a final decision from the governmental authorities regarding the use of property (the final decision requirement);[102] and 2) seek

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court and administrative system. The leading case in Florida, Graham v. Estuary Properties, Inc., 399 So. 2d. 1374 (Fla. 1981), *cert. denied*, 454 U.S. 1083 (1981), took six years to reach the Florida Supreme Court. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), the much acclaimed, recent "pro-property owners" case, took five years to reach the United States Supreme Court. The legal fees incurred exceeded half a million dollars. LAND USE L. REP. 117 (July 28, 1993). When the case was remanded to the lower court for a determination of state law issues, Mr. Lucas decided to forego further litigation and settled with the state for approximately $1.5 million. *Id.* Shortly thereafter, Mr. Lucas founded a nonprofit "property rights" group. *See* Brigit Schutte, *Legal Victory Heats Up the Dispute*, TALL. DEM., Jan. 3, 1994, at 7A. Two other recent noted circuit court cases, Florida Rock Indus., Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995), and Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994), have already made several rounds between the district and circuit courts. *Florida Rock Industries* has been in litigation for 10 years and has not yet been resolved.

98. *Accord* S. 239, 104th Cong., 1st Sess., § 2(4) (1994) (stating in preamble to the Private Property Owners Bill of Rights that "Private property owners are being forced by Federal Policy [sic] to resort to extensive, lengthy and expensive litigation to protect certain basic civil rights guaranteed by the constitution").

99. *See* Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978); Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 193 (1985).

100. *See* Alexander v. Town of Jupiter, 640 So. 2d 79 (Fla. 4th DCA 1994), *appeal dismissed*, 648 So. 2d 725 (Fla. 1994); J.T. Glisson v. Alachua County, 558 So. 2d 1030 (Fla. 1st DCA 1990), *rev. denied*, 570 So. 2d 1304 (1990).

101. One commentator has called the ripeness requirement "the most important legal principle in land use litigation." Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go To Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVTL. L. 91, 91 (1994); *see also* Brian W. Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 HOFSTRA PROP. L.J. 73, 75 (1988) ("In particular, the federal courts have applied the doctrines of ripeness and abstention to either dismiss or stay constitutional challenges to land use decisions, in effect, leaving the federal courthouse door only slightly ajar for land use cases which involve only the most egregious examples of arbitrary action by local governments.").

102. Courts cannot review a local forum's decisions for a takings violation until it is clear that an adequate remedy has been denied. Only when the local decisionmaking entity has made a final decision can it be determined just how far the regulatory action has gone to hinder a property right. A court will not review another authority's decision until the petitioner has had her case exhaustively reviewed at that level and the governmental agency has had an opportunity to redress the petitioner's concerns or adjust or modify its decision. *See Williamson County*, 473 U.S. at 193 ("[T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury."); MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 351 (1986) (finding appellant had not received a "final, definitive position regarding how it will apply the regulations at issue"); San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 622 (1981) (case dismissed because

compensation from the state (the state compensation requirement).[103] The ripeness requirement must be met in all "as-applied" takings challenges[104] and pertains to questions both of whether the regulatory action constitutes a taking, as well as whether the landowner has been justly compensated. Failure to comply with the ripeness requirement will result in dismissal of a takings suit.[105]

The final decision requirement has proven to be particularly onerous in land use cases. Under the final decision requirement, the petitioner must first apply for a permit and be denied.[106] Then, if a

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California Court of Appeal did "not decide whether any taking, in fact, occurred;" therefore, the case was not "final"); Agins v. City of Tiburon, 447 U.S. 255 (1980) (holding that appellants failed to apply for alternative development on property; therefore case was not properly before the court); Villas of Lake Jackson, Ltd. v. Leon County, 796 F. Supp. 1477 (N.D. Fla. 1992) (requiring exhaustion of all remedies with respect to takings claims); *see also* Executive 100, Inc. v. Martin County, 922 F.2d 1536 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 55 (1991) (requiring exhaustion of all administrative remedies, including inverse condemnation proceedings).

103. The state compensation requirement responds to the question of whether there has been a denial of just compensation. It requires a petitioner to seek compensation available under state, local, and administrative processes and to have been denied relief under such processes. *See Williamson County*, 473 U.S. at 194-95 ("[B]ecause the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied . . . . If the government has provided an adequate process for obtaining compensation and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking.") (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1013, 1018 n.21 (1984)). However, such recourse must be an adequate process for securing compensation. In *Williamson County*, the Supreme Court held that the availability of an inverse condemnation claim in state court was an "adequate" compensation remedy that the petitioner should have exhausted. *Id.* at 197.

104. Only a facial challenge, that is, a challenge that the regulation itself is unconstitutional, does not have to comply with both prongs of the ripeness requirement. Village of Euclid v. Ambler Realty, Co., 272 U.S. 365 (1926); *but see MacDonald*, 477 U.S. at 348 (stating that in a facial challenge, the court may require the petitioner to exhaust local process). As the United States Supreme Court has noted, the plaintiff "face[s] an uphill battle" in a facial challenge. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987).

105. *See Williamson County*, 473 U.S. at 194. The *Lucas* decision, however, showed some flexibility with respect to the final decision requirement. In *Lucas* there was a question whether Lucas should have applied for a permit under a special procedure established by the coastal commission after Lucas had commenced his suit. The Court found that doing so would have been "pointless," rejecting the state's ripeness defense. Lucas v. South Carolina Costal Council, 112 S. Ct. 2886, 2891 n.3 (1992). This was the first time that the Court applied the "futility" exception, which provides that a petitioner need not exhaust all local remedies if to do so would be futile. *Id.* at 2891.

Professor Roberts argues that *Lucas* signals to federal lower courts that they may treat the ripeness requirement as "prudential," rather than as a matter of subject matter jurisdiction. *See* Thomas Roberts, *Ripeness After Lucas, in* AFTER LUCAS: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION 23 (David Callies ed., 1993). In *Reahard v. Lee County*, 968 F.2d 1131, 1133 (11th Cir. 1992), *cert. denied*, 115 S. Ct. 1693 (1995), a case decided after *Lucas*, the Eleventh Circuit continued to regard ripeness as a question of subject matter jurisdiction.

106. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 137 (1978) (takings claim

variance or exception is available (which will be the case for the most part),[107] the petitioner must seek a variance and be rejected.[108] If the petitioner's original development plan required an intensive use and her plan was rejected, she must reapply for a "less intensive, yet still valuable development."[109] Moreover, the requirement that the decision be "final" requires that, at each step, the petitioner actually obtain a final determination from the land use entity. Particularly because a land use entity has a great deal of discretion, it could potentially take years to make a final determination.[110]

The effect of the ripeness requirement in "closing the court house door" cannot be underestimated. The ripeness requirement can be applied by a court at any time and thereby bar a plaintiff from access to

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rejected in part because petitioner had "not sought approval for the construction of a smaller structure" than the 50-story office building to be built on top of Penn Central Station); *Agins*, 447 U.S. at 255 (challenge to zoning ordinance that permitted up to five single family dwellings to be built on five-acre tracts dismissed because petitioner did not submit development plans to local officials, who would have determined what petitioner would have been allowed to build).

107. *Accord* Roberts, *supra* note 105, at 22.

108. *See Williamson County*, 473 U.S. 199-200. In *Williamson County* the developer obtained initial approval for a subdivision of 736 units in a single-family residential zone. *Id.* at 177. However, the planning commission subsequently amended the zoning ordinance to permit less intensive use, known as "down-zoning," and denied subdivision approval. *Id.* The Court ruled that the developer had not met the finality requirement because he did not seek a variance, which could have overridden the planning commission's rejection. *Id.* at 186.

109. *See* MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 347 (1986). In this case, the planning commission denied a subdivision proposal for 159 units, and petitioner argued that the rejection effectively restricted use of the land to only agricultural activities, a low intensity use. The Court rejected this argument and found as follows:

> Here plaintiff applied for approval of a particular and relatively intensive residential development and the application was denied. The denial of that particular plan cannot be equated with a refusal to permit any development, and plaintiff concedes that the property is zoned for residential purposes in the County general plan and zoning ordinance. Land use planning is not an all-or-nothing proposition. A governmental entity is not required to permit a landowner to develop property to [the] full extent he might desire or be charged with an unconstitutional taking of the property. Here, as in *Agins*, the refusal of the defendants to permit the intensive development desired by the landowner does not preclude less intensive, but still valuable development. Accordingly, the complaint fails to state a cause of action.

Id. at 347.

110. *See MacDonald*, 477 U.S. at 350 ("The local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with one hand they may give back with the other."). A land use entity's ability to postpone a final determination has prevented many a property owner from obtaining a fair hearing within a reasonable time frame. In one extreme federal case, the land use agency took six years to make a final determination. In that case, the court required the petitioner to wait until the agency made a final determination. *See* Norco Construction, Inc. v. King County, 801 F.2d 1143, 1145 (9th Cir. 1986). When a governmental entity takes an inordinate amount of time in making a final determination, some courts have indicated their willingness to apply the futility exception, but few courts have applied such exception. *See, e.g.*, Kinzli v. City of Santa Cruz, 818 F.2d 1449, 1454 n.5 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988).

a neutral arbiter and possible relief.[111] A comprehensive study of federal takings cases showed that in a five-year period beginning in 1983, only 5.6% of all land use cases filed in federal court were found to have satisfied the ripeness requirement.[112]

2. *Layers of Governmental Authorities*

The onerous effect of the ripeness requirement is compounded by the typically complex and multi-layered permitting process. Each agency and each level has its own mission and distinct view in the land use process. In Florida, many agencies, local governmental entities, and special districts[113] have some authority in approving a land development order. Although Florida's growth management laws direct governmental entities to coordinate growth management efforts with each other,[114] there is no directive or regulation that governmental authorities coordinate their demands with respect to the applicant.[115]

Land use permitting is a one-step-at-a-time process with only one governmental entity involved at a time. The petitioner cannot determine, at the beginning of her project, the concerns of the pertinent land use entities. Also, each land use entity may exercise a veto over the project with respect to its area of concern.[116] The factors that caused other entities to approve the project need not be given the same weight or deference by another governmental entity.[117]

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111. *Accord* Overstreet, *supra* note 101, at 124 ("[F]ederal courts dislike adjudicating land use cases and have applied the ripeness doctrine harshly in an effort to close the federal court house doors to land use taking cases."). *But see* Roberts, *supra* note 105.

112. Blaesser, *supra* note 101, at 90-136.

113. Four hundred and fifty-eight local agencies had to prepare a comprehensive plan, and by 1991 all had completed their plan. HOUSE COMM. ON COMM'Y AFF., 1995 FLORIDA LOCAL GOVERNMENT FORMATION MANUAL I-4 (4th ed. 1995) There are 11 regional planning councils in Florida, five water management districts, and 1,040 special districts of which 92 are not active. HOUSE COMM. ON NAT. RES., PROGRAM REVIEW OF SPECIAL DISTRICTS 1, 21 (Nov. 1994).

114. *See* FLA. STAT. §§ 163.3204, 186.509, 187.201(26) (1995).

115. A recent article describes environmental and land use permitting as follows:

> Under Florida's current environmental regulatory framework, a person engaging in water or land altering activity is likely required to secure separate permits from the Department of Environmental Protection (DEP), a Water Management District (WMD), and local government. Wetland impacts are regulated by these state, regional, and local entities through wetland resource, surface water management, sovereign submerged lands, coastal construction, mangrove alteration, and in some cases, city or county permitting programs. At the federal level, there is also a requirement to obtain a permit from the United States Army Corps of Engineers ("Corps") for the same development activities that impact wetlands.

John J. Fumero, *At a Crossroads in Natural Resource Protection and Management in Florida*, 19 NOVA L. REV. 77, 80 (1994).

116. *See* Richard A. Epstein, *Property as a Fundamental Civil Right*, 29 CAL. WESTERN L. REV. 187 (1992).

117. In spite of successful permitting at the local level, a state agency can veto a project,

3. *The Politics of Upset Neighbors*

Land use decisions have always been, and likely will always be, political. Much is riding on the decision of local zoning boards. Neighbors may perceive an end to their community as they have known it or a threat to the value of their most important investment, their home. For the developer, failure to obtain approval means wasted development costs, a loss from which she may not be able to recover. For the city, land use is one of the most visible and sensitive areas through which the city serves the taxpayers and enhances future growth.[118] Thus, land use decisions are frequently made on the basis of local politics and local sentiment.[119]

Although Florida cases such as *Board of County Commissioners v. Snyder*[120] and *Jennings v. Dade County*[121] have attempted to minimize

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even if the project is much desired by local government. For example, the Southwood development project in Leon County, Florida, sponsored by the St. Joe Paper Co., is an ambitious plan to transform 6,000 acres in economically depressed southeast Leon County to a development which will eventually employ 2,000 people and house 30,000 more in middle-class housing. Planning on this project began in March 1994 and was negotiated by the City of Tallahassee, Leon County, and St. Joe Paper Co. The plan has been submitted twice to the Department of Community Affairs and twice it has been rejected. The local officials "thought [they] had answered all [the State's] questions," but the Department of Community Affairs denied approval because the project does not contain enough affordable housing and would permit St. Joe Paper Co. to harvest pine trees. *See* Savannah Blackwell, *State Halts Growth Plan: The DCA Ruling Puts the Brakes on the Southwood Development*, TALL. DEM., June 8, 1995, at C2. The issue is now being litigated. Interview with Richard Geshwiller, Chief of Planning, City of Tallahassee-Leon County Planning Agency (September 27, 1995) (notes on file with author).

118. *See generally*, RICHARD F. BABCOCK & CHARLES SIEMON, THE ZONING GAME REVISITED (1985); RICHARD F. BABCOCK, THE ZONING GAME (1966).

119. Many examples can be cited. In spring 1994, the Tallahassee-Leon County Planning Commission considered a subdivision application for a mobile home development, which was to be located at the fringe of an older, established community of single-family homes on the south side of Tallahassee. *See* Savanah Blackwell, *Neighborhood Up in Arms over Comp Plan, Trailers*, TALL. DEM., Jan 10, 1995, at B1, B3. The lots would be owned by the mobile home occupant and the plan provided for two-car parking for each lot. *Id.* at B1. The community adjoining the proposed development vigorously opposed the subdivision and attacked the development at lengthy and raucous public hearings. *Id.* The petitioner, the developer of the mobile home park subdivision, had complied with all zoning code and comprehensive plan requirements and had exceeded them as requested by the city planning officials. *Id.* at B3. Nonetheless, during the second public hearing, in the din of the upset neighbors, the planning commission denied approval. Penelope M. Carrington, *Board Rejects Trailer Park Plan*, TALL. DEM., Jan 19, 1995, at D1, D2. The Tallahassee City Commission, which heard the appeal, stood behind the planning commission's decision, and authorized the city to purchase the parcel in question. Savanah Blackwell, *Residents Defeat Mobile Homes*, TALL. DEM., March 23, 1995, at 6B; *see generally* BABCOCK & SIEMON, *supra* note 118, at 5, 11-36, 183-206 (describing some land use cases as "hysterical" and reminding attorneys to "[n]ever ignore the political climate when trying a zoning case").

120. 627 So. 2d 469 (Fla. 1993).

121. 589 So. 2d 1337 (Fla. 3d DCA 1991).

the influence of politics by imposing more rigor in local land use processes,[122] local governments continue to have broad discretion and ample flexibility.[123] While the Florida Supreme Court has made the local zoning decisionmaking process more legalistic, forcing landowners and planning commissioners to conduct themselves more like lawyers and administrative judges, the supreme court has continued to bless the broad political discretion exercised by local zoning boards. Under *Snyder*, a local board has the discretion to deny a rezoning or an amendment to a comprehensive plan, even if the change sought by the petitioner is consistent with the comprehensive plan.[124] The local board may determine that it is in the public interest to deny such use, if its decision is supported by substantial competent evidence.[125] Thus, even though *Snyder* introduces a higher level of scrutiny, local decisionmakers can continue to factor in the politics of the situation.

Local politics, although responsive to the views of the community on how to resolve competing land uses,[126] nonetheless increases

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122. *Snyder* holds that a site-specific rezoning is a quasi-judicial proceeding, and upon judicial review the local governing body's decision is subject to strict scrutiny for compliance with the local comprehensive plan. 627 So. 2d at 473-75. Additionally, the local government's decision must be supported by "substantial competent evidence." *Id.* Moreover, *Snyder* is not limited to site-specific rezoning. *Snyder* has been applied to site plan approvals, *see* Park of Commerce Ass'n v. City of Delray Beach, 636 So. 2d 12, 15 (Fla. 1994), and amendments to comprehensive plans, *see* Florida Inst. of Technology, Inc. v. Martin County, 641 So. 2d 898, 899-900 (Fla. 4th DCA. 1994). Quasi-judicial proceedings are more formal than quasi-legislative proceedings: *ex parte* communications are not allowed, *Jennings*, 589 So. 2d at 1341, witnesses may be cross-examined, expert witnesses may testify, transcripts can be made available, and opposing factions must receive copies of all notices and be given an opportunity to testify. *See generally*, Mark P. Barnebey & Bonnie T. Polk, *Quasi-Judicial Land Use Hearings: Does Your Evidence Pass Muster?*, FLA. B.J. 42-47 (March 1995) (describing cases therein); *see also* Section 28 Partnership, Ltd. v. Martin County, 642 So. 2d 609 (Fla. 4th DCA 1994) (analyzing the distinction between a quasi-legislative and a quasi-judicial zoning decision). *Jennings* has been somewhat modified by legislative fiat, which has relaxed the formality of quasi-judicial proceedings by permitting local officials to communicate with citizens if the local government adopts a resolution permitting such communications. 1995, Fla. Law ch. 95-352 (codified at FLA. STAT. § 286.0115 (1995)).

More generally, the need to be able to determine whether local politics has had an undue influence on local land use decisionmaking has caused courts to emphasize the need for local decisions to be made "in accordance" or "consistent with" the comprehensive plan. *Snyder*, 627 So. 2d at 476; Machado v. Musgrove, 519 So. 2d 629 (Fla. 3d DCA 1987); Fasano v. Board of County Comm'rs, 507 P.2d 23 (Ore. 1973) (en banc).

123. *See* MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 350 (1986) ("[local agencies] are singularly flexible institutions").

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

125. *Id.* In a quasi-judicial matter, if the applicant shows that a land use change is consistent with the comprehensive plan, the burden of proof shifts to the local government to show that maintaining the existing classification accomplishes a legitimate governmental purpose. *Id.* at 476. The *Snyder* holding clearly bothered the 1994 Property Rights Task Force. See 1994 PROPERTY RIGHTS REPORT, *supra* note 28, at 58-63, and probably influenced its recommendation to adopt legislation substantially similar to the Property Rights Act.

126. *See generally* Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837 (1983).

uncertainty, risk, and expense for developers.[127] Some have argued that the local land use boards are subject to capture by political groups and that this renders the local process inherently inefficient[128] and subject to charges of unfairness.[129]

B. *The Muddle of Takings Law*[130]

Critics find the substance of land use law as unsatisfactory as its process. The legal formulation of takings analysis, the ubiquitous nature of takings, and the many unarticulated policy conflicts have made a muddle of takings law.

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127. To deter neighbors from taking an adversary position, some developers have filed SLAPP suits (strategic lawsuits against public participation), usually alleging tortious interference with business relations or defamation. *See* John C. Barker, *Common Law and Statutory Solutions to the Problem of SLAPPs*, 26 LOY. L.A. L. REV. 395 (1993). Alternatively, sophisticated developers include in their planning strategy public relations campaigns to win local support. Dwight H. Merriam et al., *Grass Roots Lobbying*, *in* ALI-ABA LAND USE INSTITUTE, PLANNING REGULATION, LITIGATION, EMINENT DOMAIN AND COMPENSATION 769 (1994).

128. From an efficiency standpoint, government regulations should allocate to developers only spill-over costs or externalities caused by new development that otherwise would be shifted to nonconsenting third parties. *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). For example, local officials may exact as terms and conditions of a building permit, costs that properly should be financed by the entire community. Developer Philip Emmer cites as an example his having been required by city officials to build a wall around a subdivision, the walls having been demanded by a neighborhood group. He argues that if the city had to pay for the wall, it would have built a much less expensive one. *See* Binkley, *Solution to Land Use Law*, *supra* note 18, at F1.

129. *See* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 701-02 (1973):

> The pervasiveness of special influence is inherent in the zoning system. Judicial insistence on uniform standards for decision, a basic way of preventing favoritism in government, is not possible in the case of zoning; the name itself suggests a system of nonuniform regulation. Since the courts cannot easily distinguish good planning from bad, judicial checks on unfair variations in land use restrictions have been minimal. Studies have documented the lawlessness of zoning variance decisions in most communities. Many courts have stopped trying to police local zoning and consistently sustain the local government's action under the "presumption of validity" given to zoning provisions.

Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 407-408 (describing local zoning to be a system in which campaign contributions, fees to politically connected attorneys, and personal relationships with planning officials and public officials are key to positive outcomes); EPSTEIN, TAKINGS, *supra* note 26, at 265 ("[S]trict judicial supervision of the zoning process is . . . appropriate to correct the unstable political situation . . . judicial deference to local action is wholly inappropriate."); *see generally* SUSAN ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY (1988); BABCOCK, *supra* note 118; *see also* FEDERALIST NO. 10, *supra* note 24, at 83 ("The smaller the society, the fewer probably will be the distinct parties and interests composing it . . . and the smaller the compass within which they are placed, the more easily will they unite to execute their plans of oppression.").

130. I have borrowed this caption from Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984).

1. Formulation of Legal Takings Analysis

Judging merely by how often and how prominently property rights are mentioned in the federal and Florida constitutions,[131] property rights appear to be among the most strongly protected of all rights. The takings clauses of the federal and Florida constitutions clearly apply when a governmental entity physically "takes" or appropriates private property by exercising its power of eminent domain. Land use law in this area—eminent domain—generally functions smoothly and without controversy.[132]

But takings law is more complex when the government action is more subtle, such as when a government regulatory action prevents a property owner from using her property in a certain manner.[133] The United States Supreme Court first addressed this issue in the 1922 case *Pennsylvania Coal Co. v. Mahon*.[134] Justice Holmes pronounced that "if a regulation goes too far it will be recognized as a taking."[135] For nearly three-quarters of a century following this decision, practitioners and courts have struggled with how to determine where the critical point lies at which "the regulation goes too far."[136] The purpose of the takings inquiry has also been described as determining whether a property owner has been unfairly burdened by a regulation that benefits the community, when the costs, in all fairness, should be borne by all.[137] Justice Brandeis's solution is to provide compensation when the

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131. U.S. CONST. amend. V & XIV; FLA. CONST. art. X, § 6(2) & art. I, § (2).

132. The 1976 Property Rights Report committee contacted practitioners and academic and government officials practicing in this area in the State of Florida and concluded that "the [eminent domain] system appears to be working well and appears to be fundamentally fair." 1976 PROPERTY RIGHTS REPORT, *supra* note 3, at 68.

133. These cases are commonly referred to as regulatory takings or inverse condemnation cases.

134. 260 U.S. 393 (1922).

135. *Id.* at 415.

136. *Id.* In addition, scholars have struggled to reconcile the "too far" standard of *Mahon* with the Court's earlier pronouncement in Mugler v. Kansas, 123 U.S. 623 (1887), in which the Court found that a government regulation that forced the defendant to close his brewery was a valid exercise of the police power and did not amount to a taking. This holding was based on the noxious use exception, which provides that a regulation of land use is not a taking if it is to control some "evil" or "noxious" use. *Mugler*, 123 U.S. at 640; *see generally* FRED P. BOSSELMAN ET AL., THE TAKINGS ISSUE (1973); William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057 (1980).

137. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 512 (1987) (stating that purpose of Fifth Amendment is to prevent "the public from loading upon one individual more than his just share of the burdens of government, and [it] says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him") (quoting Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893)); Armstrong v. United States, 364 U.S. 40, 49

state, through the police power, acquires a virtual proprietary interest.[138] After seventy-odd years of common law, there are remarkably few clear guideposts; but, clearly, regulatory takings analysis is an ad hoc inquiry.[139]

Following *Lucas v. South Carolina Coastal Council*,[140] the Supreme Court's most recent regulatory takings case, it is the Holmesian approach, which promotes formalistic notions of property rights, that dominates takings jurisprudence.[141] Accordingly, the Court has developed categorical rules that outline when a governmental entity goes too far. If there is a physical invasion due to a regulation, then this is a per se taking.[142] Likewise, if all economically viable use of the property is destroyed by the governmental action, then a per se compensable taking has occurred.[143] Yet few government regulations go this far.

Florida takings law closely tracks federal takings law and recognizes a regulatory taking under the state's constitution.[144] The Florida Supreme Court has stated that "there is no settled formula" for determining "when the valid exercise of police power stops and an impermissible encroachment on private property rights begins."[145] The court has also held that the regulatory takings inquiry should determine the fair balance between the costs of a regulation imposed on a

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(1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

138. *Mahon*, 260 U.S. at 417 (Brandeis, J., dissenting); *see* Sax, *Takings & Police Powers*, *supra* note 23, at 39 ("Under this . . . theory then the constitutional issue turns upon whether the government has asserted a proprietary interest for itself in the affected property.")

139. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

140. 112 S. Ct. 2886 (1992).

141. The Court, speaking through Justice Scalia, recharacterizes the police power noxious use cases, Hadacheck v. Sebastian, 239 U.S. 394 (1915), Miller v. Schoene, 276 U.S. 272 (1928), and Goldblatt v. Hempstead, 369 U.S. 590 (1962), as "simply the progenitor[s] of our more contemporary statements that 'land-use regulation does not effect a taking if it substantially advance[s] legitimate state interests.' " *Lucas*, 112 S. Ct. at 2897. The approach under *Lucas* protects expectations based on traditional common law notions of property rights. *See infra* notes 185-190. Similarly, Justice Holmes emphasized in *Mahon* that the Kohler Act went too far because it "purports to abolish what is recognized in Pennsylvania as an estate in land." 260 U.S. at 414.

142. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); *see* Yee v. City of Escondido, 112 S. Ct. 1522 (1992) (rejecting the lower court's finding that the combination of rent control and landlord-tenant statutes conceded to renters virtual physical possession of mobile home lots).

143. *Lucas*, 112 S. Ct. at 2893.

144. See Graham v. Estuary Properties, Inc., 399 So.2d 1374, 1380 (1981); Newman v. Carson, 280 So. 2d 426 (Fla. 1973); State Plant Bd. v. Smith, 110 So. 2d 401 (Fla. 1959); Varholy v. Sweat, 15 So. 2d 267 (Fla. 1943).

145. *Graham*, 399 So. 2d at 1380.

private property owner and the public benefits, the costs of which should properly be borne by the public.[146] As in the federal context, there are few categorical rules. A physical invasion caused by a governmental regulatory action is a per se taking.[147] The court has recognized under the state constitution the right of a property owner to exploit the economically viable use of her land.[148] However, it has not yet determined whether denial of all economically viable use is a per se taking.

Given the very narrow scope of per se categories under either federal or state law, the outcome in partial regulatory takings cases turns upon an inevitably uncertain and inconsistent ad hoc balancing and fairness test.[149] The modern approach to regulatory takings first established in *Penn Central*[150] requires a court to 1) examine the character of the governmental action; 2) assess the economic impact of the regulation on the landowner; and 3) determine the extent to which the regulation has interfered with investment-backed expectations.[151] Lower courts have added more factors to the *Penn Central* test;[152] and

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146. Estuary Properties, Inc. v. Askew, 381 So. 2d 1126, 1138 (Fla. 1979) ("[W]hile government clearly has the right to expropriate private property for purposes beneficial to the general public, it cannot require a single property owner to bear the cost of such general benefits. This principle, which is the essence of the 'property clauses' of the United States and Florida Constitutions, commands that the cost of public benefits be borne by the public.") (citing State Road Dep't v. Tharp, 1 So. 2d 868 (Fla. 1941)).

147. Storer Cable T.V. of Fla., Inc. v. Summerwinds Apartments Ass'n, Ltd., 493 So. 2d 417 (Fla. 1986) (Under article X, section 6 and article I, sections 2 and 9 of the Florida Constitution, as well as the Fifth and Fourteenth amendments of the United States Constitution, the Florida supreme court found that a statute permitting cable companies to install cable equipment on property that a tenant did not specifically have the right to use was a taking because it resulted in a permanent, physical invasion.)

148. *Askew*, 381 So. 2d at 1137.

149. Such uncertainty and inconsistency is increased by the way in which courts apply the test—often blending due process and takings analysis and, in effect, balancing the public purpose served by the regulation against the economic harm imposed on the individual landowner. *E.g.*, *Graham*, 399 So. 2d at 1381 (finding that the public interest in preserving the integrity of the environment "promotes the welfare of the public, prevents a public harm, and has not been arbitrarily applied"); *see generally* Glen E. Summers, *Private Property Rights: Toward a Takings Jurisprudence Uncorrupted by Substantive Due Process*, 142 U. PA. L. REV. 837, 862-877 (1993) (identifying this blended approach and deploring "balancing" as clearly an inadequate protection of property rights); Stoebuck, *supra* note 136, at 1065 ("Balancing is a false taking test . . . . [It] is also too dangerous to function as a test for a police power taking.").

150. 438 U.S. at 124.

151. *Id.*

152. In the leading modern regulatory takings case in Florida, *Graham*, 399 So. 2d at 1374, the Florida Supreme Court reformulated the *Penn Central* balancing test into six non-exhaustive factors:

> 1. Whether there is a physical invasion of the property;
> 2. The degree to which there is a diminution in value of the property, or [] whether the regulation precludes all economically reasonable use of the property;

subsequent United States Supreme Court cases have reformulated the *Penn Central* factors.

The *Lucas* Court recast takings analysis as a two-tier test. The first tier examines whether the land use regulation "substantially advance[s]" a "legitimate state interest,"[153] that is, the legitimacy of the regulatory action.[154] If the land use regulation substantially advances a state interest, a court proceeds to the second tier of the test: determining whether the regulatory action denied the property owner

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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.

Id. at 1380-81.

Reahard is a decision involving permitting of a subdivision on a 40-acre piece of waterfront property, once part of a larger parcel of 540 acres purchased 48 years earlier. The court listed a total of eight factors as relevant to the inquiry of whether the landowner has been deprived of all or substantially all economically viable use of the property:

(1) the history of the property—when was it purchased? How much land was purchased? Where was the land located? What was the nature of title? What was the composition of the land and how was it initially used?;
(2) the history of development—what was built on the property and by whom? How was it subdivided and to whom was it sold? What plats were filed? What roads were dedicated?;
(3) the history of zoning and regulation—how and when was the land classified? How was use proscribed? What changes in classifications occurred?;
(4) how did development change when title passed?;
(5) what is the present nature and extent of the property?;
(6) what were the reasonable expectations of the landowner under state common law?;
(7) what were the reasonable expectations of the neighboring landowners under state common law?; and
(8) perhaps most importantly, what was the diminution in the investment-backed expectations of the landowner, if any, after passage of the regulation?

Reahard v. Lee County, 968 F.2d 1131, 1136 (11th Cir. 1992), *cert. denied*, 115 S. Ct. 1693 (1995). These factors are duplicated in the dispute resolution portion of the Act as factors to be considered in the inordinate burden determination. *Cf.* FLA. STAT. § 70.51(18) (1995).

In *Florida Rock Industries, Inc.*, the court listed other factors to be considered in addition to the loss of economic use to the property owner as a result of the regulation imposed:

[A]re there direct compensating benefits accruing to the property, and others similarly situated, flowing from the regulatory environment? Or are benefits, if any, general and widely shared through the community and the society, while the costs are focused on a few? Are alternative permitted activities economically realistic in light of the setting and circumstances, and are they realistically available? In short, has the Government acted in a responsible way, 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?

Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1571 (Fed. Cir. 1994).

153. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992).

154. *See* DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE 283 (2d ed. 1994).

economically viable use of her land,[155] that is, the reasonableness and magnitude of the individual economic harm.[156]

The first tier of the *Lucas* analysis applies a deferential scrutiny to the governmental purpose.[157] However, the Court has recently intimated that such review should be more stringent in certain categories of land use cases. In *Nollan v. California Coastal Commission*[158] and *Dolan v. City of Tigard*,[159] the Court expands the application of the "substantially advances" test for cases of permit exactions.[160]

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155. *See Lucas*, 112 S. Ct. at 2893; *See also* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

156. *Id.*

157. The deferential standard found in Berman v. Parker, 348 U.S. 26 (1954), an eminent domain takings case, is often applied to this prong of the takings analysis. The *Berman* standard has been characterized as a virtual abandonment of judicial review. In *Berman* the Court stated:

> We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them.

348 U.S. at 38 (citations omitted); *see also* Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 243 (1984) ("When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings . . . are not to be carried out in the federal courts."); *see generally* EPSTEIN, TAKINGS, *supra* note 26.

The Court's frustration with virtual abandonment of the governmental purpose requirement is evidenced in *Lucas*, where it voiced skepticism at the Legislature's finding that it was necessary to prohibit construction along the area where Lucas had applied for a building permit. 112 S. Ct. at 2898. Other owners' structures were permitted to remain and the Commission subsequently permitted construction subject to a hardship procedure. *Id.* The Court stated that to scrutinize a legislative governmental purpose "amounts to a test of whether the legislature has a stupid staff." *Id.* at 2898, n.12.

However, this analysis is not always entirely deferential. Professor Merrill analyzed the application of the governmental purpose test in takings cases and found that between 1964 and 1985 over 16% of the takings cases in state appellate courts were invalidated based on the governmental purposes prong. Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 96 (1986). Professor Merrill concluded that "judicial enforcement of the public use requirement is not a thing of the past." *Id.*

158. 483 U.S. 825 (1987). In *Nollan*, Justice Scalia argued that the level of review in takings cases should not be so deferential to legislative judgement as in due process and equal protection cases. *Id.* at 834 n.3 ("[T]here is no reason to believe . . . that so long as the regulation of property is an issue the standards for takings challenges, due process challenges and equal protection challenges are identical . . . .").

159. 114 S. Ct. 2309 (1994).

160. *See Nollan*, 483 U.S. at 837 (holding unconstitutional permit conditions that require a property owner to deed portions of her property to the government because the exaction was not reasonably related to the governmental purpose, and noting that such exactions can be justified only if the government "make[s] some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development"); *Dolan*, 114 S. Ct. at 2319-20 (holding that there must be an "essential nexus" and "rough

This test would also apply to cases where the governmental entity has acted arbitrarily or improperly. For example, courts have been willing to declare a taking when a governmental entity is acting in an enterprise capacity,[161] in a predatory manner,[162] or where the government treats one property owner in a markedly different manner from other similarly situated property owners.[163] This legitimacy analysis is

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proportionality'' between the governmental interest and exactions required in a land use permit).

It is not entirely clear that permit exaction cases should be treated as takings cases. In *Lucas*, the Supreme Court cited *Nollan* as a takings case in which a regulation denied a property owner all economically viable or productive use of the land. 112 S. Ct. at 2893.

Some would argue that such heightened scrutiny applies to exaction cases where there was a physical invasion. In *Nollan*, the California Coastal Commission required a public easement bounded by the Nollan's seawall on one side and mean high-tide mark on the other side. In *Dolan*, the local planning commission required Dolan to deed the city a portion of her property in and adjacent to the 100-year flood plain so that the city could control flooding and build a pathway. 114 S. Ct at 2314.

161. United States v. Causby, 328 U.S. 256 (1946), cited in Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 105 (1981). *See* Sax, *supra* note 23, at 55-60.

162. *See, e.g.*, San Antonio River Auth. v. Garrett Bros., 528 S.W.2d 266 (Tex. Civ. App. 1975) (city officials interrupted plaintiff-developer's development of his property by refusing a permit for installation of utilities because the development of the land would increase the city's costs of acquiring the land for a dam project the city was planning); Nemmers v. City of Dubuque, 716 F.2d 1194 (8th Cir. 1983) (government rezoned plaintiff's property to light industrial use, plaintiff spent a substantial amount of money to develop the property and donated substantial sums to the city and county, but the city rezoned again; the court found that the plaintiff had acquired a vested right to continue developing); Archer Gardens, Ltd. v. Brooklyn Ctr. Dev. Corp., 468 F. Supp. 609 (S.D.N.Y. 1979) (conspiracy between city and private developer to inhibit private landowner's ability to sell or lease land, which ultimately resulted in title forfeiture was a taking). *See generally* Sax, *supra* note 23; William C. Leigh and Bruce W. Burton, *Predatory Governmental Zoning Practices and the Supreme Court's New Takings Clause Formulation: Timing, Value, and R.I.B.E.*, 1993 B.Y.U. L. REV. 827 (1993); *but see* Cambria Spring Co. v. City of Pico Rivera, 217 Cal. Rptr. 772 (Cal. Ct. App. 1985); Redevelopment Agency v. Contra Costa Theater, Inc., 185 Cal. Rptr. 159 (Cal. Ct. App. 1982); Toso v. City of Santa Barbara, 162 Cal. Rptr. 210 (Cal. Ct. App. 1980), *cert. denied*, 449 U.S. 901 (1980).

163. Although in takings analysis, courts do not explicitly articulate an equal protection concern in assessing the legitimacy of a regulation, markedly disparate treatment of the petitioner has clearly influenced the Supreme Court's view as to the reasonableness of the governmental entity's action. In *Nollan*, the Court called the Coastal Commission's permit condition "extortion" because the Court believed the Nollans were singled out and force to bear a disproportionate share of the cost of the Commission's beach access program. 483 U.S. at 835 n. 4 ("If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate [the] Takings Clause . . . ."). In *Lucas*, the Court emphasized that Lucas's neighbors had been permitted to build dwellings and allowed to have their houses stand, while Lucas was now prohibited from building. 112 S. Ct. at 2889; *but see, Penn Central*, 438 U.S. at 133 ("zoning laws often affect some property owners more severely than others but have not been held to be invalid on that account"). Professor Summers justifies this higher level of scrutiny in these cases because "[w]hen individuals or small groups are singled out by government and forced to surrender property rights, they may have little ability to appeal to the political process . . . . a government that takes from a few and gives to many may be quite popular indeed." Summers, *supra* note 149, at 880.

similar to the first prong of the *Penn Central* test involving the "character of the governmental action."[164] Under this prong, particularly egregious governmental infringement on property rights will be prohibited, either because such infringement amounts to a physical invasion,[165] a restriction on alienation,[166] or an improper and arbitrary cause of action.

The second tier of *Lucas*, whether the property owner retains "economically viable or beneficial use" of her land, is equivalent to the second and third parts of the *Penn Central* test,[167] the economic impact of the regulation, given a property owner's reasonable, investment-backed expectations.[168] In *Lucas*, the Supreme Court fashioned the bright-line rule that when a property owner is left with no economically viable use of her property, there is a taking.[169] Absent such a categorical showing, the landowner must prove that the regulation has diminished the value of the property enough to constitute a taking. A mere diminution of the property's value is not a taking.[170] Nor is the property owner entitled to the highest and best use of her property.[171] If a regulation permits present use of property, then no taking results.[172]

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164. *Penn Central*, 438 U.S. at 124.

165. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

166. Hodel v. Irving, 481 U.S. 704 (1987).

167. *Compare Penn Central*, 438 U.S. at 127, 138 n.36 (emphasizing that the holding was based on the finding that Penn Central's current use of the property was "economically viable") *with Lucas*, 112 S. Ct. at 2893 (examining whether regulation denies "all economically beneficial or productive use of land").

168. *See* Nollan v. California Costal Comm'n, 483 U.S. 825, 834 (1987) (citing Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)) (a regulation is a taking if it denies property owner of "economic viable use" of her property); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987); MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 349 (1986); Loveladies Harbor, Inc. v. United States, 28 F.3d 1177 (Fed. Cir. 1994) (to establish individualized financial harm, petitioner had to show "a serious financial loss from the regulatory imposition."); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981); Mahon v. Pennsylvania Coal Co., 260 U.S. 393, 414 (1922) ("To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."); *see generally* Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91, 117-120 (1995).

169. *Lucas*, 112 S. Ct. at 2893 (stating that "we have found categorical treatment appropriate . . . where regulation denies all economically beneficial or productive use of land"). For Justice Scalia, total deprivation of use is comparable to physical appropriation. *Id.* at 2894. An exception exists if state nuisance or tort law would have permitted a total deprivation. *Id.* at 2900.

170. *See, e.g.*, Skaw v. United States, 740 F.2d 932 (Fed. Cir. 1984), *cert. denied*, 488 U.S. 854 (1988); Jengsen v. United States, 657 F.2d 1213 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982); Arnold v. Prince George's County, 311 A.2d 223 (Md. 1973); Bonds v. City of Webster Groves, 432 S.W. 2d 777 (Mo. Ct. App. 1968); Oriental Blvd. Co. v. Heller, 297 N.Y.S.2d 431 (App. Div. 1969).

171. Goldblatt v. New York, 369 U.S. 590, 592 (1962) (deprivation of most beneficial use does not constitute a taking); *Penn Central*, 438 U.S. at 136-137; *see also* Graham v. Estuary

Courts are left with the difficult task of determining when a regulation that does not completely destroy the value of the property substantially denies economic benefit so as to constitute a taking. Many difficult issues must be resolved.[173] How much return or profit is a property owner entitled to make?[174] In order to measure such losses, the court must first define the property interest comprised by the government action,[175] determine how to measure lost profits or

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Properties, 399 So. 2d 1374, 1381 (1981); Lee County v. Sunbelt Equities, 619 So. 2d 996, 1006 (Fla. 2d DCA 1993) (citing *Penn Central*).

172. Hadacheck v. Sebastian, 239 U.S. 394 (1915); Miller v. Schoene, 276 U.S. 272 (1928); United States v. Causby, 328 U.S. 256 (1946); Griggs v. Allegheny County, 369 U.S. 84 (1962); *Penn Central*, 438 U.S. at 136.

173. *See generally* Oswald, *supra* note 168; Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369 (1993).

174. *Penn Central* is the only Supreme Court case that addresses the issue of adequate rate of return in takings law, and it does so obliquely. In *Penn Central*, the Court found that the railroad company's present use of the premises for its operations and leases was an adequate return. 438 U.S. at 135.

Profit is relevant to takings analysis, although the Supreme Court does not always use the term "profit." *See* Mahon v. Pennsylvania Coal Co., 260 U.S. 292, 414 (1922) ("What makes the right to mine coal valuable is that it can be exercised with profit."); *Penn Central*, 438 U.S. at 137 n.36 (ability to use property in "gainful fashion"); Lucas v South Carolina Coastal Council, 112 S. Ct. 2886, 2894 (1992) ("productive options" other than leaving land in its natural state); Hamilton Bank of Johnson City, 473 U.S. 172, 191 (1985) (not profitable to develop [only] 67 units); *Keystone Bituminous Coal Ass'n*, 480 U.S. at 501 (property interest cannot be used profitably by one who does not also possess the surface or mineral estate). Other courts also have been willing to consider whether the uses under the regulation permit a reasonable return. *E.g.*, Florida Rock Indus., Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994); Orion Corp. v. State, 109 Wash. 2d 621, 642 (Wash. 1987) ("present, possible, and reasonably profitable use"), *cert. denied*, 486 U.S. 1022 (1988); Hornstein v. Barry. 530 A.2d 1177 (D.C. App. 1987) ("reasonable financial return"); Wheeler v. City of Pleasant Grove, 833 F.2d 267, 271 (11th Cir. 1987) ("the landowner's loss takes the form of an injury to the property's potential for producing income or an expected profit"). However, lower courts have not uniformly accepted that profit is relevant to takings analysis. *See, e.g.*, Park Ave. Tower Assocs. v. City of New York, 746 F.2d 135 (2d Cir. 1984) (inability of owners to receive reasonable return on their investment did not, in itself, amount to an unconstitutional taking), *cert. denied*, 470 U.S. 1087 (1985); William C. Haas and Co. v. City of San Francisco, 605 F.2d 1117 (9th Cir. 1979) (impairment of economic value of property due to rezoning, although substantial, was insufficient to give rise to constitutional claim to just compensation), *cert denied*, 445 U.S. 928 (1980); MacLeod v. County of Santa Clara, 749 F.2d 541, 549 (9th Cir. 1984), *cert. denied*, 572 U.S. 1009 (1985). In *MacLeod*, the Court found that denial of a permit to harvest timber did not deny the owner the economically viable use of the property amounting to a taking. The landowner could still raise cattle on it. The fact that the owner would not realize a profit over expenses on land did not mean that the denial of the harvesting permit was a taking.

175. This segmentation issue is brought into sharper focus with the mining extraction cases. *Compare Mahon* 260 U.S. at 414 (regulation requiring mining companies to operate mining so as not to affect habitable houses was a taking, because private deeds granted to the mining companies such rights) *with Keystone Bituminous Coal*, 480 U.S. at 470, 498 (taking not found where statute required mining companies to leave 27 million tons (2% of rights in coal) in place). In *Lucas*, Justice Scalia muses that when "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

returns,[176] and set the relevant timeline.[177] Ultimately the inquiry may be mathematical: how much use of the property must be eliminated before there is a taking?[178] Yet courts have not fashioned rules to answer these important questions but have instead been guided by the facts and circumstances of each particular case.[179]

In addition to showing that the regulation substantially decreases the economic benefit of the property, the petitioner must also show that such decrease interferes with her reasonable or distinct investment-backed expectations (RIBEs) (the third *Penn Central* requirement).[180] That is, not all losses will be treated as legally cognizable. Takings are ubiquitous; with every regulatory action someone gains value and someone else loses value.[181] If every regulatory loss were considered a taking, "government hardly could go on."[182] To answer

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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." 112 S. Ct. at 2894 n.7; *see also Florida Rock Indus., Inc.*, 18 F.3d at 1572 n.32 ("Property interests are about as diverse as the human mind can conceive."); Jed Rubenfeld, *Usings* 102 YALE L. J. 1077, 1158-61 (1993).

176. Should a court determine whether there is a taking by measuring the residual fair market value of the property? *See Florida Rock Indus., Inc.*, 18 F.3d at 1575 (Nies, J., dissenting) (market value of land is not relevant to takings analysis). What evidence should the court consider in determining fair market value? *See id.* at 1567 (whether, for the purposes of takings analysis, fair market value of property should include speculative value).

177. In *Lucas*, the relevant timeline was when the petitioner acquired the parcel. *Lucas*, 112 S. Ct. at 2899. But often, development of a large parcel occurs over an extended period. In *Reahard*, the parcel was acquired by petitioner's parents 48 years prior to petitioner's claim and developed over that period. The court remanded the case, in part, for the lower court to determine the relevant timeline. Reahard v. Lee County, 968 F.2d 1131, 1136 (11th Cir. 1992), *cert. denied*, 115 S. Ct. 1693 (1995).

178. In *Lucas*, Justice Scalia recognized that there are no guidelines as to what level of denial of economically viable use, short of 100%, rises to a taking and conceded that in some cases denial of 95% of economically viable use may not be a taking. *Lucas*, 112 S. Ct. at 2895 n.8. Past Supreme Court cases have found no taking even when denial of use was substantial. *See Village of Euclid*, 272 U.S. at 365 (75% diminution); Hadacheck v. Sebastian, 239 U.S. 394, 405 (1915) (88% diminution); *see* CALLIES ET AL., *supra* note 154, at 32.

179. Justice Scalia straightforwardly acknowledged that "[u]nsurprisingly, this uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court." *Lucas*, at 112 S. Ct. at 2895 n.7 (comparing *Pennsylvania Coal Co.* with *Keystone Bituminous Coal Ass'n*).

180. This concept was first mentioned as the "primary expectation concerning the use of the parcel" in *Penn Central*, 438 U.S. at 136. RIBE is a term of art. *Accord* Epstein, *Expectations*, *supra* note 173, at 1370.

181. *See* Steven Medema, *Making Choices and Making Law: An Institutional Perspective on the Takings Issue*, *in* LAW AND ECONOMICS PERSPECTIVES, *supra* note 24, at 45, 46 ("losses are ubiquitous: any legal change restricts someone's opportunity set, that is, engenders loss [and expands someone else's opportunity sets, that is, engenders gain.] The question that remains is whether the losers will be compensated for their losses.").

182. *See Mahon*, 260 U.S. at 412; *accord Loveladies*, 28 F.3d at 1176 ("the second criterion . . . was intended to ensure that not every restraint imposed by government to adjust to the competing demands of private owners would result in a takings claim").

which losses are legally cognizable, the court must determine the nature of the petitioner's expectations[183] and whether such expectations were "reasonable" and "investment-backed."[184]

The most clearly protected expectations are those which arise from title in the property. When used in this context, "expectations" are akin to entitlements. Thus, the landowner is allowed to challenge regulatory actions that impinge upon expectations relating to the "traditional" and "core bundle" property rights,[185] including interference with the landowner's exclusive physical possession,[186] her right to alienate,[187] and her right to exclude others.[188] In addition, under *Lucas*, expectations are informed by how property is defined by state property law,[189] and how property interests are limited by state common

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183. It is useful to begin by observing that the term used in takings jurisprudence is expectation, not interest or right. The use of the term "expectation" indicates that a property owner's expectation is something less than a legal interest or right, but something more than mere speculation. *See* Oswald, *supra* note 168, at 108.

184. Professor Epstein would prefer the use of the term "reasonable expectations" rather than "investment-backed" since the latter overly emphasizes whether the property owner has made an "investment," rather than whether the investor is reasonably entitled to protection under the law. Epstein, *Expectations*, *supra* note 173, at 1370.

185. *Lucas*, 112 S. Ct. at 2888 ("[T]akings jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over the 'bundle of rights' that they acquire when they obtain title to property."). Professor Epstein, explains why this formalistic view of property is important:

> [P]roperty rights . . . are only of value if the holder . . . is in a position to preserve their use against all comers. Thus, there are legal rules to protect . . . exclusive rights of possession of privately owned property . . . . [Their] importance cannot be underestimated. The rules of trespass and nuisance are for the protection of property interests, and they insure that once the rights in property have been assigned to one person . . . they cannot be taken or destroyed by another individual.

Epstein, *Property*, *supra* note 116, at 191.

186. *See Loretto*, 458 U.S. at 419 (statute that permitted small television antennas to be placed on roofs was a taking); *Causby*, 328 U.S. at 256 (intermittent air invasions were a taking). Although Professor Tribe criticizes this group of cases as the Court's "fetish," it may reflect the Court's comfort in treating property as a "thing," TRIBE, *supra* note 23, at 47; *see* Frank Michelman, *Takings, 1987*, *supra* note 24, at 1628 ("[T]hese may be regarded as judicial devices for putting some kind of stop to the denaturalization and disintegration of property. . . . [and although] logically vulnerable, can still make sense ideologically as tokens of the limitation of government by law."); JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 234-239 (1991).

187. *See Hodel*, 481 U.S. at 704.

188. See Nollan v. California Coastal Comm'n, 483 U.S. 825, 831 (1987) ("We have repeatedly held that, as to property reserved by its owner for private use, the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property'."); Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994) ("[P]ublic access would deprive petitioner of the right to exclude others, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property'.").

189. In *Lucas*, Justice Scalia states that "the owner's reasonable expectations [are] shaped by the state's law of property—i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land . . . ." 112 S.Ct. at 2894.

law, such as nuisance law and the principle of "*sic utere tuo ut alienum non laedas.*"[190]

But with respect to the most difficult questions regarding RIBEs, courts are virtually rudderless. RIBEs are more than a "unilateral expectation or an abstract need."[191] A property owner has no RIBE of being able to obtain the permits necessary to exploit the highest and most profitable use of her property.[192] Should a property owner "reasonably" expect changes in government regulation?[193] If government regulation or action adds value to a property owner's parcel, can the governmental agency amend or repeal the regulation without the action's amounting to a taking?[194] Should the property owner expect that a governmental agency will act "reasonably"?[195] How much knowledge of permitting and land use regulations should be attributed to a property owner when assessing the property owner's expectations?[196] In addition to resolving these issues, to be able to define the

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190. *Lucas*, 112 S. Ct. at 2894 n.7, 2900 ("[R]egulations that prohibit all economically beneficial use of land . . . cannot be newly legislated or decreed (without compensation) but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.").

191. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160 (1980); Ruckelshaus v. Monsanto, 467 U.S. 986 (1984).

192. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 136 (1978); Graham v. Estuary Properties, Inc., 399 So.2d 1374, 1382 (1981).

193. The Supreme Court has equivocally defined "expectations" in the context of existing and future regulatory schemes. Justice Scalia would rule that a property owner's reasonable expectations need not factor in the possibility that a regulatory agency will alter its regulations from time to time. *Lucas*, 112 S. Ct. at 2900 ("[T]he notion . . . that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture."). On the other hand, Justice Kennedy views existing regulatory schemes as part of the background that should inform reasonable expectations. *Lucas*, 112 S.Ct. at 2903 (Kennedy, J., concurring) ("The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source . . . . Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.").

194. Mahon v. Pennsylvania Coal Co., 260 U.S. 292, 414 (1922) (distinguishing regulations where there was "reciprocity of advantage"); *Penn Central*, 438 U.S. at 135 (noting that historic preservation regulations benefit the owner of the train terminal).

195. In *Ruckelhuas*, 467 U.S. at 999, the Court held that Monsanto did not have a reasonable expectation that the EPA would not disclose trade secrets, although the applicable statute did not require the agency to refrain from such disclosures.

196. Generally, courts will impute to the petitioner the knowledge that a reasonably diligent property owner would have regarding existing land use regulations. *See* Namon v. Dept. of Envtl. Reg., 558 So. 2d 504 (Fla. 3d DCA 1990) (appellants who learned that wetlands regulations would bar construction on the property were attributed with constructive knowledge of the regulation). Some courts have been willing to apply differing standards depending on the type of regulation. *See* Vatalaro v. Dept. of Envtl. Reg., 601 So. 2d 1223, 1229 (Fla. 5th DCA 1992) (court found that the petitioner did not have constructive knowledge of wetland regulations but had constructive knowledge of zoning regulations).

expectation and whether it is reasonable, the court must again determine the property interest, the relevant timeline, and the range of profit expectations that are reasonable (and thus legally cognizable). Inevitably, each court and each case provides a different answer based on competing notions of justice and fairness.[197]

The confusion engendered by the takings analysis is evidenced by inconsistent results, the length of litigation in complex cases,[198] and the number of cases remanded to lower courts.[199] Such confusion has led to a general belief that courts are not qualified to make land use decisions.[200] The language of law cannot hide the fact that the infinite flexibility of a balancing test allows the judge to prioritize and weigh competing values of her own.[201]

2. *Unarticulated Policy Conflicts*

The United States Supreme Court's failure to articulate the theoretical foundation of takings analysis also accounts for the doctrinal confusion. At a fundamental level the purpose of the analysis is merely to be "fair," where fairness is not defined. Thus, lower courts attempt to find fairness without an articulated starting point.

Legal scholars have suggested numerous alternative theories and justifications as to why, when, and how courts should protect property interests under takings law. In searching for "fairness," are we concerned with the ability of an individual property owner to preserve her wealth against a less well-off majority?[202] Do efficiency concerns about government interference lead us to protect certain classes of expectations?[203] Are we concerned with government excesses in the exercise of the police power?[204] Or are we concerned with "demoralization" costs that occur when the police power is exercised

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197. *See* Kirby Forest Indus. v. United States, 467 U.S. 1, 14 (1984).

198. *See supra* note 97-98 and accompanying text.

199. *E.g.*, Florida Rock Indus. Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994) (case remanded for fifth time).

200. *See* 1994 PROPERTY RIGHTS REPORT, *supra* note 28, at 57. As Professor Rose-Ackerman noted, inconsistent results contribute to a lack of confidence that courts are making just decisions. *See* Rose-Ackerman, *supra* note 24.

201. *See* Reahard v. Lee County, 968 F.2d 1131 (11th Cir. 1992), *cert. denied*, 115 S. Ct. 1693 (1995); EPSTEIN, TAKINGS, *supra* note 26, at 116 ("The asserted incoherence of legal doctrine becomes the entering wedge to allow, encourage and indeed justify judges to reach whatever result they prefer on any given state of affairs."); *see generally* RONALD M. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

202. *See* THE FEDERALIST NO. 10, *supra* note 24, at 83-84.

203. *See* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS (1988); Rose-Ackerman, *supra* note 24; WILLIAM A. FISCHEL, REGULATORY TAKINGS (1995).

204. EPSTEIN, TAKINGS, *supra* note 26.

to redistribute wealth arbitrarily?[205] Are we simply unable to reconcile our individualist view of property—that society is better-off formulating rules that protect acquisition of property—with our civic view—that communities must rely on the public spiritedness of its members?[206] Is "property" a socially constructed set of entitlements, which courts and legislators should be able to change?[207] The courts have failed to adopt any single view of property.[208] This lack of theoretical coherence in takings law, which is pragmatic, inevitably plays itself out in the form of unresolved takings conundrums.[209]

IV. UNPACKING THE PROPERTY RIGHTS ACT

> [The] law is what the courts say it is.[210]
>
> HLA Hart

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205. Rose-Ackerman, *supra* note 24.

206. Rose, *supra* note 130, at 596-97.

207. Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); NEDELSKY, *supra* note 186, at 239-40.

208. Perhaps the single most important factor in explaining the shift in takings analysis from *Penn Central* to *Lucas* is the Court's differing view of property rights. Justice Brennan's view of property is clearly a view based on a series of entitlements that the community is free to add or take away. *See Penn Central*, 438 U.S. at 104 (reciprocity of advantage); Nollan, 483 S.Ct. at 842 (1987) (Brennan, J., dissenting) (disputing private landowners' expectations to beach access). Justice Scalia's views are more "thing" based, relying on "traditional" state law concepts of what is property. *See Lucas*, 112 S.Ct. 2894 n.7 (property owner's expectations determined by state property law); *Nollan*, 483 U.S. at 831 (right to exclude others is an essential stick in the bundle of property rights).

This flexible view of property has been condemned by some legal scholars, *see* Epstein, *Property, supra* note 116, but others view this flexibility as a function of our common law system responding to a changing environment:

> "Property" is the product of 800 years of judicial manipulation. "Property" is, literally, what the courts have made it. The concept of property is part of the common law . . . . Our system contemplates that the ingredients [in the old bottle labeled "property"] will change to, among other things, accommodate the needs of a changing society. All we require of our judges is that they proceed in a rational manner, retaining enough of the existing ingredients to give stability . . . and adding enough new ingredients to meet the needs of society.

Stoebuck, *supra* note 136, at 1072-73.

209. Some legal scholars have viewed indeterminate outcomes under takings law not as a negative, but a necessary part of takings law. *See* Gerald Frug, *Property and Power: Hartog on the Legal History of New York City*, 3 AM. B. FOUND. RES. J. 673-91 (1976) (stating that judges should recognize that takings law does not reflect a particular methodological or conceptual approach, but instead requires a judge to experiment and exercise imaginative solutions); Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1542-48 (1991) ("[Can] the riddles posed by our allegiance to conflicting views of property . . . be escaped at all. The most obvious improvement would involve coming to terms with the absence of a 'set formula' for takings decisions so that our current state of affairs need no longer pejoratively be judged 'ad hoc'.")

210. H.L.A. HART, THE CONCEPT OF LAW 141 (1961).

> Whoever has an absolute authority to interpret any written or spoken laws it is he who is the lawgiver to all intents and purposes and not the person who first wrote or spoke them.[211]
>
> Bishop Hoadly

The Property Rights Act has an "all things to all people" quality. Longtime property rights activists view the Act as a victory because they believe property owners' rights are finally protected; state agency and local government officials view the Act as part of the 1995 legislative reform directing them to act "common sensibly";[212] and environmentalists view the Act as successful damage control in a disappointing legislative session.[213] The Executive Branch took comfort in seeing that any attacks on Florida's growth management laws were temporarily averted.[214]

It is precisely this "all things to all people" quality that makes the Act good politics, but not good law. Far from being a "modest" proposal,[215] the Act, while short and terse, is very complex. It uses many takings terms of art; consequently, many of the interpretive conflicts present in takings lore are duplicated in the Act. In addition, as there is almost no legislative history,[216] the courts have been given very little guidance on how to resolve historical conflicts between community and individual property interests. In short, a plethora of issues await those who must interpret and implement the Act.

There are four main themes within the Property Rights Act. It aims to 1) provide a "fair" compensation remedy, outside of takings law, to property owners who may have to bear an "inordinate" burden for government regulations that benefit the community at large; 2) signal local governments to exercise greater caution and use more "common sense" in issuing and amending land use regulations; 3) provide to

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211. J.C. GRAY, THE NATURE AND SOURCES OF LAW 276 (1902).

212. *See supra* notes 72-83 and accompanying text.

213. David Gluckman, a longtime environmental lobbyist, offered this assessment of the 1995 legislative session: "I had no expectations and they've been met. We've generally had a fairly miserable session." Elizabeth Wilson, *Environmentalists Gloomy After a Session of Setbacks*, ST. PETE. TIMES, May 11, 1995, at B5.

214. The supporters of "property rights" also often oppose growth management laws. For example, Rep. Ken Pruitt, a co-sponsor of the Property Rights Act, is also a leading opponent of growth management laws. *See supra* note 18.

215. The 1994 Property Rights Report credits Robert M. Rhodes, a participant in the Governor's Task Force with the "modest" suggestion that the 1994 Task Force consider a program, outside of takings law, whereby property owner could obtain relief if government regulations "inordinately burdened" her land use. *See* 1994 PROPERTY RIGHTS REPORT, *supra* note 28, at 70. The 1975 Property Rights Report contained the same recommendation. *See* 1975 PROPERTY RIGHTS REPORT, *supra* note 3, at 12.

216. *See supra* notes 6-7.

property owners mechanisms that sidestep the slow, laborious and costly administrative and court processes; and 4) facilitate decentralized decisionmaking.

Part A below sets forth an interpretive model for the Act based on these four themes. Rather than providing the reader with a detailed explanation of the Property Rights Act, which is already provided in the companion piece,[217] part B then briefly describes how a property owner would proceed to make a claim under section 1 of the Act.[218] Part C will apply this model to the major interpretive issues that will likely arise under the Act.

A. Constructing a Compass

Despite the Act's many shortcomings, it is possible to use the text and history of the Act to articulate an interpretive model that can provide guidance. I call this model a compass because, although it can help point the way, it cannot ultimately resolve the most difficult issues under the Act. The four points of the compass are as follows: first, the Act is a response to the muddle of takings law; second, takings common law is relevant to the construction of the Act; third, the Act is a signal to local governments to exercise more caution, common sense, and flexibility in issuing and amending land use regulations; finally, the Act does not select a political theory of property rights.

1. The Property Rights Act Is a Response to Takings Law

The Act is a direct response to the procedural and substantive problems perceived to exist in takings law. Although the 1994 Property Rights Study Commission's "modest" proposal,[219] which one year later became the model for the Property Rights Act, did not attempt to revamp takings law head on,[220] the Act did address both procedural and substantive concerns not addressed by takings law.

The Property Rights Act creates new procedures that address the dilatory effects of state ripeness doctrine. First, an aggrieved property owner can bypass administrative and state courts—instead, she can negotiate under section 1 of the Act or directly employ the special master mechanism in section 2 of the Act.[221] Second, ripeness doctrine

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217. Powell et al., *supra* note 6, at 296-313.

218. *See supra* note 40.

219. *See supra* note 215.

220. *E.g.*, Fla. SB 1326 (1995) (mandates the numerical proportion at which denial of economically viable use becomes a taking); FLA. S. JOUR. 218 (Reg. Sess. 1995) (amends the state constitutional takings provision).

221. *See supra* notes 34-30 and accompanying text.

is substantially modified for compensation claims under the Act. Whereas takings common law and administrative procedures permit delays, under the Act the state land use entity must issue a "ripeness decision" within 180 days; whether or not the land use entity responds, the claim thereafter is deemed "ripe" for purposes of litigating a compensation claim made under the Act.[222]

With respect to substantive issues of takings law, the Act provides a compensation remedy, outside of takings law, to property owners who may be forced to bear an "inordinate burden" caused by regulations that benefit the community at large.[223] Under current takings law, only regulatory actions categorized as per se takings can be resolved with any certainty.[224] The Act appears to sidestep these hurdles by providing property owners a new cause of action which is not necessarily wedded to the takings common law.[225]

2. *Takings Law Is Relevant in Interpreting the Act*

The Property Rights Act provides that it "may not necessarily be construed under the case law regarding takings, if the governmental

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222. *See supra* note 36 and *infra* notes 285-86 and accompanying text.

The Property Rights Act also addresses indirectly the problems of multilayered and highly politicized governmental decisionmaking discussed in part III. *See* notes 113-29 and accompanying text. The Act seeks to help the property owner cut through multiple layers of government by permitting the property owner to file simultaneously a claim to initiate negotiation or the special master procedure with all the land use entities that have some authority over the disputed use of the property. *See* FLA. STAT. §§ 70.001(4)(a), 2(3) (1995). Moreover, the Act provides an incentive for each land use entity to notify and involve in the dispute resolution other state land use entities with potential jurisdiction. *Id.* § 70.001(4)(a). If compensation is due the property owner, the state land use entity's responsibility will be reduced to the extent the circuit court finds that other participating land use entities are responsible for the "inordinate burden." *Id.* § 70.001(6)(a). The Act could have addressed this issue more directly by creating a one-stop permitting procedure.

It is not clear whether the drafters ever considered how the Property Rights Act would impact the well-established publicity and notice procedural safeguards in local land use decisionmaking. The Act requires that the land use entity notify the contiguous neighbors and all parties involved in prior administrative actions that an inordinate burden claim has been made, *see id.* § 70.001(4)(b), or that the special master procedure has been invoked, *see id.* § 70.51(4). The Act does not require notice to the public at large. Moreover, the Act is silent as to whether the negotiation or special master process is open to the public. The Act appears to regard the claim of the property owner, not primarily as a land use issue requiring community input, but rather as an issue of compensation affecting the individual.

Additionally, the issue of how the Property Rights Act interacts with the Florida Administrative Procedure Act, which requires notice and publicity of administrative actions, is likely to be litigated. *See* FLA. STAT. §§ 120.53-542, .55 (1995). While the Florida Administrative Procedures Act does not apply to most local government land use decisions, *see Snyder*, 595 So. 2d at 65, it does apply to decisions made by state agencies, including wetlands permitting.

223. *Id.* at § 70.001(2); *see infra* notes 287-93 and accompanying text.

224. *See supra* notes 133-79 and accompanying text.

225. *See infra* notes 226-34 and accompanying text.

action does not rise to the level of a taking."[226] This confusing declaration must be construed in applying almost every provision of the Act. Certainly the phrase should not be interpreted to preclude a court from considering takings precedent.

As argued in part III of this Article, the Property Rights Act was drafted as a response to problems identified in existing takings law. Moreover, the Property Rights Act and takings common law have similar purposes—to determine when a regulatory action has gone so far that an individual property owner has been forced to bear a burden that in all fairness should be borne by the public as a whole.[227] With such close parallels, then, it should not be surprising that many of the principles in the Property Rights Act are similar to or refer directly to takings common law doctrine. In fact, many of the sparse provisions of the Property Rights Act can be interpreted only in the context of the background principles of takings common law.[228] For example, the Act adopts certain takings law concepts, such as "existing use"[229] and "reasonable, investment-backed expectations."[230] Moreover, the "inordinate burden" determination is remarkably similar to regulatory takings analysis[231] and incorporates the nuisance and noxious use exception as well.[232] Ultimately, as in takings law, no political guidance is provided as to which factors to prioritize, and no

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226. *See* FLA. STAT. § 70.001(9) (1995).

227. *See supra* note 137 and accompanying text.

228. *See supra* notes 228-34 and accompanying text.

229. The definition of "existing use" includes reasonably foreseeable non-speculative uses, *see* FLA. STAT. § 70.001(2) (1995), and "actual present use or activity." *Id.* § 70.001(3)(e). These definitions are similar to the concept of "economically viable use" in takings jurisprudence. *See supra* notes 167-79 and accompanying text.

230. *See* FLA. STAT. § 70.001(3)(e) (1995). "Inordinate burden" can be found if governmental regulation permanently impairs a property owner's reasonable investment backed expectations. *See id.* The Act does not define this term. The only area of the law where this concept is applied is regulatory takings law. *See supra* notes 180-97 and accompanying text.

231. The Property Rights Act inordinate burden determination and the *Penn Central* test are similar. The first step under the Act, which directs the court to consider whether there is an existing use, corresponds to the second prong of the *Penn Central* test, the economically viable use prong. *See supra* notes 167-79 and accompanying text. The second step of the Act, the inordinate burden determination requires consideration of one of the following: 1) reasonable investment-backed expectations, a concept which corresponds to the third prong of the *Penn Central* test, *see supra* notes 180-184 and accompanying text; or 2) whether the property owner's remaining use is reasonable. The statute defines reasonable in terms of the *Armstrong* fairness test—fairness to the individual, given the benefits to the community as a whole. *See supra* note 137.

232. The Property Rights Act provides that the law of nuisance and noxious use should be read into what a property owner should reasonably expect to be her use of property. *Cf.* FLA. STAT. § 70.001(3)(e) (1995) (carving out an inordinate burden exception for "remediation of a public nuisance at common law or a noxious use of private property"). *Compare with Lucas*, 112 S. Ct. at 2900 (an exception to denial of economically viable use lies if state nuisance or tort law permitted a total deprivation).

theoretical framework is articulated for the inordinate burden analysis.

The Legislature's equivocation may be plausibly interpreted as the drafters' recognition of the continued relevance of takings analysis and concepts. Arguably, having recognized the great difficultly of balancing the interests of the many against the private property interests of individuals, the Legislature decided not to clarify doctrine or theory. Instead, the Act again delegates to the courts, already experienced in resolving regulatory takings dilemmas, the question of when, under the Property Rights Act, a regulation has become an inordinate burden. In the Legislature's view, courts should be able to calibrate the "fairness" to be meted out under the Property Rights Act, just as courts mete out "fairness" under regulatory takings law.[233] Takings analysis, then, as complex, contradictory, and inconsistent as it is, was not rejected outright by the Legislature, but rather the Legislature intended that takings jurisprudence inform the interpretation of the Property Rights Act.

Rather than totally proscribing courts' consideration of seventy-odd years of common law regulatory takings, perhaps all that the Legislature was stating with this limiting provision was that it did not like certain results under takings law. A reasonable construction of this provision is that relief for regulatory action should be more available to property owners under the Property Rights Act than it is under the common law of takings.[234]

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233. Fla. S. Comm. on Comm'y Aff., tape recording of proceedings (April 24, 1995) (on file with comm. secretary) (consideration of Fla. SB 2912 (1995)) [hereinafter Fla. S. Comm. on Comm'y Aff. tape]. In response to a question concerning how the courts would interpret terms similar to terms used in the Property Rights Act, then DCA Secretary Linda Loomis Shelly responded:

> We trust the circuit courts of Florida, when dealing with the facts presented to them by the property owners, [having been] told by the Legislature that it doesn't have to be a takings to be an inordinate burden, will find that new regulations that impose restrictions on property owners which are not fair, considering how the property owner is impacted . . . . [are] an inordinate burden; one that should have been [born] by the taxpayers or public-at-large . . . . [W]e don't feel that an arbitrary number, 10%, 25%, 40%, no matter what the number is, [is appropriate.] [T]hat just throws it into an issue of appraiser['s] [opinions] . . . . We think the circuit courts are well-equipped to make these decisions. They are often called upon to interpret the common law. What would a reasonable person do under similar circumstance? This is the type of [decision] that a circuit court can make.

Id.

234. *Cf.* FLA. STAT. § 70.001(2) (1995) ("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.").

3. *The Property Rights Act as a Signal*

The Property Rights Act should be viewed as a signal requiring land use entities to reorient their organizational culture to be more responsive to property owners' concerns and to act with more common sense. The Property Rights Act was enacted in a populist and reformist political climate, which fostered reform of administrative procedures in general.[235] The directive of the Property Rights Act, just as the general directive of the entire 1995 Legislative session to all administrative agencies, called for more common sense, more reasonable actions, and more connectedness to people's problems.[236]

When viewed as a whole, the innovative provisions of the Act are the mechanisms that apply this directive. First, the settlement offer requirement is a mechanism that requires the land use entity to focus on the individual concerns of a property owner, to reassess its regulation in light of the impacts on the particular property owner, and to make an individualized counterproposal.[237] Whereas land use entities previously made decisions on a broad basis, with relatively little concern for individualized impacts, the Act now requires more individual decisionmaking. Second, the ripeness decision innovation, granting property owners much readier access to courts, is a response to charges of delayed decisionmaking and its detrimental impact upon individuals.[238]

4. *The Property Rights Act Does Not Adopt Any Particular Theory of Property*

The single most important fact arising from the available legislative history is that the Act was a *compromise* among interest groups with widely divergent views.[239] During the work of the ad hoc committee drafting the legislation, no particular group was able to prevail over another in securing a radical redefinition of compensable property rights.[240] Rather, the group rejected more drastic alternative models.

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235. *See supra* notes 58-83 and accompanying text.

236. *See supra* notes 73-83 and accompanying text.

237. *See infra* notes 279-84, 334-45 and accompanying text.

238. *See infra* notes 285-86, 295-98 and accompanying text.

239. *See supra* note 5.

240. Note, however, that the definition of "existing use" was amended by way of a technical amendment, in the waning hours of the Legislative session, *after* the Legislature's nearly unanimous approval of the bill. The definition was expanded to add the second sentence of section 1(3)(b), which now recognizes non-speculative, reasonably foreseeable use as a compensable "existing use." FLA. STAT. §§ 70.001(2), (3)(b) (1995). It is not clear whether all members of the ad

For example, the committee did not consider legislation that would have imposed a formulaic approach to the takings balancing-fairness test.[241] With the Act, the Legislature certainly created additional entitlements that benefit property owners.[242] But these additional entitlements should not be viewed as representing an intention to make any fundamental changes as to what comprises "property," to announce a fundamental political shift in favor of property owners, or to free property owners from the constraints and protections of zoning and environmental laws.[243]

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hoc group were aware of this last minute amendment (called by some a "midnight amendment"), or that the majority of legislators were aware of the importance of the "technical" amendment. *Compare* version passed by voice vote in the House of Representatives *with* final version, FLA. H.R. JOUR. 1050 (Reg. Sess. May 2, 1995); *see also infra* note 291.

241. The proposal, contained in the 1994 legislation and revisited in HB 1381, was that any government regulation that resulted in a diminution of economically viable use by 25% would be deemed a taking. Fla. HB 1381 (1995).

242. Property can be viewed as a series of entitlements protected by legal rules. Society makes choices as to which group to grant legal entitlements, based on policy choices such as efficiency, fairness, or income redistribution. *See* Calabresi & Melamed, *supra* note 128, at 1089-1990. The enactment of the Property Rights Act represents a "windfall" in favor of property owners because, under the Act, property owners are now entitled to claim compensation for regulatory actions that do not rise to the level of a taking. *See supra* note 27.

243. There is a class conflict character to the property rights movement. *See supra* notes 24-28 and accompanying text; *see also* Medema, *supra* note 181, at 48 ("The choice of a particular rule serves several functions, the most important of which are the resolution of the problem of order, the obfuscation of loss, legitimation, and psychic balm. In the face of radical indeterminacy, the law establishes order, or social control."); Warren J. Samuels & Nicholas Mercuro, *The Role of the Compensation Principle in Society, in* LAW AND ECONOMICS: AN INSTITUTIONAL PERSPECTIVE, 210-47 (Warren J. Samuels & Alan A. Schmidt eds., 1981). At some level, those whose wealth is concentrated in real property are resentful of land use laws that inhibit their ability to exploit the commodity value of their land. They feel that growth management and environmental laws benefit primarily those whose wealth is not concentrated in land, but concentrated mainly in intangibles, such as stocks or intellectual property (a law degree for example). Such "elites" should pay for the benefits that they derive from growth management and environmental laws. *Accord* Harris, Interview One, *supra* note 5. This anti-elite sentiment is also a basic tenet of populist ideology. *See supra* note 59; *compare* James V. DeLong, *It's My Land Isn't It?*, N. Y. TIMES, March 15, 1995, at A-10;

> Yet it is easy for many proponents of regulation to [oppose pro-property rights legislation]. After all, real estate means little to them. Their estate lies in their professional degrees, connections or civil service job protection—possessions that are shielded from appropriation. They don't understand the fear and anger of people whose economic well-being and very identity is bound up with their land

Id.; *with* Dan Gordon, *Want a Toxic Dump Next Door?* N. Y. TIMES, March 15, 1995, at A-10.

> The advocates of these laws seem to have ignored the cliche that the factors that most affect home values are location, location and location. An incinerator built close by or polluted water will immediately reduce home values in a neighborhood. Coastal protection and wetland laws protect property values by keeping communities attractive and by buffering floods and ocean storms. A band of wetlands along the coast invariably increases the value of homes behind it. So under the new anti-regulation agenda, homeowners' property values are threatened. Also, the sheer cost of paying property

There are many competing political theories of property rights, and the choice of a political theory will influence the outcome of a takings challenge.[244] For example, in addition to the classical view of property rights,[245] there is the utilitarian approach, which takes a Benthamite view of human behavior. Utilitarianism assumes that, in the long run, most people are self-interested actors who will act in rational ways.[246] For utilitarians, "property is nothing but a basis of expectation—the expectation of deriving advantages from a thing, which we are said to possess, in consequence of the relation in which we stand towards it."[247] Applying the utilitarian approach to takings law, one can formulate a clear political framework: results should maximize total utility of all society[248] and, wherever possible, the takings test should result in outcomes that are predictable so that rational actors can adjust their behavior.[249] Consequently, uncompensated takings should be limited to those which society as a whole can view as beneficial.[250]

On the other hand, a communitarian view of property rights reconstructs property as the rights determined by the political process.[251] Government's function is to mediate between competing and often

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owners for their claims and the specter of continual litigation would dramatically undermine our environmental and zoning laws.

Id.

244. *See supra* notes 202-209 and accompanying text.

245. *See supra* note 26.

246. JEREMY BENTHAM, THE THEORY OF LEGISLATION 92, 90 (1975).

247. *Id.*

248. *Id*; *see, e.g.*, Calabresi & Melamed, *supra* note 128, at 1096 (justifying eminent domain power as a method of minimizing transaction costs and avoiding the holdout problem); Ellickson, *Alternatives to Zoning*, *supra* note 129, at 723-38 (rejecting zoning regulations as generally inefficient).

249. This is the public investment issue raised by law and economics scholars such as Susan Rose-Ackermann, Robert Cooter and Thomas Ulen. Law and economics scholars have been particularly concerned as to how the unpredictability of the exercise of the takings power can affect investment decisions of individual property owners. *See* Rose-Ackerman, *supra* note 24; COOTER & ULEN, *supra* note 203; Thomas Ulen, *The Public Use of Private Property: A Dual Constraint Theory of Efficient Governmental Takings*, *in* LAW AND ECONOMICS PERSPECTIVES ON THE TAKINGS ISSUE, *supra* note 24, at 163.

250. Michelman, *supra* note 23, at 1224.

251. *See generally*, Sax, *supra* note 207 (property is interconnected and mutually dependent); Robert Reich, *The New Property*, 73 YALE L. J. 733, 771 (1964) (property rights create areas of independence and self-reliance which the majority democratic process should protect); Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (courts should protect the area of "personhood" from incursion by the majority and other property owners); Frank I. Michelman, *Property As a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981) (property rights are political rights affecting democratic participation); Rose, *supra* note 130, at 593-99 (property rights include civic responsibilities which may require property owners to sacrifice and bear losses); Robin P. Malloy, *A Classical Liberal Critique of Takings Law: A Struggle Between Individualist and Communitarian Norms*, *in* LAW AND ECONOMICS PERSPECTIVES ON THE TAKINGS ISSUE, *supra* note 24, at 199-215.

conflicting private uses.[252] The political process validates controversial land use regulations.[253] Applying this theory to takings law, the state can regulate property for public benefit, except when there are important countervailing policies, such as ensuring that the police power is not exercised arbitrarily.[254]

Consider what would likely happen if the Property Rights Act were construed to select a theory of property rights that substantially favors real property owners, such as the classical utilitarian Hobbesian view championed by Professor Epstein.[255] From a classical viewpoint, property consists of a bundle of rights minimally including possession, use, and the right to exclude and to dispose rights which the owner is free to exercise in the manner she wishes. The role of courts and the law is to protect private property rights and owners' liberty interests in exercising such rights, so that individuals can freely pursue their profit-maximizing strategies.[256] Any governmental restriction on this principal bundle of rights that cannot be justified on clear efficiency grounds is a taking for which just compensation must be paid by the government.[257]

If the Property Rights Act were interpreted to adopt this view, it would cause either a massive redistribution of wealth to private real property owners from state and local governments and taxpayers or the virtual cessation of issuance of land use regulations. Under the current growth management system, local land use entities routinely make decisions that restrict the ability of property owners to use their property and exploit its economic value. For example, zoning has been characterized as a form of regulatory action that enables property owners to preserve their value in land by excluding certain uses, such as operation of a noisy, dirty factory that would depress adjoining land values.[258] Every time a land use entity issues a land

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252. *See* Sax, *supra* note 207.

253. Not all scholars rely on the political process as a justification of the communitarian view of property, but instead rely on their original insight as the basis for justifying actions by the majority. *See, e.g.*, Radin, *supra* note 251 (relying on the moral importance of personhood); Reich, *supra* note 251 (positing that property is necessary for individuals to remain independent and to preserve dignity); Sax, *supra* note 207 (viewing property as an interdependent network); Rose, *supra* note 130 (viewing property as a civic responsibility).

254. *See supra* note 163.

255. EPSTEIN, TAKINGS, *supra* note 26, at 65, 177, 257-59, 297-99.

256. *Id.*

257. *Id.*

258. The utilitarian justification for zoning is based on preventing "harmful externalities [which would] decrease the utility and thus the values of neighboring property." Ellickson, *Alternatives to Zoning*, *supra* note 129, at 687-90. However, the evidence as to whether zoning preserves property value is mixed. *See generally*, WILLIAM A. FISCHEL, DO GROWTH CONTROLS

development order that forbids or impairs a use, at least one property owner is prevented from realizing the potential use of her property, while at least one other is able to preserve her land value.[259] That is, each land use regulatory action results in winners and losers. Under the Property Rights Act, every "loser" could attempt to claim compensation,[260] while the government would not necessarily be able to claim the increase in value given to another property owner by the same regulatory actions. If the state and local government had to compensate every "loser," then "state and local governments could not go on."[261] Alternatively, government would either have to desist radically from enacting additional land use regulations or attempt to tax the increases in value attributable to regulatory action so that it could fund compensation for losses. The latter alternative would be administratively costly and burdensome and would radically increase the "presence" of government in citizens' lives.[262]

Neither alternative was intended. Even the sparse legislative history of the Act makes clear that the Act was not intended to affect Florida's growth management or environmental laws.[263] Clearly the overall thrust of the legislative session was to simplify government, not to push local governments towards more cumbersome and complex regulation.[264] Moreover, no comment in the debate, no legislative report, and no public statements by government officials involved in the ad hoc committee indicate an intent to shift significant public

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MATTER? A REVIEW OF EMPIRICAL EVIDENCE ON THE EFFECTIVENESS AND EFFICIENCY OF LOCAL GOVERNMENT LAND USE REGULATION (1990) (empirical evidence was inconclusive); Macmillen & McDonald, *Could Zoning Have Increased Land Values in Chicago?*, 33 J. URB. ECON. 167, 168 (1993) (study of Chicago property values showed no increase in property values following zoning); Patrick Beaton, *The Impact of Regional Land-Use Controls on Property Values: The Case of the New Jersey Pinelands*, LAND ECON. 172 (May 1, 1991) (study of growth management controls in New Jersey Pinelands area showed increase in value of developed residential property in the growth-controlled areas). Professors Epstein and Ellickson have argued that the tort law of nuisance is all that is needed in land use to mediate disputes between conflicting land uses. *See* EPSTEIN, TAKINGS, *supra* note 26, at 224-62; RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1995) [hereinafter SIMPLE RULES].

259. *See supra* note 181 and accompanying text.

260. The only exception under the classical view, reflected in the Property Rights Act, is where a land development regulation prohibits a nuisance or a noxious use. *See* FLA. STAT. § 70.001(3)(e) (1995).

261. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

262. Consider how complex a task it is for local governments to keep property values on local tax rolls current. The task is so administratively onerous that property tax assessments consistently lag behind market values, even though it is clearly to the advantage of local governments to keep property values current since this would increase tax revenues.

263. In the Senate debate, the sponsor of the Act, Sen. Mackey unequivocally states in his closing argument that the Act is not intended to have any drastic effect on growth management and environmental laws.

264. *See supra* notes 72-83 and accompanying text.

resources from taxpayer-financed land use entities to private property owners.[265] Moreover, no fundamental redefinition of property rights could have been intended if a legislature as diverse as Florida's passed this Act with near unanimity.[266]

Rather, the Legislature granted this additional entitlement as an acknowledgment that the current scheme of property entitlements was not satisfactorily meting out "fairness." Again, it is up to courts to be "fair" in balancing. The Property Rights Act, like the past seventy-five years of takings common law, does not select any political theory to provide guidance to courts in balancing the interests of the many against the property rights of the individual.

B. A Walk Through the Act

This part of the Article briefly describes how a potential claimant and a land use entity would proceed under the Act.

1. The Claim

Consider the following hypothetical case. In the County of Mithica, Florida, local land use officials[267] have ordered an exhaustive study of what the county needs to do to conserve Lake Purewater, which provides most of the drinking water for the residents of the county. The county's comprehensive plan includes a goal to conserve the quality of the drinking water and to preserve the ecological viability of Lake Purewater. The study of Lake Purewater, now completed, concludes that current densities around Lake Purewater should not be increased in order to assure the purity of the lake's drinking water.

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265. *See supra* note 28 and accompanying text.

266. *See supra* note 6. The Legislature did not allocate any funding to land use entities when it enacted the Act, even though the potential monetary effect of the Act is in the billions of dollars. *See supra* note 28 and accompanying text. The Act provides that its application is prospective, applying only to new regulations or amendments. FLA. STAT. § 70.001(12) (1995). This provision could put off indefinitely the application of the Property Rights Act if it is interpreted to mean that any land use regulation issued under the growth management laws is an application of an existing law, and not a new land use regulation. However, this is an extreme interpretation of this provision and one that would be contrary to the interpretation of the Act as a signal to regulatory agencies to mend their organizational culture. Nonetheless, at some time the wealth transfer effects due to the compensation provision in the Property Rights Act will have to be confronted. Concerns regarding funding surfaced in the subcommittee meetings of the Senate Judiciary Committee and Committee on Community Affairs, when the Florida Association of Counties and Florida League of Cities opposed the Act. *See* Fla. S. Judiciary Comm., tape recording of proceedings (April 19, 1995) (on file with comm. secretary) [hereinafter Fla. S. Judiciary Comm. tape]; Fla. S. Comm'y Aff. Comm. tape, *supra* note 233.

267. These officials would most likely be members of the local planning board and the local water management district. For purposes of discussion of the hypothetical, I will assume that the only officials involved are the members of the Mithica planning commission.

On October 1, 1996, the Mithica County Planning Commission "downzones" a three-mile band around the perimeter of Lake Purewater to a low-density conservation zone. No new construction will be permitted, but existing uses will be grandfathered. Six months ago, Growth Inc. (Growth) purchased fifty acres, twenty acres of which front on Lake Purewater, to develop a project consisting of a fifty-unit condominium (the Project). The price Growth paid reflected the value of the land to Growth if it could develop it at the highest use for Growth—building the Project. Growth has not yet applied for any permits and no county official has acted in such a way that would give rise to a vested right that Growth could claim. Nonetheless, Growth has invested significant development costs in the Project.

Although Growth's attorneys believe that Growth could have a takings claim, Growth decides to proceed under the Property Rights Act.[268] Accordingly, Growth files a written claim with the head of the county planning commission and all other pertinent government agencies.[269] The claim includes the following: 1) a statement that Growth is the title holder[270] of the parcel; 2) a description of how the change in zoning classification "permanently" and "directly"[271] frustrates

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268. Growth would have to exhaust numerous local administrative procedures to meet ripeness requirements necessary to file a takings claim. *See supra* notes 97-112 and accompanying text. Therefore, Growth, like any other rational property owner, would probably opt first for the procedures offered under the Property Rights Act. Under the Act, Growth can, within six months, and at relatively low cost, secure a "final decision" from the land use entity that, under a worst case scenario, would render Growth's compensation claim "ripe" under the Act or, at best, secure a favorable remedy.

269. It is the property owner's responsibility to file a claim with the appropriate government agencies, although a land use entity can also notify another entity whose active participation may be required. FLA. STAT. § 70.001(4)(a) (1995). There is actually an incentive for agencies to involve other land use entities that may have responsibility for impairing the existing use of the property, since the land use entity's potential financial liability to the property owner will be reduced to the extent a circuit court finds other land use entities are responsible for the property owner's inordinate burden. *See Id.* § 70.001(6)(a).

270. Under the Act, only persons who hold legal title may file a claim. *Id.* § 70.001(3)(f).

271. The Act defines "inordinate burden" as:

> an action of one or more governmental entities [that] directly restrict[s] or limit[s] 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 "inordinately burden" or "inordinately burdened" do not include temporary 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 . . . .

Id. § 70.001(3)(e).

Growth's "reasonable, investment-backed expectations"[272] or leaves Growth with an existing use[273] that is unreasonable[274] with respect to the property "as a whole";[275] and 3) a description of losses[276] incurred by Growth as evidenced by a real estate appraiser's report[277] stating the fair market value of the parcel before and after downzoning.[278]

2. *The Settlement Offer*

The county planning commission must now make a "settlement offer" within the next 180 days.[279] The planning commission will

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272. *Id.*

273. The Act defines "existing use" as:

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

Id. § 70.001(3)(b).

274. An existing use is unreasonable when "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." *Id.* § 70.001(3)(e).

275. *Id.*

276. Business damages are excluded from the compensation calculation. *Id.* § 70.001(6)(b).

277. *See id.* § 70.001(4)(a). The Act contains no requirement for professional certification of the appraiser, a precaution normally observed in commercial real estate transactions.

278. *See id.*

279. *Id.* § 70.00(4)(c). The Act specifies what a government agency must do in extending a settlement offer as follows:

> 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.

Id. This description does not specify whether the settlement offer is the result of a bargaining process between the property owner and the government agency or a single offer. Nonetheless, a bargaining process is contemplated by the Act:

> 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*

review[280] its earlier decision to determine whether, given its statutory obligations and existing laws,[281] it can modify its earlier decision in a way that will lessen the burden of the regulation on the individual property owner.[282]

After careful review, the planning commission decides that the study is very clear that the county's water supply will be jeopardized if additional building is permitted around the lake. The planning

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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.

Id. § 70.001(6)(c)3 (emphasis added). A bargaining process may be advantageous to both parties since it would facilitate the exchange of information about the property and the offers they would have been willing to accept. *See infra* note 337.

280. Whether this process is a review or reconsideration is not expressly provided in the Act. However, this 180-day settlement offer period can be viewed as a "cooling-off" period during which local governments can reconsider their decisions, removed from the political pressures generated at the moment the decision was initially made.

281. A government agency must obey its enabling act and existing laws and regulations. In addition, during this bargaining process, land use entities should be aware of the common law doctrine of contract zoning, which prohibits a land use entity from contracting away their police power. The policy behind this doctrine is a concern for arbitrariness and subversion of local processes in favor of influential parties able to exact concessions from local governments. The police power can be exercised only in the interest of the whole community. *See* Hartnett v. Austin, 93 So. 2d 86 (Fla. 1956); Collard v. Incorporated Village of Flower Hill, 421 N.E.2d 818, 821-22 (N.Y. 1981) ("Because no municipal government has the power to make contracts that control or limit it in the exercise of its legislative powers and duties, restrictive agreements made by a municipality in conjunction with a rezoning are sometimes said to violate public policy."); Cederberg v. City of Rockford, 291 N.E.2d 249, 251 (2d Dist. Ill. 1972) ("When zoning is conditioned upon collateral agreements or other incentives supplied by a property owner, the zoning officials are placed 'in the questionable position of bartering their legislative discretion for emoluments that had no bearing on the merits of the requested amendment.' "); *see generally* Judith W. Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957, 983-84 (1987) (contract zoning and spot zoning are in essence a substantive due process and procedural due process judicial review).

282. The final "settlement offer" is to be taken into consideration by the court if negotiations fail and the property owner proceeds to seek compensation for "inordinate burden" compensation under the Act. FLA. STAT. § 70.001(6)(a) (1995) ("The circuit court shall determine . . . considering the settlement offer . . . [whether] the governmental entity . . . inordinately burdened the real property.") The "settlement offer" is also considered in the award of attorney's fees to the prevailing party in subsequent litigation under the Act. The Act provides that "the property owner is entitled to recover reasonable costs and attorney [sic] fees . . . if the property owner prevails in the action and the court determines that the settlement offer . . . did not constitute a bona fide offer to the property owner which reasonably would have resolved the claim. . . ." *Id.* § 70.001(6)(c)1. Similarly, the land use entity may be awarded attorney's fees and costs if "the property owner did not accept a bona fide settlement offer. . . ." *Id.* § 70.001(6)(c)2.

These types of penalties would encourage the land use entity to make a settlement offer that it could defend as reasonable in court. It will not necessarily be the entity's "best offer," since the agency will anticipate that the court, and other parties, will use the agency's "settlement offer" as a starting point for settlement negotiations in any ensuing litigation proceedings.

commission would consider offering to purchase the land or making a land swap, but since no funds are available,[283] its settlement offer to Growth is that it cannot make any change in zoning classification.[284]

3. *Ripeness Decision*

At the same time, as required by the Act, the planning commission issues a "ripeness decision," in which the planning commission states 1) that Growth's intended use of the parcel is not permitted under the present zoning classification and 2) what uses are allowable under the new zoning classification.[285] Whether or not the planning commission complies with issuing the "ripeness decision," as a matter of law, Growth's claim will be deemed ripe for purposes of seeking compensation under the Act.[286]

4. *Going to Court*

Growth, dissatisfied with the planning commission's settlement offer and ripeness decision, files a claim under the Act in the circuit court of Mithica County, where the property is located.[287] The well-pleaded complaint alleges the facts contained in Growth's initial written claim to the planning commission, describes the planning commission's settlement offer and ripeness decision, and asserts that Growth

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283. There is no funding for local entities under the Act, although funding was recommended by the 1994 Property Rights Report and the 1975 Property Rights Report. *See* 1994 PROPERTY RIGHTS REPORT, *supra* note 28, at 91-92; 1975 PROPERTY RIGHTS REPORT, *supra* note 3, at 8. The only funds available for purchase of environmentally sensitive land would be under one of Florida's land acquisition programs, such as the Conservation and Recreation Lands (CARL) program which gives local governments grants to buy land in their own communities. FLA. STAT. § 259.032 (1995).

284. This is an enumerated settlement option. *See* FLA. STAT. § 70.001(4)(c)11 (1995) ("No changes to the action of the governmental entity.").

285. *See id.* § 70.001(5)(a) ("[t]he governmental entit[y] . . . issue[s] a ripeness decision *identifying the allowable uses to which the subject property may be put.*") (emphasis added).

286. *See id.* § 70.001(5)(a).

> 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.

Id. (emphasis added). "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." *Id.* § 70.001(5)(b). Thus, the property owner need not apply for variances or exceptions, propose a less intensive use, or await a final decision, as required under current takings common law. *See supra* notes 97-105 and accompanying text.

287. *Id.* § 70.001(5)(b).

has rejected these.[288] Growth must prove the elements of its claim: 1) that the land use entity's action is responsible for 2) an inordinate burden on the existing use of the property.[289]

There is a two-tier fact-finding process in the litigation. First, the court must determine whether the land use entity's actions have created an inordinate burden by considering, among other things, the settlement offer and the ripeness decision. The court must analyze[290] whether the subject property has an "existing use," which can be either 1) an actual present use or activity, or 2) the potential, nonspeculative use of the property, if suitable to the property and compatible with neighboring properties.[291] Additionally, the court must analyze whether, considering the settlement offer and ripeness decision, the land use entity "inordinately burdened" the existing use. There is an "inordinate burden"[292] when 1) the property owner is permanently unable to attain her reasonable, investment-backed expectations for the existing use of her property (or vested right), with respect to the property as a whole, or 2) the property owner is left with an existing use (or vested right) that is unreasonable, which is defined as a governmental action that places a disproportionate burden on an existing use that, in all fairness, should be borne by the public as a whole. An

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288. The Act requires that the landowner reject the land use entity's settlement offer in order to file suit. *See id.* The Act does not require that the property owner's rejection of the settlement offer be reasonable. *Id.* If the county had made a settlement offer that was more advantageous to the land owner than the original decision, then the land owner could file a claim based on the land use entity's original decision. However, the court would be directed to consider the subsequent settlement offer in reaching its decision. *Id.*

289. *See* FLA. STAT. § 70.001(3)(e), (6)(b) (1995). It is not clear whether the property owner would also have to show that the property owner's desired use is not subject to a common law nuisance or noxious use exception, or if the exceptions are defenses that the governmental entity would have to prove. *See id.* § 70.001(3)(e) ("The terms 'inordinate burden' or 'inordinately burdened' do not include . . . 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 . . . .").

290. *See id.* § 70.001(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. *Id.*

291. For the definition of "existing use," *see supra* note 273. Clause (ii) of the existing use definition was added in the last minute "technical amendment." *See supra* note 240. This clause has great potential for abuse. Consider that developers purchase land for its potential use, not for its actual use, and at the urban fringes development of any undeveloped parcel will be "suitable" for the property and "compatible" with neighboring properties. Hence this clause will increase pressure for urban sprawl, which is against the policies of Florida growth management laws. *See* FLA. STAT. § 163.3180 (1995).

Moreover, the line between "speculative" and "more speculative" potential uses will be difficult for the courts to draw. *See, e.g.*, Florida Rock Indus. Inc. v. United States, 18 F.3d 1560, 1560 (Fed. Circ. 1994).

292. For the definition of "inordinate burden," *see supra* note 271.

inordinate burden does not include a restriction on use that would be considered a public nuisance or a noxious use.

If the court does find a compensable claim, it will impanel a jury of twelve members to determine compensation based on the loss in fair market value caused by the regulation's prohibition or curtailment of the existing use.[293]

C. *Marching into the Interpretive Swamp: Using the Compass*

The following applies the interpretive compass[294] to three key issues that likely would arise in the Mithica hypothetical set forth in Part B (Scenario I). The first issue is what the Mithica County Planning Commission must do to comply with the "ripeness decision" requirement. The second issue is how the court should evaluate the planning commission's "ripeness decision" and "settlement offer" if Growth litigates its compensation claim. The third issue is whether a court should find that the Mithica County Planning Commission placed an inordinate burden on Growth.

1. *The Ripeness Decision Requirement*

As discussed earlier, the Act's ripeness provision requires the Mithica County Planning Commission to provide Growth with a statement clarifying allowable uses within 180 days of filing a compensation claim.[295] But what is required if a land use entity does not have sufficient information or requires other studies or input to make a final determination?[296]

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293. The Act provides that "[t]he 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." FLA. STAT. § 70.001(6)(b) (1995). The jury's compensation findings will overlap with the court's "inordinate burden" findings. The jury will have to determine 1) the existing use, and 2) whether the existing use is reasonable, or the governmental action interfered with the property owner's reasonable, investment-backed expectations. Thus, this two-tier fact-finding process is inefficient.

294. *See supra* 219-66 and accompanying text.

295. *See supra* notes 221-22 and accompanying text.

296. If the study Mithica had commissioned had been inconclusive and required further tests, Mithica should place a moratorium on further development, and not permanently downzone to a conservation use. The Act applies only to a "permanent" denial of an existing or reasonable use, *see* FLA. STAT. § 70.001(3)(e) (1995), so under a moratorium, Growth would not be able to bring a complaint under the Act, unless it could show that the moratorium was a *de facto* permanent change in zoning classification, or that it was unreasonable. *See* First English Evangelical Church v. Los Angeles, 258 Cal. Rptr. 893, 906 (1989), *remanded by*, 482 U.S. 304 (1987).

Adding to Scenario I, suppose that aggressive opposition by property owners leads the Mithica County Planning Commission to review the conservation zoning of the perimeter around Lake Purewater. The planning commission orders additional scientific studies of the effect of further development around Lake Purewater on the drinkability of the water. Meanwhile, it does not change the conservation zone classification. Growth then files a claim under the Act. These additional facts create Scenario II.

The Act requires a ripeness decision regardless of circumstances;[297] so, under Scenario II, Mithica should issue a decision even if it has insufficient information.[298] Mithica's ripeness decision would be based on the information available at that time—the scientific studies already completed. Its ripeness decision would indicate that the allowable uses for Growth's parcel are conservation only and that no construction would be permitted. But Mithica should go beyond this answer. If the Property Rights Act is construed as a signal to land use entities to act "commonsensibly" and be more responsive to property owners' concerns, the land use entity should provide all relevant information in its response. The ripeness decision should also indicate that the planning commission will review the conservation zoning classification upon completion of further studies. Further, if the ripeness provisions are viewed as a reaction to takings law, land use entities should view the ripeness decision requirement as a directive to arrive as expeditiously as possible at a "final determination" of allowable uses. Thus, where an immediate final decision is not issued, the ripeness decision should ideally bind the agency to issue a decision by a particular date or at least indicate the approximate time frame in which the planning commission would expect to be able to complete its reconsideration.

2. The Court's Evaluation of the Ripeness Decision and Settlement Offer

Given the interpretive model, the court should review the ripeness decision and settlement offer both procedurally and substantively. Specifically, the court should determine whether Mithica acted reasonably, and in good faith, in rendering its ripeness decision and

297. The Act only provides that the land use entity must issue a ripeness decision within 180 days. *See* FLA. STAT. § 70.001(5)(a) (1995).

298. This would be the cautious approach. Mithica's failure to issue a ripeness decision could affect the court's inordinate burden determination if the claim proceeds to litigation. Additionally, if the property owner prevails the court could award the property owner court costs and attorney's fees. *See supra* note 282.

settlement offer. The court should then substantively assess whether the allowable use set forth in the ripeness decision and settlement offer is so limited as to constitute an inordinate burden.[299]

In both Scenario I and Scenario II, Mithica issued a ripeness decision and settlement offer reasonably and diligently. In Scenario II, although Mithica did not issue a definitive ripeness decision, it did what was reasonable under the circumstances by binding itself to make a final determination by a particular date. Therefore, the court should find that the planning commission's actions did not create an inordinate burden on Growth under the procedural prong of its review. If, on the other hand, Mithica had not issued a ripeness decision at all, even though it had the information available as to what uses were allowable, then the court should weigh this factor against Mithica in its inordinate burden determination.

3. Inordinate Burden Analysis

In making the inordinate burden determination, the court would first determine the existing use, which is either 1) the actual, present use of the property prior to the Mithica conservation rezoning,[300] or 2) the reasonably foreseeable, nonspeculative use suitable for the property and compatible with adjacent land uses.[301] Under the first prong of the existing use definition, Mithica's actual and present use of the property is holding the property as it is, without any development on it. Since the conservation rezoning would have the same result as Growth's present use of the property, which is leaving the property undeveloped, Mithica would not be able to sustain a claim under this prong of the existing use definition.

Under the alternative definition of existing use, Growth's developmental interest in the property would be protected if Growth is able to establish that its intended development of the project is an "existing use" under the Act. The Act sets forth the following requirements for a future use of property to be considered an "existing use": the

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299. When conducting the inordinate burden analysis the court is not limited to the original governmental action that initiated the property owner's compensation claim. The court should consider both the land use entity's original action and its response within the 180-day period following the filing of petitioner's claim. The Act, however, seems to provide that the compensation award shall be based only on the property owner's original claim. *See supra* note 280.

300. Section 70.001(2) of the Act provides that "when a specific action . . . has inordinately burdened an existing use of property . . . the property owner is . . . entitled to relief." FLA. STAT. § 70.001(2) (1995). This phrasing indicates that, for purposes of determining inordinate burden, the relevant timeline for the determination of existing use is the existing use prior to the enactment of the regulatory action being challenged.

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

development of the project must be 1) a reasonably foreseeable use of the property, 2) nonspeculative, 3) suitable for the property, and 4) compatible with adjacent property.[302]

What is a reasonably foreseeable use? What type of future developmental use is nonspeculative? And under what circumstances is a use that will have environmental impact "suitable" for the property and "compatible" with adjacent uses? The answers are not clear in this hypothetical, as they are not likely to be clear in most cases.

Mithica would argue that the development of the condominium project, a high-density use, in an environmentally sensitive area adjacent to Lake Purewater, which is the source of the drinking water for the county, is not a reasonably foreseeable use of the property. Furthermore, Mithica would argue that the scientific analysis shows that such a high-intensity use of the property is not suitable for the property and is not compatible with adjacent property since such use would harm the purity of the lake's drinking water and would threaten the viability of the community as a whole.

Growth, on the other hand, would argue that, given the information available to it at the time that it purchased the property, its proposed use of the property was a reasonably foreseeable use. Zoning regulations permitted such a use, neighboring properties had been developed—albeit to a lesser extent—and there was no reason for Mithica to believe that the environmental permits would not be obtainable. No information available to Growth or any regulatory authority would have indicated that Growth's proposed project would have any impact on the lake's drinking water. Moreover, Growth would argue that the proposed project is a suitable use of the property and compatible with other adjacent property uses. It is not Growth's use of its property that will negatively impact Lake Purewater; rather, it is the cumulative impacts of all of the properties surrounding Lake Purewater that threaten the viability of the lake's drinking water. If other property owners are permitted to maintain their developments around Lake Purewater and benefit from such use, Growth should also be permitted to sustain a similar development. At the very least, this would mean that Growth should be able to develop on its property a project equivalent to the intensity of adjacent properties.

If a court were to turn to takings jurisprudence to resolve this issue, Florida pre-*Lucas* takings cases would favor Mithica's position. These cases have narrowly construed a property owner's reasonable expectations of use of property. A property owner is not entitled to the

302. FLA. STAT. § 70.001(3)(b) (1995).

highest and best use of her property.[303] Further, under the leading pre-*Lucas* Florida takings case, *Graham v. Estuary Properties, Inc.*, a court should not find it reasonable for a developer to expect to be able to develop a project that has significant environmental impacts.[304] Furthermore, Florida courts have applied Justice Kennedy's view expressed in *Lucas*[305] that existing regulation and the expectation that regulations will be modified should inform how a court construes a property owner's reasonably foreseeable use.[306]

Assume, for purposes of our discussion, that a Florida court would adopt a definition of existing use that would recognize Growth's developmental interest in the Project. The court would then proceed to determine whether Mithica's rezoning to conservation classification constitutes an inordinate burden. The inordinate burden determination involves a disjunctive two-prong test: 1) does the conservation zoning restrict Growth's existing use so that Growth cannot permanently attain its RIBEs (the expectancy prong), or 2) is the conservation use restriction unreasonable because it places an inordinate burden on Growth that, in all fairness, should be borne by the entire community of Mithica (the fairness prong)?[307]

Under the expectancy prong of the inordinate burden test, Growth would be successful if it could show that the conservation rezoning permanently frustrates its RIBEs. This inquiry would be similar to the inquiry as to whether Mithica's future development of the project is an "existing use" under the second prong of the existing use definition. In both cases, the court would have to determine whether the property owner's desired use of the property is reasonable given the

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303. *See* Graham v. Estuary Properties, Inc., 399 So.2d 1374, 1376 (Fla. 1981); Lee County v. Sunbelt Equities, II, 619 So. 2d 996, 1006 (2d DCA 1993) (citing Penn Central Transp. Corp. v. City of New York, 438 U.S. 104 (1978)).

304. 399 So. 2d at 1382 ("[a]n owner of land has no absolute and unlimited right to change the natural character of his land . . . .") (citations omitted) *see also* Smith v. City of Clearwater, 383 So.2d 681 (Fla. 2d DCA 1980).

305. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2903 (1992) (Kennedy, J., concurring) ("The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and the courts must consider all reasonable expectations whatever their source.").

306. *See* Cason v. Florida Power Co., 76 So. 535 (Fla. 1917) ("All property is owned and used subject to the laws of the land."); Namon v. Department of Environmental Regulation, 558 So.2d 504 (3d DCA 1990) (holding that constructive knowledge of existing regulatory scheme is ascribed to the purchaser of property). *But see* Vatalaro v. Dept. of Envtl Reg., 601 So.2d 1223 (Fla. 5th DCA 1992) (holding that the property owner should not be ascribed with constrictive knowledge of state wetlands regulations in effect at the time she purchased the property); Valerie A. Collins, *Vatalaro v. Department of Environmental Regulation: The Mysterious Takings Rule*, 8 J. LAND USE & ENVTL. L. 611 (1993).

307. FLA. STAT. § 70.001(3)(e) (1995).

surrounding circumstances, including the regulatory terrain, and whether such desired use is more than a mere expectation.[308]

But it is the fairness prong of the inordinate burden test that would be the most favorable to Growth under the facts set forth in our hypothetical. The conservation zoning classification clearly benefits the community of Mithica as a whole, because the rezoning will protect the community's drinking water, which is a resource that is needed by the entire community. However, only Growth is being forced to bear the cost of ensuring the purity of the drinking water. No other property owner around Lake Purewater is being required to curtail her present use of property, nor is any property owner being required to share in the costs of conserving the purity of Lake Purewater in other ways. On the other hand, the loss to Growth is substantial. Growth purchased the property with the expectation of developing the condominium project. However, the rezoning to conservation forecloses Growth from developing the condominium project or any other lower-density development. Therefore, given the imbalance in the burdens and benefits, a court should conclude that Mithica's zoning regulation is unreasonable under the fairness prong of the inordinate burden test.

However, Mithica's actions would not constitute an "inordinate burden" if the court finds that Mithica's zoning ordinance prohibits a public nuisance at common law or a noxious use of private property.[309]

A public nuisance is very broadly defined;[310] it protects the public interest in freedom from activities that 1) endanger or injure the health, safety, or property of a considerable number of persons, or 2) offend public morals.[311] Furthermore, nuisance analysis is very

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308. *See supra* notes 167-97 and accompanying text.

309. It is not clear under the Act who has the burden of proof to show the existence or nonexistence of a public nuisance exception.

310. *See* Orlando Sports Stadium, Inc. v. State *ex rel.* Powell, 262 So. 2d 881, 884 (Fla. 1972) ("nuisance" is difficult to define comprehensibly and before the fact); United States v. County Bd. of Arlington County, 487 F. Supp. 137 (N.D. Miss. 1979) ("nuisance" incapable of absolute definition).

311. Florida law defines a nuisance as "any place which tends to annoy the community or injure the health of the community, or become manifestly injurious to the morals or manners of the people . . . or any place where the law of the state is violated." FLA. STAT. § 823.05 (1995). *See* RESTATEMENT (SECOND) OF TORTS § 821B(1) ("a public nuisance is an unreasonable interference with a right common to the general public"); DANIEL R. MANDELKER, PLANNING AND CONTROL OF LAND DEVELOPMENT 48 (1992); William Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 999 (1966) ("[A] public nuisance is a species of catch-all low-grade criminal offense, consisting of an interference with the rights of the community at large, which may include anything from the blocking of a highway to a gaming house or indecent exposure.").

flexible and ad hoc.[312] Florida's case law has been expansive in its determinations of public nuisances.[313] In a well-reasoned article, Richard Grosso and David Russ have characterized Florida cases as "put[ting] governments in good stead when they are called upon to show the 'background principles of the law of property and nuisance.' "[314] A 1939 Florida Supreme Court case, *National Container Corp. v. State ex rel Stockton,*[315] supports the proposition that a public nuisance may be found where an incompatible use would create a public environmental harm. In *Stockton*, the plaintiff argued that the increased discharge from a wood pulp and paper plant on the St. Johns River, when added to the City of Jacksonville's poorly treated sewage, would cause the level of pollutants to rise to dangerous levels. The court relied on specific evidence and a series of inferences to find a causal link between the wood pulp mill and the threat to a public resource, the St. Johns River.[316] Accordingly the court held that the wood pulp and paper plant would be a public nuisance and granted an injunction prohibiting construction of the plant. Hence, a court relying on *Stockton* could find a public nuisance abatement exception that would exonerate Mithica from inordinate burden liability.

The Act's reliance on the public nuisance exception to distinguish acceptable governmental actions is ultimately circular and can easily engulf the entire inordinate burden analysis.[317] The court's nuisance

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312. *See* CALLIES ET AL., *supra* note 154, at 265-68 (discussion of nuisance and takings law).

313. Cason v. Florida Power Co., 76 So. 535 (Fla. 1917); Sheip v. Amos, 130 So. 699 (Fla. 1930); Pompano Horse Club, Inc. v. State *ex rel.* Bryan, 111 So. 801 (Fla. 1927); Rearer v. Martin Theaters of Florida, Inc., 52 So. 2d 682 (Fla. 1951); Orlando Sports Stadium, Inc., v. State *ex rel.* Powell, 262 So. 2d 881 (Fla. 1972); National Container Corp. v. State *ex rel.* Stockton, 189 So.2d 4 (Fla. 1939).

314. Richard J. Grosso and David J. Russ, *Takings Law in Florida: Ramifications of Lucas and Reahard*, 8 J. LAND USE & ENVTL. L. 431, 463 (1993).

315. 189 So. 2d 4 (1939).

316. In finding that the State could enjoin the mill's polluting activities, the Court reasoned:

> If the . . . [mill] . . . discharge[s] . . . waste and refuse matter into the River which will be highly toxic to . . . fish and aquatic life . . . upon which the fish are accustomed to feed and the result will be that the supply of fish in the river will be seriously reduced . . . and commercial [fishing] . . . will [be] seriously and permanently damaged and the facilities for pleasure will be thereby diminished, we think that it requires no citation of authority to support the assertion that the state may enjoin . . . even before the damaging condition comes into being.

Id. at 13.

317. This circularity did not bother Justice Scalia in *Lucas* where he crafted a public nuisance exception to the "no economic use" category of per se takings. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2902 n.18 (1992). He clearly recognized that a similar balancing analysis would be undertaken by courts in a public nuisance analysis, but he reasoned that such balancing would be constrained by "well-established" common law doctrine. *Id.* By contrast, he is much more skeptical of legislatures that balance the interests of the community against private property owners. *Id*; *see* Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1 (1993).

analysis is a balancing test: is the private property owner's use reasonable, or should the property owner be prohibited from using and enjoying her property as she wishes because of community concerns? Not surprisingly, courts' outcomes are closely related to theories of property rights[318] and policy concerns.[319]

The public nuisance exception can yield results that would not be satisfying from an equity perspective because of the inherent tension in the interests that the court is balancing:[320] in the case of Mithica, the public interest in protecting the community's drinking water through the exercise of the police power versus Growth's private, but substantial, losses. The whole community of Mithica benefits from Growth's loss which goes uncompensated; the result is a negative redistributive impact on Growth.[321] A justification for this outcome is

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318. *Compare* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922) (Brandeis, J. dissent) (discussing that noxious fumes could be abated without compensation because the property owner never had a right to inflict noxious fumes on his neighbors and therefore the regulation was not a taking) *with Lucas*, 112 S. Ct. at 2900 (Scalia, J.) (nuisance exception is based on traditional notions of state property law).

319. Compare application of nuisance law based on efficiency notions, Boomer v. Atlantic Cement Co. 257 N.E. 2d 870 (N.Y. 1970); EPSTEIN, TAKINGS, *supra* note 26, at 229-45; Calabresi, *supra* note 117; Ellickson, *Alternatives to Zoning*, *supra* note 129, at 722-27; Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 STAN. L. REV. 1075 (1980); Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 VA. L. REV. 1299 (1977); Comment, *Internalizing Externalities: Nuisance Law and Economic Efficiency*, 53 N.Y.U. L. REV. 219 (1978) with application of nuisance law based on communitarian policies and Just v. Marinette County, 201 N.W. 2d 761 (Wis. 1972); Sax, *supra* note 207, at 150-53; Michelman, *supra* note 23, at Sec. VD (nuisance law forces individual property owner to give back to society what it was not entitled to take); *see also* Philadelphia Elec. Co. v. Hercules Inc., 762 F.2d 303 (3d Cir. 1985) ("[Recent] economic analysis proceeds on the basis that the goal of nuisance law is to achieve efficient and equitable solutions to the problems created by discordant land uses . . . [however] to so extend private nuisance beyond its historical role would render it little more than an epithet.").

320. *See* Summers, *supra* note 149, at 876 (balancing of public versus private interests provides an inadequate protection for private property rights because the governmental interest advanced is often viewed by courts as being more important than the property rights of the individual).

321. Consider the following justifications for noncompensation based on fairness and efficiency policy concerns. Professor Michelman proposes a balancing test that would consider 1) demoralization costs of regulations (for example, a regulation which takes away bargained-for property rights may affect the whole community's perception of such unfair treatment), and 2) the cost of compensating the "losers", including the transaction cost for each settlement. *See* Michelman, *supra* note 23, at 1214-18. These costs should be balanced against the benefit of the regulation. The case for noncompensation is strongest if demoralization and compensation costs are low and efficiency gains are high. As stated by Professor Michelman, demoralization costs can be low when the "disappointed claimant can appreciate how such regulatory decisions might fit into a consistent practice which holds forth a lesser long-run risk to property owners similarly situated." *See id.* In this case, if Growth can appreciate that in the long run it will benefit from the zoning ordinance and other ordinances like it, demoralization costs would be low, and a result of noncompensation under the Mithica scenario can be justified.

Professor Ellickson differs with Professor Michelman's conclusion on demoralization costs.

that a court should not attempt to balance the public interest in protecting the public, health, safety, and welfare of the community against a private economic loss.[322] But this justification remains fundamentally inequitable when the losses are concentrated on one individual and this loss virtually destroys the economic value of the property owner's land.

In sum, the interpretive issues involved in the inordinate burden analysis under the Act are no less daunting than regulatory takings interpretive issues. Moreover, the inordinate burden analysis set up by the Act would not necessarily protect property owners' interests more effectively than has takings law. First, the inordinate burden test could be interpreted to give land use entities a great deal of latitude, especially if a court is loathe to second-guess the judgment of the land use entity. The first prong of the disjunctive inordinate burden test recognizes only the property owner's *reasonable* expectations. Hence, courts could construe "reasonable expectations" to permit exercise of the police power even when it impacts disproportionately on an individual. The second prong of the inordinate burden test is in essence a balancing test: how fair was the regulation given its impact on the individual owner and the benefits gained by the community as a whole? Only in extreme cases, such as the Mithica hypothetical, could a court be clear as to whether the burden imposed on an individual is "unfair" in view of the benefits to the community as a whole. Finally, the public nuisance exception, essentially another balancing test, permits courts to countenance restrictions of uses that can be shown necessary to protect the public safety and welfare. Thus, although a regulation is clearly an unfair burden on an individual property owner, it could still fail to be compensable under the Act.

A better approach would be to focus on the reasonableness of the government agency's action. The Property Rights Act directs land use entities to be more accessible to citizens and more responsive to their concerns. It further requires that land use decisions be less arbitrary and that individuals' concerns be considered in the decisionmaking of

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He sets forth a paradigm case for noncompensability that is similar to Professor Michelman's, but emphasizes to a greater extent efficiency concerns. Professor Ellickson proposes noncompensation when the following conditions are met: 1) the efficiency of the government program that caused the loss is transparently obvious, 2) the administrative cost of compensation is high, and 3) the losses suffered are small and widespread. *See* Ellickson, *Alternatives to Zoning*, *supra* note 129, at 699-704. Professor Ellickson maintains that in a downzoning demoralization costs are high because property owners view zoning decisions as random and subject to special influence in the zoning system. *See id.* at 700.

322. This justification focuses on an analysis of the justifiable exercise of the police power. *See* Oswald, *supra* note 168, at 138-45; Sax, *supra* note 23.

the land use entity. If this policy is emphasized, a court's inordinate burden analysis should focus primarily on the *reasonableness* of the exercise of the police power, which would de-emphasize attempts to "balance" individual interests against community interests[323] or determine when a property owner's economic expectations should be legally cognizable.

A "reasonableness" review is a form of the substantive due process review that originated with *City of Euclid v. Ambrose Realty Co.*[324] and has evolved into various forms in other areas of land use law.[325] Reasonableness review would require compensation if the court determines that the land use agency 1) fails to choose a means to implement the governmental purpose that was closely related to that purpose, and 2) the regulation places an onerous and disproportionate burden on a single property owner.[326] The court would ask several questions. How over-inclusive or under-inclusive is the regulation in attaining its purpose?[327] Are other means to implement the regulation available that would have been less intrusive or less burdensome to the property owner's existing use?[328] Can the governmental entity justify

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323. *Cf.* Oswald, *supra* note 168 (arguing that the *Penn Central* economically viable use factor and RIBEs are fraught with theoretical inconsistencies and open-ended questions; accordingly, in applying the takings test courts should focus on how regulatory agencies exercised the police power); *see also* Summers, *supra* note 149, at 882 (arguing that heightened ends-means scrutiny is justified when a limited class of individuals may be burdened by a majority which benefits form the regulation).

324. 272 U.S. 365 (1926).

325. Contract zoning, spot zoning and subdivision cases involve unarticulated substantive due process review. *See, e.g.*, Hartnett v. Austin, 93 So. 2d 86 (Fla. 1956); Cederburg Contractors & Builders Assoc. v. City of Dunedin, 329 So.2d 314 (Fla. 1978); St John's County v. Northwest Florida Builders Ass'n, Inc., 583 So. 2d 631 (Fla. 1991); *see generally* Wegner *supra* note 281. Takings cases frequently mix substantive due process and takings analysis. *See, e.g.*, Graham v. Estuary Properties Inc., 399 So.2d 1374, 1381 (1981) (in applying takings factors analysis the court concluded that the "regulation . . . promotes the welfare of the public, prevents a public harm, and has not been arbitrarily applied"); Joint Ventures, Inc. v. Department of Transp., 563 So. 2d 622, 626-27 (Fla. 1990) (court invalidated a statute as an unreasonable regulation that had "taken" substantially all of the beneficial use of property."); *see also supra* note 152.

326. This approach would be similar to the *Dolan-Nollan* test which requires 1) an "essential nexus" between a dedication requirement (the government action) and the governmental purpose, and 2) "rough proportionality" between the dedication requirement and the impacts caused by the use of the land. The first prong is an inquiry into whether government action is sufficiently related to the governmental purpose. The second prong is an inquiry into the reasonableness of the burden on the individual property owner. *See generally* Stoebuck, *supra* note 136, at 1058.

327. *See* Dolan v. City of Tigard, 114 S. Ct. 2309, 2317 (1994); Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987).

328. The purpose of a "less burdensome alternative" inquiry is to determine if the means used by the land use entity "fit" the governmental purpose. The test would not require that the land use entity choose the less burdensome means since that would in effect be usurping much of the discretion needed by land use entities in exercising the police power.

the reasonableness of the restrictions placed on the use of private property?[329]

Applying a reasonableness test to the Mithica hypothetical, the court would examine the process by which Mithica enacted the zoning ordinance. In addition to examining the scientific studies, the court should ascertain both whether Mithica considered the impact of its regulation on the property owners around the perimeter of Lake Purewater and whether Mithica considered alternative means of protecting the lake other than the zoning regulation. If Mithica did consider all these factors and still proceeded with the zoning conservation ordinance, Mithica would still have to justify the reasonableness of a regulation that burdens a single property owner's use of her property when the benefits are gained by the community at large. From our information, it does not appear that Mithica would be able to justify the burdens imposed upon an individual property owner; thus, under this "reasonableness" approach, a court could find that Mithica placed an inordinate burden on Growth.

Such an approach would de-emphasize balancing, which, without an articulated theoretical framework, would require courts to make value choices in which individual interests pale compared to the public interest. Admittedly, a reasonableness analysis is also subjective and invites courts to second-guess the land use entity's decisions. Accordingly, reasonableness review should be circumspect and courts should intercede in land use administrative decisionmaking only where decisions are clearly unjust or the land use entity clearly acted unreasonably. However, under such an approach, the courts would not be placed in the position of making policy choices in an area where tensions cannot be easily reconciled; instead, courts would be exercising their pragmatic judgment as to whether land use entities wield their regulatory power reasonably. Outcomes would continue to be ad hoc, but this result was intended by the Act.[330]

V. A TRAP FOR THE UNWARY: REGULATORY REFORM THAT DOESN'T QUITE WORK

> A fair law can be unfairly administered, even by those who seek in good faith to achieve their perceived notions of public good. To assist in alleviating this problem, the Legislature should carefully examine and statutorily define its intent in enacting regulatory

329. This is in essence the second prong of the Act's inordinate burden test, which focuses on burdens disproportionatly placed on individual property owners.

330. *See* Fla. S. Comm'y Aff. Comm. tape, *supra* note 233.

> legislation and should develop a greater sensitivity to administrative costs and responsibilities required by regulatory programs.[331]
>
> 1975 Property Rights Report

Part IV has used the content and legislative history of the Act to provide a model for its interpretation. As discussed earlier, the Property Rights Act identifies significant problems and offers some intriguing solutions. While the Act may have been modest and cautious in its approach to reforming takings law, the Act is innovative and bold in its attempt to reform the regulatory process. In an effort to reform decisionmaking by land use regulatory bodies, the Property Rights Act attempts to 1) make land use entities more accountable by imposing costs for regulatory actions that create an inordinate burden on private landowners, and 2) provide more flexibility by creating a framework for decentralized decisionmaking.[332] However, while the impulse for reform may have been amply justified, the Legislature's naive reform efforts will likely have unintended, unjust results.

A. Decentralized Decisionmaking[333]

1. Settlement Offer as Decentralized Decisionmaking

The Act seeks to introduce flexibility into the land use regulatory system by facilitating decentralized decisionmaking.[334] A property

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331. 1975 PROPERTY RIGHTS REPORT, *supra* note 3, at 10.

332. This approach is another example of how the Act seeks to create reform without going outside established frameworks. For instance, the Act does not seek to abolish zoning or growth management controls, but instead seeks to reform the process by imposing market-like mechanisms. Free market analysts have argued that zoning is inefficient when compared to individualized decisionmaking among private individuals. *See generally* Coase, *supra* note 128. They also point to the high transaction costs of zoning schemes. *See* Ellickson, *Alternatives to Zoning*, *supra* note 129, at 719-725; WILLIAM A. FISCHEL, THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS 30 (1985); ROBERT H. NELSON, ZONING AND PROPERTY RIGHTS: AN ANALYSIS OF THE AMERICAN SYSTEM OF LAND USE REGULATION (1977); Jan Z. Krasnowiecki, *Abolish Zoning*, 31 SYRACUSE L. REV. 719 (1980).

333. When the land use entity is a state agency there may be an issue whether this type of settlement offer process falls within the provisions of the Florida Administrative Procedures Act (APA). For purposes of this discussion, I will assume that the Florida APA does not apply to the settlement offer process. This appears to be the assumption of the ad hoc committee that drafted the Act and of the legislators involved in the two Senate committee hearings, since no comment reveals any concerns with this potential issue. See Fla. S. Judiciary Comm. tape, *supra* note 258; Fla. S. Comm'y Aff. Comm. tape, *supra* note 233.

334. The opposite of decentralized decisionmaking is legal centrism, the belief that government is the chief source of rules. Supporters of decentralized decisionmaking in certain kinds of situations include Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchange*, 73 AM. ECON. REV. 519 (1983), ROBERT C. ELLICKSON, ORDER WITHOUT LAW (1991), and Robert Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 INT'L REV. L. & ECON. 214 (1994).

owner need file only a written claim under the Act to trigger an obligation on the part of the government entity to make a written settlement offer to the property owner within 180 days.[335] The only initial constraint precluding the property owner from filing a frivolous claim is the requirement that the landowner attach a real estate appraiser's opinion.[336]

The events that follow are a form of legislatively directed bargaining.[337] The Legislature implicitly instructs agencies to exercise wide discretion and flexibility in fashioning a settlement offer. Specifically, it directs agencies to fashion "appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property."[338] The Act even goes so far as to provide expressly that an entity's settlement offer may "contraven[e] the application of a statute as it would otherwise apply to the subject real property" so long as the public interest served by the regulation is protected.[339] The land use entity may offer "variance, special exception, or other extraordinary relief"[340] to the property owner. The Legislature lists additional alternatives, such as a land swap or outright purchase of the property owner's rights or land.[341] The Legislature lists only as the *very last option* that the governmental entity may respond "no change" to its original determination.[342]

The negotiation process envisioned by the Act is to be a private process devoid of input of the public at large.[343] The notice requirements are limited to parties previously involved in any related administrative actions and contiguous property owners. The Act does not require a general public notice that a bargaining process has been initiated.[344] In general, no court or neutral third party need approve the

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335. FLA. STAT. § 70.001(4)(a) (1995); *see supra* notes 267-282 and accompanying text.

336. *See supra* note 277 and accompanying text.

337. Although the Act does not mandate the format of the negotiation, the parties' ignorance as to each others' position will likely lead parties to opt for a process that enables them to obtain more information about the other's claim, such as exchanging offers. *See* Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. OF LEGAL STUD. 225 (1982); Daniel Fudenberg & John Tirole, *Sequential Bargaining with Incomplete Information*, 50 REV. ECON. STUD. 221 (1983); Lucian A. Bebchuck, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404 (1984).

338. FLA. STAT. § 70.001(4)(d)1 (1995).

339. *Id.* § 70.001(4)(d)2.

340. *Id.* § 70.001(4)(b)9. This kind of flexibility was also recommended by the 1975 Property Rights Task Force. *See* 1975 PROPERTY RIGHTS REPORT, *supra* note 3, at 12.

341. FLA. STAT. § 70.001(4)(c)4, 10 (1995).

342. *Id.* § 70.001(4)(c)11.

343. *See supra* notes 221-22 and accompanying text.

344. FLA. STAT. § 70.001(4)(b) (1995).

settlement offer; a neutral third party is introduced into the process only if the proposed settlement offer contravenes a statute.[345]

The Property Rights Act, then, sets up a very flexible, privately oriented, and relatively unrestricted form of decentralized decisionmaking.

2. *Why Move Toward Decentralized Decisionmaking?*

Free-market economists,[346] as well as legal analysts sharing their views, have argued that market mechanisms are superior to centralized governmental regulation in numerous ways.[347] First, they note that the market process is voluntary and thus can minimize the need for governments to implement rules by coercion. Free-market economists, who would characterize growth management laws as centralized, top-down government,[348] argue that market mechanisms can,

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345. *Id.* § 70.001(4)(d)2.

346. Economics is a form of analysis that is particularly powerful for analyzing legal rules. *See generally* COOTER & ULEN, *supra* note 203; RICHARD POSNER, THE ECONOMICS OF JUSTICE (1981). Economists make certain assumptions that have normative implications; for example, markets maximize efficiency and individual or aggregate utility, and that individuals behave rationally when they seek to maximize their individual welfare. *See* JOHN RAWLS, A THEORY OF JUSTICE 27-33 (1971).

347. CHARLES SCHULTZE, THE PUBLIC USE OF PRIVATE INTEREST (1977); KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963); GEORGE STIGLER, THE CITIZEN AND THE STATE (1965); Ellickson, *Alternatives to Zoning*, *supra* note 129; Epstein, *Property*, *supra* note 116; EPSTEIN, SIMPLE RULES, *supra* note 258; Cooter, *supra* note 334, at 214.

348. The growth management laws could be viewed as a modified form of centralized "command and control" lawmaking. Local governments are under legal obligation to develop local comprehensive plans. The Local Growth Management Act sets forth in great detail what the comprehensive plan must contain and how these elements are to be scientifically-based. FLA. STAT. § 163.3177 (1995); *see generally* David L. Powell, *Managing Florida's Growth: The Next Generation*, 21 FL. ST. U. L. REV. 223 (1993); Thomas G. Pelham, William L. Hyde & Robert P. Banks, *Managing Florida's Growth: Toward an Integrated State, Regional and Local Comprehensive Planning Process*, 13 FL. ST. U. L. REV. 515 (1985). Local governments must submit their plans to the Department of Community Affairs, which in turn must approve them. FLA. STAT. § 163.3184 (1995). The Local Growth Management Act requires the local comprehensive plan to be consistent with the State Comprehensive Plan and the applicable regional plan. FLA. STAT. § 186.001-.911 (1995). The Department of Community Affairs (DCA) is responsible for reviewing local comprehensive plans to ensure consistency. FLA. STAT. § 163.3177(9)(c) (1995). If the DCA believes that local comprehensive plans are not in compliance with legal requirements, the DCA is empowered to challenge the local government's comprehensive plan in administrative hearings. FLA. STAT. § 163.3184(4) (1995). The Property Rights Act amends the Local Growth Management Act to permit alternative dispute resolution to resolve intragovernmental disputes. *See* 1995, Fla. Laws ch. 95-181 § 4, 1651, 1664 (codified at FLA. STAT. 163.3184(10)(c) (1995)). If the DCA is not satisfied with the local comprehensive plan, the Governor and the Cabinet may direct state agencies to withhold funds for water and sewer system improvements, roads and bridges, revenue sharing, community development block grants and recreation development assistance. FLA. STAT. § 163.3184(11) (1995); *see generally* EPSTEIN, TAKINGS, *supra* note 26 (wherein he calls Washington State's growth management laws "coercive"); Cooter, *supra* note 334, at 214-16; Richard B. Stewart, *Regulation, Innovation, and Administrative Law: A Conceptual Framework*, 69 CAL. L. REV. 1259 (1981); HOWARD, *supra* note 78.

instead, harness individual self-interest to promote societal good.[349] Market proponents further argue that markets, which revolve around individual decisionmaking, reduce the need for collection or provision of information. For a centralized planning process to function effectively, the agency must obtain so much detailed and complex information[350] that it may be impossible for complex planning ever to function well. In private bargaining, by contrast, the parties will have or take the time to obtain the relevant information. In short, proponents of decentralized lawmaking have argued that as societies become more complex, law should become more decentralized, not centralized.[351]

In the land use area, therefore, decentralized lawmaking can be defended as providing a more flexible, effective approach to solving individual land use problems. Already, land use laws have adopted forms of zoning and permitting that are more flexible and decentralized. For example, conditional zoning, development agreements, and planned unit developments (PUDs) are land use innovations encouraged by the Local Growth Management Act;[352] they provide an opportunity for developers and planning officials to negotiate permissible land uses and to mitigate the impacts of such uses.[353]

Citing a proposition known as the Coase theorem, free-market economists argue that, regardless of the initial legal rule, individuals can negotiate a legal outcome that will maximize their individual welfare.[354] This proposition is based upon the assumption that there are no significant transaction costs and that both parties have the same

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349. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (William Benton, ed., Chicago Books 1952) (1776) (discussing work of "invisible hand" of the market, which through price signals will guide self-interested individuals to do what is best for themselves and also for society as a whole); *see also* POSNER, *supra* note 346, at 51-115; COOTER & ULEN, *supra* note 203, at 1-14; SCHULTZE, *supra* note 347.

350. *See* SCHULTZE, *supra* note 347, at 27; FRIEDREICH VON HAYEK, CONSTITUTION AND LIBERTY (1960); Kenneth Arrow, *Limited Knowledge and Economic Analysis*, 64 AM. ECON. REV. 1 (1974). In land use regulation the information needed is varied and complex. The costs borne by developers, demand curves of homeowners, valuation of natural resources, and costs of alternatives for less damaging development are examples of complex land use information necessary to formulate good laws. Growth management laws have been criticized because the information required to formulate good laws takes too much time to gather and process. *See* Epstein, *Property*, *supra* note 116, at 110.

351. Cooter, *supra* note 334, at 285; SCHULTZE *supra* note 347, at 22. Schultze adds that market-like arrangements have the potential ability to direct innovation in socially desirable directions.

352. FLA. STAT. § 163.3202(4) (1995).

353. Such individualized decisionmaking is generally used in high impact developments because these techniques have high transaction costs. *See generally*, Wegner, *supra* note 281.

354. *See generally* Coase, *supra* note 128.

information.[355] Thus, the Act can be seen as setting up a situation that allows parties to maximize their utility. Two parties, one a private property owner and the other a land use entity, can set new conditions for a particular land use and allocate the costs of a restrictive land use to meet their objective and subjective requirements.

B. *Thinking Beyond the Beguiling Mantra of "Market Solutions"*

In setting up a decentralized decisionmaking process, the Legislature intended regulatory reform but followed too readily the mantra of "efficient markets."[356] Even assuming that the individual bargaining process under the Act would allow those involved to maximize their utility under existing constraints, microeconomic theory recognizes that the results of an individualistic bargaining process will not always be equitable (distribution issues).[357] Further, to the extent that bargaining parties impose costs on other nonconsenting, nonbargaining parties, the negotiated solution will not be efficient for society as a whole (negative externalities).[358] In addition to these considerations, efficient market outcomes, even between only two parties, are premised on three key assumptions: no significant transaction costs, perfect information, and rational utility maximization by the bargaining agent on behalf of its principal.

Game theory research has analyzed what happens in a bargaining framework when these assumptions do not hold. Let us examine how, in a noncooperative bargaining situation[359] under the decentralized decisionmaking framework envisioned under the Act, factors such as transaction costs, limited information, the parties' perception of

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355. *Id.* There are many other ways to state the Coase theorem. *See* Cooter, *supra* note 334; Guido Calabresi, *Transaction Costs, Resource Allocation and Liability Rules—A Comment*, 11 J. LAW & ECON. 67 (1968); *Coase Theorem Symposium: Part I*, 13 NATURAL RESOURCES J. 557 (1973); BRUCE ACKERMAN, ECONOMIC FOUNDATIONS OF PROPERTY LAW 23-24, 30-31 (1975).

356. Markets are efficient in the sense described by Adam Smith's "invisible hand" theorem. *See* SMITH, *supra* note 346. Welfare efficiency is established when no consumer can be made better off by a transfer of goods or services. *See* COOTER & ULEN, *supra* note 203.

357. The economic concepts of "utility maximization" and "efficiency" are not concerned with the initial distribution of resources between parties (i.e. "equity"). *See* POSNER, *supra* note 346.

358. Coase, *supra* note 128; Calabresi & Melamed, *supra* note 128.

359. Under a cooperative framework parties may not necessarily maximize their short-term individual outcomes, but instead maximize the group long-term outcome in order to maximize their own individual long term utility. Cooperative frameworks, for the most part, require that relationships be long-term and stable, that both parties have a stake in the success of the cooperative relationship, and that both parties be able to easily monitor mutual compliance. *See generally* ELLICKSON, *supra* note 334; Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421 (1992). For purposes of this analysis, I assume noncooperative behavior because the conditions for a cooperative framework are difficult to achieve.

favorable or unfavorable litigation outcomes, and shifting costs to the land use entity could affect government decisionmaking and property owners' incentives.[360]

1. The Market Is Imperfect

a. Cost Shifting

> Proposition 1. The Act shifts significant costs to agencies, increasing the likelihood of negative impacts on the land use entity if is fails to settle.

The Property Rights Act has granted Florida property owners a new entitlement to receive compensation for land use regulatory actions that create an inordinate burden.[361] This compensation scheme can be viewed as imposing a direct cost on government agencies that make improper regulatory decisions.

Under the prior regime, although, in theory, a landowner could bring and win a regulatory takings claim, the procedural and substantive hurdles previously discussed in detail made it quite difficult for the landowner to prevail. But now, under the Act, the likelihood of succeeding on a compensation claim has increased because the ripeness doctrine does not apply to compensation claims under the Act, and the intent of the Act is to make compensation more readily available than under takings law.[362] Accordingly, many of the costs of unreasonable government action are shifted back to the land use entity to manage. These costs must be covered from the land use entity's existing budget allocation, since no additional funds have been budgeted to land use entities under the Act.[363]

In addition, at the discretion of the court, the Act shifts costs and attorney's fees to the losing party (the British rule).[364] Since the plaintiff will not have to bear her litigation costs and attorney's fees if she prevails, a landowner who is optimistic about her likelihood of prevailing will be further encouraged to proceed to litigation.[365] On

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360. Proofs of the propositions set forth below would require statistical empirical analysis which this Article will not attempt to undertake.

361. *See supra* notes 219-22 and accompanying text.

362. FLA. STAT. § 70.001(9) (1995).

363. Since the state did not fund such expenditures, the land use entity will have to either reallocate funds initially dedicated to other tasks or seek additional funding. Both the 1975 Property Rights Report and the 1994 Property Rights Report recommended funding for reforms. *See supra* note 25.

364. FLA. STAT. § 70.001(6)(c) (1995).

365. Steven Shavell, *Suit Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982).

the other hand, if one party is pessimistic as to its litigation outcomes, then that party will have an even greater incentive to settle.[366]

b. *Transaction Costs*[367]

> Proposition 2. Given profit-maximizing incentives, there should be more claims filed by property owners under the Property Rights Act than under the present takings law regime.

The Act makes it relatively easy and cheap for a property owner to file a claim under the Act. The claimant's costs would be only her administrative expenses in preparing a claim,[368] her opportunity cost,[369] and any direct costs, such as the fee for the real estate appraisal.[370] When a property owner files her claim, the only provision in the Act designed to ensure that the owner has filed a bona fide claim is the requirement that her claim be supported by a real estate appraiser's report stating that there has been some loss in fair market value due to the regulatory action. No neutral arbiter screens the property owner's claim to determine whether it is meritorious. The only penalty that would attach to filing an unmeritorious claim applies when the property owner decides to proceed from negotiation to litigation. If she loses in the litigation, the court may order the property owner to pay the costs and attorney's fees incurred by the land use entity from the date of filing the circuit court action.[371]

In addition, the negotiation process under the Property Rights Act provides to the property owner substantial procedural advantages not

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366. H.S.E. Gravelle, *The Efficiency Implication of Cost-Shifting Rules*, 13 INTL. REV. LAW AND ECON. 3, 12 (1993).

367. The Coase theorem emphasizes the importance of transaction costs in considering the effect of legal rules. *See* Coase, *supra* note 128; *see also* ACKERMAN, *supra* note 355, at 23-24; EPSTEIN, SIMPLE RULES, *supra* note 258. In this case, transaction costs are the costs associated with negotiating the settlement order.

368. Once a property owner has deciphered the appropriate procedure under the Property Rights Act, the administrative costs (time of preparation and consultant fees) should be very low for the average property owner. Attorney counseling, a high cost item, would be most appropriate in formulating an overall strategy; for example, whether to negotiate or mediate under the Property Rights Act, whether the property owner should seek compensation under the Property Rights Act, or whether she should file a 42 U.S.C. § 1983 (1994) civil rights claim in federal court. An attorney's advice would most likely benefit a sophisticated property owner with much at stake.

369. Opportunity costs are the costs of selecting one option rather than another. In this instance the property owner's opportunity cost is the time allocated to processing her claim which she could have used to pursue other alternatives. *See* COOTER & ULEN, *supra* note 203, at 35.

370. The Property Rights Act does not require that the appraiser be certified or selected by both parties. Accordingly, the property owner will have a wide range of appraisers from whom she can select. *See* FLA. STAT. § 70.001(4)(a) (1995).

371. *Id.* § 70.001(6)(c)(2).

available under the normal regulatory scheme. The property owner will obtain a use determination within 180 days, a decision which is not required under other growth management and environmental laws. Following this 180-day period, the property owner's claim will "ripen" and she can go forward to litigation.[372] Moreover, the property owner can engage the land use entity in an individualized negotiation process. If she has at her disposal superior negotiation skills, she may be able to generate options more favorable to her than she could otherwise have secured.[373]

Given low costs, lack of constraints, and other procedural advantages, property owners have an incentive to file claims under the Act, even with respect to the most reasonable governmental action.

Proposition 3. Agencies will be at a transaction cost disadvantage.

While for individual property owners transaction costs will be much lower under the Act than under the prior regime, the land use entity will incur increased transaction costs. An agency, because of efficiency concerns, is organizationally designed to handle land use issues in a general fashion; for example, agencies issue zoning regulations or building codes that set forth general requirements with which individuals must comply. Individualized determinations, by contrast, are generally resolved outside of the land use entity; for example, land use adjudicative bodies, rather than a centralized agency, determine whether to grant a variance or subdivision approval.[374]

Now, under the Property Rights Act, the land use entity must make a careful, individualized determination for each claim filed. The Act requires that a land use official be assigned to process the claim.[375] This personnel cost will have to be absorbed by the agency, since administrative costs of the Act are not funded.[376] Moreover, because of the consequences of a cursory review, the agencies will not be able to go blithely through the motions of a review. The agency's ripeness determination and the settlement order will be considered by the court

372. *See supra* notes 279-80 and accompanying text.

373. Negotiation theory, a relatively new area of study, is premised on the insight that individuals with superior negotiation skills can achieve better outcomes. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES (1981). Negotiations will yield more options to property owners than the current regulatory process, which tends to center on whether the property owner meets the mandatory requirements of an agency rule. *See* Ellickson, *Alternatives to Zoning*, *supra* note 129; *see generally* Susan Rose-Ackerman, *Consensus versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L. J. 1206 (1994).

374. Ellickson, *Alternatives to Zoning*, *supra* note 129, at 691-94.

375. FLA. STAT. § 70.001(4)(b) (1995).

376. *See supra* notes 25, 266.

in any subsequent compensation litigation.[377] The ultimate result of not giving a landowner's claim proper attention could be a large compensation award to the landowner.

As agencies, already working with lean staffs, are required to provide careful review to more individual claims with the same administrative resources, they could be overwhelmed. Consequently, the land use entity will be at a transaction cost disadvantage.[378]

c. *Information*

Information is key to a party's ability to negotiate its desired outcome.[379] In the settlement negotiation the key information issues are 1) the value of the claim if successfully litigated, and 2) the likelihood that a court will find that the land use regulation has inordinately burdened the property owner's existing use.

> Proposition 4. The property owner most will likely have an informational advantage over the agency.

The value of the compensation claim is the fair market value of the existing use that has been impaired by the agency's regulatory action.[380] Establishing the fair market value of real estate is notoriously difficult; evaluating an "existing use" will be even more difficult. Each piece of real estate is said to be unique. Its location, physical characteristics, uses of the land, its improvements, and its resources are all characteristics that make each parcel unique and create its value.[381] A commonly used method of establishing the "fair market value" of real estate is to collect sales data for parcels of real estate that have comparable characteristics and then to estimate what a reasonable buyer would be willing to pay for the property.[382]

The landowner, naturally, will have an advantage in gathering information regarding her own land. Having owned the property for some time, she will have some familiarity with its positive and

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377. FLA. STAT. § 70.001(6)(a) (1995); *see supra* note 274 and accompanying text.

378. I am not arguing that the land use entity will always incur transaction costs higher than the property owner's costs. Rather, I am suggesting that the agencies will not be equipped to handle these additional claim transactions, so each claim will impose strains on the planning system which will be difficult for the agency to absorb.

379. Informational asymmetry as a variable in a settlement negotiation has been explored by others. *See generally* Cooter et al., *supra* note 337; I.P. L. P'ng, *Strategic Behavior in Suit, Settlement, and Trial*, 14 BELL J. ECON. 539 (1983); Bebchuck, *supra* note 337; Bruce L. Hay, *Effort, Information, Settlement, Trial*, 29 J. LEG. STUD. 29 (1995).

380. FLA. STAT. § 70.001(6)(b) (1995).

381. GEORGE LEFCOE, REAL ESTATE TRANSACTIONS 65-68 (1993).

382. *Id.*

negative aspects. The property owner will present her most optimistic evaluation of the property's value in the real estate appraisal that accompanies her initial claim. Since the property owner will be selecting the real estate appraiser and paying for her fee, the incentive is for the property owner to select an appraiser who will produce a favorable report.[383] In addition to this "objective" valuation, the land also has a "subjective" value to the landowner, an amount the landowner would actually require to part with her property. This figure might be either higher or lower than the parcel's objective value. The property owner's minimum acceptable value is, then, her private information and would not generally be known to the land use entity.

The land use entity must also develop a range of what it believes is the fair market value of the property, both before and after impairment of the existing use. Since the negotiation is not governed by a discovery procedure, as it would be in litigation, the agency will have to collect its own information on these complex matters.

The land use entity's options are not limited to making a monetary offer. Under the Act, the land use entity has great flexibility in negotiating an outcome that will satisfy the claimant. The land use entity, for example, can grant a variance or exception or modify its use determination.[384] Therefore, the land use entity will need substantial information on these various alternatives in order to assess whether to offer any nonmonetary options to the property owner.

In sum, the land use entity will need to evaluate a greater range of information than the property owner. It must collect and evaluate objective data such as appraisals, characteristics of the parcel, and information on the existing use. It must also collect and evaluate less tangible data: the benefit to the community of denying the existing use, the cost to the community of alternative nonmarket options, and the ability to exchange the property owner's desired existing use for a nonmarket option. Even if the agency decides to hire experts to guide it through this issue, the results probably will be inconclusive.[385] The data on the cost of nonmarket alternatives will be difficult to gather; there is lack of agreement, and even controversy, as to the methods of valuation.[386]

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383. Real estate reports tend to be highly variable and can be influenced by the parties. In commercial transactions such incentives are avoided by using certified appraisers mutually accepted by the parties.

384. FLA. STAT. § 70.001(4)(c)9 (1995).

385. *See generally* J. DALES, POLLUTION, PROPERTY AND PRICES (1968); *Law and Economics Symposium: New Directions in Environmental Policy*, 13 COLUM. J. ENVTL. L. 153 (1988).

386. Richard B. Stewart, *Economics, Environment and the Limits of Legal Control*, 9 HARV. ENVTL. L. REV 1 (1985); ROBERT MITCHELL & RICHARD CARSON, USING SURVEYS TO VALUE PUBLIC GOODS: THE CONTINGENT VALUATION METHOD (1989).

The difference in the data initially possessed by the parties and the types of data required by each of them put the state land use entity at an informational disadvantage. Moreover, in our culture, exact cost data, which are supposedly objective, are persuasive. A decisionmaker is likely to find cost data more persuasive than even the most eloquent description of the public interest.[387] The landowner will have exact numbers as to what the land use entity's regulatory action is costing her. By contrast, the land use entity's estimates of social costs will most likely be less exact and therefore less persuasive.

> Proposition 5. If courts apply the inordinate burden test without a theoretical framework, litigation outcomes will be uncertain.

If either party believes that she will obtain a better outcome through litigation after taking into account litigation costs, she will reject the other party's settlement offer.[388] To determine whether litigation is preferable, each party will assess her likelihood of success in litigation by considering factors such as evidence that she will present at trial, counsels' abilities, and the predisposition of the decisionmaker. Moreover, each party will also apply the legal rules to her case to assess the probability of prevailing in the litigation.[389]

Game theory analysts have characterized court outcomes in takings cases as random.[390] This cold assessment of takings law is backed by legal commentators and common sentiment.[391] If courts apply the inordinate burden test without any theoretical framework, results will inevitably be inconsistent.[392]

Nonetheless, even though court outcomes are unpredictable, the parties will generally form an opinion as to the likelihood of success. A party may be optimistic about her case because she believes her preparation of the case, her evidence, or her capable counsel will sway the decisionmaker in her favor.[393] In addition, the parties could be

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387. *See* FISHER & URY, *supra* note 373, at 81-94.

388. *See* Steven Shavell, *Suit Settlement and Trial: A Theoretical Analysis under Alternative Methods for Allocation of Legal Costs*, 11 J. LEG. STUD. 55 (1982); Cooter et al., *supra* note 337; Hay, *supra* note 337.

389. *Id.*

390. Richard Porter, *Environmental Negotiation: Its Potential and Its Economic Efficiency*, 15 J. ENV. ECON. & MGNT. 129 (1988) (court decisions are often made on obscure procedural grounds); Ronald Braeutigam et al., *An Economic Analysis of Alternative Fee Shifting Systems*, 47 LAW & CONTEMP. PROBS. 173 (1984) (court decisions are stochastic due to imperfect information and strategic behavior).

391. *See supra* notes 249, 321 and accompanying text.

392. *See supra* notes 149, 300-30 and accompanying text.

393. See Hay, *supra* note 379.

influenced by others' opinions about likely outcomes under the Act. At this time, the Act is too recently enacted for a body of data and opinions to have developed about it. Nonetheless, the Act's intent is to make compensation more readily available than under takings law.[394] Moreover, proponents of the Act have billed it as being pro-property owner. Parties may choose to believe this characterization and anticipate that litigation outcomes will favor property owners.[395]

Game theory research has shown that the more optimistic a party is about the litigation outcome the less likely she is to settle; on the other hand, the more pessimistic a party is about the litigation outcome the more she wants to settle.[396] Uncertain outcomes will favor the party who has more confidence in her case and is less averse to taking risks.[397]

d. Summing Up Market Imperfections Even Assuming Rational Utility Maximization

The above subsection concludes that under the Property Rights Act: 1) the Act's cost-shifting to the land use entity means that it is now subject to more severe negative outcomes if it fails to settle; 2) given profit-maximizing incentives, there should be more claims filed by property owners under the Property Rights Act than under the present takings law regime; 3) agencies will be at a transaction cost disadvantage; 4) the property owner most likely will have an informational advantage over the agency; 5) if courts apply the inordinate burden test without a theoretical framework, litigation outcomes will be uncertain, thereby favoring the less risk-averse party.

Let us now apply these propositions to differing assumptions about rational government officials' behavior. First assume that the governmental entity is risk-averse. Under tight budgetary constraints, an unfavorable inordinate burden determination will have a substantial adverse impact on the agency's budgetary position. We also assume that under the current political climate, agencies will prefer to cooperate[398] because they do not want to be viewed as inflexible, bureaucratic, and lacking in common sense, images which would have unfavorable political consequences. If, as discussed earlier, litigation

394. *See supra* notes 219-22 and accompanying text.

395. Opinion, gossip and reputation are short-hand methods for persons to evaluate alternatives. *See generally*, ROBIN M. HOGARTH & MELVIN W. REDER, RATIONAL CHOICE: THE CONTRAST BETWEEN ECONOMICS AND PSYCHOLOGY (1983).

396. *See supra* notes 364-66 and accompanying text.

397. *See* Cooter et al., *supra* note 337; Gravelle, *supra* note 366.

398. *See generally* Rose, supra note 359.

outcomes under the inordinate burden test will be considered random by both parties, risk-averse agencies will prefer to settle rather than go to litigation.[399]

Now assume that the property owner is a developer or large corporation with the resources to prepare its case well and obtain any information that may be needed in the negotiation. Also, assume that this type of property owner is less risk-averse than the typical governmental entity. In this scenario, settlements will favor the property owner because the land use entity has a stronger desire to settle. The agency is more risk-averse and may well lack such information about its case that might make it confident about a favorable outcome.[400] In addition, the agency may have a greater taste for settling the matter out of the public limelight than the property owner.[401]

Now assume that land use entities are pessimistic about outcomes under the Act because they believe that the Act is pro-property owner. Under this scenario, land use entities will be even more eager to settle and will make even greater concessions to property owners because of the cost-shifting effects under the Act.[402] Moreover, to minimize administrative costs of the settlement procedure, land use entities will want to settle as early as possible in the process.

Now assume that under the Act the settlement process, by and large, will be out of the public limelight and that monitoring of agencies' settlement agreements by the public at large will be lax. In this situation a land use entity may be able to rationalize a land use determination that satisfies the property owner but is costly to other public purposes, such as following growth management goals or preserving the environment. Such types of agreements would not require that the land use entity make any immediate expenditure of funds or other assets. Instead, the cost of this exercise of executive discretion would be borne by the public at large at some future time. The costs to land use entities under the Act are immediate; they have a direct and relatively high budgetary impact,[403] while the benefits of being a good public agent are distant and accrue to a diffuse and not easily identifiable

399. *See supra* notes 390-92 and accompanying text.

400. *See* Cooter et al, *supra* note 337.

401. *See* Rose, *supra* note 359.

402. *See* Shavell, *supra* note 365.

403. In addition to administrative costs accounted for in terms of dollars and cents, such as the cost of having to pay a compensation award to a successful claimant and increased person-hours in processing and attending claims filed under the Act, the Act creates intangible costs, such as increased risks to a risk-adverse entity, loss of reputation and goodwill, and greater skeptical scrutiny from legislators and courts. In the regulatory state, the predominant organizational culture of land use entities is to avoid public controversy, to prefer certainty to uncertainty, and to prefer proven methods to innovation and creativity.

public interest. Without cost data as to more permissive land uses, without significant third party checks, and with the agency under pressure to "settle" the controversy quickly, we can expect "settlement offers" markedly to favor changes in the growth management scheme that promote more intensive land uses. There is already some anecdotal evidence that this will be the unintended effect of the Property Rights Act.[404]

2. *Other Factors*

a. *Undue Influence*

The preceding analysis has assumed that the goal of government officials is rationally to maximize the utility of their principal, the government. However, we should still consider whether this basic tenet of microeconomic theory would hold. Students of land use law critique local decisionmaking because it can be subject to undue influence by wealthy and politically powerful groups.[405] In microeconomic terms, this phenomenon would be viewed as a failure of the negotiating agent—the government official—to represent the interests of her principal adequately. Land use law addresses this issue by making the land use processes public,[406] requiring that certain issues be adjudicated,[407] and closely reviewing local bodies' decisions.[408] Each of these measures are designed to ensure that the decisionmaker remains loyal to the public interest.

The Act provides no such prophylactic devices to ensure that decentralized decisionmaking is not subject to undue influence. For

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404. In a recent rezoning controversy in Broward County, farmers close to the urban fringe wanted to rezone their land to commercial use. The Government officials agreed to upzone, citing their potential liability under the Property Rights Act as a justification for the decision. Telephone interview with Richard Grosso, Legal Director, 1000 Friends of Florida (July 10, 1995) (notes on file with author).

Recent newspaper articles as well confirm this prediction. The *Wall Street Journal* recently reported that in Palm Beach County, planning officials wanted to increase preservation area boundaries bordering the Everglades. They desisted in their plans because they feared lawsuits under the Property Rights Act. Peter Mitchell, *New Property Rights Law Sends Planners Scrambling for Cover*, WALL ST. J., Oct. 25, 1995, at F1, F3. The article also reports that in Manatee County, Charlotte County, and the City of Deland, the Act has had a chilling effect as well on conservation efforts. In another article Gainesville City Attorney Marion Radson characterized the Act as "hav[ing] a chilling effect . . . [i]t is going to be very difficult to try and be a responsible government when it comes to land use." Lucy Beebe, *New Law to Chill Planning, Zoning*, SARASOTA HERALD-TRIB., Oct. 8, 1995, at B1.

405. *See supra* note 128. *But see* Rose, *supra* note 126 (skeptical of the common belief that local processes are inherently corrupt).

406. *See supra* note 122 and accompanying text.

407. *See supra* notes 122-25 and accompanying text.

408. *See supra* notes 122, 125 and accompanying text.

example, the Act does not require that the negotiation process be open to the public at large, nor that the results be approved by a neutral third party.[409] If critics of local land use law are correct in their suspicion of local process, the absence of such prophylactic devices will place the settlement order process at risk of being subject to undue influence.

b. *Distributional Effects*

It is well-recognized that, even where a market is economically efficient, that market may cause or support an inequitable distribution of resources.[410] The Act may well further distributional inequities. Flexibility is the strength of decentralized decisionmaking. However, a consequence of flexibility is variability of results. Absent any attempt to coordinate bargaining results, settlements will differ from landowner to landowner, even if they are similarly situated. For example, a landowner in Broward County may negotiate with a government official who is particularly risk-averse and anticipates that court outcomes will be pro-property owner. In Dade County, another landowner with a similar land use problem may negotiate with a government official who is risk-neutral, anticipates that court outcomes will be random, and places higher values on long-term guardianship of public resources. The Broward County property owner has a higher probability than the Dade County property owner of obtaining a favorable settlement.[411]

Not only will there be variability of results due to differences among actors, but competition among localities will also lead to a multitude of distributive outcomes. Local governments compete with each other to attract new developments and jobs.[412] Conceivably, as in corporate law, this competition could initiate a "race to the

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409. Only if the settlement agreement is in violation of a statutory provision, such as when the settlement order is inconsistent with the local comprehensive plan, does the settlement agreement need to be approved by a court. *See supra* notes 290-98 and accompanying text.

410. *See supra* notes 356-58.

411. *See* Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963) (different persons in an organization will have different utilities and value structures and consequently fashion contracts with different conditions).

412. *See* FISHEL, *supra* note 258 (large cities tend to be more pro-development because of job creation concerns). But not all local governments may be competing for more growth. Commentators have observed that suburbs have a "parasitic" relationship with the metropolitan center in which they are located, and these may aim to control development more closely. See Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 J. LAND USE & ENVTL. L. 45, 58 n.50 (1994) (suburbs establish land use controls which enable them to pursue anti-growth and exclusionary policies beneficial to the suburb but detrimental to the larger metropolitan community).

bottom,"[413] a competition to interpret the Property Rights Act in a way that provides a more permissive development environment. If there is rigorous competition over laxity and demand for development opportunities is elastic (i.e., responsive to the laxity of standards), bargaining flexibility could undermine much of what the growth management and environmental laws have been able to achieve.[414]

This issue of distributive justice is inherent to any reform that relies on market-like mechanisms. A fundamental principle of democratic governance is that similarly situated persons should be treated substantially the same.[415] In other areas where the Legislature has applied market-like mechanisms, it has attempted to coordinate results to minimize unequal treatment of similarly situated Floridians.[416] However, the Act contains no such mechanism.[417]

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413. It has been postulated that states attempt to structure their corporate laws to be as pro-management as possible in order to encourage businesses to incorporate in the state. The empirical evidence does not support this proposition. Scholars have explained that such results may be due to the fact that the securities market may demand a premium for investing in corporations in states with pro-management statutes, and that states therefore attempt to create a legal framework that balances the interests of management and shareholders. *See* Ralph K. Winter, Jr., *State Law, Shareholder Protection and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977); Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709 (1987); Ellicot J. Weiss & Lawrence J. White, *Of Econometrics and Indeterminacy: A Study of Investors' Reactions to 'Changes' in Corporate Law*, 75 CAL. L. REV. 551 (1987).

Florida has already had some experience in the "race to the bottom" with land use and environmental laws. The political forces that led to the enactment of the State Land Use Plan Act and the Local Growth Management Act grew from experience with a pro-development culture that threatened public goods which benefit all Floridians. *See* DeGrove, *supra* note 18; PELHAM, *supra* note 18; Powell, *supra* note 348.

414. *But see* Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV 473, 528-33 (arguing that competition among city governments may not be sufficiently competitive for a race to the bottom in development standards).

415. John Stuart Mill, *Utilitarianism in* THE UTILITARIANS 468 (1961) ("[S]ociety should treat all equally well who have deserved equally well of it."); BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 3-31 (1980).

416. Mitigation banking is a market-like mechanism where a development that has had an environmental impact offsets this impact by participating in a restoration project intended to restore the environment by either recreating, restoring or enhancing a natural ecological system. Mitigation banking offers potential efficiencies and economies of scale by concentrating resources in larger, environmentally-sensitive areas. Thus, mitigation banking is a system whereby a regulatory agency recognizes participation in a larger preservation effort as equivalent to compliance by another project with the agency's regulations. *See generally* ENVIRONMENTAL L. INST., WETLAND MITIGATION BANKING (1993); Fumero, *supra* note 115. In 1993, Florida adopted mitigation banking legislation. *See* FLA. STAT. § 373.4135 (1995). In order to address issues of coordination and consistency among agencies, the legislation adopted standards for the development of mitigation banking projects. *Id.*

417. The Property Rights Act provides that when any governmental entity receives written notice of a claim, the land use entity shall notify the Department of Legal Affairs in writing of the claim. *See* FLA. STAT. § 70.001(4)(b) (1995). This is an informational function, not a coordination function.

VI. SUGGESTIONS FOR POSSIBLE REFORMS

Now that we have explored the potentially negative results of the Act's decentralized decisionmaking, let us examine whether any modifications could be made that might result in more acceptable outcomes. The proposals set forth below do not purport to address, much less solve, all of the problems with the Act that this Article has identified. Nonetheless, the suggestions below reflect my view on some reforms that should be undertaken, even now, to avoid perverse incentives and unwanted results.

A. Adopt a Theoretical Framework for Interpretation of the Inordinate Burden Test

Microeconomic theory emphasizes the importance of predictable outcomes because such outcomes best enable parties to adjust their conduct to the incentives or disincentives set forth in the law. In terms of takings law, predictable outcomes are efficient because the parties can factor a government regulation or the risk of a government regulation into their investments.[418] Random government actions make intentionally rational investments inefficient because government regulations will interfere with the investments in unanticipated ways.[419]

Uncertain court outcomes also prevent government officials from adjusting their organizational behavior. The Act's compensation rule is designed to prevent government officials from overregulating and needlessly limiting property owners' abilities to use their land as they wish. In order for government officials to reorient their decisionmaking, they must believe that court outcomes will reward or punish such conduct.[420]

Moreover, game theory posits that uncertain court outcomes influence parties' negotiation. When the parties are risk-neutral and their rights are clear, they are more likely to cooperate.[421] If the land use entity is risk-averse and land use outcomes are risk-neutral or risk-

418. In the Mithica scenario, for example, if Growth had known the parcel might be downzoned, it would have paid less for the parcel because of this risk. Alternatively, Growth could have negotiated a form of contingent ownership, such as an option, that would have decreased its exposure to risk.

419. *See* COOTER & ULEN, *supra* note 203, at 198-201.

420. *Id.*

421. *See* Elizabeth Hoffman & Matthew L. Spitzer, *The Coase Theorem: Some Experimental Tests*, 25 J. LAW & ECON. 73 (1982); Elizabeth Hoffman and Matthew Spitzer, *Experimental Tests of the Coase Theorem with Large Bargaining Groups*, 15 J. LEGAL STUD. 149 (1986).

preferring, the land use entity will be more willing to settle than the property owner.[422]

As has been shown in part IV, it is possible to articulate a coherent interpretative framework for the Property Rights Act in order to reduce variability of interpretation and results. Given the negatives of unpredictable outcomes, the Department of Legal Affairs (or other likely entity) should issue a detailed advisory opinion crafting interpretative guidelines for the Act.

B. Reconsider Costs Under the Act

The Act markedly increases the administrative costs of land use regulations and penalizes land use entities in cases of overregulation. In spite of recommendations,[423] these added costs were not funded under the Act. This marked change from the status quo should be reconsidered. Its potentially negative effects are sufficiently serious that the Legislature should monitor carefully how land use entities react to this change. In addition, the Legislature should reconsider whether the Act's provision of unlimited access to individualized decisionmaking by landowners is desirable.[424] If the Legislature determines that unlimited access to individualized decisionmaking is good policy, the costs of this policy need to be addressed.[425]

C. Public Process

The Act does not require that any of the alternative dispute resolution mechanisms established by the Act be open to the public at large. This issue requires further study, both as a matter of policy and as a matter of interpreting how this process interacts with Florida's substantive laws. Opening the land use process to the public at large has marked advantages: it acts as a check to ensure that land use decisions are responsive to public needs, and it enables the community and statewide interest groups to monitor local officials' decisionmaking.[426]

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422. *See supra* notes 388-404 and accompanying text.

423. *See* 1994 PROPERTY RIGHTS REPORT, *supra* note 28, at 74-75; 1975 PROPERTY RIGHTS REPORT, *supra* note 3, at 12.

424. An alternative that would make the Act less onerous to administer would be to include a procedure enabling the land use entity or a neutral third party to dismiss unmeritorious claims expeditiously.

425. As previously noted, the House Report concluded that the Act does not violate Florida's Constitution unfunded mandate provision. *See supra* note 25. Nonetheless, the Act may be subject to attack. The Legislature's finding that the Act addresses an overriding state interest could be characterized as clever legislative drafting. *See Lucas v. South Carolina Coastal Council*, 122 S. Ct. 2886, 2898 n.12 (skeptical of legislative fact-finding because any scrutiny "amounts to a test of whether the legislature had a stupid staff").

426. *See supra* notes 343-45 and accompanying text.

On the other hand, publicity may have a chilling effect on the resolution of disputes, and it could delay the procedure. A task group should study this issue and advise land use entities whether the settlement order negotiation process should be made public.

D. Settlement Results Guided by Standards

The equity issues raised by decentralized decisionmaking raise legal process issues that can undermine confidence in the land use process. Moreover, competition for permissiveness could undermine Florida's growth management and environmental laws. In this area, the Executive Branch could begin a dialogue at the statewide level to help diverse land use agencies formulate standards and policies that will guide them in fashioning settlement orders. Until such standards are devised, the Legislature should consider delaying the application of this provision of the Act.

E. Provide Land Use Entities with Available Information

One prerequisite for efficient bargaining results is information. Many market-type mechanisms that require complex information are being implemented in Florida and other areas of the United States with varying degrees of success.[427] The Executive Branch could pool information on land use market mechanisms, as well as information on the costs of alternative land uses, and make such information accessible to local land use entities. Providing such information could help balance the information inequity which, as discussed earlier, will tend to favor the landowner.

VII. CONCLUSION

At many levels, the Property Rights Act was an inevitable response to much of the frustration created by current land use law and its processes. The Act adopts a multitude of devices designed to give property owners more accessibility to government regulators and provides them the opportunities to obtain quick redress in instances of government overreaching. These are laudable goals which most Floridians support.

However, the Act contains many innovations that represent good ideas but which have not been fully thought out. For example, the compensation provision attempts to reset the balance between individual property interests and the government's regulatory power, but it

427. *See supra* notes 348-50.

does so without clear guidelines or a theoretical framework. Consequently, this innovation will likely recreate the same maze of confusion and inconsistent results that exist in takings law and very likely may not lead to the responsiveness of governmental entities which the Act sought to instill. The decentralized decisionmaking under the Act is based upon naive assumptions, including suppositions that "markets are efficient" and "more accessibility to government is always good." This Article concludes that too little thought has been given to the possible consequences of shifting costs and incentives and that, to avoid consequences that were clearly not intended by the populist impulse which enabled the Act to be passed, reforms are required. The possibly perverse incentives are too serious to ignore. Without help from the Legislative and Executive Branches, even the most dedicated government officials and judges will not be able to correct the flaws contained in the Act. Leadership is required now to ensure that Florida's growth management and environmental laws continue to be a source of pride for most Floridians.[428]

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428. Surveys have shown that the majority of Floridians approve of Florida's environmental and growth management laws. *See* MARK D. DUDA & KIRA C. YOUNG, FLORIDIANS' WILDLIFE-RELATED ACTIVITIES, OPINIONS, KNOWLEDGE AND ATTITUDES TOWARD WILDLIFE: 1995 UPDATE (1995) (survey commissioned by the Florida Game and Fresh Water Fish Commission finding that 98% of Floridians believe protecting wildlife habitat is important and 97% of Floridians believe enforcing laws to protect wildlife is important).