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Cover Page Footnote

The opinions expressed in this Article are the opinions of the author.

HOW THE "PROPERTY RIGHTS" MOVEMENT THREATENS PROPERTY VALUES IN FLORIDA

DAVID J. RUSS AICP*

> Defining "quality of life" necessarily has to do with philosophy and esthetics, yet, in Florida as in other states, people have had a tendency not to ask the fundamental question: "What kind of place do we want this to be?"
>
> – *Luther J. Carter, The Florida Experience (1974)*[1]

> Nearly 200,000 acres of the 775,000-acre agricultural district surrounding Lake Okeechobee are devoted to sugarcane, which survives as a cash crop in the United States because of federal price supports. In effect, the U.S. Department of Agriculture is subsidizing the destruction of South Florida's environment.
>
> – *Mark Derr, Some Kind of Paradise (1989)*[2]

> "We now recognize that allowing nature to function in its pristine state is critical to man's ability to live and prosper. We will never again manipulate the natural wonders of South Florida for short-term gain at long-term expense."
>
> – *U.S. Senator Bob Graham (1994)*[3]

I. INTRODUCTION – THE UNDEAD MOVEMENT IN PARADISE

This Article is about the threat to the average Floridian of a powerful and well financed "property rights" movement that is trying to weaken environmental and land use laws in the state by adopting legislation or a constitutional amendment that would make the public pay when regulations lower the value of real estate.[4] The success of this movement in Florida would result in taxpayers having to compensate landowners for reducing the speculative value of property even if the regulations being enforced are completely

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1. LUTHER J. CARTER, THE FLORIDA EXPERIENCE 14 (1974).

2. MARK DERR, SOME KIND OF PARADISE 358 (1989).

3. *Kissimmee River Restoration Finally Begins*, TALLAHASSEE DEMOCRAT, April 24, 1994, at 4C.

4. Thus far, only one constitutional amendment has actually been circulated for the 1994 ballot.

constitutional and efficiently protect natural resources from destruction, public facilities from over-crowding, and adjacent landowners from incompatible uses.

The mainly corporate beneficiaries of this movement, including large landowners and their service-providers, want to reverse in a single step legislation incrementally adopted during the past two decades that helped to reduce the negative impacts of land use activities on the Florida public. These measures have included laws to discourage inefficient development patterns like urban sprawl;[5] the wasteful loss of wetlands, green spaces, wildlife habitat, endangered and threatened species, open spaces and other amenities;[6] the overcrowding of public facilities;[7] and the intrusion of incompatible uses into established neighborhoods.[8] These laws have tended to protect Florida's remaining quality of life and the public's investments in public and private land and infrastructure. Therefore, the movement threatens to incapacitate the laws the average Floridian relies on to protect her investment in real property—her home, her neighborhood or residential lot, or her apartment—and the type of life she hopes to enjoy in the future.

The first measure proposed by the Florida "property rights" movement to weaken current regulations was a law to make the public financially liable for land use and environmental controls that reduced the market value of land by more than forty percent or otherwise "severely limited" the "practical use" of that land, even if those controls would not amount to constitutional "takings."[9]

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5. *See* FLA. ADMIN. CODE r. 9J-5.006 (1989). Discouraging urban sprawl has been a major focus of the state's enforcement of its growth management legislation. *See* JOHN M. DEGROVE, PLANNING & GROWTH MANAGEMENT IN THE STATES 17-21 (1992). Urban sprawl is an object of wide criticism among planners, *see* JAMES E. FRANK, THE COST OF ALTERNATIVE DEVELOPMENT PATTERNS 37-41 (1989), and even draws comments from cultural figures like Stephen King, who said, "The plague I wrote about [in *The Stand*] was a means to unleash magic on our everyday world of bowl-a-dromes, mini-malls, and exurban sprawl," 42 TV Guide 11, 12 (May 7-13, 1994), and Warren Zevon, who sang in "Gridlock," Transverse City (Compact Disc) (Virgin Records 1989):

> The brake lights flash—there's an R.V. crashed
> I'm in the passing lane going nowhere fast
> The traffic crawls and the engine stalls
> I'm stuck on the edge of the urban sprawl.

6. *See* FLA. STAT. §§ 163.3161, 163.3177 (1985); ch. 403, pt. VIII (1989).

7. *See* FLA. STAT. § 163.3180 (1993).

8. *See* FLA. ADMIN. CODE r. 9J-5.006 (1989).

9. Fla. HB 485 § 1 (1994). The 1993 version of House Bill 485, Florida House Bill 1437, was never passed by both houses. In the face of a promised gubernatorial veto, it was replaced with Senate Bill 1000, which did pass and was presented to the governor for his signature. Senate Bill 1000 created a Study Commission on Inverse Condemnation. Because the bill and its commission, were seen as lacking balance, Governor Chiles vetoed it. He did, however, create a property rights study commission by executive order. *See* Report of the Governor's

Proposals such as these establish a threshold for a "taking" far more liberal than the "denial of all economically viable use" standard[10] now used in property cases.

The other proposed method for reigning in land use controls is a constitutional initiative being pursued as part of a "tax-cap" package for the November 1994 election. This ballot item, although poorly worded, would apparently compensate property owners for any diminution in value caused by the exercise of the police power.[11] Given the considerable resources of the "property rights" movement, another constitutional initiative would not be a surprise, perhaps even during this election cycle.[12]

Past citizens of Florida are partly responsible for the growth-at-any-cost mentality that pushed the state to the brink of environmental meltdown in the late 1960s and early 1970s. To their mutual credit, however, both they and their political leaders educated themselves quickly about the devastating impacts of some development decisions. They took legislative steps to slow the assault on Florida's

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Property Rights Study Commission II 36-38 (Feb. 28, 1994) (on file with the *Journal of Land Use & Environmental Law*).

10. *See, e.g.*, Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).

11. Petition of "Tax Cap Committee," New Smyrna Beach, Florida (1994). Received in the mail at home by the author and on file with the *Journal of Land Use & Environmental Law*. The text and summary of the amendment, which is titled "Property Rights," read as follows:

Insert the underlined words in Article I, Section 2:

> Basic Rights - All natural persons are equal before the law and have inalienable rights, among which are the rights to enjoy and defend life [sic] 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 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.
>
> Ballot Title: **PROPERTY RIGHTS**
>
> SHOULD GOVERNMENT COMPENSATE OWNERS WHEN DAMAGING THE VALUE OF HOMES OR OTHER PROPERTY?
>
> SUMMARY: 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.

12. Kevin Metz, *Property Rights Bills Run Course*, TAMPA TRIB., April 1, 1994; *see also Property Rights Battle May Shift to the Ballot*, FLA. TIMES UNION, April 3, 1994, in which a state senator said the language in HB 485 "eventually will become a state constitutional amendment."

fragile environment. Together, they created a consensus to adopt a package of laws that, in theory, still leads the nation in protecting the environment and controlling growth.[13] Public opinion surveys show that the conservationist consensus is still extremely strong among the public, both nationally and in Florida.[14]

Although the "property rights" movement has skillfully marketed itself as working for the benefit of the public,[15] it is in reality an effort

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13. *See* William Fulton, *Land-Use Planning, A Second Revolution Shifts Control to the States*, GOVERNING 40, 44-45 (Mar. 1989); DANIEL P. SELMI & KENNETH A. MANASTER, STATE ENVIRONMENTAL LAW A-25,A-26 (1993).

14. Rose Gutfeld, *Eight of 10 Americans Are Environmentalists, At Least So They Say*, WALL ST. J., Aug. 2, 1991, at A-1. The subject polls say 53% of the voters expected to bring about dramatic changes in the environment only by making fundamental changes in lifestyle. *Id.* at A-1.

Public opinion surveys show that a large majority of Florida's population cares about the environment and the ill effects of rapid growth. A 1988 survey listed growth as the most important problem cited by Floridians. POLICY SCIENCES PROGRAM, FLORIDA STATE UNIVERSITY, FLORIDA PUBLIC OPINION 6 (Summer 1988). One third of the respondents placed community development or the environment as the top problem area for the state for that year. *Id.* at 7-9. The authors of the 1989 version of the survey noted that community development (which includes rapid growth and transportation and roads) had been listed among the top three problem areas in the state each year between 1979 and 1989 (except 1982) and was rated the number one problem in 1985, 1986, 1987, and 1988. POLICY SCIENCES PROGRAM, FLORIDA STATE UNIVERSITY, FLORIDA PUBLIC OPINION 9-10 (Summer 1989).

Similarly, although the 1991 survey respondents most often listed economic concerns as the top problem (it was listed first by 18%), more than a quarter said either growth-related problems or the environment was the top issue for the state. POLICY SCIENCES PROGRAM, FLORIDA STATE UNIVERSITY, 1991 FLORIDA ANNUAL POLICY SURVEY 1-3. Also, the authors pointed out:

> During the past two years, a consensus seems to have formed that development needs to be controlled in this state. This year 80 percent of the public said that development should be stopped (10%) or limited (70%). Last year 86 percent of the public expressed the same concern.
>
> Although it might be expected that conservatives and Republicans might be less willing to put limits on development, they were no more likely than Democrats, Independents, liberals or moderates to feel that way. This is another indication of the widespread support limiting development has received.
>
> Among those who supported limits, 79 percent thought that government should be the one to control development. The most popular level of government to exercise control was local government (cities and towns, 35%; counties, 26%; and state, 31%).

Id. at 2-3.

Also, fully 65% of the survey respondents in 1993 said population growth in their communities was a major or minor problem. POLICY SCIENCES PROGRAM, FLORIDA STATE UNIVERSITY, 1993 FLORIDA ANNUAL POLICY SURVEY 8. Also indicative of the public's attitude toward the environment was the answer to the question of "How important is it to know that endangered species are being protected?" Fully 93% said it was important to them to know that some or all endangered species are being protected; only 7% said protection of some or all endangered species was not important. *Id.* at 28.

15. Craig Quintana, *Landowners Turn Rights Into War Cry*, ORLANDO SENTINEL, Feb. 7, 1994, at C-1, C-5. The article discusses a planned Feb. 9th demonstration at the Florida Capitol, with one organizer saying he expects "to have 5,000 and 10,000 people turn out for the rally." *Id.* at C-5. Actually, fewer than 200 people showed up, including 25 state legislators. Bill Moss, *Rally Pumps Up Property Rights Act*, ST. PETE. TIMES, Feb. 10, 1994, at B-1.

financed by and for the benefit of Florida's largest corporate landowners.[16] These firms own at least 2.1 million acres of undeveloped land consisting primarily of wetlands, timberlands, native pasture, and land of marginal developability isolated from existing development.[17] It is no wonder that they, and the organizations that supply them with financial, legal, developmental, and lobbying services, now want to return to a time when few laws stood in the way of development of such lands.

The true goal of the "property rights" movement is economic: the movement would shift the negative impacts of development from the developer of property, or from the purchaser of developed property, to the general public. Since this will tend to devalue the

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16. The most public supporters of the movement in 1994 are:
- St. Joe Paper Co., and its associated corporation, Florida East Cost Industries, the largest private landholders in the state, holding more than 1.1 million acres of undeveloped land (mostly timberland in the Panhandle and railroad grant lands on the east coast) and whose president and chief executive, Robert Nedley, is a Florida Legal Foundation director.
- Sugar Corp., with 135,000 acres. Nelson Fairbanks, its president, is second vice chairman of the Florida Legal Foundation and a director of the Florida Land Council.
- Lykes Brothers, which owns 350,000 acres of undeveloped land in Central Florida and whose president and chief executive is chairman and president of the Florida Legal Foundation and a director of the Florida Land Council.
- Deseret Ranches, which owns 300,000 undeveloped acres in Orange, Osceola and Brevard counties (including the largest contiguous piece of privately held property in Florida). John King, the general manager of its real estate subsidiary, is a director of the Florida Legal Foundation.
- Collier Enterprises, which owns 135,000 undeveloped acres in Southwest Florida, and whose managing general partner, Miles Collier, is vice chairman of the Florida Legal Foundation and a director of the Florida Land Council.
- A. Duda & Sons Co., holder of 110,000 undeveloped acres in East Central Florida. Its executive vice president, Joseph A. Duda, is a director of both the Florida Land Council and the Florida Legal Foundation.
- Florida Land Council, a successor organization to an assemblage organized in 1985 to fight growth management and environmental legislation made up of at least 20 firms, including Florida Farm Bureau, U.S. Sugar, Duda & Sons, St. Joe Paper Co., Lykes Brothers, Graves Brothers, and Collier Enterprises.
- Florida Legal Foundation, a legal defense fund and lobbying group formed and operated by Florida Farm Bureau, U.S. Sugar, Duda & Sons, St. Joe Paper Co., Lykes Brothers, Graves Brothers, Collier Enterprises, and other large business interests.

Mary E. Klas, *Powerful Landowners Fuel Property Revolt*, PALM BEACH POST, March 11, 1994, at 1A, 8A. The article states, quoting the general counsel of the Florida Farm Bureau, that "agriculture has to exploit the stories of the 'little guy' to counter the prejudice against this industry. 'The environmentalists always portray themselves as David vs. Goliath,' he said. 'We're trying to use the same valuable tools.'" *Id.* at 8A.

17. *Id.*

foremost real property investments of the middle class—investments in homes, apartment leases, residential lots, and neighborhood properties—it can be said with only slight hyperbole that the goal of the movement is to take from the middle class and give to the rich.

Paradoxically, this movement is financed largely by business interests combating environmental and land use laws that were designed to counteract the negative economic impacts of development at a time when these impacts still exist and the state's environment continues to decline. The results of past mistakes are all too apparent: traffic congestion and commuting times are increasing statewide;[18] flood control structures designed to store water for consumption, to drain muckland for farms, and to control periodic inundation of developed lands are killing Florida Bay;[19] and saltwater intrusion into drinking water supplies and development interference with groundwater recharge is growing worse on both coasts.[20] These resource problems are exacerbated every year with the arrival of 300,000 new permanent residents[21] and 40 million visitors. This seems not to be a good time for retreat on the environmental front.

The "property rights" movement sends the message that, facts notwithstanding and regardless of the consequences, it is time to return to no-holds-barred wrestling with the environment to extract the last measure of profit. Those behind the movement seem to be counting either on Floridians having short memories or on the support of people who have lived in Florida only during a relatively enlightened regulatory period.

Indeed, the phrase "property rights" belongs in quotation marks because the cause being espoused is not really the enforcement of existing, recognized rights in real property. What is really at issue is the creation of a whole new right, guaranteed by state law, to profit from real estate speculation at the expense of laws designed to manage growth and protect the environment. By suggesting that the public pay if unilateral expectations of profit are frustrated by laws that safeguard the public's health, safety, and welfare, those

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18. Florida has the fourth longest average commuting time in the nation, a figure that is rising primarily because an increasing number of people are commuting longer than forty-five minutes. CENTER FOR URBAN TRANSPORTATION RESEARCH, TRENDS AND FORECAST OF FLORIDA'S TRANSPORTATION NEEDS 13-14 (Oct. 1993).

19. *Crisis in Florida Bay*, MIAMI HERALD, Aug. 11, 1992, at B-1; Donald Smith, *Experts Can't Agree On How To Save Dying Florida Bay*, ST. PETE. TIMES, March 25, 1994, at A-1.

20. *See* Michael Nyenhuis, *Duval Warned of Seawater Threat to Wells*, FLA. TIMES UNION, Feb. 9, 1994, at A-1.

21. It is almost like the City of Cincinnati picking up and moving to Florida every twelve months. *See* THE 1994 INFORMATION PLEASE ALMANAC 796 (Otto Johnson ed., 47th ed. 1994).

landowners who support the movement are advocating that their investments in land be given a privileged place among all other investments that people can make.[22]

Creating this new right to profit from real estate speculation would devalue the property and quality of life of the rest of us: it is the average Floridian who stands to lose the most if the "property rights" movement succeeds. This is because the public at large is the primary economic beneficiary of the existing system of land use and environmental laws in Florida that have tended to protect Florida's remaining quality of life and the public's investments in land and infrastructure. The "property rights" movement threatens not only to incapacitate these laws but also to strip the government of its ability and willingness to continue protecting the average Floridian in order that the owners of large, isolated parcels of land could realize the maximum speculative values of their property.

Despite its dangerous potential, this particular proposal of compensation-for-diminution—like Dracula—keeps rising from the grave. Although the proposal has been rejected in every state where it has been introduced, its proponents will not let it expire. It is the legislative equivalent of The Undead. It therefore demands some serious attention and study.

This Article discusses the negative externalities that result from all land use transactions and considers the inability of the market system to distribute effectively the costs of development. Looking at the origins of these negative externalities, throughout the United States and in Florida, and recognizing the failure of measures other than environmental regulation to deal with the negative impacts, this Article discusses the past actions of Florida courts and the Florida legislature in this arena.

With this background, the Article then explores the nature of the contest presently being waged over property rights in Florida, tracing the origins and achievements of the property rights movement and analyzing the most recent legislative and constitutional proposals. It concludes that the proposals of this movement would damage significantly the present value in developed properties for the sake of the speculation interests of large landholders.

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22. The legislation proposed so far is the economic equivalent of the owners of fast food restaurants demanding compensation from the public if laws on minimum wages or workplace safety reduce the value of their investments.

II. PARABLES OF NEGATIVE EXTERNALITIES (OR WHY TALK OF CIGARETTES IN A LAND USE ARTICLE)

A. The Consumption of a Leaf

The goal of the American economy is to achieve the efficient distribution of goods and services through the operation of a free market economy. Shortly after declaring independence, this country embraced the capitalistic canons of Adam Smith, who said the most reliable way to produce wealth for a country was to allow "an invisible hand" to guide each individual to maximize his own wealth. This, in turn, would unintentionally but most certainly maximize the wealth of the nation.[23] One of the assumptions of efficient competition and a free market is that "the actual price embodies all the relevant information that is available."[24] In all such markets, however, there exist externalities.[25] Externalities are costs or benefits of a private transaction that impact persons other than the parties to the transaction.[26] The market's inability to eliminate externalities creates inefficiencies because the parties who plan and carry out an otherwise private transaction neither bear the full costs it produces for society nor capture the full benefits of the transaction. In practical terms to society, *negative* externalities create the most problems.

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23. ADAM SMITH, THE WEALTH OF NATIONS 423 (1937). *But see* James Fallows, *How the World Works*, ATLANTIC MONTHLY, Dec. 1993, at 64-73, where the author suggests that the strongest, fastest-growing economies in the world rely on forces other than those of "the invisible hand."

24. MICHAEL PARKIN, ECONOMICS 281 (1990). The seven conditions for perfect competition to exist are usually said to include the following:

1. There must be many firms selling an identical product.
2. There must be many buyers of that identical product.
3. There must be no restrictions on entry into the industry.
4. Firms in the industry must have no advantage over potential new entrants.
5. Firms and buyers must be fully informed about the prices of the product of each firm in the industry and the costs and consequences of the transaction. [Economists refer to this state as "perfect knowledge" or "perfect information." *See id.* at G-11 (1990).]
6. There must be no transaction costs, including survey fees, attorney fees, realtor commissions, and loan origination fees.
7. Firms and buyers must adjust the price of the product to reflect the cost of eliminating all "externalities" that result from the transaction.

25. *See* MARILYN S. SCHWARTZ & VIVIAN L. KASEN, ENCYCLOPEDIA OF COMMUNITY PLANNING AND ENVIRONMENTAL MANAGEMENT 136 (1989), where in a land-use context the term is defined as:

> The social costs that a group must pay or the social benefits that a group receives as a result of the actions of others. They are the often unintended and unexpected results of a development or activity that are not directly associated with that activity and may result from both public and private-sector investment.

26. *Id.*

Take, for example, the habit of smoking. For centuries American society encouraged tobacco smoking.[27] It used slave labor to grow and harvest the plant cheaply. It manipulated the prices and quantities with government subsidies and production quotas to make the crop abundant and affordable. During the last century, it exalted the cultural worthiness of smoking in films, TV programs and advertisements. It made cigarettes part of the standard rations for America's fighting women and men overseas.

More subtly, over the years it ignored mounting medical evidence linking smoking to illness and looked the other way when the minimal regulations on the books—like selling tobacco to minors—were ignored. As a result, lung cancer, such a rare disease in the early 1900s that new cases were immediately written up in medical journals,[28] assumed epidemic proportions, and became the leading cause of cancer deaths by 1993.[29] The negative externalities associated with smoking are costs to the public that are generated by the habit but not covered by the price of cigarettes. These external costs approach $100 billion a year in lost productivity, medical bills, insurance premiums, heating and cooling expenses, maintenance, and cleaning costs.[30] If the product's price reflected the full cost of this expense, in other words if the market truly worked in establishing the price of cigarettes, each pack would bear a user fee of $5.80.[31] This fee would be collected and transferred to the institutions and individuals that end up subsidizing smoking by paying more than their fair share of the costs of smoking.[32]

Clearly, the analogy between smoking and the irresponsible consumption of land is not perfect. One necessarily involves the use of

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27. *See* Timothy J. McNulty, *Cigarettes are Spiked, FDA Says*, TALLAHASSEE DEMOCRAT, June 22, 1994, at 1A, 13A: "Tobacco has been a big money crop since colonial days, and a huge amount has been spent to defend it in the last two decades."

28. Evarts Graham & Ernest Wydner, *Tobacco Smoking as a Possible Etiologic Factor in Bronchiogenic Carcinoma*, 143 JAMA 329, 329-36 (1950).

29. Lung cancer killed 93,000 men and 56,000 women in 1993. THE UNIVERSAL ALMANAC 212-13 (John W. Wright ed., 1994). While cancer deaths among adults have continued to rise since the 1950s, cancer death rates for children (who are presumably not old enough to smoke) have fallen dramatically because of medical advances. *Id.* Smoking is the single most preventable cause of death in our society, killing approximately 434,000 people in 1993. *Id.* at 220.

30. *Id.*

31. This assumes each smoker consumes twenty cigarettes a day, that there are approximately 50 million adult smokers, and that the uncompensated costs to society are $100 billion. *Id.* This is about the amount of the cigarette tax in Canada.

32. Last session the Florida Legislature unwittingly passed a law that could allow the state to recover part of the social costs of smoking. It abrogates common law defenses typically used by the tobacco industry in liability suits, such as assumption of risk and comparative negligence, and allows the *state* to recover from liable third parties Medicaid expenses incurred in treating people with illnesses, which would include people with smoking-related illnesses. *See* § 4, ch. 94-251, 1994 Fla. Laws ____.

fire; the other does not. More pertinently, the development and use of land are the precursors of civilization. We could not feed, clothe, house, or enjoy ourselves if someone had not had the entrepreneurial spirit and capital to put plow to ground, hammer to nail, dollar to account, or formica to countertop. Nevertheless, just as with smoking, there are many negative externalities associated with land use or development that do not reflect the actual price of the land or its development and are therefore absorbed by the public at large. These include pollution, loss of public amenities and public facilities, and loss of shared natural resources.[33] Conversely, there are many actions financed by the public at large that add value to individual property but which provide the public with no return. These actions include the building of new roads and road interchanges, the deductibility of purchase-money interest payments for property, and the provision of water and sewer services at uniform rates.

Unfortunately, the market in buying, selling, and developing real estate does an especially bad job of living up to the ideals of perfect competition. This happens for at least two reasons. First, buyers and sellers cannot acquire full information about the properties on the market or the true, long-term ramifications of transactions involving those properties. Second, the real estate market is currently incapable of constructing a private economic transaction between buyer and seller that creates no negative externalities. In other words, it is impossible to insure that the immediate parties to the transaction absorb all costs generated by the transaction. These negative and positive externalities have generated the need for and widespread acceptance of police power regulations designed to internalize the costs of land development and natural resource destruction.

The externalities associated with the use and development of land are especially relevant to the public interest because, as the science of ecology has shown, projects that seem confined to one parcel of land can have huge effects further down the ecological stream.[34]

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33. A good example is the reduction in home values anticipated by residents near the proposed site for Blockbuster Park, a proposed theme park in South Florida. *See* Catherine Wilson, *Theme-park Neighbors Find Little Joy in 'Wayne's World,'* TALLAHASSEE DEMOCRAT, June 22, 1994, at 7B.

34. The federal government is currently considering the creation of many new mechanisms tending to make market prices for products and resources reflect more of the societal cost of producing them. *See* Robert N. Stavins, *Harnessing the Marketplace*, 18 EPA JOURNAL 21 (May/June 1992).

B. *The Consumption of Land*

The diseconomies in land use today reflect the system of land tenure in the newly independent United States, which lent itself to speculation as its new residents looked upon the huge, undeveloped continent as a land of unlimited opportunity and limitless spaces. This was reflected both in the law of property and in the fact that speculation became the "primary basis" for land distribution.[35] This meant that land use planning took place only in the sense that someone bought a large parcel and split it into smaller parcels if sufficient profit could be earned.[36] Missing from public or private consideration in this process was the notion that those alive now owe a duty to future generations to maintain the land so they can enjoy it without undue diminishment.[37]

Whether out of philosophical bent,[38] ignorance, or pure greed, new American immigrants quickly established a pattern of exploiting the resources of the territory. The new country had so much land and so many resources that perhaps the country seemed limitless to the land-starved Europeans.

Exploitation in Florida was even worse. The federal government forcefully deprived the indigenous Native Americans of their property.[39] It then granted the land to the state government on the

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35. JAMES H. KUNTSLER, THE GEOGRAPHY OF NOWHERE 25-27 (1993).

36. *Id.* at 26.

37. *Id.*

38. Some may ascribe this short-sighted attitude about land to the capitalist principles of Adam Smith. But he endorsed land use restrictions to "give each one the secure and peaceable possession of his own property," including laws for trade, commerce, agriculture, manufacture, and even the cleanliness of cities. ALAN BLOOM, CONFRONTING THE CONSTITUTION 318-319 (1990). The lack of attention to stewardship of the land may actually be more attributable to the tenets of the philosopher John Locke. JOHN LOCKE, TWO TREATISES OF GOVERNMENT, Book I, Section 93 (New American Library 1965). Locke caused much commotion in his time by re-interpreting *The Bible* to assure the dominant position of humankind:

> Property, whose Original is from the Right a Man has to use any of the inferior Creatures for the Subsistence and Comfort of his Life, is for the benefit and sole advantage of the proprietor, so that he may even destroy the thing, that he has Property in by his use of it, when need requires.

Id.

39. The Native Americans benefited from no well-orchestrated "property rights" movement in their favor. The irony of this is described by one author:

> Apparently unmindful of the freehanded disposal of the Florida public domain lands to claimants and buyers who were often less than worthy, many Floridians today somehow think of property rights in terms of a revealed truth. There is, however, at least one small isolated group of people that entertain no illusions about the fixed and sure nature of property rights. These are the Seminoles of Florida and Oklahoma, whose forebears ceded Florida to the U.S. Government virtually at bayonet point. To this day, they have not received compensation for the nearly 30 million acres that was taken from them, although the fact that most

condition that it be drained, diked, and made suitable for human settlement.[40] The Florida government, standing to receive 22 million acres under this offer, quickly established the governor and cabinet as the Board of Trustees of the Internal Improvement Fund to administer the former swamp land.[41] The trustees then illegally offered the unimproved land as collateral for many railroad and canal companies doing business before the Civil War.[42] After these companies defaulted and the bondholders pursued their collateral, a cloud settled over the title to millions of acres of Florida real estate.[43]

Desperate to settle this debt and open the state for development, Governor William Bloxham agreed to sell four million acres of land still in public ownership at twenty-five cents an acre to a Philadelphia businessman, and also to give him half of twelve million acres he was to drain and reclaim by lowering the level of Lake Okeechobee, and channelizing much of South Florida.[44] Three years later the

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of Florida once belonged to the Seminole nation was recognized by the U.S. Indian Claims Commission in 1964.

LUTHER J. CARTER, THE FLORIDA EXPERIENCE 80 (1974). To some economists, the early exploitation of indigenous peoples or other groups casts doubt on any modern claim that the land economy is equitable or truly competitive. *See* Michael Parkin, ECONOMICS 1003-04 (1990), where the author says:

> A major disadvantage of capitalism is seen, even by those who support this economic system, as arising from the fact that the historical distribution of endowments is arbitrary and indeed is the result of massive illegitimate transfers. For example, the European colonists of North America took land from the native people of this continent. Because there have in the past been illegitimate transfers – violations of private property rights – the current distribution system of wealth has no legitimacy. If there were no large inequality in the distribution of wealth, its historical origins would not be a matter of much concern. But the fact that wealth is distributed very unequally leads most people to the conclusion that there is a role for state intervention to redistribute income and wealth.

A similar observation could be made about the institution of slavery in this country. Africans were seized, unlawfully converted into personal property, and transported across the sea, where their labors and liberties were bought and sold for the benefit of their owners and the institutions that relied on slave labor. Slavery was legally abolished in 1865, but African-Americans continue to suffer economic deprivation by receiving substandard opportunities and rewards because of their race. The nation's legacy of slavery has not been eliminated from the modern economy.

40. *Id.* at 60, 62.

41. *Id.* at 63-64.

42. *Id.*

43. *Id.*

44. *Id.* Although this grand scheme was never realized, most of these projects were completed over the next eighty years by the Central and South Florida Flood Control District, the predecessor to the South Florida Water Management District, at a cost of more than $500 million. *Id.* Unfortunately, most of these projects proved to be environmental disasters. As a matter of fact, state and federal authorities are now spending $392 million to de-channelize the Kissimmee River because the effort to straighten it, which was finished in 1964, had devastating effects on the water quality of Lake Okeechobee. Authorities hope the River, which became officially known as "Canal 38" when the Army Corps of Engineers finished the channelization project at a cost of $30 million, can be restored to its meandering course and to

state legislature passed a bill instructing the trustees to give 10,000 acres of swampland in alternating sections within six miles of the right-of-way for each new mile of canal or railroad track completed in the state.[45] These actions established a blueprint for the state's future treatment of its land and natural resources. Even at this early date, the negative effects of development were ignored in the rush to open up the state and create wealth for the development community.

C. *The Environmental and Growth Management Movements: Internalizing Externalities*

As the relaxed 1950s gave way to the frenetic 1960s, scientists across the land began noticing and reporting the terrible impact on the environment huge increases in wealth and consumption of goods, materials, and facilities, especially fossil fuels, were having.[46] Between 1940 and 1965, America's population grew by forty-seven percent, but the Gross National Product almost tripled.[47] As pointed out in 1970:

> Our growing affluence has had several effects: Each of us uses a larger quantity of materials, and thus there is more to throw away. We can afford to discard many objects we once saved and reused. Our habits of consumption have changed toward using materials and doing things which are especially destructive to our environment. As the primary wants of the great majority have become satiated, we have become more concerned with the quality of life and the effects of our own actions in demeaning it.[48]

In an efficiently functioning free market, the market would have adjusted itself to reflect people's advanced understanding of and concern for the environmental consequences of their activity. Built into the price of each economic decision would have been a component that both accounted for the negative externalities caused by the transaction and internalized that cost in the transaction itself. This component would have measured and taken care of the negative impacts to society of increased pollution by raising enough money to eliminate the source of the pollution. However, the market continued to dump the negative impacts of these economic decisions on the public in the form of air too dirty to breathe, water too dirty to drink, pesticides too dangerous to use safely, and wildlife too poisoned to

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a habitat that once provided shelter for more than 300 fish and wildlife species. *Kissimmee River Restoration Finally Begins*, TALLAHASSEE DEMOCRAT, April 24, 1994, at 4C.

45. MARK DERR, SOME KIND OF PARADISE 87 (1989).

46. R. REVELLE & H. LANDSBERG, AMERICA'S CHANGING ENVIRONMENT iii-xii (1970).

47. *Id.*

48. *Id.*

live. Rivers caught on fire, air emergencies were declared, people waited for chemical time bombs to go off in their bodies, and the country watched as species after species, including the American Bald Eagle, teetered on the brink of extinction.[49]

Environmental advocates who used theories such as nuisance, trespass, strict liability for the release of dangerous materials, and violation of the public trust doctrine met with limited success in curbing the abuse and waste of public resources.[50] Nuisance actions were ineffective in accounting for the more subtle and complex negative spillovers that occurred as urbanization increased and the instances of incompatible uses being located next to each other rose. Courts were willing to label few land uses as nuisances *per se*.[51] This resulted from the elusive nature of the negative land use impacts such as a decrease in the price of surrounding properties when a repair shop would locate or expand in a residential area or when a house would be converted to a boarding house in the middle of a single-family area. The judiciary was not equipped to broker the land use conflicts that arose in such a rapidly growing, wealthy society.[52]

After recognizing that neither the courts nor the market could effectively distribute the negative externalities of land development, the federal government began studying and adopting major pieces of environmental legislation in the 1970s to correct the imbalance. The five most important federal laws passed in this era were the National Environmental Policy Act (NEPA),[53] the 1970 Clean Air Act,[54] the 1972 Clean Water Act[55] the Resource Conservation and Recovery Act (RCRA)[56] in 1976, and the 1980 Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[57] Each of these

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49. *Id.*

50. *See* Frank E. Maloney, *Judicial Protection of the Environment*, 25 VAND. L. REV. 145 (1972); D. SELMI & K. MANASTER, STATE ENVIRONMENTAL LAW 4-1 to 4-50 (1993).

51. SELMI & MANASTER, *supra* note 50 at 3-14; *see* National Container Corp. v. State ex rel. Stockton, 189 So. 4 (1939) (holding that state constitutional amendment permitting pulp mills and exempting them from taxation precluded granting injunctive relief against pulp mill air pollution).

52. The United States Supreme Court did uphold the constitutionality of zoning and recognize the state's increasing interest in controlling the negative spillover effects of individual economic decisions. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 392 (1926). Such traditional zoning was, however, reactive and limited, with little or no impact on the timing and placement of new development or the provision of facilities and services to accommodate the new development. THE LAND USE AWAKENING 31-34 (R. Freilich & E. Stuhler ed., 1981).

53. 42 U.S.C. §§ 4321-4370a (1988).

54. 42 U.S.C. §§ 7401-7671q (1988).

55. 33 U.S.C. §§ 1311-1387 (1988).

56. 42 U.S.C. §§ 6901-6992i (1988).

57. 42 U.S.C. §§ 9601-9661 (1988).

was designed to compensate for defects in the market by making the buyers and sellers in polluting activities internalize more of the costs.

III. THE FLORIDA EXPERIENCE WITH ENVIRONMENTAL AND LAND USE REFORM

A. The Flight to Florida

As the urbanized areas of the rest of the country were being reborn in response to huge increases in wealth, consumption, and population, and as city dwellers moved to suburban areas generally, the migration-bound residents of the Midwest, Northeast, and Mid Atlantic states were flocking to places like Florida. Florida was transformed from a swampy destination for winter tourists to a permanent migration destination for people and firms from the north eager to acquire their chunk of paradise.

Population in the state increased from half a million in 1900 (the least populous southern state) to 2.7 million in 1950.[58] Over the next forty years, Florida's population grew another 5.2 million, to 12.9 million, by 1990.[59] Current projections are that over 19 million people will live in Florida by the year 2020.[60]

Beginning in the 1920s, the major destination of people moving into Florida shifted from the northern parts of the state most able to absorb growth, like Tallahassee and Jacksonville, to the extremely sensitive areas along Florida's southeast and southwest coasts. Populations boomed around Tampa and Fort Myers, as well as in Dade, Broward and Palm Beach counties.

In the peninsular part of the state, the part most sensitive to development, grandiose and insensitive subdivision activity proliferated quickly. For instance, operating with "a virtual *carte blanche*" between 1950 and 1970, large corporate developers created more than 420,000 lots in only eight huge subdivisions sprawling across 300 square miles—enough new capacity to hold a population greater than 1.2 million.[61] Perhaps anticipating inevitably tougher regulatory times, speculators created these lots in a kind of subdividing frenzy with no regard to negative environmental impact. Developers

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58. Policy Science Program, Florida State University, Proceedings of the Symposium on Florida's Migration and Population Redistribution Patterns: Planning and Policy Implications 11, 21, Tallahassee, Florida (May 27, 1980).

59. *Id.*; Bureau of Economic Business Research (BEBR), FLORIDA STATISTICAL ABSTRACT 32 (1991).

60. *Florida's Population Forecast*, ST. PETE. TIMES, April 21, 1994, at 1A.

61. 2 LESLIE ALLAN, BERYL KUDER, SARAH L. OAKES, PROMISED LANDS: SUBDIVISIONS IN FLORIDA'S WETLANDS 11 (1977).

maximized the number of waterfront lots by dredging and filling "fingers" of land on which houses could be placed. Developers also ignored marketing realities. Although many of them had been in existence for more than twenty years and marketed around the world, by 1977 these subdivisions had attracted less than six percent of their buildout potential.[62] During this period in Florida more than 73,000 lots were created for each home being constructed in these subdivisions.[63]

B. Adverse Impacts and Legislative Reaction

The Florida landscape experienced significant adverse impacts as a result of this type of abuse. One study said in 1977:

> The uncontrolled development of environmentally fragile lands has offered residents ambiguous rewards. Hurtling forward at an ever more rapid rate, the state's growth is producing unwanted side effects. Intimately involved with these trends is Florida's land-sales industry.[64]

Florida's natural amenities, low-tax philosophy, and lax regulatory climate attracted developers and new residents in droves. However, the new impacts on the natural and constructed environments began to cause rumblings among some of the stronger institutions in the state. For example, in 1967 the Florida Legislature created a Joint House and Senate Interim Committee on Urban Affairs to study the ever-increasing problems in the state attributable to population growth, and the inability of current government structures to ameliorate the negative impacts of that growth.[65]

As a premise for its recommendations, this Interim Committee reported that the "nature of urban life has undergone radical changes," with attendant increases in crime and other problems affecting the desirability of the urban environment, including "air and water pollution, uncontrolled or loosely controlled development and zoning, and overcrowding and neglect in providing open-space land."[66] The Committee recommended twenty-one new pieces of legislation enhancing the powers of state and local governments to

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62. *Id.* at 22. It should be pointed out that while some of these mega-subdivisions have experienced very rapid growth since the early 1980s, they are so large that this has put but a small dent in their capacity.

63. COUNCIL ON ENVIRONMENTAL QUALITY, THE USE OF LAND 265 (William K. Reilly ed., 1973).

64. 2 LESLIE ALLAN, BERYL KUDER, SARAH L. OAKES, PROMISED LANDS: SUBDIVISIONS IN FLORIDA'S WETLANDS 1 (1977) (footnote omitted).

65. Florida House of Representatives Concurrent Resolution No. 3011 (1967).

66. Report of the Interim Committee on Urban Affairs to the Florida Legislature 11 (April 1969).

deal with the problems of growth. These included the creation of a Department of Community Affairs, intergovernmental contracting for services, regional planning councils, municipal home rule, and legislation authorizing local governments "to adopt comprehensive plans for future development . . . [and to provide] for administration of zoning and subdivision regulations in accordance with such plans, as well as construction codes."[67] These recommendations were ambitious for their times, but no immediate growth management legislation resulted from the committee's recommendations.

Legislative action was taken a few years later, after Florida's most severe drought in modern history. Between October 1970 and April 1971, South Florida received less than a third of the lowest amount of rain previously on record. As a result, fires swept over more than 400,000 acres of the Everglades.[68] Because ecologically substandard flood control structures had been installed over the previous decades, the Everglades National Park did not receive enough water to survive. This led to pressure on state officials by the national government.[69] At this same time, Florida was struggling with decisions involving the Cross Florida Barge Canal and a proposed jetport in the middle of the Everglades. Environmental meltdown appeared to be just around the corner.

These environmental crises focused the attention of the enlightened executive and legislative leadership that held state office at that time. They realized the need to tackle the problem of the impacts of Florida's rapidly expanding population and rapidly dwindling natural resources. Then-Governor Reubin Askew convened a water management conference in September 1971. He told the 150 people who attended:

> It's time we stopped viewing our environment through prisms of profit, politics, and geography or local and personal pride. Already the cities, the farms, and the Everglades National Park are engaged in a fierce competition for Lake Okeechobee's dwindling supply of water. As the population expands and the supply [of water] continues to diminish, then that competition becomes critical. We must build a peace in south Florida, a peace between the people and their place.[70]

The chairman of the conference said the governor's frank recognition of the problems associated with growth caused the members of the conference to respond accordingly. He said it was the "first time any

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67. *Id.* at 7-8.
68. LUTHER J. CARTER, THE FLORIDA EXPERIENCE 125 (1973).
69. *Id.*
70. *Id.* 125-126.

high state official in Florida had questioned the goodness of growth."[71]

This informed leadership adopted very ambitious legislation over the next fifteen years, putting in place a system of state administered environmental, planning, and growth management laws designed to keep natural Florida from going the way of the passenger pigeon and the dusky seaside sparrow.[72] These laws included the Florida Environmental Land and Water Management Act of 1972,[73] the 1972 Water Resources Act,[74] the 1973 Land Conservation Act, the 1975 Local Government Planning and Land Development Regulation Act,[75] and the growth management legislation adopted in 1985 and 1986 popularly known as The Growth Management Act.[76] Increased resources for the state agencies charged with administering the laws accompanied progress on the legislative front.

IV. THE ECONOMIC IMPACT OF ENVIRONMENTAL AND GROWTH MANAGEMENT LAWS

As evidenced by Florida's exploitation, one thing is clear: there is no way to mitigate efficiently the negative impacts of development without restraining the use of land. The alternative is sacrificing the welfare of society to the development desires of particular individuals. Even though this concept appears obvious to some, the advisability of environmental and land use regulations has always been questioned. Some people suggest that they interfere in otherwise efficiently functioning markets and unnecessarily restrict a property owner's desires to use her property as she sees fit. In other words, they argue that growth controls may interfere with the promotion of economic growth, may cause economic dislocations, and may place unfair burdens on individuals.[77] Contrary to these views, however, studies show that the evidence of negative impacts of regulations is widely overstated and that, in fact, regulations on the use of land positively affect the economies in which they exist.

Further, while economists may differ about the economic impact of land use controls on property values, they do agree that properly implemented land use controls help to protect the value of

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71. *Id.* at 126.

72. *See* JOHN M. DEGROVE, LAND, GROWTH AND POLITICS (1984).

73. FLA. STAT. ch. 380 (1993).

74. FLA. STAT. ch. 373 (1993).

75. FLA. STAT. ch. 163 (1975).

76. FLA. STAT. §§ 163.3161-.3202 (1993). This was actually codified as a new law entitled "The Local Government Planning and Land Development Regulation Act."

77. *Cf.* David L. Powell, *Managing Florida's Growth: The Next Generation*, 21 FLA. ST. U. L. REV. 223, 339-40 (1993).

developed residential areas; that is, the value of homes, platted lots, and neighborhood commercial properties.[78] Furthermore, growth controls that tend to preserve amenities in undeveloped areas can even cause property values in those areas to increase because of their future attractive potential.[79] A study of farmland property values in Oregon, which enforces a strict urban growth boundary policy, demonstrated that land use controls on rural land there increased the value of lands immediately adjacent to the boundary, slightly decreased the value of land somewhat further from the boundary, but then increased the value of land even further out because of its viable continued use as agricultural land.[80] Evidence indicates that controls on the use of land, whatever the secondary impacts, do indeed accomplish their intended purpose, minimizing the negative externalities that the use of other land might otherwise impose on them and saving money by providing services and facilities to urbanizing lands.[81]

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78. William A. Fischel, *Introduction: Four Maxims for Research on Land-Use Controls*, 66 LAND ECONOMICS 229, 230-232 (1990); John D. Landis, *Do Growth Controls Work?* 58 AM. PLAN. ASS'N J. 489 (1992).

79. Jan K. Brueckner, *Growth Controls and Land Values in an Open City*, 66 LAND ECONOMICS 237, 247-48 (1990).

80. GERRIT KNAAP & ARTHUR C. NELSON, THE REGULATED LANDSCAPE 142-44 (1992).

81. *See* MARTIN A. GARRETT, LAND USE REGULATION 105 (1987):

> From a planning perspective, several factors suggest the need for regulation. First, optimal resource allocation requires optimal utilization of urban infrastructure. It is through the planning process that the location of infrastructure is determined, especially the transportation system and sewer and water services. . . . Second, from a planning perspective, the pervasiveness of negative spillovers without regulation is all too real. Those who believe the negative spillover argument is overrated need only talk to anyone who has been involved in the implementation of land use policies. Even with zoning ordinances, what individual property owners and some landlord-developers request in the way of zoning changes, variances, or special-use permits for particular parcels of land continues to stretch the imagination. There are many variations to the old story of a request for a funeral home in a single-unit family neighborhood; an automobile junk yard adjacent to a single-unit family neighborhood in an area designated for low-density housing; a mobile home park to be located on a prime commercial site between a multimillion dollar motel complex and a similar project in the planning stage; and requests to construct high-density multiunit housing projects that abut single-unit housing neighborhoods for the sole purpose of rent seeking, that is, to take advantage of the amenities of the adjacent neighborhoods. Note that these are site-specific illustrations. One could also make a strong argument that the social reasons behind land use controls are a significant part of the negative spillover effect, if we include the deterioration of the ambience of the community as a negative spillover.

Id.

There is even substantial evidence indicating that states with stronger growth management systems better weathered the savings-and-loan institution debacle of the late 1980s because their land use systems reduced the number of shaky, speculative-type projects that brought about the crisis in states with weaker controls. *See* Barnaby J. Feder, *Vermont*

The economic validity of these policies and Florida's environmental laws is supported by a study of the relative economic performances of states with varying environmental policies published in 1992 which concluded:

> States with stronger environmental policies and programs did not exhibit hobbled economic growth or development compared to those with weaker environmental records. Moreover, rather than detect the absence of a systematic relationship between pursuit of environmental quality and economic growth and development—which would have been sufficient to dismiss the environmental impact hypothesis—the data revealed a clear and consistent *positive* relationship between the states' environmental effort and their economic performance. States with higher environmental rankings outperformed states with lower environmental rankings on four of the five economic growth indicators. This surprising yet solid finding allows us to dismiss the environmental impact hypothesis with even greater confidence.[82]

The 1993 update to the study went on to report:

> [T]hose who live and work in states that have vigorously pursued environmental quality and are now contemplating rolling back environmental standards as a quick fix to jump-starting their economics out of recession should reconsider. Based on the evidence there is no reason to expect that loosening environmental standards will have any effect on the pace of state economic growth.[83]

Moreover, in a study of Florida's economy in 1993, the University of Florida Bureau of Economic Business Research was unable to establish a correlation between growth management and adverse economic conditions.[84] Rather, its study concluded that:

Development Laws May Have Saved Its Banks, N.Y. TIMES, March 4, 1991, at B1; Dan McMillan, *Oregon Banks Stack Up Well in Nationwide Survey*, DAILY J. OF COM., July 29, 1991, at 1, 36; Arthur C. Nelson, Beggar Thy Neighbor or How Growth Management States Subsidize Non-Growth Management States (1992) (unpublished manuscript, Georgia Institute of Technology) (on file with the *Journal of Land Use & Environmental Law*).

82. Stephen M. Meyer, Environmentalism and Economic Prosperity 42 (Oct. 5, 1992) (unpublished manuscript, Massachusetts Institute of Technology) (on file with the *Journal of Land Use & Environmental Law*).

83. Stephen M. Meyer, Environmentalism and Economic Prosperity: An Update (Feb. 16, 1992) (unpublished manuscript, Massachusetts Institute of Technology) (emphasis omitted) (on file with the *Journal of Land Use & Environmental Law*).

84. *See* Ivonne Audriac, David Denslow, William O'Dell, & Anne Shermyen, Assessment of the Economic Impact of Local Government Comprehensive Plans Adopted Pursuant to Chapter 163, Florida Statutes, STAR Grant 92-03, A Report for the Florida Institute of Government, BEBR, College of Business Administration, University of Florida 1-4 (1993) (on file with author).

- Stronger planning is reducing negative externalities among properties.
- Growth management regulations had no detectable effect on the number of construction jobs between 1988 and 1992.
- There was no empirical evidence indicating that the adoption of growth management plans and regulations affected the number of housing starts in any county.
- There was no empirical evidence that growth management regulations caused a decrease in total just value in any county.
- County property appraisers estimate a small loss (approximately three percent) in total just value due to growth management regulations.
- County property appraisers attribute the reduction in real estate markets between 1988 and 1992 primarily to national economic management regulations in the study and in people's minds, and was singled out as a particularly obtuse and onerous intergovernmental process.
- Concurrency constraints, density changes and wetland regulations have affected some property values. Most properties affected have declined in value while others have increased.
- Empirical findings reject the thesis that implementation of the Growth Management Act is reducing employment.
- Development processes are less politicized. Issues are on the table up-front and there is greater certainty about when and where public infrastructure is being provided.
- Government is spending more to acquire environmentally sensitive lands and to provide infrastructure.
- Businesses are more involved in comprehensive planning.[85]

There is no disputing that the enactment or enforcement of environmental and planning regulations can decrease the value of some property, just as the enactment of a law raising the minimum wage can devalue shares of stock in fast-food companies or a law setting speed limits can devalue the use of a Maserati for a driver who wants to go 120 miles per hour. No credible information has been generated, however, to show that either growth management or environmental laws are bad for an economy generally. On the other hand, as pointed out above, substantial evidence indicates that these systems reduce negative externalities of land use and development. Although it may be optimistic to conclude that the BEBR study

85. *Id.*

shows an economic benefit from the enforcement of growth management, planning, and environmental regulations, it does show that regulations are not having the dreadful results attributed to them by the proponents of the property rights movement. In fact, the most recent forecasts predict robust growth in Florida's economy, with retail sales, job growth, and growth in personal income exceeding the anticipated population growth.[86]

The regulations Florida has adopted which affect development, like all other regulations, inevitably transfer some degree of wealth from one segment of society to another. Just as speed limits transfer wealth from those who could make more money by getting where they are going faster to those who obtain additional safety through slower traffic, land use and environmental regulations benefit people who do not own the land immediately affected by the regulation at the expense of people who do.[87] Governmental exercise of police power in the area of growth management may be particularly appropriate in Florida, however. Over the past thirty years, the state has experienced the most rapid growth ever seen in this country. The environmental and social stresses caused by this growth, following the pro-growth culture that dominated Florida well into the 1960s, has produced a clash between those who want to maximize profits on their investments in undeveloped land and those who want to react legislatively to scientific proof that development of this property could generate adverse impacts beyond the actual boundaries of that property.

V. THE NEW CONTEST FOR FLORIDA'S FUTURE

A. The "Property Rights" Movement

As growth management evolved in the 1970s and 1980s, special interest groups continued working to insure that Florida did not forget its frontier property rights roots and laissez faire governmental system that prevailed through the mid-1960s. The continuing influence of this segment of Florida's culture has been evidenced, most effectively since 1988, by the enactment of many one-stop permitting processes that allow the governor and cabinet to override individual agency and local concerns and approve projects.[88] The

86. *See* FLORIDA TREND ECONOMIC YEARBOOK (April 1994).

87. This is also what happens when governments use taxpayers' money to install a new interstate highway interchange or water line that benefits adjacent properties. It transfers wealth from the public at large to the owners of that property—again, in the public interest.

88. *See* FLA. STAT. § 240.155 (1993); FLA. STAT. ch. 403, pt. IX (1993).

enactment of environmental and growth management legislation that could be fairly characterized as weakening prior laws also demonstrates this influence.[89]

Most especially, the "property rights" movement's influence has surfaced in a well-financed public relations campaign to persuade citizens to abandon their preservationist impulses in favor of a message that Florida has gone too far in its effort to protect natural resources. This campaign purports that the average Floridian's welfare depends on finding a way to accommodate more and more growth, ignoring the cost to the public and the environment. It further suggests that Florida laws now routinely deprive average people of constitutionally protected property rights.

This interest group, which now includes among its members almost all of the organized business and property groups in the state,[90] has set up a formal umbrella organization to help spread its message, "Citizens to Protect Constitutional Property Rights."[91] It has succeeded in having seriously considered in the 1993 and 1994 legislative sessions compensation bills that would gravely damage the sustainability of effective environmental, growth management, and even local zoning measures. This group has also started a drive to amend the Florida Constitution to include a new, expansive "property rights" provision. Property rights proposals are being argued in the name of the common person, but members of the land speculation community in Florida would be the real beneficiaries of the adoption of this law because any such proposal will change government behavior. State, local, and regional governments will tend to withdraw from trying to control speculative land uses, or trying to protect existing property values and the quality of life. Average property owners, owners of occupied single family residential property who, as a group, account for forty-one percent of the value of all privately owned property in the State of Florida,[92] will be those most at risk under this legislation.

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89. *See* Bruce Wiener & David Dagon, *Wetlands Regulation and Mitigation After the Florida Environmental Reorganization Act of 1993*, 8 J. LAND USE & ENVT'L L. 521 (1993); David L. Powell, *Managing Florida's Growth: The Next Generation*, 21 FLA. ST. U. L. REV. 223, 291-313 (1993).

90. These organizations include the Florida Association of Realtors, the Florida Homebuilders Association, the Florida Chamber of Commerce, the Florida Cattleman's Association, the Florida Farm Bureau, the Florida Forestry Association, the United States Sugar Corporation, the Florida Community Developers Association, and Associated Industries of Florida, Inc. *See* FLORIDA CHAPTER, AMERICA PLANNING ASSOCIATION, CAPITOL HIGHLIGHTS, No. 94-1 (Feb. 2, 1994); *see also infra* note 16.

91. *Id.*

92. BEBR, FLORIDA STATISTICAL ABSTRACT 658 (1993).

B. The "Roots" of the "Property Rights" Movement

According to most accounts, the effort by the "property rights" movement to enact positive legislation to compensate landowners for diminutions less than a taking got its real genesis in Edwin Meese's Justice Department while he was serving as attorney general in the Reagan Administration.[93] At that time, Meese succeeded in having the President sign a 1988 executive order calling for a "takings" assessment of all governmental regulations that would require, in one form or another, an agency to evaluate the potential for takings when it promulgates or adopts a regulation affecting land use.[94] This executive order actually exemplifies one of the less draconian of the legislative approaches since pursued by the movement.[95]

Early on, the organizers of the "property rights" movement began putting a populist spin on their objectives. For example, an official of the American Farm Bureau Federation said, "[T]he best I know is this is 100 percent grassroots activity by all kinds of people that have property interests."[96] In reality, however, as Former Solicitor General Charles Fried admitted, the Justice Department's use of the Takings Clause was hardly the result of a groundswell of public opinion but was an "aggressive[,] . . . quite radical project."[97] He continued: "The grand plan was to make the government pay compensation as for a taking of property every time its regulations impinged too severely on a property right. If the government labored under so severe an obligation, there would be, to say the least, much less regulation."[98]

The election of President Clinton in 1992 diverted proponents of compensation-for-diminution legislation to state forums.[99] The group introduced takings legislation in many states around the country, and drafted legislation for pro-business organizations like the American Legislative Exchange Council.[100] Although no state has yet passed a diminution-equals-taking bill, the "property rights" movement has been somewhat successful. Washington state adopted legislation that requires the attorney general to establish a

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93. Marianne Lavelle, *The "Property Rights" Revolt*, NAT'L L. J. 1 (May 10, 1993).

94. *See* Exec. Order No. 12,630, 3 C.F.R 554 (1988).

95. *See* NATIONAL AUDUBON SOCIETY, STATE TAKINGS: A RESOURCE BOOK FOR ACTIVISTS (1993).

96. *Id.* (quoting John J. Rademacher, General Counsel).

97. Marianne Lavelle, *The "Property Rights" Revolt*, NAT'L L. J. May 10, 1993, at 1.

98. *Id.*

99. *But see Private Property Bill Attacked as Too Costly*, TALLAHASSEE DEMOCRAT, June 18, 1994, at 3A, which discusses a proposed federal property-value-reduction bill.

100. Lavelle, *supra* note 97, at 1.

process to ensure government actions do not result in a taking. The legislature of that state stressed, however, that its purpose was not to expand or reduce the scope of private property protections provided in the state and federal constitutions.[101] A similar law passed in the minimal-growth state of Delaware.[102]

The "property rights" movement was perhaps most successful in Arizona.[103] The Arizona legislature enacted an elaborate scheme requiring the attorney general to promulgate takings guidelines, and to make state agencies use those guidelines in considering less "onerous" courses of action, such as buying property that would be the subject of a regulation.[104] Like all other state legislatures that have acted in this area, though, the Arizona legislature refused to budge on the definition of a taking, stating:

> "'Constitutional taking' or 'taking' means due to a governmental action private property is taken such that compensation to the owner of that property is required by either: (a) The fifth or fourteenth amendment of the Constitution of the United States [or] (b) Article II, s. 17 of the Constitution of Arizona."[105]

C. *The "Property Rights" Movement in Florida*

These proposals are markedly weaker than the legislation proposed in Florida. Further, although the primary forum for this year's struggle was once again the Florida Legislature, the movement in this state is passing into the arena of direct public opinion with one or more statewide constitutional petition drives as an alternative should they fail to get a statute tilting the balance of government further in their favor.

The opponents of these initiatives wish to keep the public from having to pay large damage awards brought about because their governments have reacted to advancements in knowledge by adopting new legislation designed to protect the public from physical or economic harm. These forces seem to reflect a conservationist sentiment shared by a large majority of citizens in Florida.[106] Perhaps

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101. WASH. REV. CODE § 36.70A.370 (West Supp. 1994).

102. *See* DEL. CODE ANN. 29 § 605 (Michie Supp. 1992) (requiring attorney general review of agency rules for takings potential).

103. Arizona's population grew from 2,718,000 in 1980 to 3,665,000 in 1990, an increase of 94,700 per year. Florida's population grew from 9,746,000 in 1980 to 12,938,000 in 1990, an increase of 312,900 per year. THE 1994 INFORMATION PLEASE ALMANAC 833 (Otto Johnson ed., 47th ed. 1994).

104. ARIZ. REV. STAT. ANN. §§ 37-221-37-223 (West 1993).

105. *Id.*

106. The 1993 Florida policy survey shows that sixty-five percent of the public feel that population growth in their community is a major or minor problem, fifty-six percent want to

this is because people perceive these laws as protecting both the natural environment and, in some sense, the economic best interests and values of a large majority of the 8.8 million Floridians living in owner-occupied housing.[107]

On the other side of the 1994 debate are the forces that favor regulatory retrenchment. While purporting to represent true populist sentiment, this is a well-financed group of organizations consisting mostly of firms that buy, sell, hold, and develop large parcels of Florida real estate for speculation, and their service providers.[108] Recently, this alliance's primary political objective has been passage of "property rights" legislation in Florida that sidesteps existing state and federal takings jurisprudence. This legislation creates a new cause of action against the public for damages, fees, and injunctive relief for adopting or enforcing any regulation that "severely limits the practical use" of any land, or otherwise reduces its market value by more than forty percent. The 1994 embodiment of this legislation was Florida House Bill 485.[109]

In an effort to prove their cause's appeal, the lobbyists for this bill publicized a "March on the Capital" for February 9, 1994, predicting the protest against government intrusion on property rights would bring motorcades from around the state carrying 10,000 angry citizens. The rally actually attracted only 200 citizens, although 25 state legislators did appear in support.[110] Although only 0.0000153

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increase, thirty-three percent want to maintain current state funding for environmental protection, and ninety-three percent say that knowing some or all endangered species in the state are being protected is important to them. FLORIDA STATE UNIVERSITY POLICY SCIENCES CENTER, FLORIDA ANNUAL POLICY SURVEY 8, 13, 28 (1993). Sixty-two percent of the respondents to this same survey said the Florida Legislature is doing a fair or poor job. *Id.* at 26.

107. BEBR, FLORIDA STATISTICAL ABSTRACT 67, 69 (27th ed. 1993). This number is generated by multiplying the number of households in 1992 (5,348,609) by the percentage of owner-occupied households in 1990 (67.2%), and multiplying the product by the average household size in 1992 (2.45 persons). *Id.*

108. *See supra* note 16. Mary Klas, *Powerful Landowners Fuel Property Revolt*, PALM BEACH POST, March 11, 1994, at 1A, 8A. The article says, "Scotty Butler, general counsel of the Florida Farm bureau, believes agriculture has to exploit the stories of the 'little guy' to counter the prejudice against his industry. 'The environmentalists always portray themselves as David vs. Goliath,' he said. 'We're trying to use the same valuable tools.'" *Id.*

109. Fla. 1994 HB 485 (1994). "A bill to be entitled 'An act relating to private property rights.'"

110. Bill Moss, *Rally Pumps Up Property Rights Act*, ST. PETE. TIMES, Feb. 10, 1994, at 1B. The crowd apparently inspired Representative Pruitt to say, "We feel a lot more optimistic than we did last year. It seems grass-roots support has increased dramatically." *Id.* Many signs displayed at the rally indicated the people carrying the signs associated land use planning and environmental protection with socialism or a police state. *Id.* Actually, the current and former socialist or communist states of Eastern Europe and Asia have an abysmal record of land use planning and caring for the environment. They contain some of the most ecologically devastated and environmentally polluted people and places on the planet. *See* THE 1994 INFORMATION PLEASE ALMANAC 471-605 (Otto Johnson ed., 47th ed. 1994). In fact, Karl Marx himself

percent of the residents of the state showed up to support the bill, fully 15 percent of their elected state legislators did. Clearly, the cause has political appeal to some. No one can say for sure why so few citizens rallied to champion an issue that its sponsors contend has grown to "crisis" proportions in this state. Probably the average property owner correctly sees she has nothing to gain and much to lose if the "property rights" movement succeeds.

Undeterred by this lack of tangible public support for their cause, these groups continue to exercise considerable influence in the legislature, where House Bill 485 was introduced with many co-sponsors in the House and Senate. Eventually, the Senate version of this bill, Senate Bill 430 (1994), died on the last day of the legislature after passing the House. This led to the prediction that it would become "a state constitutional amendment" on the November ballot.[111]

This type of legislation is inimical to the best interests of the average property owner, who probably does not want to be taxed so government can pay landowners not to use their land in ways proven to be contrary to the public interest. More importantly, the true impact of legislation like House Bill 485 would be to devalue homes and lots in existing neighborhoods by weakening government's ability to protect them from adverse consequences of other development and also to devalue the quality of their lives by chilling government's resolve to act in the public interest. Thus, proponents of House Bill 485 or similar measures face the daunting task of convincing the vast majority of property owners in Florida—home owners, lot owners, and owners of land near existing neighborhoods—that they should risk whatever security they have in their real estate investments so that mainly large, wealthy landowners can make more money speculating in land at public expense. On second thought, perhaps it is surprising that as many as 200 people in a state

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probably would have found bourgeois the way Florida is trying to preserve wetlands, maintain a separation of urban and rural uses, and direct development to places where it is most appropriate, advocating as he did:

> Extension of factories and instruments of production owned by the State; the bringing into cultivation of wasteland, and the improvement of the soil generally in accordance with a common plan.
>
> * * *
>
> Combination of agriculture with manufacturing industries; gradual abolition of the distinction between town and country, by a more equitable distribution of the population over the country.

K. MARX AND F. ENGELS, THE COMMUNIST MANIFESTO 105 (Penguin ed. 1967). In this sense, governments and institutions trying to manage growth and protect the environment could be said to be aiding the battle against communism. After all, land use planning is not the same as centralized state economic planning.

111. *Property-rights Bill Dies in Committee*, TALLAHASSEE DEMOCRAT, April 2, 1994, at 4B.

of 13 million showed up in Tallahassee on February 9th to champion the "property rights" cause.

VII. AN ANALYSIS OF THE IMPACT OF THE FORTY PERCENT PROPOSAL

Whether fashioned as a bill or a constitutional amendment, the most radical effect of this "property rights" measure would be the creation of a new cause of action that entitles a property owner to damages, fees and costs when a government promulgates or implements a program which allegedly prohibits or "severely limits" the "practical use" of private property.[112] For purposes of House Bill 485, property so affected would have been "deemed to have been taken for the use of the public."[113] Also, it is "presumed" that the property is taken—that its use has been prohibited or severely limited—when its fair market value is reduced by more than forty percent below its value immediately prior to the promulgation or enforcement of the government action being challenged.[114] This new cause of action raises many philosophical and practical questions about the need for this Act and how courts would apply it.[115]

A. Justice By Formula

The most obvious departure from existing "takings" law is the Act's use of a mere diminution in value to declare a taking. *Pennsylvania Coal Co. v. Mahon*[116] has long been cited for the proposition that a regulation that goes "too far" in restricting the use of property will trigger a finding of a taking under the Fifth Amendment.[117] The opinions of the Supreme Court and other courts, however, have always shunned a formulaic approach when applying the "too far" language. Instead, the courts have consistently defined the law of takings as holding that a constitutional violation will not be found unless a regulation denies an owner "all economically beneficial use" of her land.[118]

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112. Fla. HB 485 at 2-4 (1994).

113. *Id.*

114. *Id.*

115. This Article refers throughout to House Bill 485. In many places, this represents not only the House Bill but also Senate Bill 430 and any proposed constitutional amendment. Certainly, the discussed problems associated with that Bill would have also existed for proposed Senate Bill 430, and continue to exist for the proposed constitutional amendment.

116. 260 U.S. 393 (1922).

117. Although there is reason to suggest that to cite *Mahon* for the proposition that adoption or enforcement of a regulation that goes "too far" is to miscite the case, it is now a *fait accompli* that this is the result that will be reached when a regulation runs afoul of that rule. *See* Charles L. Siemon, *Of Regulatory Takings and Other Myths*, 1 J. LAND USE & ENVT'L. L. 105 (1985).

118. *See* Nollan v. California Coastal Commission, 483 U.S. 825 (1987).

As explained by the Supreme Court in *Penn Central Transportation Co. v. New York City*, a finding that all beneficial use has been denied can only be reached after "essentially ad hoc, factual inquiries,"[119] which must determine in each case: (1) whether the regulation advances a legitimate state interest; (2) the impact on the owner, particularly the economic impact on the owner and the extent to which the regulation interferes with distinct investment-backed expectations; (3) the character of the government action; and (4) whether the cost of the regulation should be borne by the individual property owner or, in fairness, by the public at large.[120]

Furthermore, each case must turn on its own facts because each piece of land is unique, and the impact of that regulation on that land is also unique.[121] The Supreme Court has specifically disapproved a formulaic approach to takings determinations, saying, "[t]here is no set formula for where regulation ends and taking begins."[122] Clearly, the formulaic approach proposed by the "property rights" movement tosses all this careful judicial reasoning out the window, making the state government compensate property owners even where they are not denied all economically viable use of their land.

1. The Question of Parcel

House Bill 485 allows the owner of a property to isolate only the portion of the property affected by the regulation for purposes of measuring the forty percent diminution. For example, assume a shopping center site exists consisting of one hundred acres valued at $10,000 an acre. Ten of those acres are Department of Environmental Protection (DEP) jurisdictional wetlands in which development is prohibited. Under this law, if DEP denied an application for a permit to fill those wetlands, the court would look only at the economic impact of the denial on those ten acres, not the impact on the parcel as a whole.

This would make it impossible for local governments to use commonly accepted zoning techniques like buffer areas and setbacks to maintain property values because each discrete piece would be evaluated separately. Further, this approach is entirely inconsistent with the approach used in takings cases. Courts have consistently

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119. 438 U.S. 104, 124 (1978).

120. *Id.* at 124-125.

121. *Id.*; *see also* Reahard v. Lee County, 968 F.2d 1131, *supplemented by* 978 F.2d 1212 (11th Cir. 1992), which lists eight specific factors that must be examined in each potential taking situation, only one of which is impact on the value of property.

122. Goldblatt v. Homestead, 369 U.S. 590, 594 (1962); *see also Penn Central*, 438 U.S. at 124.

held that in determining whether a regulation deprives a property owner of all economically viable use of his land, thereby constituting a taking, courts must examine the impact of the regulation on the property as a whole.[123] As the Supreme Court said in *Penn Central Transportation Co. v. New York City*:

> 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.[124]

Prior Supreme Court precedent also holds that regulation does not necessarily effect a taking when it prohibits development on only a certain physical portion of the owner's property.[125] Florida law is essentially the same.[126]

The parcel-as-a-whole approach makes sense economically as well as legally. Consider the following example:

> 1. Smith buys GreenAcre (100 acres) for a new housing development at a purchase price of $1 million. Ten of these acres are DEP jurisdictional because they are part of a lake.
>
> 2. Smith wants to subdivide but the state denies him a fill permit, making the ten acres worth $1,000 an acre. Smith sues and collects $90,000 plus fees and costs, then develops and sells GreenAcre for $2 million (a profit of $1 million) due, at least in part, to the fact that the undeveloped lake shore is an amenity.

A provision that lets the owner determine the parcel in question will result in the above outcome.[127]

2. *Why Not Seventy-five Percent (or Twenty)?*

Measures such as House Bill 485 are also questionable in the way they guarantee an owner forty percent of market value. This

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123. *See* Concrete Pipe and Prods. of Cal., Inc. v. Construction Laborers Pension Trust, 113 S. Ct. 2264 (1993); Mountain States Legal Found. v. Hodel, 799 F.2d 1423, 1430 (10th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987).

124. 438 U.S. 104, 130-131 (1978).

125. *Id.*; Gorieb v. Fox, 274 U.S. 603 (1927) (holding that government may prohibit use of property within setback area thirty feet wide); Welch v. Swasey, 214 U.S. 91 (1909) (upholding height restriction on buildings).

126. Miami v. Romer, 58 So. 2d 849 (Fla. 1952) (upholding building setback line upheld); Indialantic v. McNulty, 400 So. 2d 1227 (Fla. 5th DCA 1981) (holding beachfront setback line of fifty feet not invalid on its face).

127. *See also* Laura M. Schleich, *Takings: The Fifth Amendment, Government Regulation, and the Problem of the Relevant Parcel*, 8 J. LAND USE & ENVT'L L. 381 (1993).

arbitrary number is far less than diminutions in value for which takings have *not* been found. For example, in *Village of Euclid v. Ambler Realty Co.*, an ordinance zoning the property for residential rather than industrial use reduced land value by seventy-five percent, yet the court found that this was not a taking.[128]

The defenders of House Bill 485 have never offered a cogent reason for the forty percent figure. The alleged basis for a formula is "to offer Floridians guidance when a regulation 'goes too far.'"[129] However, the awkward use of precedent-determining terms such as "severely limit," "practical use," and "demonstrable harm," can hardly be said to offer a level of certainty above that of existing jurisprudence. One can only conclude, therefore, that the real reason for the forty percent figure is to guarantee a certain return on investment for land speculators.

If courts were to interpret the phrase "severely limit all practical use of property" in the same way they interpret the phrase "deny all economically viable use of the property" for takings cases, this language in the proposal would be much less discomforting.[130] But inasmuch as measures such as House Bill 485 *are* geared toward the creation of a new cause of action, reliance on takings precedent is unlikely.

Courts are required to assume that legislators intend the plain and ordinary meaning of words used in the statutes.[131] A dictionary's definition of the term "practical" is "manifested in or involving practice," or "actually engaged in some work or occupation."[132] If these definitions were used, they would require only that an owner be allowed to engage in some work or occupation on her land or that the land be capable of being used or put into effect. This dictionary definition of "practical" sounds very much like the minimalist use

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128. 272 U.S. 365 (1926). *See also* Hadacheck v. Sebastion, 239 U.S. 394 (1915) (holding that no taking occurred even though the property's value had been reduced by eighty percent); Pace Resources, Inc. v. Shrewsbury Township, 808 F.2d 1023 (3rd Cir. 1987) (holding that a reduction in value from $495,000 to $52,000 was not a violation of the Takings Clause), *cert. denied*, 482 U.S. 906 (1987); William C. Haas & Co. v. San Francisco, 605 F.2d 1117 (9th Cir. 1979) (allowing a reduction in the value of property by ninety-five percent), *cert. denied*, 445 U.S. 928 (1980). *But see* Loveladies Harbor, Inc. v. United States, 21 Cl. Ct 153 (Cl. Ct. 1990) (holding that ninety-nine percent diminution in value was a taking), *aff'd*, 1994 WL 259489 (Fed. Cir. 1994).

129. RON WEAVER & MARK D. SOLOV, FLORIDA PROPERTY RIGHTS: TAKING ISSUES UPDATE, 10TH ANNUAL ENVIRONMENTAL PERMITTING SHORT COURSE 767, 772 (Jan. 19, 1994).

130. *See* Richard S. Grosso & David J. Russ, *Takings Law in Florida: Ramifications of Lucas and Reahard*, 8 J. LAND USE & ENVT'L L. 431, 468-478 (1993).

131. Brooks v. Anastasia Mosquito Control District, 148 So. 2d 64 (Fla. 1st DCA 1963).

132. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1028 (William Morris ed., 1973).

language in *McNulty v. Town of Indialantic*,[133] in which a federal district court ruled no taking resulted from a coastal construction setback ordinance precluding the construction of even a single family home on the plaintiff's lot. The court said that allowing the construction of walkovers, boardwalks, sand fences, gazebos, a viewing deck, a snack bar, stairways and other structures was enough.[134] The court stated that the phrase "'economically viable use' . . . should not be read to assure that an owner will be able to use property to earn a profit or to produce income. Rather, it assures an owner will be able to make some use of property that economically can be executed."[135] This "economically viable use" language compares favorably with the term "practical" in House Bill 485, and yet the drafters of that legislation probably did not have this in mind.

An alternative definition of this term can be found in *Dargel Construction Co. v. DeSoto Lakes Corp.*, where the court interpreted the word "practicable."[136] The trial court found that a sewage treatment plant serving seventy-five trailers could be removed by undoing some bolts that held part of it in place and excavating a large rectangular tank and restoring the premises to their former condition. Nevertheless, the court found that removal of the item under lien was not "practicable." The Second District Court of Appeal reversed, effectively holding that "practicable" means capable of being done physically.[137]

Under this legislation, the "practical uses" of the property must be "severely limit[ed]." A definition of the term "severe" to mean merely that something is strictly controlled by the law would be illogical. Certainly requiring uses of property to conform to the law does not severely limit all uses of property. This would create a tautology that would lead observers into a virtual Möbius strip of property development expectation that probably even the legislature would not have anticipated. The most likely definition of this term consistent with the plain meaning in the dictionary is therefore "extremely difficult to accomplish."[138] Yet, even this offers little guidance. If the forty percent diminution figure is only a presumption that could be rebutted with evidence that practical use of a property has not been "severely limited" because some physical use can still take place, then perhaps House Bill 485 is not as threatening

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133. 727 F. Supp. 604 (M.D. Fla. 1989).

134. *Id.* at 611.

135. *Id.* at 608.

136. 172 So. 2d 849 (Fla. 2d DCA 1965).

137. *Id.*; *see also McNulty*, *supra* note 133 and accompanying text.

138. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1028 (William Morris ed., 1973).

as it seems at first glance. This interpretation, though, would create an even stricter standard for the aggrieved property owner than the "denial of all economically viable use" standard in current taking law and thus is extremely unlikely. In any case, the government would be responsible for fees and costs regardless of the outcome.

The terms of House Bill 485 will not likely be construed in such a confining manner. The manifest intent of the legislature would probably prevail over the literal import of the words used.[139] Because courts would presume the legislature knows the current judicial standards for a taking case, they would interpret the legislation to effect a change in the law and, in light of the intent language, to lower the threshold for finding a taking.[140] In addition to the cognizance courts would take of the legislative history and conditions of the passage of such legislation, the fact that the bill could accurately be characterized as "remedial legislation" would probably guarantee a broad reading of its terms to supply the relief contemplated.[141] The bottom line is that, given the history of this legislation, relying on a narrow reading of its provisions builds an unrealistic level of comfort for those concerned with the ill effects of land use.

B. The Riddle of Retroactivity

House Bill 485 was to be applied to "all changes in regulatory programs enacted after the effective date" of the law. The Bill did *not*, however, say that it was inapplicable to programs enacted before the effective date of the law. Although it is arguable that the expression of the one effective date excludes a broader effective date,[142] the final clause in the affected section makes the act applicable to all regulatory programs, specifically those usually associated with environmental protection and land use controls.

This raises some chilling retroactivity possibilities. First, a change in a minor portion of a regulatory program, such as the plant indicator species for wetlands, could potentially open that program to attack under this Bill. Importantly, because the measure applies to enforcement as well as enactment of regulations, an owner could potentially legitimately claim that circumstances around her

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139. *See, e.g.*, Holly v. Auld, 450 So. 2d 217 (Fla. 1984) (it is not the duty of the court to modify legislative intent); Worden v. Hunt, 147 So. 2d 548 (Fla. 2d DCA 1962).

140. *See* Collins Investment Co. v. Metropolitan Dade County, 164 So. 2d 806 (Fla. 1964); Davies v. Bossert, 449 So. 2d 418 (Fla. 3d DCA 1984).

141. *See* Neville v. Leamington Hotel Corp., 47 So. 2d 8 (Fla. 1950); Pools by Tropicana, Inc. v. Swan, 167 So. 2d 775 (Fla. 2d DCA 1964).

142. *See* Dobbs v. Sea Isle Hotel, 56 So. 2d 341 (Fla. 1952) (holding that the express mention of one thing is the exclusion of another when interpreting legislation).

property had so changed over the intervening years that she was entitled to a de novo evaluation of the appropriateness of her land use designation under a zoning ordinance, thereby transforming a denial of rezoning from an existing category into a whole new cause of action. The issue of retroactivity is certainly not settled and threatens to reverse decades of foresight and courageous political leadership in favor of the small group of landowners clamoring for immediate relief.

C. Fees, Win or Lose

Also chilling is the clause in House Bill 485 that would allow the owner to collect fees and costs associated with the action as she could in a regular eminent domain case. This would encourage numerous meritless suits under this act. Virtually no disincentive exists to influence whether the owner or the owner's attorney files suit. Additionally, the owner's attorney will be paid win or lose. Fees are not discretionary and can not be cut off with an offer of judgment under this proposal. This clause will become an easy avenue for people to bring unwarranted pressure against government simply by threatening such an action.

The scope of liability for fees and costs is so large it is difficult to estimate. Attorneys doing condemnation work, where there is a statute regulating how much they get, regularly are awarded in excess of $600 an hour.[143] No lawyer worth her salt would plan on spending fewer than one hundred hours preparing and trying a case under this new law. Fee demands in the neighborhood of $60,000 will therefore not be uncommon. Figure in expert witness fees for planners, economists, surveyors, and appraisers, and costs for travel and discovery, and the amount that claimants will typically seek could easily average $100,000.

The number of these suits that will be generated by this liberal attorney's fee provision is also difficult to estimate. As indicated above, it is arguable that an owner can file suit any time she believes a past or current action of the government has reduced the value of her property. Probably 300 of the 460 local governments in Florida are actively engaged in land use actions such as plan amendments, rezonings, site plan review, variances, building permits, special exceptions and the like. Putting aside building permits, a local government usually handles at least thirty major land use or environmental issues a month. If only half of these are denials, local

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143. *See* Geoffrey B. Dobson, *Attorney Fees Payable by Local Condemning Authorities in Florida*, 22 STETSON L. REV. 747 (1993).

governments could be looking at 180 potential actions under this new law each year.

D. Whom to Tag with the Bill?

Another common property rights feature found in House Bill 485 is a clause stating that liability against a county or municipality will be passed along to the state management agency for any award "as a result of that local government's implementation of a state-mandated regulatory program." This provision is aimed primarily at growth management and the Department of Community Affairs, which reviews and makes initial compliance decisions on local government plans under the law.[144] Awards against the Department are unlikely, however, as there is no local government action that is a "result" of its implementation of growth management. The Growth Management Act was specifically designed for, and has the specific legal effect of, giving local governments control over their own destinies. A local government may always make the final decision about whether to abide by an order of the Administration Commission. If the local government chooses not to abide, it may lose state largesse in the form of revenue sharing and facility capacity funds. Otherwise, the state has no power to determine a "result."

Further, even if it could be argued that some state agency determined a "result," the agency that would be responsible for that result would be the Administration Commission, in the Chapter 163 process, or the Florida Land and Water Adjudicatory Commission, in the Chapter 380 processes. Until the Administration Commission enters an order with remedial actions to a local government, there is no state mandate. This Bill may be aimed at the Department, but it will result in limiting local ability to react to local conditions in accordance with local decisions.

Another problem arises when the actual land use allowed is a result of a process involving permits from many agencies[145] or when local governments conflict with federal regulations. For example, under the Federal Emergency Management Agency flood insurance program, local government must periodically revise flood protection standards to meet federal law; otherwise, buildings in floodplains

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144. *See* FLA. STAT. §163.3184(9)&(10) (1993). The Department also has the power to appeal to the Florida Land and Water Adjudicatory Commission (FLWAC—the governor and cabinet) development orders and permits issued in Areas of Critical State Concern which are inconsistent with local or state law. FLA. STAT. ch. 380, pt. I (1993). However, final order authority rests with FLWAC. *Id.*

145. *See* Garrett Power, *Multiple Permits, Temporary Takings, and Just Compensation*, 23 URB. LAW. 449 (1991).

within the jurisdiction theoretically do not qualify for flood insurance coverage. House Bill 485 could force a local government to either face suit for damages for a forty percent diminution or to lose flood insurance for a large part of its jurisdiction.

Even if this clause were interpreted to impose Departmental liability for all costs associated with statewide growth management, local governments could take steps in accordance with purely local wishes or demands, yet blame those decisions on the state. For example, a local government could easily deny a rezoning for a landfill, severely limiting the practical use of the site. If damages were awarded, the local government could claim it was denying the use in the course of implementing the Growth Management Act.

E. The False Promise of Being Able to Regulate "Demonstrable Harm"

House Bill 485 and similar legislation offer a virtually meaningless exception for legislation adopted to prohibit a noxious use or to prevent a demonstrable harm to health or safety. This exception would not work to protect one of the primary rationales for land use and environmental measures of protecting property values.

In the legislation, "noxious" is restricted to statutory or common law nuisances, which have little to do with the complex society and economy that surround the public in modern times. This language appears to be an attempt to echo the nuisance exception carved out by the majority in *Lucas v. South Carolina Coastal Council*,[146] which is indicative of judicial treatment of "harm-preventing" land use regulations that deny all economically viable use. In that case, the court held that the state may resist compensation only "if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[147]

The common law[148] of real property in Florida is that the rights which naturally attend the ownership of land include freedom from physical intrusion, freedom from nuisance, right to support, riparian rights, and rights to underground and surface water.[149] However, while the common law favors the free and unrestrained use of real property,[150] the Florida Supreme Court has stated that a landowner

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146. 112 S. Ct. 2886, 2899 (1992) (footnote omitted).

147. *Id.*

148. "Common law" may be defined as custom sanctioned by immemorial usage and judicial decision; it is not a fixed body of rules but instead a juristic manner of treating legal questions. Quinn v. Phipps, 113 So. 419, 425 (Fla. 1927).

149. Cunningham, THE LAW OF PROPERTY 410 (1984).

150. Ballinger v. Smith, 54 So. 2d 433 (Fla. 1951).

has no "absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state."[151] Further, Florida courts have held that "[a]ll property is owned and used subject to the laws of the land" and that the use of land is limited by the reasonableness of use and compliance with the laws established for the use of others.[152]

Among the first cases to discuss the theoretical basis for the law of nuisance in Florida was *Cason v. Florida Power Co.*, where the court in 1917 said that: "property may be used as its owner desires within the limitations imposed by law for the protection of the public and private rights of others. Those who own real estate may use it as desired so long as the rights of others are not thereby invaded."[153] Nevertheless, there are few—if any—Florida cases holding that a use is a nuisance *per se*.[154] This bodes ill for those who try to use the "noxious in fact" standard in legislation like House Bill 485. This conflict with precedent, coupled with the technical and practical problems with legislation such as House Bill 485, raises many questions as to the necessity or wisdom of such action.

VIII. OTHER AVENUES OF THE PROPERTY RIGHTS MOVEMENT

A. The Property Rights Commission Proposal

Last year Governor Chiles created the "Property Rights Study Commission II" to hold hearings and make recommendations on any changes needed in Florida law to protect private property rights adequately.[155] After several months of hearings and meetings, most of the members of the committee agreed to the creation of an alternative dispute resolution method when a property owner felt "unduly burdened" by the enactment of enforcement of a government regulation. The commission produced proposed legislation that would have created an office of "intermediator" in each circuit

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151. Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1382 (Fla. 1981), *cert. denied*, 454 U.S. 1083 (1981).

152. Corbett v. Eastern Air Lines, Inc., 166 So. 2d 196, 201 (Fla. 1st DCA 1964) (citations omitted).

153. 76 So. 535, 536 (1917).

154. *See* Frank E. Maloney, *Judicial Protection of the Environment*, 25 VAND. L. REV. 145, 147-48 (1972). It could also be argued that allowing a judge to address the issue of noxiousness de novo, with no presumption of legislative correctness, violates the separation of powers provisions of the Florida Constitution because it gives no deference to legislative determinations that a proscribed use is harmful in fact. It therefore allows judges to make final policy decisions about what is or is not sufficiently harmful to merit exception under this section. *See* Ervin v. Collins, 85 So. 2d 852 (1956).

155. *See* Report of the Governor's Property Rights Study Commission II (Feb. 28, 1994).

court in the state. Any property owner could file for a proceeding in front of the intermediator if he felt government action "inordinately limits the effective and practical use of real property."[156] Upon such a petition being filed, all relevant government agencies would be made a party to the proceeding. The intermediator would hold a hearing, listen to the positions of the party, and recommend relief—or no relief—to the governmental unit taking the action.[157]

Most of the Commission reached a consensus on the advisory nature of the intermediator's recommendation and the fact that it would establish "standing" for purposes of any future takings lawsuit.[158] The Commission also developed a mechanism for potential funding of property purchases through moneys provided in part by the Florida Communities Trust.[159]

B. The "Vested Rights" Proposal

As alluded to earlier in this Article, U.S. Sugar has paid the Tax Cap Committee of New Smyrna Beach $450,000[160] to include in its now four-part petition to amend the constitution a provision that would provide:

> 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.

Like the language in House Bill 485, the words in this proposal leave substantial ambiguity as to their application. It is not clear whether the phrase "or any interest therein" applies to a property right or to a "vested property right." The petition forms sent to voters throughout the state indicate the purpose of the amendment is to answer the question: "SHOULD GOVERNMENT COMPENSATE OWNERS WHEN DAMAGING THE VALUE OF HOMES OR OTHER PROPERTY?"[161] Also, the summary states that the amendment is designed to give an owner full compensation "when

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156. *Id.* at 5.
157. *Id.*
158. *Id.* at 29-30.
159. *Id.* at 25-26.
160. Tim Nickens, *There May Be a Surprise on the November Ballot*, TALLAHASSEE DEMOCRAT, April 21, 1994, at 5B.
161. *See supra* note 11.

government action damages the value of the owner's home, farm, or other vested private property right or interests therein."[162]

If the amendment truly applies only to property rights that are vested, it really only repeats existing law. Under Florida land use law, the terms "vested rights" and "equitable estoppel" are generally interchangeable, and if the facts justify the application of equitable estoppel, rights will be deemed vested.[163] However, satisfying the elements of equitable estoppel is not easy. It requires that an owner show by a preponderance of the evidence that she has (1) relied in good faith (2) on an act or omission of government and (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights she has acquired.[164] As articles indicate, these requirements are extremely difficult to meet, and courts infrequently grant the relief of equitable estoppel.[165] In Florida, a landowner has no vested right in a particular zoning classification unless he has actually expended moneys or has made improvements based on such zoning.[166] Furthermore, a "subjective expectation that the land could be developed in the manner it now proposes" does not create any vested rights.[167]

However, the possible liberal judicial interpretations of House Bill 485, previously discussed, would be even more likely and more expansive for a constitutional amendment. In interpreting amendments, courts are compelled to ascertain and carry out the intent of the framers and the ratifying public, if this can be done in a way arguably consistent with the terms of the amendment.[168] Purely technical rules of interpretation are not permitted to frustrate the "spirit" of the provision of the attainment of the object it seeks.[169] Those concerned about preserving the present advantages of the system of land use and environmental laws in the face of this amendment should take no solace from "vested rights" being narrowly construed under Florida law.

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162. *Id.*

163. *See* Robert M. Rhodes & Cathy M. Sellers, *Vested Rights: Establishing Predictability in a Changing Regulatory System*, 13 STETSON L. REV. 1 (1983).

164. Hollywood Beach Hotel v. Hollywood Beach, 329 So. 2d 10, 15-16 (Fla. 1976).

165. *See, e.g.*, Craig A. Jaslow, *Understanding the Doctrine of Equitable Estoppel in Florida*, 38 U. MIAMI L. REV. 187, 188 (1984).

166. Smith v. Clearwater, 383 So. 2d 681 (Fla. 2nd DCA 1980).

167. Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1383 (1981) *cert. denied* 454 U.S. 1083 (1981).

168. *See* State v. State Board of Administration, 25 So. 2d 880 (1946).

169. City of Jacksonville v. Continental Can Co., 151 So. 488 (Fla. 1933).

X. THE ILL EFFECTS OF CURRENT "PROPERTY RIGHTS" PROPOSALS

At least five negative things will happen if the vested rights proposal or the equivalent of HB 485 is someday adopted by law or constitutional amendment. First, the value of developed or readily developable property will fall because governments will not adopt or enforce any more regulations that could arguably decrease the value of speculative property. Even if governments could ultimately prevail on the merits of an action under this Bill, the automatic attorneys fees and costs, regardless of result, would break them. Stasis will set in and government will no longer take the initiative to control land use. Thus, the amenities that add value to property, such as road capacity, environmental values, clean air and water, protected beaches, and buffers between incompatible uses, will disappear more rapidly than in the past. Very soon the land economy will falter, and property values will decrease rapidly because the vast majority of property value in this state lies in the value of developed property, not raw land. When developed property loses its protection, and there is no protection for property that could be developed in the future, lenders will not lend, home buyers will not buy, builders will not build. It will make the deregulation of the airline industry look like a quilting bee.

Second, property values will fall because governments will also never again adopt regulations (like rezonings) that tend to increase the speculative value of property, out of fear that if future circumstances create conditions indicating that a down-zoning is appropriate, fear of the consequences of this bill will preclude them from acting.

Third, property values will also fall because the protection of private property will become the business of the individual property owner, not the government. Since reasonable government regulation will no longer be an option, individuals will resort to court suits to protect their property from other uses or development that reduce their property values. They will have to take the costs of bringing such actions into account when buying property. If a property looks as if it will need legal protection in the future, the price a willing buyer pays for it will be reduced accordingly.

Fourth, the forum for protecting property rights will switch from legislative bodies to the courts. The courts will face many more nuisance suits than currently exist, requiring more judges, court personnel and facilities. Eventually, courts may assume the role this Bill would effectively deny to legislatures, the role of policy-maker for reasonable land use regulation. This would occur on an

individualized, hit-or-miss basis and would of course require that an owner file suit to enforce judicially created protection.

Finally, environmental injustice will increase as efforts to preserve quality of life are left more and more to private individuals and communities. The individuals and communities that will be least able to resist the intrusion of negative or dangerous uses will be the poor ones, the ones that lack political and economic power to resist.

XI. CONCLUSION

Beyond the negative impact on environmental and land use regulation that the legislation proposed by the "property rights" movement would have, there are also serious economic ramifications. The true value of real estate cannot be set without regard to time or place. It cannot be set without regard to the economic, legal, political and cultural systems that make property worth something to the buyer and seller. It cannot be set without regard to the negative spillover effects of its use on others,[170] its physical characteristics, its suitability for development, or its proximity to other uses. For example, an acre of land in the middle of the Gobi Desert is probably worthless; a physically identical acre of land a mile from the city limits of Las Vegas may be worth millions.

Any attempt to freeze the value of property, as a matter of law, at a specific time and place is bound to create extraordinary inefficiencies in the land market. Any attempt to measure the value of property, as a matter of law, without regard to ways that society has enhanced the value of that property is socially irresponsible. Any attempt to guarantee more intense uses of property, as a matter of law, without matching existing levels of protection for property that could be devalued by uses of that property ensures that the owners of small parcels of land in and near existing and planned neighborhoods—mostly homeowners, owners of subdivision lots, and associated neighborhood lands—will lose value in their property. These

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170. The phrase "negative spillover effects" means the negative impacts that the use of one parcel of land can have on others. *See* MARTIN A. GARRETT, JR., LAND USE REGULATION: THE IMPACTS OF ALTERNATIVE LAND USE RIGHTS 58 (1987):

> Residents desire a contract that provides two kinds of protection. First, they want protection from direct spillover effects of neighboring properties that includes protection from noncompatible land uses, such as commercial or industrial. Second, residents desire a contract that offers some protection with respect to the way in which the community will grow. That is, recognizing that communities will change, residents increasingly would like to maintain the integrity or ambience of the community.

are the consequences of the action proposed by the "property rights" movement.[171]

Florida is now beginning its third decade of statewide growth management and strong environmental protection. During these thirty years the per capita income has risen and the percentage of persons owning their own homes has increased. The taxable value of real property has increased astronomically. Indeed, Florida seems to prove the generally accepted notion that places that manage growth and prize environmental values can do well economically while still attempting to preserve some semblance of a quality of life for its current and future residents and its visitors.

These successes are not enough to satisfy the firms that, while marching under the banner of protecting "property rights" for the common person, are actually seeking to weaken Florida's environmental and growth management systems in a way that enhances the wealth of land speculators and unwise investors by making the average person less wealthy. That loss of wealth will be measured in actual dollar investment in existing homes and neighborhood properties or observable reductions in the public's quality of life and environment.

Should this lobby prevail this year in Florida or elsewhere, the law it passes will dislocate the market for existing homes and neighborhood properties by preventing governments from using environmental or land use laws to protect the value and relative attractiveness of these properties as investments. It will diminish the value of existing homes and undeveloped lots in existing subdivisions, and the value of vacant parcels near existing neighborhoods that rely on neighborhood stability for their market appeal.

The proponents of "property rights" cannot artificially aid the speculative land market without harming the market in established properties because there is a quid pro quo, or equilibrium of values and amenities, in the real estate universe. It cannot transfer wealth back to land speculators without taking wealth from other players in the real estate economy. Enhancing the opportunities to use undeveloped land, without regard to negative economic and physical spillover effects on other properties, will lessen the value of established properties. In other words, in the real estate market—as in other branches of commerce and life in general—there are no free lunches or, for that matter, free smokes either.

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171. To be more accurate, it should be called the "property *desires*" movement because its demands extend way beyond rights recognized under existing law.