

Florida State University Journal of Land Use and Environmental Law

Volume 11
Number 2 *Spring 1996*

Article 4

April 2018

Adding a Statutory Stick to the Bundle of Rights: Florida's Ability to Regulate Wetlands Under Current Takings Jurisprudence and the Private Property Rights Protection Act of 1995

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Available at: <https://ir.law.fsu.edu/jluel/vol11/iss2/4>

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ADDING A STATUTORY STICK TO THE BUNDLE OF RIGHTS: FLORIDA'S ABILITY TO REGULATE WETLANDS UNDER CURRENT TAKINGS JURISPRUDENCE AND UNDER THE PRIVATE PROPERTY RIGHTS PROTECTION ACT OF 1995

TIRSO M. CARREJA, JR.*

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I. INTRODUCTION

The controversy regarding the preservation of wetlands involves two diametrically opposed and equally important interests: the maintenance of Florida's sensitive ecology and the continued increase in Florida's population. As Florida's population increases, the need for land development proportionately increases. Since a large portion of Florida's undeveloped landmass is comprised of wetlands,¹ and wetlands are relatively easy and inexpensive to develop,

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1. Whether property constitutes a wetland is determined by the statutory definition of wetlands. See FLA. STAT. § 373.019(17) (1995). See also discussion *infra* part II.A. Generally, Florida attempts to classify land as wetlands based on the land's physical characteristics, including soil type, plant species and several hydrological factors. See FLA. STAT. § 373.019(17) (1995). See also

wetlands have been targeted by many developers as the construction site of choice. However, given the important role that wetlands play in Florida's ecology, the State protects wetlands by regulating their development.

Wetlands serve a vital function in Florida's ecology and economy by acting as breeding grounds for commercial fish and shellfish, habitats for many migratory birds and recreational hunting fowl, estuaries for many endangered species, and a water filtration system for Florida's water sources. In fact, wetlands serve as habitats for about fifty percent of Florida's endangered species and provide spawning grounds, nurseries and food to two-thirds of marine life along the Atlantic Coast and the Gulf of Mexico.² Wetlands also serve "as nature's kidneys, storing and cleansing water as it makes its way into rivers, lakes and streams."³ Thus, in addition to their aesthetic beauty, wetlands are essential to Florida's ecology.

However, every year, Florida's wetlands are threatened by an equally important competing interest: progress. Florida contains approximately 39.5 million acres of landmass.⁴ Over the past two hundred years, Florida's cultural evolution has resulted in a loss of over 9.3 million acres of wetlands.⁵ This decrease in wetlands stems from a continued increase in Florida's population, which shows no signs of waning.⁶

Generally, landowners must dredge and fill wetlands to develop them for habitable purposes. Since Florida's wetlands regulations may prohibit landowners from dredging and filling wetlands, an issue has arisen regarding whether owners of wetlands should be

discussion *infra* part II.A. These statutory and regulatory factors are subject to change as scientists learn more about wetlands. By changing the statutory definition of wetlands, the percentage of Florida's landmass that constitutes a wetland is also subject to expansion or contraction.

2. Pamela Davis-Diaz, *Water, Water Everywhere Series: Xtra Credit*, ST. PETERSBURG TIMES, Apr. 3, 1995, at 3D.

3. Craig Quintana, *Proposed Wetlands Rule Could be All Wet*, ORLANDO SENTINEL, Jan. 13, 1994, at B1.

4. Charles H. Ratner, *Should Preservation be Used as Mitigation in Wetland Mitigation Banking Programs?: A Florida Perspective*, 48 U. MIAMI L. REV. 1133, 1135 (1994) (citing W.E. FRAYER & J.M. HEFNEN, *FLORIDA WETLANDS: STATUS AND TRENDS, 1970s to 1980s*, at 2 (1991)).

5. Dennis J. Priolo, *Section 404 of the Clean Water Act: The Case for Expansion of Federal Jurisdiction Over Isolated Wetlands*, 30 LAND & WATER L. REV. 91, 92 (1995) (citing THOMAS E. DAHL, *WETLAND LOSSES IN THE UNITED STATES, 1780s to 1980s*, at 1 (1990)).

6. Florida's estimated population in 1995 was 14.2 million, and could pass 22 million by the year 2020. Sergio R. Bustos, *Report Calls For Further Immigrant Restrictions: Group Says Foreigners Fuel Excessive Growth*, FT. LAUDERDALE SUN-SENTINEL, Jan. 19, 1996, at 1B. See also Craig Quintana, *Controlling Population Boom: Growth Problem Hits Close to Home*, ORLANDO SENTINEL, Sept. 5, 1994, at A1. Florida's population growth and urbanization have helped reduce wetlands from fifty-one percent of the state's area in 1900 to less than thirty percent today. Bustos, *supra*, at 1B.

compensated for the inability to develop their land. This issue has ordinarily been litigated under takings law.⁷ However, in 1995, the Florida legislature gave landowners another tool—the Bert J. Harris, Jr., Private Property Rights Protection Act (PPRPA)⁸—to recover compensation for the loss of a landowner's ability to engage in land use activities.

This article focuses on Florida's ability to regulate wetlands under current takings jurisprudence and under the PPRPA. Accordingly, Part II of this article focuses on the topographical characteristics that are necessary for land to constitute a wetland. Part III then analyzes the history of wetlands regulations under the Takings Clause. This part also evaluates and compares takings jurisprudence under the Florida and federal judiciary systems. Finally, Part IV outlines the PPRPA and considers the extent to which the PPRPA may affect Florida's ability to regulate wetlands.

II. FLORIDA'S DEFINITION OF "WETLANDS"

A. Statutory Definition of "Wetlands"

Prior to the Florida Environmental Reorganization Act of 1993 (Reorganization Act),⁹ no statutory definition of "wetlands" existed in Florida. During this time, all governmental entities with the authority to regulate wetlands, including state agencies, water management districts (WMDs), and local governments, developed independent delineation methodologies and therefore independent definitions of wetlands.¹⁰ As a result, Florida lacked a uniform system of wetlands regulation.

Florida's piecemeal wetlands regulatory system proved to be administratively burdensome to landowners and agencies. The problems stemmed from an overlap in the jurisdictional powers among different governmental entities.¹¹ This overlap required landowners seeking to alter wetlands to secure permits from the Department of Environmental Protection (DEP), WMDs, and local

7. E.g., *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54 (Fla. 1994); *Department of Transp. v. Jirik*, 498 So. 2d 1253 (Fla. 1986); *City of Riviera Beach v. Shillinburg*, 659 So. 2d 1174 (Fla. 4th DCA 1995); *Florida Game & Fresh Water Fish Comm'n v. Flotilla, Inc.*, 636 So. 2d 761 (Fla. 2d DCA 1994); *Vatalaro v. Department of Env'tl. Reg.*, 601 So. 2d 1223 (Fla. 5th DCA), *rev. denied*, 613 So. 2d 3 (Fla. 1992).

8. 1995, Fla. Laws ch. 95-181, § 1 (codified at FLA. STAT. § 70.001).

9. 1993, Fla. Laws ch. 93-213 (codified in scattered sections of FLA. STAT. chs. 252, 253, 259, 367, 370, 373, 403 (1993)).

10. John J. Fumero, *Environmental Law: 1994 Survey of Florida Law—At a Crossroads in Natural Resource Protection and Management in Florida*, 19 NOVA L. REV. 77, 98 (1994).

11. *Id.* at 80.

governments.¹² Agencies frequently determined different wetlands boundaries on the same parcel of land, causing confusion to land-owners regarding which agency's regulations controlled.¹³

Criticism from this overlap and duplication of effort¹⁴ led to the enactment of the Reorganization Act.¹⁵ This Act has established a uniform system of delineating and defining wetlands, and has streamlined wetlands permitting into a single regulatory approval known as an "environmental resource permit."¹⁶ This Act defines wetlands as:

those areas that are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soils. Soils present in wetlands generally are classified as hydric or alluvial, or possess characteristics that are associated with reducing soil conditions. The prevalent vegetation in wetlands generally consists of facultative or obligate hydrophytic macrophytes that are typically adapted to areas having soil conditions described above. These species, due to morphological, physiological, or reproductive adaptations, have the ability to grow, reproduce, or persist in aquatic environments or anaerobic soil conditions. Florida wetlands generally include swamps, marshes, bayheads, bogs, cypress domes and strands, sloughs, wet prairies, riverine swamps and marshes, hydric seepage slopes, tidal marshes, mangroves swamps and other similar areas. Florida wetlands generally do not include longleaf or slash pine flatwoods with an understory dominated by saw palmetto.¹⁷

The statutory definition of wetlands requires an agency to consider three issues when determining whether land may be classified as a wetland. These issues are: (1) whether the land is inundated¹⁸ or saturated¹⁹ by surface waters²⁰ or groundwaters;²¹ (2) whether the

12. *Id.*

13. *Id.* at 98.

14. *Id.* at 81.

15. See *supra* note 9.

16. Fumero, *supra* note 10, at 83.

17. FLA. STAT. § 373.019(17) (1995).

18. "'Inundation' means a condition in which water from any source regularly and periodically covers a land surface." FLA. ADMIN. CODE ANN. r. 62-340.200(10) (1995).

19. "'Saturation' means a water table six inches or less from the soil surface for soils with a permeability equal to or greater than six inches per hour in all layers within the upper 12 inches, or a water table 12 inches or less from the soil surface for soils with a permeability less than six inches per hour in any layer within the upper 12 inches." *Id.* at r. 62-340.200(14).

20. "'Surface water' means water upon the surface of the earth, whether contained in bounds created naturally or artificially or diffused. Water from natural springs shall be classified as surface water when it exits from the spring onto the earth's surface." FLA. STAT. § 373.019(10) (1995).

land's soil is hydric²² or alluvial;²³ and (3) whether the land's vegetation consists of facultative²⁴ or obligate²⁵ hydrophytic macrophytes that typically grow in wetland soil. Although these issues seem cryptic to the average person, the Florida Legislature and the DEP have promulgated statutes and rules that define many of the technical words within the statutory definition of wetlands.²⁶

Generally speaking, wetlands are classified as lands that: (1) are regularly or periodically covered with water; (2) contain anaerobic soils; and (3) support, or are capable of supporting, vegetation listed under rule 62-340.450 of the *Florida Administrative Code*. All agencies and WMDs are required to use this definition to determine whether an area is subject to regulation as a wetland.

B. Delineation Methodologies for Approximating the Landward Extent of Wetlands

Chapter 62-340 of the *Florida Administrative Code* offers agencies five distinct methodologies for applying the statutory definition of wetlands to an area of land. All methodologies require agencies to use "reasonable scientific judgment" and consider all reliable information in determining whether a particular area is a wetland.²⁷

Methodology One requires agencies "to locate the landward extent of wetlands visually by on site inspection, or aerial photointerpretation in combination with ground truthing."²⁸ This methodology focuses on a direct application of the statutory definition of

21. "'Groundwater' means water beneath the surface of the ground, whether or not flowing through known and definite channels." *Id.* § 373.019(9).

22. "'Hydric [s]oils' means soils that are saturated, flooded, or ponded long enough during the growing season to develop anaerobic conditions in the upper part of the soil profile." FLA. ADMIN. CODE ANN. r. 62-340.200(8) (1995).

23. No statutory definition of "alluvial" exists. The *American Heritage Dictionary* defines alluvium as "[s]ediment deposited by flowing water, as in a river bed." AMERICAN HERITAGE DICTIONARY 50 (3d ed. 1992).

24. Rather than define the term "facultative," the administrative code provides a plant species list. FLA. ADMIN. CODE ANN. rr. 62-340.200(4)-(5), 62-340.450(2)-(3) (1995). The code recognizes a distinction between facultative plants and facultative wet plants. *Id.* at r. 62-340.200(4)-(5). Facultative plants are equally likely to be found in both upland and wetland areas. Fumero, *supra* note 10, at 100 n.116. Facultative wet plants are two-thirds more likely to be found in wetland areas than in upland areas. *Id.*

25. Rather than define the term "obligate," the administrative code provides a plant species list. FLA. ADMIN. CODE ANN. rr. 62-340.200(11), 62-340.450(1) (1995).

26. See FLA. STAT. § 373.019 (1995). See also FLA. ADMIN. CODE ANN. r. 62-340.200 (1995).

27. FLA. ADMIN. CODE ANN. r. 62-340.300 (1995).

28. *Id.* at r. 62-340.300(1).

wetlands. Agencies are required to use Methodology One unless visual detection proves to be impossible or impracticable.²⁹

Chapter 62-340 offers four additional methodologies for delineating the landward extent of wetlands.³⁰ These alternative methodologies "approximate the combined landward extent of wetlands" when a precise calculation cannot be achieved through the use of Methodology One.³¹ Generally, an area of land is a wetland if the land's characteristics meet the specifications established by any of the remaining four methodologies.³²

Methodologies Two and Three consider the percentage of plants listed under rule 62-340.450 that are present in the given area.³³ Once the appropriate percentage of obligate and facultative wet plants are identified, the agency must determine: (1) whether the area's soil consists of soils generally found in wetlands; or (2) whether "one or more of the hydrological indicators listed in . . . [rule] 62-340.500 . . . are present and reasonable scientific judgment indicates that inundation or saturation is present sufficient to meet" the statutory definition of wetlands.³⁴

Methodology Four considers solely the given area's soil characteristics. To qualify as a wetland, the area must consist of undrained hydric soils with characteristics listed under rule 62-340.300(c). Hydric soils are presumptively considered undrained unless reasonable scientific judgment indicates that the area no longer supports the formation of hydric soils due to permanent artificial alterations.³⁵

Methodology Five classifies areas as wetlands if: (1) the area contains "one or more of the hydrological indicators listed in . . . [rule] 62-340.500;" (2) the area's soil is hydric; and (3) "reasonable

29. *Id.* at r. 62-340.300. This chapter was ratified by the Florida Legislature. FLA. STAT. § 373.4211 (1995).

30. FLA. ADMIN. CODE ANN. r. 62-340.300 (1995).

31. *Id.* at r. 62-340.100(1).

32. *Id.* at r. 62-340.300(2).

33. *Id.* at r. 62-340.300(2)(a), (b). Methodology Two requires the aerial extent of obligate plants to be greater than the aerial extent of upland plants. Methodology Three requires the aerial extent of obligate or facultative wet plants—in combination or separately—to be greater than eighty percent of all plants in that area. Methodology Three excludes facultative plants from consideration because they are equally likely to be found in both upland and wetland areas. Fumero, *supra* note 10, at 100 n.116. See also *supra* note 24.

34. FLA. ADMIN. CODE ANN. r. 62-340.300(2)(a)(3) (1995).

35. *Id.* at r. 62-340.300(2)(c). Presumably, the policy behind this exception is that once alterations have eliminated the area's ability to support wetland characteristics, the area should not be regulated as a wetland. Methodology Three also exempts pine flatwoods and improved pastures from wetland classification. *Id.* For the purposes of this methodology, pine flatwoods and improved pastures are defined in rule 62-340.300(2)(c)(4) of the *Florida Administrative Code*.

scientific judgment indicates that inundation or saturation is present sufficient to meet" the statutory definition of wetlands.³⁶

Although these methodologies are generally useful, they may not be capable of reliably delineating the landward extent of wetlands in areas of land that have been altered by natural or human-induced factors. Under these circumstances, Chapter 62-340 requires agencies to use the most reliable available information³⁷ coupled with "reasonable scientific judgment" to determine where the landward extent of wetlands would have been located but for the land's alteration.³⁸ However, altered lands are exempt from this requirement if: (1) the alteration was permitted or did not require a permit; and (2) the land "no longer inundates or saturates at a frequency and duration sufficient to meet" the statutory definition of wetlands.³⁹

The delineation methodologies promulgated in Chapter 62-340 supersede all delineation methodologies previously developed by other wetlands regulatory agencies of the state.⁴⁰ Chapter 62-340 requires all regulatory agencies to follow these delineation methodologies when determining the landward extent of wetlands.⁴¹

Courts have neither interpreted the statutory definition of wetlands nor evaluated the effectiveness of the delineation methodologies. However, Chapter 62-340 establishes uniform procedures for determining whether property is subject to wetlands regulations.

III. THE HISTORY OF WETLANDS REGULATION UNDER THE TAKINGS CLAUSE

A. General Overview of the Takings Clause

The Takings Clause of the Fifth Amendment states: "[N]or shall private property be taken for public use, without just compensation."⁴² This clause has been applied to the states through the Fourteenth Amendment.⁴³ Although, on its face, the Takings Clause

36. *Id.* at r. 62-340.300(2)(d).

37. *Id.* at r. 62-340.300(3)(a). "Reliable available information may include, but is not limited to, aerial photographs, remaining vegetation, authoritative site-specific documents, or topographical consistencies." *Id.*

38. *Id.*

39. *Id.* at r. 62-340.300(3)(b).

40. FLA. STAT. § 373.421(1) (1995).

41. FLA. ADMIN. CODE ANN. r. 62-340.300 (1995). See also FLA. STAT. § 373.421(1) (1995).

42. U.S. CONST. amend. V. The Florida Constitution also includes a taking provision similar to the United States Constitution's Takings Clause. FLA. CONST. art. X, § 6. For purposes of this article, the term "Takings Clause" includes the takings clauses of both the United States Constitution and the Florida Constitution. An analysis of the distinctions between the two documents' taking clauses is beyond the scope of this article.

43. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 829 (1987).

seems unambiguous, courts have wavered when determining whether private property has been "taken" for public use. Failure to find a clear distinction between a governmental exercise of police powers and a taking of private property is especially manifest in regulatory takings cases.⁴⁴ Courts, however, have been more consistent in finding a taking and awarding "just compensation" when land is appropriated through a permanent physical invasion.⁴⁵

The Takings Clause was established to publicly spread the costs of redistributing resources from private individuals to the public at large.⁴⁶ Generally, three categorical outcomes exist in takings cases. First, when a government exercises its powers of eminent domain,⁴⁷ compensation to the landowner is constitutionally required. For example, if a city determines that certain privately owned land is needed for public purposes, the city may use its powers of eminent domain to condemn the land for public use, but the city must pay the market value of the land.

Second, when a government "takes" property without exercising its powers of eminent domain a landowner may recover compensation through an "inverse condemnation" proceeding.⁴⁸ For example, a landowner may bring an inverse condemnation suit against the city if the city imposes ordinances which constitute a permanent physical invasion of the land.⁴⁹ Although the city has not used its powers of

44. Compare *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980) (holding that "zoning ordinances substantially advance legitimate governmental goals" and, therefore, were valid "exercises of the city's police power to protect the [city's] residents . . . from the ill defects of urbanization") (emphasis added) and *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138 (1978) (holding that a city's laws restricting the ability to use the airspace above plaintiff's property did not constitute a taking because the laws were "substantially related to the promotion of the general welfare" and merely limited plaintiff's use of the land) (emphasis added) with *Nollan*, 483 U.S. at 838-39 (finding a taking where the city's permit grant imposed a condition which required plaintiffs to grant the public an easement across their beachfront property) and *Nectow v. City of Cambridge*, 277 U.S. 183, 186-87 (1928) (finding a zoning ordinance unconstitutional because the restrictions rendering a portion of plaintiff's land worthless for commercial use failed to bear a substantial relation to the public's health, safety and welfare).

45. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) ("Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred.").

46. GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 1565 (2d ed. 1991).

47. "Eminent domain refers to a legal proceeding in which a government asserts its authority to condemn property." *Agins*, 447 U.S. at 258 n.2 (citing *United States v. Clarke*, 445 U.S. 253, 255-58 (1980)).

48. "Inverse condemnation is 'a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted.'" *Id.* (citing *Clarke*, 445 U.S. at 257).

49. The Supreme Court has stated that permanent physical invasions of land constitute a taking of property. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028-29 (1992); *Loretto*, 458 U.S. at 419.

eminent domain to condemn the land for public use, it has nonetheless taken the property for public use and must pay just compensation.

Third, when courts find that a regulation is justified by a governmental exercise of its police powers, then no taking has occurred and no compensation to the landowner is necessary.⁵⁰ For example, a court may find that a governmental exercise of its police powers restricting a landowner's ability to develop land does not constitute a taking because the restriction advances a public benefit.

The latter two situations, termed "regulatory takings," encompass the majority of judicial disputes between the government and private landowners. Usually, courts must determine whether a governmentally enacted regulation is sufficiently intrusive upon a private landowner's property rights to constitute a taking.

An inverse relationship exists between the government's police powers and the Takings Clause. If the government's police powers were expanded infinitely, the Takings Clause would become completely ineffective;⁵¹ conversely, if the Takings Clause were given complete deference, then the government would be required to pay compensation for any interference, no matter how minor, with a landowner's use of private land.⁵² Courts have failed to establish clear distinctions between the police power vs. takings, and have generally determined cases based on ad hoc factual inquiries.⁵³ During these ad hoc inquiries, courts use several factors to determine whether a taking has occurred, including: (1) the regulation's economic impact on the landowner; (2) the extent to which the regulation

50. *E.g.*, *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). However, regulations that require property owners to suffer a physical invasion of their property are compensable regardless of the public interest advanced by the regulation. *Lucas*, 505 U.S. at 1028-29. See also discussion *infra* part III.B. Regulations that deny landowners "all economically beneficial [or productive] use of land" are considered categorical takings and must be compensated regardless of the public interest advanced by the regulations, unless the property's title was subject to regulation through state "background principles" of property and nuisance. *Lucas*, 505 U.S. at 1029. See also discussion *infra* part III.B.

51. "If . . . the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].'" *Lucas*, 505 U.S. at 1014 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

52. "'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.'" *Penn Central*, 438 U.S. at 124 (quoting *Mahon*, 260 U.S. at 413).

53. *Penn Central*, 438 U.S. at 124; see also *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926) (holding that a zoning ordinance which decreased the value of a landowner's property was a valid exercise of the city's police powers, but stating that the Court "preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise . . .").

interferes with the landowner's investment-backed expectations; and (3) the character of the governmental action.⁵⁴

In *Lucas v. South Carolina Coastal Council*, the United States Supreme Court recognized two forms of categorical takings which do not require a factual balancing test.⁵⁵ These two forms of categorical takings are: (1) permanent physical invasions; and (2) regulations that deprive landowners of "all economically beneficial or productive use of land."⁵⁶ The latter form of categorical taking is particularly important to wetlands regulation because wetlands regulation frequently deprives a landowner of virtually all land uses.⁵⁷

B. The Lucas Decision

In 1986, Lucas purchased two beachfront lots on a South Carolina barrier island, intending to erect a single-family residence on each lot.⁵⁸ At the time that Lucas purchased these lots, he was not legally required to obtain a permit from the South Carolina Coastal Council (Coastal Council) to develop the land.⁵⁹ All properties adjacent to these lots were developed prior to 1986.⁶⁰

In 1988, the South Carolina Legislature enacted the Beachfront Management Act (BMA),⁶¹ which directed the Coastal Council to establish a new coastal erosion "baseline."⁶² The Coastal Council fixed the baseline landward of Lucas's two lots.⁶³ Under the BMA,

54. *Penn Central*, 438 U.S. at 124-25.

55. *Lucas*, 505 U.S. at 1015-16.

56. *Id.* at 1015.

57. Most legal commentators have praised the *Lucas* decision, maintaining that it has provided an effective tool in protecting landowners' interests against oppressive governmental regulations. See, e.g., Michael J. Quinlan, *Lucas v. South Carolina Coastal Council: Just Compensation and Environmental Regulation—Establishing a Beach Head Against Evisceration of Private Property Rights*, 12 TEMP. ENVTL. L. & TECH. J. 173 (1993); Kent A. Meyerhoff, *Regulatory Takings—Winds of Change Blow Along the South Carolina Coast: Lucas v. South Carolina Coastal Council*, 72 NEB. L. REV. 627 (1993). Nonetheless, commentators disagree on the impact of the *Lucas* ruling on wetlands regulations. Compare Jan Goldman-Carter, *Protecting Wetlands and Reasonable Investment-Backed Expectations in the Wake of Lucas v. South Carolina Coastal Council*, 28 LAND & WATER L. REV. 425 (1993) (arguing that the Court's decision in *Lucas* might give rise to numerous takings claims of landowners and thereby have a detrimental effect on wetlands regulations), with Richard C. Ausness, *Regulatory Takings and Wetland Protection in the Post-Lucas Era*, 30 LAND & WATER L. REV. 349, 351 (1995) ("*Lucas* does not pose much of a threat to wetland protection regulations that recognize the interests of landowners as well as the needs of the environment.").

58. *Lucas*, 505 U.S. at 1003.

59. *Id.* at 1008

60. *Id.*

61. S.C. CODE ANN. § 48-39-50 (Law. Co-op. 1988).

62. *Lucas*, 505 U.S. at 1008.

63. *Id.*

construction of single-family residences was prohibited seaward of a line drawn twenty feet landward of, and parallel to, the baseline.⁶⁴ Therefore, Lucas was barred from erecting a single-family residence on his two barrier island lots.⁶⁵

Lucas filed suit against the Coastal Council, stating that the BMA's restrictions on his property resulted in a taking without just compensation.⁶⁶ The trial court determined that the BMA completely usurped Lucas' barrier island lots of all value and that the Coastal Council was required to pay just compensation regardless of whether the legislature had acted within its police power.⁶⁷ However, the South Carolina Supreme Court reversed, reasoning that "when a regulation respecting the use of property is designed 'to prevent serious public harm' no compensation is owing under the Takings Clause regardless of the regulation's effect on the property value."⁶⁸ Subsequently, the United States Supreme Court granted certiorari to resolve whether a regulation's total economic devaluation of private property results in a constitutional taking of that property.⁶⁹

1. General Takings Analysis for Property Deprived of All Economically Beneficial Land Uses

Generally, the United States Supreme Court analyzes takings cases based on "ad hoc factual inquiries" to determine whether the regulation goes "'too far' for the purposes of the Fifth Amendment."⁷⁰ Thus, a determination of whether a governmental action constitutes a taking is dependent on the facts of each case. However, in *Lucas*, the Court recognized two forms of regulations that constitute a categorical taking: (1) "regulations that compel the property owner to suffer a physical 'invasion' of his property,"⁷¹ and (2) regulations that deny a property owner "all economically beneficial or productive use of land."⁷² This article will refer to the first form of

64. S. C. CODE ANN. § 48-39-290(A) (Law. Co-op. 1988).

65. *Lucas*, 505 U.S. at 1007.

66. *Id.* at 1009.

67. *Id.*

68. *Id.* at 1010 (citations omitted).

69. *Id.* at 1007.

70. *Id.* at 1015 (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

71. *Id.* See also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

72. *Lucas*, 505 U.S. at 1015.

regulation as a "physical invasion regulation" and the second form of regulation as a "total economic devaluation regulation."⁷³

These two forms of categorical takings require governmental entities to compensate landowners regardless of the public interest advanced by the regulation.⁷⁴ However, a total economic devaluation regulation does not mandate the payment of compensation if the regulation is based on state "background principles" of property and nuisance.⁷⁵

In *Lucas*, the Court recognized total economic devaluation regulations as categorical takings because:

when no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life,' in a manner that secures an 'average reciprocity of advantage' to everyone concerned. And the functional basis for permitting the government, by regulation, to affect property values without compensation . . . does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.⁷⁶

The Court's total economic devaluation rule in *Lucas* does not take the place of the traditional ad hoc factual analysis, but merely adds to current takings jurisprudence by identifying another form of categorical taking; the traditional, ad hoc takings analysis remains intact.⁷⁷ Therefore, the categorical takings rule, based on a total

73. Note that regulations that decrease the value of land but do not eliminate *all* economic uses of the land are not included within this definition.

74. *Lucas*, 505 U.S. at 1015-16. "In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Id.* at 1015. This rule also generally applies to total economic devaluation regulations. *Id.* at 1016. ("[T]he Fifth Amendment is violated when land use regulation . . . 'denies an owner economically viable use of his land.'" (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).

75. *Id.* at 1029. See also *infra* part III.B.2.

76. *Lucas*, 505 U.S. at 1017-18 (citations omitted) (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

77. In *Lucas*, Justice Stevens criticized the majority's decision, stating that "the deprivation of all economically beneficial use" rule is "wholly arbitrary" because the rule is not sufficiently flexible to account for regulations that fall short of depriving all beneficial property uses. *Id.* at 1064 (Stevens, J., dissenting). However, the majority responded to Justice Stevens' critique by stating that:

[Justice Stevens'] analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, "[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant to takings analysis generally.

economic devaluation, does not preclude courts from determining that a regulation "takes" a landowner's property even though the regulation does not deprive the landowner of all economically beneficial use of the property. However, if the regulation does not deprive the landowner of all economically beneficial land use, then the categorical takings rule is not applicable and a traditional ad hoc analysis is required. Therefore, the *Lucas* case is limited to situations where a regulation eliminates all economically beneficial use of a landowner's property; *Lucas* may not affect traditional ad hoc factual inquiries.

2. *Exception to Categorical Takings Based on a Total Economic Devaluation: Common-Law Principles of Property and Nuisance*

The *Lucas* Court recognized an exception to categorical takings from a total economic devaluation regulation. Since land title is subject to "background principles of the State's law of property and nuisance," governmental entities may eliminate all economically beneficial uses of property without compensation only when the regulation proscribes a use that was previously impermissible under that state's common-law principles of property and nuisance.⁷⁸

This exception is premised on the theory that landowners take title subject to state property and nuisance principles.⁷⁹ Although a landowner may engage in land uses that inhere to the title of the land, a landowner is prohibited from engaging in land uses that are proscribed by these background principles.⁸⁰ Thus, the government may regulate land uses based on these background principles without paying compensation, because the regulation merely prohibits

Id. at 1019 n.8 (quoting *Penn Central*, 438 U.S. at 124). Therefore, the question is not whether a ninety-five percent devaluation constitutes a taking under the *Lucas* total economic devaluation standard; in fact, it does not. *Id.* The question becomes whether a ninety-five percent devaluation based on the facts of the particular circumstances constitutes a taking under a traditional ad hoc takings analysis. The *Lucas* analysis is not controlling if a trial court determines that the regulation has not deprived the land of all economically beneficial uses.

78. *Id.* at 1029. The Court gave some examples of regulations that deprive landowners of all economically beneficial uses of their property without requiring compensation under the Takings Clause:

[T]he owner of a lake bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault.

Id.

79. *Id.*

80. *Id.* at 1029-30.

the landowner from engaging in land uses that were already prohibited by state property and nuisance laws.

If a property's land uses are based on expectations created by a state's common law, then the land uses inherent in the land's title may change as the common law changes.⁸¹ One may argue that a statutorily defined nuisance becomes part of that state's common law of nuisance.⁸² Under this reasoning, states may avoid compensation by merely promulgating a statute that declares specific land uses as public nuisances. However, allowing states to circumvent the Takings Clause by enacting statutes that recognize new forms of public nuisance is not compatible with the theory behind the nuisance exception, because these new proscriptions have not inhered to the title of the land.⁸³ The Court in *Lucas* warned that state courts "must do more than proffer the legislature's declaration that the [land] uses . . . are inconsistent with the public interest . . ."⁸⁴ State courts must base their decisions on firmly grounded common-law principles.

In determining whether a regulation is sufficiently grounded in state property or nuisance laws to avoid just compensation, the *Lucas* Court reviewed the balancing test for nuisance included in the *Restatement (Second) of Torts*.⁸⁵ This balancing test is similar, but not necessarily identical to, most states' nuisance laws. The balancing test evaluates the following factors: (1) the degree of harm that the proposed land use may pose to public lands and resources or to adjacent private property;⁸⁶ (2) the social value of the proposed land

81. The Court in *Lucas* stated that because common law property and nuisance exceptions to a total categorical takings analysis are a question of state law, state courts should decide the issue. *Id.* at 1031. Thus, state courts may prohibit certain land uses by determining that the common law of property and nuisance has changed to prohibit such activity. For example, in Florida, the common law is viewed as a continually evolving body of law.

The common law has not become petrified; it does not stand still. It continues in a state of flux. And, its ever present fluidity enables it to meet and adjust itself to shifting conditions and new demands. It has been described as a leisurely stream that has not ceased to flow gently and continuously in its proper channel, at times gradually and imperceptibly eroding a bit of the soil from one of its banks and at other times getting rid of and depositing a bit of silt.

State v. Egan, 287 So. 2d 1, 7 (Fla. 1973). See also David L. Powell et al., *Measured Step to Protect Private Property Rights*, 23 FLA. ST. U. L. REV. 255, 290-91 (1996).

82. Cf. *Commonwealth v. Parks*, 30 N.E. 174, 175 (Mass. 1892) (stating that the authority to enact nuisance statutes is the authority to "change the common law as to nuisances, and . . . move the line either way, as to make things nuisances which were not so, or to make things lawful that were nuisances . . ."). See also Powell, *supra* note 81, at 291 n.225.

83. See *supra* notes 78-80 and accompanying text.

84. *Lucas*, 505 U.S. at 1031.

85. *Id.* at 1030-31. See also RESTATEMENT (SECOND) OF TORTS §§ 826-28, 830-31 (1979).

86. *Lucas*, 505 U.S. at 1030-31. See also RESTATEMENT (SECOND) OF TORTS §§ 826-27 (1979).

use and its suitability to the locality in question;⁸⁷ and (3) the ease with which the harm may be avoided through mitigation by the landowner or by the governmental entity.⁸⁸ The Court stated, however, that it would be rare for common-law principles of property and nuisance to prevent a landowner from erecting all types of "habitable or productive improvements."⁸⁹

3. *The Ripeness Issue*

Prior to oral arguments before the South Carolina Supreme Court, the South Carolina Legislature amended the BMA. This amendment authorized the Coastal Council to issue "special permits," allowing construction of residential properties seaward of the baseline.⁹⁰ The Coastal Council argued that this amendment left Lucas' takings claim unripe because Lucas had failed to seek a "special permit" and thus exhaust all administrative remedies available to him.⁹¹

However, the South Carolina Supreme Court declined to address the ripeness issue and decided the case on its merits.⁹² Although the United States Supreme Court agreed with the Coastal Council's ripeness argument, the Court determined that the South Carolina Supreme Court's discussion of the merits had precluded Lucas from seeking compensation for past temporary deprivations.⁹³ Thus, the

87. *Lucas*, 505 U.S. at 1031. See also RESTATEMENT (SECOND) OF TORTS §§ 828(a), 828(b), 831 (1979).

88. *Lucas*, 505 U.S. at 1031. See also RESTATEMENT (SECOND) OF TORTS §§ 827(e), 828(c), 830 (1979). The Court also noted two factual circumstances that undermine a governmental entity's ability to assert that the regulation is based on common-law principles of property or nuisance laws, and thus avoid compensating landowners. *Id.* The first situation is where a particular use has historically been engaged in by similarly situated landowners. *Id.* The second situation is where other landowners under similar circumstances are permitted to continue the use denied to the landowner seeking compensation. *Id.* These two factual circumstances were also gleaned from the *Restatement (Second) of Torts*. See RESTATEMENT (SECOND) OF TORTS § 827, cmt. g (1979).

89. *Lucas*, 505 U.S. at 1031 ("[I]t seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the 'essential use.'"). However, the Court noted that whether the state's common law precluded the owner from all "habitable or productive" land uses was dependent on state law. *Id.*

90. *Id.* at 1010-11 (citing S.C. CODE ANN. § 48-39-290(D)(1) (Supp. 1991)).

91. *Id.* at 1011. See also Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. LAND USE & ENVTL. L. 37 (1995).

92. *Id.*

93. *Id.* (citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) (noting that temporary land use deprivations are compensable under the Takings Clause)).

Court held that this case was ripe for review as a temporary takings claim for loss of use between 1988 and 1990.⁹⁴

4. *The Segmentation Issue*

Since all parties in the *Lucas* case acknowledged that the BMA denied Lucas of all economically beneficial land uses, the Court refused to address whether the "all economically beneficial" use test pertained to the parcel as a whole or merely to that portion of the parcel that was subject to the regulation.⁹⁵ The Court acknowledged that "this uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court."⁹⁶ However, the Court stated:

The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property—i.e., whether and to what degree the State's law has accorded legal recognition and protection to the *particular interest* in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.⁹⁷

This precursor to an issue that will inevitably reach the United States Supreme Court suggests that the Court may reconcile the "denominator" issue by focusing on the degree of importance that state law has afforded the particular interest being regulated, rather than on the amount of regulated land relative to the entire parcel.

For example, suppose that a landowner purchases property with the expectation of erecting a residence. The law of the state in which the property is located "has accorded [the landowner] legal recognition and protection" of fee simple interests in the property.⁹⁸ Suppose further that the topography of the property renders only ten percent of the property capable of being developed, and that a regulation is subsequently promulgated denying the landowner permission to construct a residence because the construction would

94. *Id.* at 1011-12.

95. *Id.* at 1016 n.7.

96. *Id.* (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)). The *Lucas* Court acknowledged the prior inconsistencies that it had created when addressing this issue. *Id.* The Court further stated, in dicta, that the calculus used by a New York court in *Penn Central* was "extreme" and "unsupportable." *Id.* In *Penn Central*, the Court affirmed the New York court's determination that the diminution in the parcel's value failed to constitute a taking because the diminution in value was viewed in light of the total value of the landowner's property. *Penn Central*, 438 U.S. at 104.

97. *Lucas*, 505 U.S. at 1016 n.7 (emphasis added).

98. *Id.* The *Lucas* Court recognized fee simple interests in property as having a "rich tradition of protection at common law." *Id.*

be contrary to the public interest. Although such regulation merely prohibits the landowner from developing ten percent of the property, the landowner has essentially been deprived of "all economically beneficial" land uses.

Since the landowner purchased the property for the specific purpose of building a residence, the Court may find that the regulation eliminated all of the property's economically beneficial uses by depriving the landowner of the "*particular interest* in land with respect to which the takings claimant alleges a diminution in (or elimination of) value."⁹⁹ Although the regulation affected less than 100 percent of the property's total area, a court may determine that under these circumstances a categorical taking based on a total economic devaluation is appropriate because the "reasonable expectations" to develop the property of that landowner have been deprived.¹⁰⁰

C. Florida's Post-Lucas Ability to Regulate Wetlands Under the Takings Clause

In light of the *Lucas* decision, the Florida judiciary has continued to develop the law of regulatory takings. This section contrasts Florida takings law with federal takings law to determine which law, if any, is more expansive. An overview of the nuances between federal and Florida takings jurisprudence is necessary to determine Florida's ability to regulate wetlands under the Fifth Amendment. Also, this juxtaposition is necessary to analyze whether, and to what extent, the PPRPA may affect subsequent wetlands regulations. Although federal takings law is binding in Florida courts, Florida may develop its own body of takings law, as long as such law does not relax federal requirements.

1. Florida's General Takings Rule

Generally, Florida employs a traditional takings analysis by requiring an ad hoc factual inquiry to determine whether a regulation goes "too far" for the purposes of the Fifth Amendment.¹⁰¹ Florida also recognizes the two forms of categorical takings enunciated in *Lucas*. However, Florida's takings law differs from federal law in two respects: (1) the scope of Florida's total economic devaluation regulations is broader than that of the corresponding

99. *Id.* (emphasis added).

100. *Id.*

101. *Reahard v. Lee County*, 968 F.2d 1131, 1135 (11th Cir. 1992) (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). See also Richard J. Grosso & David J. Russ, *Takings Law in Florida: Ramifications of Lucas and Reahard*, 8 J. LAND USE & ENVTL. L. 431 (1993).

federal regulations; and (2) Florida has resolved the segmentation issue left unanswered in *Lucas*. Since wetlands regulations may affect only a portion of the landowner's property but substantially deprive a landowner of all economically beneficial land uses, these distinctions are significant to the government's ability to regulate wetlands in Florida.

Wetlands regulations generally usurp environmentally sensitive wetlands of substantially all economically beneficial land uses by prohibiting landowners from altering the wetlands. Under the categorical takings rule enunciated in *Lucas*, a wetland regulation violates the Takings Clause *per se* only if it deprives the landowner of all economically beneficial land uses.¹⁰² If the wetlands regulation leaves some economically beneficial land use, regardless of how small that use is, then the landowner must seek compensation under the traditional ad hoc takings analysis.¹⁰³

The Florida Supreme Court has determined that "[a] taking occurs where regulation denies *substantially* all economically beneficial or productive use of land."¹⁰⁴ This determination expands Florida's total economic devaluation regulations to include regulations that devalue the property by less than 100 percent.¹⁰⁵ The Florida Supreme Court may have intended merely to allow a categorical-takings analysis when an "all economically beneficial," or an extremely nominal residual land use, remained on the property; however, this expansion muddies the clear distinction established by *Lucas*, requiring an ad hoc factual inquiry for regulatory devaluations of less than 100 percent of the property value.¹⁰⁶

Since the Florida Supreme Court has arguably interpreted Florida's total economic devaluation rule to be more expansive than the federal rule, more categorical takings challenges may be brought under Florida's categorical takings rule than under the federal rule. This distinction is significant because once a landowner proves that the property is subject to a total economic devaluation regulation, the burden shifts to the government to show that the regulation is based on common law principles of property and nuisance.¹⁰⁷ Otherwise,

102. *Lucas*, 505 U.S. at 1017-18.

103. See *supra* note 77 and accompanying text.

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

105. Compare *Lucas*, 505 U.S. at 1017-18 (holding that the Fifth Amendment is violated when a "regulation denies all economically beneficial or productive use of land") with *A.G.W.S. Corp.*, 640 So. 2d at 58 ("A taking occurs where regulation denies *substantially* all economically beneficial or productive use of land.") (emphasis added).

106. *Lucas*, 505 U.S. at 1019 n.8. See also *supra* note 77 and accompanying text.

107. See *Lucas*, 505 U.S. at 1031.

in a traditional ad hoc analysis, the landowner always has the burden of showing that the regulation constitutes a taking of the property. Thus, Florida's more expansive rule may be more burdensome to governmental entities because it may place more cases under a categorical takings analysis based on a total economic devaluation.

However, one may argue that Florida's rule is simply a restatement of the federal rule as to what constitutes a "total" taking. In *Lucas*, the Court adhered to the lower court's finding that the land was valueless even though, as Justice Blackmun pointed out, several residual economic land uses were still available to the landowner.¹⁰⁸ Thus, since the total economic devaluation rule established in *Lucas* was used despite the fact that residual economic land uses remained on the property, courts may determine that Florida law mirrors federal law regarding whether a total economic devaluation analysis is warranted.

Florida courts have established several factors to determine whether a regulation has deprived a landowner of substantially all economically beneficial land uses. These factors include: (1) the landowner's knowledge of existing regulations at the time of purchasing the property;¹⁰⁹ (2) the landowner's reasonable expectations under state common law;¹¹⁰ (3) the diminution in the landowner's reasonable investment-backed expectations caused by the regulation;¹¹¹ and (4) the determination of whether the government has proposed alternative land uses or offered to grant a variance to the regulation subject to some reasonable restriction.¹¹²

Regarding a landowner's knowledge of existing regulations at the time of purchasing the property, the Florida Supreme Court has determined that a landowner does not buy property with the

108. *Id.* at 1044 (Blackmun, J., dissenting) ("State courts frequently have recognized that land has economic value where the only residual economic uses are recreation or camping.").

109. *State v. Burgess*, 1995 WL 518776, at *3 (Fla. 1st DCA 1995) ("[I]n considering whether the permit denial deprived Burgess of all economically beneficial use of his property, the trial court must weigh evidence relating to numerous issues, including Burgess' knowledge and expectations when he purchased the property . . .").

110. *Id.* See also *Reahard v. Lee County*, 968 F.2d 1131, 1136 (11th Cir. 1992).

111. *Reahard*, 968 F.2d at 1136.

112. See *Burgess*, 1995 WL 518776, at *2. Under factor four, an additional takings inquiry must be considered if the governmental entity offers to grant a variance from the regulation, subject to the imposition of an exaction on the property. A court must determine whether a nexus exists between the governmental exaction and the land use that is sought. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 838 (1987). If a court determines that no nexus exists between the exaction and the prohibited land use, then the government's offer violates the Takings Clause and should not be considered when determining whether the regulation denies the landowner of substantially all economically beneficial land uses. See generally *id.* This additional takings inquiry is outside the scope of this article.

expectation that a "conveyance carri[s] with it a guarantee from the state that dredging and filling the property [is] permitted."¹¹³

However, after *Lucas*, at least one Florida court, the Fifth District Court of Appeal in *Vatalaro v. Department of Environmental Regulation*, has determined that constructive knowledge, prior to purchasing the land, of a regulation's deprivation of substantially all economically beneficial land uses does not exempt a government from paying just compensation under the Takings Clause.¹¹⁴ Although the *Vatalaro* Court acknowledged that constructive knowledge at the time of purchase is sufficient "in a case involving the denial of a rezoning or variance application, its logic fails in a case . . . involving a permit denial."¹¹⁵

The *Vatalaro* Court reasoned that, unlike zoning regulations, where a landowner takes title with the knowledge that certain activities are prohibited, permit regulations do not prohibit land use activities until the permit is denied.¹¹⁶ Thus, no constructive knowledge exists regarding the permit regulation's effect on the property's land uses because a landowner takes title "with future development legitimately anticipated and with no existing bar thereto."¹¹⁷ However, the *Vatalaro* Court acknowledged that "an owner has no

113. *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1379 (Fla.), *cert. denied sub nom.*, *Taylor v. Graham*, 454 U.S. 1083 (1981). In *Graham*, the Florida Supreme Court held that denying a permit to develop over 1800 acres of environmentally sensitive wetlands did not constitute a taking. *Id.* at 1374-75. The court reasoned that the protection of environmentally sensitive wetlands is a legitimate public concern and within the police powers. *Id.* at 1381. The court also determined that "[t]he owner of private property is not entitled to the highest and best use of his property if that use will create a public harm." *Id.* at 1382. Regarding reasonable investment-backed expectations, the court noted that these expectations do not include the landowner's subjective expectation that the land is subject to development. *Id.* at 1383. Thus, the court in *Graham* made it extremely difficult for landowners to obtain compensation for economic devaluations caused by wetlands regulations. Since the supreme court required reasonable investment-backed expectations to be viewed objectively, Florida landowners who purchase submerged lands would not be allowed to recover compensation under a takings claim because the land was purchased "with full knowledge that part of it was totally unsuitable for development." *Id.* at 1381-82.

114. 601 So. 2d 1223, 1229 (Fla. 5th DCA) (holding that the Department's denial of a permit to develop a private residence on an environmentally sensitive wetland constituted a taking because the permit denial deprived the landowner of all economically beneficial land uses), *rev. denied*, 613 So. 2d 3 (Fla. 1992). For an analysis of the *Vatalaro* court's decision, see Valerie A. Collins, *Vatalaro v. Department of Environmental Regulation: The Mysterious Takings Rule*, 8 J. LAND USE & ENVTL. L. 611 (1993) and William I. Gulliford, III, *The Effect of Notice of Land Use Regulations upon Investment-Backed Expectations and Takings Challenges*, 23 STETSON L. REV. 201 (1993).

115. *Vatalaro*, 601 So. 2d at 1229.

116. *Id.*

117. *Id. Contra Graham*, 399 So. 2d at 1379.

absolute right to change the character of his land *if the change injures the public.*"¹¹⁸

2. The Ripeness Issue

Florida's ripeness doctrine mirrors the federal doctrine.¹¹⁹ In order for a regulatory takings case to be ripe for review in Florida, a court must determine whether there has "been a final decision from the appropriate governmental entity as to the nature and extent of the development that will be permitted."¹²⁰ Thus, a landowner must be denied a permit to engage in a desired land use activity before the landowner's takings claim becomes ripe.¹²¹

Two exceptions exist to the general rule regarding ripeness. First, a claim is considered ripe if past history shows that an attempt to seek a permit would be futile.¹²² Second, a claim is considered ripe if the governmental entity concedes that a permit request would be denied.¹²³ However, both of these exceptions are narrowly construed and rarely applicable.

3. The Segmentation Issue

Although the United States Supreme Court has not conclusively answered the segmentation issue,¹²⁴ Florida courts have addressed it. Generally, Florida courts have held that "'where it is established that the parcels are physically contiguous, a presumption arises that the parcels are one unit. However, this presumption can be rebutted by evidence that the parcels are otherwise separate.'"¹²⁵

118. *Vatalaro*, 601 So. 2d at 1229 (citing *Graham*, 399 So. 2d at 1382).

119. *Taylor v. Village of North Palm Beach*, 659 So. 2d 1167, 1173 (Fla. 4th DCA 1995) ("Florida courts have adopted the federal ripeness policy of requiring a 'final determination from the government as to the permissible uses of the property.'").

120. *City of Riviera Beach v. Shillinburg*, 659 So. 2d 1174, 1180 (Fla. 4th DCA 1995).

121. See *Reahard v. Lee County*, 968 F.2d 1131, 1135 (11th Cir. 1992) ("[A] Fifth Amendment just compensation claim is not ripe until the landowner has pursued the available state procedures to obtain just compensation."); *Shillinburg*, 659 So. 2d at 1174, 1178 (holding that the landowner's taking claim was not ripe for review because the landowner had failed to apply for a permit); *Tippett v. City of Miami*, 645 So. 2d 533 (Fla. 3d DCA 1994) (holding that a facial challenge alleging that the creation of a historic district was an unconstitutional taking was not ripe for review because the landowner had failed to apply for a permit).

122. *Shillinburg*, 659 So. 2d at 1181.

123. *Id.*

124. While the Court has addressed the issue several times, inconsistencies have been created regarding the proper method for evaluating the segmentation issue. See discussion *supra* part III.B.4.

125. *State v. Schindler*, 604 So. 2d 565, 567 (Fla. 2d DCA) (quoting *Department of Transp. v. Jirik*, 471 So. 2d 549, 553 (Fla. 3d DCA 1985)), *rev. denied*, 613 So. 2d 8 (Fla. 1992). In *Schindler*, the court held that submerged land was not separate from the landowner's entire property for purposes of determining whether a total economic devaluation taking had occurred. *Id.* at 567-

In *Florida Game and Fresh Water Fish Commission v. Flotilla, Inc.*,¹²⁶ the Second District Court of Appeal considered whether a restriction on the development of forty-eight acres of the landowner's 173-acre parcel constituted a taking.¹²⁷ The *Flotilla* Court relied on *Penn Central Transportation Co. v. New York City*¹²⁸ to determine that, for purposes of a takings analysis, land must be considered in its entirety when determining whether a regulation violates the Fifth Amendment.¹²⁹ Thus, the *Flotilla* Court held that the regulation did not effect a taking because the landowner "retained the desired use of the majority of its land."¹³⁰ However, the *Flotilla* Court's reliance on *Penn Central* ignored footnote seven of *Lucas*, which indicates that the Court's determination of the denominator factor in *Penn Central* may be re-evaluated in future takings claims.¹³¹ Therefore, although the segmentation issue is resolved in Florida, the *Lucas* decision indicates that modification of Florida's existing law may be necessary in the future.

Florida courts evaluate property as a whole rather than merely considering the portion of the property which is subject to the regulation or considering the "particular interest" regulated.¹³² As a result, categorical takings claims based on a total economic devaluation are difficult to prove in Florida. Federal law has not established

68. The court also noted that the landowner had purchased the property "from a private individual 'with full knowledge that part of it was totally unsuitable for development.'" *Id.* (quoting *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374 (Fla.), *cert. denied sub nom.*, Taylor v. Graham, 454 U.S. 1083 (1981)).

Prior to *Schindler*, the Florida Supreme Court established a test consisting of three factors to determine whether the "all economically beneficial" use test pertains to the parcel as a whole or merely to a portion of the parcel that is subject to governmental intrusion. These factors are: (1) physical contiguity; (2) unity of ownership; and (3) unity of use. *Department of Transp. v. Jirik*, 498 So. 2d 1253, 1255 (Fla. 1986). In *Jirik*, the landowner owned three adjacent pieces of property. The government erected a wall that eliminated the landowner's access to one of his lots. *Id.* The supreme court considered whether the landowner's three adjacent parcels of property were separate and independent for purposes of the Fifth Amendment. *Id.* The supreme court determined that, although the use of property is the most important factor, when platted urban lots are vacant "a presumption of separateness . . . is reasonable." *Id.* at 1257. Thus, the *Jirik* Court crafted an exception to the general rule that lands owned by one person and sharing a common use are generally considered as a whole.

126. 636 So. 2d 761 (Fla. 2d DCA 1994).

127. *Id.* at 765.

128. 438 U.S. 104, 130-31 (1978).

129. *Flotilla*, 636 So. 2d at 765. Other Florida courts have also relied on *Penn Central* to determine that property should be viewed as a whole when considering whether a regulation violates the Fifth Amendment. See *Vatalaro v. Department of Envtl. Reg.*, 601 So. 2d 1223, 1228 (Fla. 5th DCA), *rev. denied*, 613 So. 2d 3 (1992).

130. *Flotilla*, 636 So. 2d at 765.

131. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992). See also discussion *supra* part III.B.4.

132. *Lucas*, 505 U.S. at 1016 n.7. See also discussion *supra* part III.B.4.

a clear rule regarding the segmentation issue.¹³³ In this respect, Florida takings law is more stringent than the federal law and favors the government's ability to reasonably regulate property without paying just compensation.

4. *Summary of Wetlands Regulation Under Florida's Takings Law*

Florida's takings jurisprudence makes it difficult for landowners to recover when a wetlands regulation deprives the landowner of substantially all economically viable uses of property. Florida provides several hurdles that a landowner must overcome before compensation under the Takings Clause is warranted.

First, a landowner must show that the regulation deprives the land of substantially all economically viable land uses.¹³⁴ Since wetlands regulations generally prohibit any alterations to environmentally sensitive wetlands, this hurdle is not difficult to surpass. Second, a landowner must show that the wetland was purchased with the expectation of development.¹³⁵ Florida law fails to recognize the dredging and filling of wetlands as an interest that inheres to the property's title;¹³⁶ thus, this requirement is difficult for landowners to meet. Third, a landowner must show that the appropriate governmental entity has issued a final decision regarding the proposed land use activity and that the landowner has exhausted all administrative remedies.¹³⁷ Many Florida takings cases are dismissed on this ground due to a lack of ripeness. Finally, a landowner must show that regulation devalues the property as a whole.¹³⁸ This requirement, known as the segmentation issue, deprives many Florida landowners of compensation because many wetlands properties include upland areas that retain some economically viable uses.

133. Compare *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) (evaluating property as a whole to determine whether permit denial constituted a taking) with *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (evaluating only the portion of the parcel regulated to determine whether a law restricting subsurface extraction of coal effected a taking). But see *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1180 (D.C. Cir. 1994) (holding that the denominator factor should include the entire parcel minus: (1) any land that was developed prior to the existence of the regulation; and (2) any land deeded to the state in exchange for a permit).

134. See *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 640 So. 2d 54, 58 (Fla. 1994). See also discussion *supra* part III.C.1.

135. See *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1379 (Fla. 1981).

136. *Id.*

137. See discussion *supra* part III.C.2.

138. See discussion *supra* part III.C.3.

IV. THE BERT J. HARRIS, JR., PRIVATE PROPERTY RIGHTS PROTECTION ACT AND ITS EFFECT ON WETLANDS REGULATION

Since recovery under Florida's takings law has proven to be difficult, a new cause of action has been introduced with the enactment of the PPRPA.¹³⁹ The PPRPA was enacted on May 18, 1995 and became effective on October 1, 1995.¹⁴⁰ The PPRPA is designed to coexist with current takings jurisprudence and to provide landowners with a separate and distinct cause of action against governmental regulations that "unfairly affect real property."¹⁴¹

The PPRPA consists of six major sections. Section I establishes the intent and application of the act.¹⁴² Section II establishes a general test for determining whether a landowner is entitled to compensation under the act.¹⁴³ Section III defines the main operative terms used.¹⁴⁴ Section IV requires the government to issue a written settlement offer and to mitigate any "inordinate burdens" placed on the property.¹⁴⁵ Section V establishes ripeness for purposes of compensation under the PPRPA.¹⁴⁶ Section VI determines the extent of judicial involvement.¹⁴⁷

Generally, the PPRPA differs from takings law by using a "carrot-and-stick" approach. The PPRPA softens takings requirements by awarding compensation for any loss in the fair market value of the property once a court determines that a regulation "inordinately burdens" the property.¹⁴⁸ In takings law, courts generally require a regulation to deprive the landowner of "all economically beneficial" land uses before compensation is available.¹⁴⁹ The PPRPA also eases ripeness requirements for the landowner.¹⁵⁰ Thus, landowners may bring a claim under the PPRPA even where a takings claim would not be ripe.

However, the PPRPA may function as a "stick," encouraging parties to find a reasonable solution to wetlands development and to avoid litigation by entitling the prevailing party to attorney's fees and court costs if a reasonable solution was available but not

139. FLA. STAT. § 70.001 (1995).

140. 1995, Fla. Laws ch. 95-181, § 6.

141. FLA. STAT. § 70.001 (1995).

142. *Id.* See discussion *infra* part IV.A.

143. FLA. STAT. § 70.001(2) (1995). See discussion *infra* part IV.B.

144. FLA. STAT. § 70.001(3) (1995). See discussion *infra* part IV.B.

145. FLA. STAT. § 70.001(4) (1995). See discussion *infra* part IV.C.

146. FLA. STAT. § 70.001(5) (1995). See discussion *infra* part IV.D.

147. FLA. STAT. § 70.001(6)-(13) (1995). See discussion *infra* part IV.E.

148. See discussion *infra* part IV.A and part IV.B.1.

149. See discussion *supra* part III.B.1.

150. See discussion *infra* part IV.D.

accepted by the other party.¹⁵¹ Thus, the PPRPA gets the parties to the negotiating table by softening compensation and ripeness requirements but discourages parties from seeking judicial determinations by subjecting each party to potentially costly attorney's fees and court costs.

A. Legislative Intent and Application of the PPRPA

The PPRPA states:

The Legislature recognizes that some laws, regulations, and ordinances of the state . . . may inordinately burden, restrict, or limit private property rights without amounting to a taking under the State Constitution or the United States Constitution . . . [I]t is the intent of the Legislature that, as a separate and distinct cause of action from the law of takings, . . . [the PPRPA] provides for relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state . . . unfairly affects real property.¹⁵²

Thus, although the PPRPA uses several terms that seem to be derived from takings jurisprudence, courts may determine that, for purposes of PPRPA compensation, these terms have a different application. Certainly, courts are not bound by takings law when interpreting what constitutes compensation under the PPRPA.

The PPRPA applies to statutes, rules, regulations, or ordinances adopted or altered after the end of the 1995 Legislative Session.¹⁵³ Thus, this prospective application does not apply to any laws that existed on or before the enactment of the PPRPA. However, alterations to pre-existing laws subject these laws to the PPRPA "to the extent that the application of the amendatory language imposes an inordinate burden apart from" the burdens placed by the pre-existing rule.¹⁵⁴

A question arises as to whether permit denials based on laws that existed prior to the enactment of the PPRPA are subject to the act. To decide this issue, courts may consider whether a property was subject to a permit regulation prior to the time that the permit is sought.

Governmental entities will argue that, since most inordinately burdensome regulations involve permit determinations, permit denials based on pre-existing regulations were grandfathered in with the regulation itself. Otherwise, the PPRPA's exemption of pre-existing laws would have no effect. Under this analysis, governmental

151. FLA. STAT. § 70.001(6)(c) 1-3 (1995). See discussion *infra* part IV.E.

152. FLA. STAT. § 70.001(1) (1995).

153. *Id.* § 70.001(12).

154. *Id.*

entities could avoid compensation by regulating wetlands under the status quo. Governmental entities would be subject to the PPRPA only where new statutes required the enactment of further regulation or where alteration of current regulations was necessary.

However, landowners will assert that permit denials are not grandfathered by the PPRPA because the law of Florida recognizes that lands are not subject to permit regulations until a permit is sought and a determination is issued.¹⁵⁵ In *Vatalaro*, the court held that the landowner's constructive knowledge of the property being subject to existing regulations did not relieve the Department of Environmental Protection's (DEP) duty to pay just compensation under the Takings Clause.¹⁵⁶ The court stated that, even where the land is subject to permit regulations, land acquisition is conducted with "future development legitimately anticipated and with no existing bar thereto" because no restrictions are imposed until the permit is denied.¹⁵⁷

As a matter of policy, the prospective application of the PPRPA should also apply to permit regulations because the PPRPA was designed to protect individuals only from new laws, rules, or regulations that inordinately affect property. Since landowners may apply for permits after having been denied in the past, a retrospective application of the PPRPA to permit regulations may require the government to pay compensation under existing laws to landowners who have previously been denied permits. This result would be inequitable and in derogation of the plain language of the statute.

B. General Test for Compensation Under the PPRPA

The PPRPA's test for general compensation states:

When a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property, the property owner of that real property is entitled to relief, which may include compensation for the actual loss to the fair market value of the real property caused by the action of government.¹⁵⁸

Florida courts may determine that the PPRPA's test for compensation is more expansive than current takings jurisprudence because

155. See *Vatalaro v. Department of Env'tl. Reg.*, 601 So. 2d 1223, 1229 (Fla. 5th DCA 1992). The *Vatalaro* court suggested that the bundle of rights is compromised at the time of the permit denial. *Id.* Therefore, one may conclude that the mere existence of permit regulations does not result in notice to the landowner that the property's land uses are restricted.

156. *Id.*

157. *Id.*

158. FLA. STAT. § 70.001(2) (1995).

the PPRPA does not require a regulation to deprive the landowner of "substantially all economically beneficial" land uses.¹⁵⁹ Instead, the PPRPA awards compensation if a regulation has "inordinately burdened" existing land uses.¹⁶⁰

1. Inordinate Burden Defined

In order for a governmental action to "inordinately burden"¹⁶¹ land, the action must either: (1) directly restrict or limit the land's use to the extent that the action permanently eliminates the landowner's "reasonable investment-backed expectations"¹⁶² of the property as a whole; or (2) unreasonably restrict the property's land uses to the extent that the landowner "bears permanently a disproportionate share of a burden imposed for the good of the public"¹⁶³ Temporary impacts or governmental actions that remediate "a public nuisance at common law or a noxious use of private property" are exempt from the definition of "inordinate burden."¹⁶⁴

Since the definition of "inordinate burden" contains two mutually exclusive prongs, uncertainty exists regarding whether the property must be viewed in its entirety or whether the portion of the property being regulated may be separated to determine whether an inordinate burden has been placed on the property. Under current

159. See *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54, 58 (Fla. 1994). See also *supra* notes 102-110 and accompanying text.

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

161. For a general analyses of the statutory term "inordinate burden" and for a discussion of the issue of burden of proof in establishing an "inordinate burden," see Ellen Avery, *The Terminology of Florida's New Property Rights Law: Will It Allow Equity to Prevail or Government To Be "Taken" to the Cleaners?*, 11 J. LAND USE & ENVTL. L. 181, 186-200, 203-07 (1995).

162. FLA. STAT. § 70.001(3)(e) (1995). In determining whether a land use contained "reasonable investment backed expectations" for takings purposes, the United States Supreme Court has generally relied on whether the landowner had knowledge, prior to purchasing the property, that the land use was regulated. See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (holding that the United States Army Corps of Engineers' lack of notice to the property owner that dredging a pond may subject the property to navigational servitude interfered with the property owner's reasonable investment-backed expectations). In Florida, courts have also considered the landowner's knowledge when determining whether a regulation deprived the landowner of all reasonable investment-backed expectations. *Reahard v. Lee County*, 968 F.2d 1131 (11th Cir. 1992). However, a landowner's knowledge that a permit is required to engage in development activities may be insufficient in Florida. See *Vatalaro v. Department of Envtl. Reg.*, 601 So. 2d 1223, 1228 (Fla. 5th DCA 1992). The court in *Vatalaro* stated:

It cannot be concluded that a permit denial has not resulted in a taking merely on the basis that the property continues to exist in the state in which it was acquired. Certainly the land is physically unchanged by a permit denial, yet the bundle of rights the owner had has been diminished.

Id.

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

164. *Id.*

takings law, Florida courts have resolved the segmentation issue by considering the property as a whole.¹⁶⁵

Certainly, under the first prong of the "inordinate burden" test, the property must be evaluated as a whole to determine whether the regulation "directly restricts" and permanently eliminates the landowner's "reasonable investment-backed expectations."¹⁶⁶ Thus, the government may not be required to pay compensation if the regulation restricts a land use on a particular portion of the land but generally allows the land use on the parcel as a whole.

However, the second prong of the "inordinate burden" test does not specify whether courts should consider the entire parcel or merely a portion thereof when determining whether the landowner should be compensated under the PPRPA. This "inordinate burden" prong warrants compensation if the regulation "unreasonably restricts" the property's land uses to the extent that the landowner shares a disproportionate share of the burden imposed for the public good.¹⁶⁷ Although this prong does not specify that the entire parcel should be evaluated, Florida courts may apply the same analysis used in takings jurisprudence to inject the whole-parcel analysis into this prong.¹⁶⁸

When considering whether a property is "unreasonably restricted," the distinction between evaluating the parcel as a whole and merely considering the portion of the parcel being regulated may be purely academic. The second prong of the "inordinate burden" test requires a determination of whether the landowner disproportionately shares the burden imposed by the regulation. Since the governmental entity may offer alternative solutions to the activity sought by the landowner,¹⁶⁹ courts may refuse to consider the segmentation issue and focus merely on whether the desired land use is unreasonably restricted by the regulation. Such a method focuses more on the particular interest being regulated than on the amount of regulated land relative to the entire parcel. By focusing on the property's land use rather than on the restriction placed on a specific portion of the property, the segmentation issue may become moot. This analysis more closely resembles the United States Supreme Court's discussion of the segmentation issue in *Lucas*¹⁷⁰

165. See discussion *supra* part III.C.3.

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

167. *Id.*

168. See discussion *supra* part III.C.3.

169. See discussion *infra* part IV.C.

170. See discussion *supra* III.B.4. See also *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n. 7 (1992) (implying that the Court's future analysis of the segmentation issue may

than the current status of the segmentation issue in Florida takings law.¹⁷¹

For example, suppose that a fifty-acre lot comprises forty acres of upland and ten acres of environmentally sensitive wetlands. A landowner purchases the property with the intention of constructing a development, requiring twenty acres of land. The landowner seeks a permit to fill the ten acres of wetlands because this area is more aesthetically appealing than other areas of the parcel. Suppose further that the DEP denies the permit.

The landowner seeks compensation under the PPRPA because the permit denial "unreasonably restricts" the use of ten acres of the property. The DEP issues a settlement offer mitigating the restriction by suggesting that the landowner construct the development on the upland portion of the property. A court may refuse to address the segmentation issue and merely consider whether the permit denial "unreasonably restricted" the landowner's use of the property. In the instant case, a court may determine that the alternative solution issued by the governmental entity was reasonable and offered the landowner the opportunity to engage in the desired land use. Since the landowner was afforded the opportunity to engage in the desired land use, no burden exists that should be transferred to the public. Thus, the court may deny compensation without addressing the segmentation issue.

2. Governmental Entity Defined

The PPRPA broadly defines "governmental entity" to generally include all state entities that exercise governmental authority.¹⁷² This definition includes state agencies, regional or local governments, and municipalities.¹⁷³ However, "governmental entity" does not include federal agencies or state governmental entities whose regulatory powers were delegated by the federal government.¹⁷⁴ Thus, state agencies that are forced by federal authority to promulgate rules that "inordinately burden" land are exempt from the PPRPA.

Florida's wetlands regulations are not delegated by the federal government. Thus, state agencies that regulate wetlands are not exempt under the act's definition of governmental entity. However,

focus on the particular interest being regulated rather than on the amount of the regulated land relative to the entire parcel).

171. See discussion *supra* part III.C.3.

172. FLA. STAT. § 70.001(3)(c) (1995).

173. *Id.*

174. *Id.*

some dredge and fill activities are regulated by the federal government under the Clean Water Act (CWA).¹⁷⁵ The CWA regulates the discharge of dredged or filled materials into United States navigable waters through the use of a section 404 permit program.¹⁷⁶ This program is administered by the United States Army Corps of Engineers and the United States Environmental Protection Agency (EPA).¹⁷⁷ Under the section 404 permit program, states are required to issue certification, verifying that proposed discharges "will have only minimal cumulative adverse effect on the environment."¹⁷⁸

Florida is currently considering whether to seek "assumption" of the section 404 permit program.¹⁷⁹ "Assumption is the process by which the EPA reviews state programs to determine whether they meet certain minimum standards. If accepted by the EPA, assumption allows for use of the federally approved state procedures and regulations."¹⁸⁰

If Florida obtains delegation of the section 404 permitting program, state governmental agencies acting under the section 404 permitting process would be exempt from the PRRPA because their regulatory powers would be delegated by the federal government. The PRRPA specifically exempts state agencies with federally delegated rulemaking authority from the requirements of the act.¹⁸¹ Thus, if assumption occurs, state governmental agencies may choose to deny dredge and fill permits under this program in order to avoid possible PRRPA compensation.

3. Existing Use Defined

The PRRPA's definition of "existing use" includes: (1) the property's actual, present land use; and (2) the property's "reasonably foreseeable, nonspeculative land uses."¹⁸² Thus, "existing use" includes any land uses for which the property may be reasonably suited. Takings jurisprudence uses a similar analysis to determine whether a regulation deprives a landowner of "substantially all

175. Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1387 (1994)).

176. 33 U.S.C. § 1344 (1994).

177. *Id.* §§ 1344 (a)-(d).

178. *Id.* § 1344 (e)(1).

179. Fumero, *supra* note 10, at 113.

180. *Id.* at 114.

181. 1995, FLA. STAT. § 70.001(3)(e) (1995).

182. *Id.* § 70.001 (3)(f).

economically beneficial" land uses.¹⁸³ The PPRPA neither expands nor contracts a landowner's ability to seek compensation for future land uses.

Although the PPRPA's definition of "existing use" does not constitute an expansion of possible uses for which the governmental entity may be required to pay compensation, the PPRPA does require the governmental entity to pay a premium for "inordinately burdened" land.¹⁸⁴ Given the premium requirement, the government may lack the financial funding necessary to adequately regulate wetlands development. Instead, the government may choose either: (1) to avoid future wetlands regulation; or (2) to structure future wetlands regulations in a manner that enables governmental entities to avoid compensation by offering reasonable mitigation measures that relieve any "inordinate burdens" placed on the property.¹⁸⁵ In light of the importance that wetlands play in Florida's ecology, it is likely that governmental entities will choose the latter alternative.

4. *Vested Rights Defined*

Under the PPRPA, a court must look to principles of equitable estoppel and substantive due process when considering whether a landowner possesses vested rights in a property.¹⁸⁶ "Vested rights" include both common law principles and statutory principles of state law.¹⁸⁷

To determine whether a landowner has a vested right in a particular land use by virtue of equitable estoppel, Florida courts generally consider whether the landowner has detrimentally relied on an act or omission of the government to the extent that inequity would result if the landowner was denied the right to engage in that activity.¹⁸⁸ Since Florida courts have generally held that property title does not include a vested right to develop land,¹⁸⁹ landowners

183. See *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54, 58 (Fla. 1994) ("A taking occurs where regulation denies substantially all economically beneficial or productive use of land.").

184. The PPRPA requires compensation which may include "the actual loss to the fair market value of the real property caused by the action of government." FLA. STAT. § 70.001(2) (1995).

185. See discussion *infra* part IV.C.

186. FLA. STAT. § 70.001(3)(a) (1995).

187. *Id.*

188. Powell, *supra* note 81 (manuscript at 19, on file with author).

189. *Graham v. Estuary Properties*, 399 So. 2d 1374, 1382 (Fla. 1981) ("An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injuries [sic] the rights of other.") (quoting *Just v. Marinette County*, 201 N.W.2d 761, 768 (Wis. 1972)).

will not be able to assert a "vested rights" argument unless the governmental entity has lulled the landowner into believing that land development was allowable.¹⁹⁰

Courts must also look to common law principles of substantive due process to determine whether a landowner has a vested right in a particular land use.¹⁹¹ In determining whether a government has violated a person's rights to substantive due process, Florida courts consider whether "a regulation is arbitrary and capricious, does not bear a substantial relation to the public health, safety, morals, or general welfare, and is therefore an invalid exercise of the police power."¹⁹² This test establishes a high standard for the landowner to meet.

A substantive due process challenge may be either a facial challenge or an as applied challenge.¹⁹³ Under a facial challenge, the landowner must show that the governmental entity acted in an arbitrary and capricious manner when it promulgated the regulation. The remedy available for a facial challenge is "the striking down of the regulation."¹⁹⁴ Under an as applied challenge the landowner must show that the regulation—as applied against the landowner—constitutes an arbitrary and capricious exercise of governmental police powers.¹⁹⁵ The remedy for an as applied challenge "is an injunction preventing the unconstitutional application of the regulation to plaintiff's property and/or damages resulting from the unconstitutional application."¹⁹⁶

190. See generally *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (holding that the Corps of Engineers' lack of notice that dredging and filling a pond would subject landowner to navigational servitude violated the Fifth Amendment). In *Kaiser Aetna*, the Court stated that the landowner's belief that the land use activity would not subject the land to the navigational servitude resulted from assurances by the Corps of Engineers that no permit was necessary for dredging and filling. *Id.* See also *Sakolsky v. City of Coral Gables*, 151 So. 2d 433, 434-35 (Fla. 1963) (holding that a city was estopped from rescinding a building permit because the landowner had "changed his position materially and incurred very substantial expense in reliance upon the . . . permit issued by the respondent City.").

191. FLA. STAT. § 70.001(3)(a) (1995).

192. *Eide v. Sarasota County*, 908 F.2d 716, 721 (11th Cir. 1990). See also *City of Jacksonville v. Wynn*, 650 So. 2d 182, 187 (Fla. 1st DCA 1995); *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 641 So. 2d 1377 (Fla. 4th DCA 1994); *Conner v. Reed*, 567 So. 2d 515, 518 (Fla. 2d DCA 1990). For an analysis of the Eleventh Circuit's decision in *Eide*, see Bruce I. Wiener, *Obstacles and Pitfalls for Landowners: Applying the Ripeness Doctrine to Section 1983 Land Use Litigation* (*Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990)), 7 J. LAND USE & ENVT. L. 387 (1992).

193. *Eide*, 908 F.2d at 722.

194. *Id.*

195. See, e.g., *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir. 1988) (holding that a permit denial based on "partisan political or personal reasons unrelated to the merits of the application for the permits" constituted a violation of substantive due process).

196. *Eide*, 908 F.2d at 722.

Since these two forms of substantive due process challenges provide different types of relief, one must consider the impact that a vested rights claim based on substantive due process will have on the PPRPA. The PPRPA provides that relief "*may include* compensation for the actual loss to the fair market value of the real property caused by the action of government" ¹⁹⁷ Thus, relief under the PPRPA is not limited to monetary compensation; courts may fashion remedies that more adequately redress the inordinate burden. Therefore, courts faced with PPRPA claims based on substantive due process challenges may choose to follow traditional substantive due process remedies, including elimination of the regulation or injunctive relief.

It is important to note, however, that under the PPRPA courts merely must look to principles of substantive due process to determine whether the landowner has a vested right to a particular land use. Once the vested right is identified, the court must determine whether the regulation is inordinately burdensome to that vested right.

Since substantive due process employs an arbitrary and capricious standard, governmental entities need only show that some relationship existed between the regulation and its application to the landowner's property. ¹⁹⁸ Wetlands regulations generally focus on water quality and habitat maintenance. Thus, it is unlikely that a court will strike down a wetland regulation under a facial substantive due process challenge because the governmental entity should be able to meet the arbitrary and capricious standard. As applied substantive due process challenges should similarly be difficult to assert under wetlands regulations because of the deference that the arbitrary and capricious standard pays to governmental agencies.

5. Nuisance and Noxious Use Exception

The PPRPA exempts regulations that remediate public nuisances or noxious uses. ¹⁹⁹ Generally, a public nuisance is an activity that "violates public rights, subverts public order, decency or morals, or causes inconvenience or damage to the public generally." ²⁰⁰ Florida has subscribed to the view that this general rule should be applied

197. FLA. STAT. § 70.001(2) (1995) (emphasis added).

198. See, e.g., *Conner v. Reed*, 567 So. 2d 515, 518-19 (Fla. 2d DCA 1990).

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

200. *Orlando Sports Stadium, Inc. v. State*, 262 So. 2d 881, 884 (Fla. 1972).

on an ad hoc factual basis to determine whether an action constitutes a public nuisance.²⁰¹

Although a noxious use need not rise to the level of a public nuisance, it must potentially inflict injury upon a community.²⁰² It is unclear how courts will distinguish between public nuisances and noxious uses for purposes of the PPRPA. However, the United States Supreme Court, in *Lucas*, eliminated noxious uses as an exception to categorical takings based on a total economic devaluation, because the Court found that it was difficult to distinguish between regulations conferring benefits and regulations preventing harmful uses.²⁰³

Under the Reorganization Act, the legislature granted state governmental entities the authority to consider the "cumulative impact on the surrounding area" when determining whether to issue dredge and fill permits.²⁰⁴ Cumulative impact analysis is designed to equitably distribute dredge and fill activities in a manner that maintains water quality standards and is in the public interest.²⁰⁵ Since governmental entities may consider cumulative impacts when determining whether to grant dredge and fill permits, compensation may be avoided under the nuisance exception to the PPRPA if the governmental entity can demonstrate that the cumulative impacts of the proposed land use will cause damage to the public by compromising water quality standards or other public interests.

201. *Id.* ("It is not possible to define comprehensively 'nuisances' as each must turn upon its facts and be judicially determined.").

202. See Powell, *supra* note 81 (manuscript at 45, on file with author).

203. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1026. The Court in *Lucas* stated:

When it is understood that "prevention of harmful use" was merely our early formulation of the police power justification necessary to sustain (without compensation) any regulatory diminution in value; and that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings" — which require compensation — from regulatory deprivations that do not require compensation.

Id.

204. 1993, Fla. Laws ch. 93-213, § 30(8) (codified at FLA. STAT. § 373.414(8) (1995)). "[C]umulative impact analysis . . . insure[s] that the Department [of Environmental Protection] . . . consider 'the cumulative impacts of similar projects which are existing, under construction, or reasonably expected in the future.'" Bruce Wiener & David Dagon, *Weilands Regulation and Mitigation After the Florida Environmental Reorganization Act of 1993*, 8 J. LAND USE & ENVTL. L. 521, 539 (1993) (quoting *Conservancy, Inc. v. A. Vernon Allen Builder, Inc.*, 580 So. 2d 772, 778 (Fla. 1st DCA), *rev. denied*, 591 So. 2d 631 (Fla. 1991)).

205. Wiener & Dagon, *supra* note 204, at 539.

6. *Temporary Impacts Exception*

Although temporary deprivation of land uses are compensable under takings jurisprudence,²⁰⁶ the PPRPA exempts temporary impacts placed on land from the definition of "inordinate burden."²⁰⁷ Thus, in this respect, takings jurisprudence is more expansive than the PPRPA.

C. *Mitigation through Written Settlement Offers*

One hundred and eighty days prior to filing an action for compensation under the PPRPA, a landowner must inform in writing the appropriate governmental entity of the landowner's intent to seek compensation.²⁰⁸ During this 180-day period, the governmental entity must attempt to resolve the landowner's grievance through a written settlement offer.²⁰⁹

Courts are required to consider the written settlement offer in determining whether reasonable alternatives were offered to the landowner that would have relieved the property from inordinately burdensome regulations.²¹⁰ Generally, no compensation will be awarded if a court determines that reasonable alternatives were available to the landowner and the landowner refused to accept the alternatives.²¹¹ Also, the landowner may be subject to paying the governmental entity's attorney's fees and court costs if the landowner has failed to accept any reasonable alternatives included in the settlement offer.²¹² Thus, the settlement offer may prove to be an important tool for the government to avoid PPRPA compensation and to encourage landowners to accept reasonable mitigating alternatives. The settlement offer may effectuate the following:

- (1) An adjustment of land use or permit standards;
- (2) A request for modification of the requested land use;
- (3) A transfer of developmental rights;
- (4) A request for land swaps or exchanges;
- (5) Mitigation;
- (6) A requirement that locates the land use in the least sensitive portion of the property;
- (7) A condition on the desired land use or development;

206. See *Lucas*, 505 U.S. at 1007 (citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987)).

207. 1995, Fla. Laws ch. 95-181, § 1(3)(e).

208. *Id.* § 1(4)(a).

209. *Id.* § 1(4)(c).

210. *Id.* § 70.001(6)(a).

211. See *infra* notes 254-257 and accompanying text.

212. See *infra* notes 254-257 and accompanying text.

- (8) A request for a more comprehensive study of the proposed land use;
- (9) The issuance of a variance or special exception to the permit;
- (10) The purchase of the real property; or
- (11) No change to the governmental action.²¹³

Since courts are required to consider whether the mitigating alternatives offered by the government were sufficient to relieve any "inordinate burden" caused by the regulation at issue,²¹⁴ the key issue in PPRPA litigation will likely surround a question whether reasonable alternatives were offered to the landowner in the written settlement offer.

A settlement offer that includes a modification, variance, or special exception to the regulation at issue must continue to "protect the public interest served by the regulation at issue and be the appropriate relief" available to prevent an inordinate burden to the property.²¹⁵ This requirement precludes governmental entities from making modifications, variances, or special exceptions that may contravene the purpose of the regulation merely to avoid compensation under the act.²¹⁶ However, the PPRPA does not specifically contain a citizen suit provision enabling third parties to stop the governmental entity from issuing mitigating alternatives that completely dilute the effectiveness of the regulation.

Florida courts generally deny third party standing in the context of land use permitting.²¹⁷ If courts also prevent third parties from intervening in settlement offers under the PPRPA, no safeguards will exist to preclude governmental entities from avoiding compensation under the act by merely issuing variances that are in derogation to the public interest.

The PPRPA makes a distinction between settlement offers that exempt a property from a regulation and settlement offers that

213. FLA. STAT. § 70.001(4)(c) (1995).

214. *Id.* § 70.001(6)(a)

215. *Id.* § 70.001(4)(d)1.

216. *Id.*

217. To appeal a permit determination, parties must seek review under the *Florida Administrative Procedure Act*. FLA. STAT. § 120.57(6) (1995). To establish standing under the *Florida Administrative Procedure Act*, a party must have a "substantial interest" in the governmental activity. See *Friends of the Everglades, Inc. v. Board of Trustees of the Internal Improvement Trust Fund*, 595 So. 2d 186, 188 (Fla. 1st DCA 1992) (citing *Agrico Chem. Co. v. Department of Envtl. Reg.*, 406 So. 2d 478 (Fla. 2d DCA 1981)).

A party seeking to show a substantial injury must demonstrate:

- (1) that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing; and
- (2) that his substantial injury is of the type or nature which the proceeding is designed to protect.

Id. (citing *Agrico*, 406 So. 2d at 482).

exempt a property from a statute.²¹⁸ If the settlement offer contravenes the application of a *statute*, both the governmental entity and the landowner must jointly seek judicial approval "to ensure that the relief granted protects the public interest served by the statute" ²¹⁹ This requirement provides safeguards against the government's ability to avoid compensation by ignoring statutory provisions.

Wetlands development generally requires the destruction of wetlands through dredging and filling. Therefore, the government's ability to find reasonable alternatives to regulations that prohibit wetlands destruction is limited. Mitigation techniques may serve a significant role in this context.

"Mitigation includes any type of activity performed to minimize the degradation of wetlands, particularly through their restoration, enhancement, or creation."²²⁰ Governmental entities may rely on four types of mitigation techniques to provide reasonable alternatives that relieve any inordinately burdensome regulations.²²¹ These four techniques are (1) wetland avoidance, (2) wetland restoration, (3) wetland enhancement, and (4) wetland creation.²²²

1. Wetland Avoidance

Due to its relatively low cost, wetland avoidance is generally the most cost-effective alternative for relieving property from inordinately burdensome regulations.²²³ Wetland avoidance involves strategical placement of land use activities so that these activities do not affect environmentally sensitive wetlands.²²⁴ Since wetland avoidance provides an alternate location for the desired land use, courts may determine that this mitigation technique adequately relieves any inordinately burdensome regulations affecting a

218. FLA. STAT. §§ 70.001(4)(d) 1-2 (1995).

219. *Id.* § 70.001(4)(d)2.

220. Wiener & Dagon, *supra* note 204, at 521-22 (citing DAVID SALVESEN, WETLANDS: MITIGATING AND REGULATING DEVELOPMENT IMPACTS 3 (Nigel Quinney ed., 1990)).

"Mitigation" means an action or series of actions that will offset the adverse impacts on the waters of the state that cause a proposed dredge and fill project to be not permittable. "Mitigation" does not mean:

(a) avoidance of environmental impacts by restricting, modifying or eliminating the proposed dredging and filling.

(b) cash payments, unless payments are specified for use in a previously identified, Department endorsed, environmental or restoration project and the payments initiate a project or supplement an ongoing project .

FLA. ADMIN. CODE ANN. r. 62-312.310(6) (1995).

221. Wiener & Dagon, *supra* note 204, at 574.

222. *Id.*

223. *See id.* at 575.

224. *Id.*

landowner's property. However, wetland avoidance may not be feasible if the landowner's property is substantially composed of wetlands. In this case, no suitable alternative land would be available for the requested land use.²²⁵ Under these circumstances, a different technique must be used.

2. Wetland Restoration

Wetland restoration focuses on allowing the dredging and filling of an existing wetland in exchange for returning "a damaged wetland to its previous ecologically productive state."²²⁶ From an economic standpoint, wetland restoration is generally preferred over wetland creation.²²⁷ However, under the PPRPA, governmental entities may offer wetland restoration as a relief to an inordinately burdensome regulation only if the restoration "protect[s] the public interest served by the regulations."²²⁸

3. Wetland Enhancement

Wetland enhancement generally involves "the selective enhancement of 'a wetland to boost one desirable attribute, such as waterfowl habitat, over another, such as flood control.'"²²⁹ Since the arguments supporting and opposing wetland enhancement are similar to those of wetland restoration, governmental entities should similarly offer wetland enhancement as a relief to an inordinately burdensome regulation only if the enhancement "protect[s] the public interest served by the regulations."²³⁰

4. Wetland Creation

Wetland creation is the most expensive form of mitigation technique because it requires landowners to create "'wetlands from scratch, turning dry woods into swamps, [and] sandy shores into salt marshes.'"²³¹ Although wetland creation is an appealing alternative, it has two significant disadvantages: (1) "wetlands are difficult to create because experts in the field have yet to understand the

225. *Id.*

226. *Id.* (citing John D. Brady, *Mitigation of Damage to Wetlands in Regulatory Programs and Water Resource Projects*, 41 MERCER L. REV. 893, 931 (1990)).

227. *See id.* at 576.

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

229. Wiener & Dagon, *supra* note 204, at 577.

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

231. Wiener & Dagon, *supra* note 204, at 577 (quoting DAVID SALVESEN, *WETLANDS: MITIGATING AND REGULATING DEVELOPMENT IMPACTS* 3 (Nigel Quinney ed., 1990)).

interdependencies between a wetland's vegetation and its animals;"²³² and (2) wetland creation is extremely costly.²³³

Wetland creation may not constitute a suitable settlement offer for two reasons. First, courts may determine that wetland creation is excessively speculative to constitute a reasonable alternative that continues to "protect the public interest served by the regulations."²³⁴ Second, courts may determine that wetland creation is excessively costly to constitute a reasonable alternative to landowners. Given the uncertainties surrounding wetland creation and the high costs involved in its implementation, courts may determine that this is not a reasonable alternative to relieving inordinately burdensome regulations.

5. Mitigation Banking

The mitigation banking process resembles a normal savings account by treating wetlands as fungible commodities that may be interchanged through a credit system. In a normal savings account, a person deposits money into an account. While the dollar amount is credited to that person's account, the actual money deposited is placed into the bank's general reserves and used for other purposes. The person's savings account represents the amount of money that person is entitled to withdraw at any time; however, the amount withdrawn may not exceed the amount deposited. Similarly, mitigation banking is a process where a landowner accumulates mitigation credits by creating, restoring, or preserving wetlands in a given area.²³⁵ Credits are assessed by evaluating the positive effects of the mitigation activity on the environment.²³⁶ The landowner may use these credits to engage in land use activities that result in the destruction of wetlands in other areas.²³⁷ The amount of destroyed wetlands may not exceed the amount of the credits accumulated through the earlier mitigation process.²³⁸ Like a normal savings account, the credits received through mitigation banking are fungible because one does not develop the same wetlands that were used to

232. *Id.* at 578. "A Florida study shows an overall survival rate of 27 percent for created wetlands but with the rate at only 12 percent for freshwater sites." Robert E. Beck, *The Movement in the United States to Restoration and Creation of Wetlands*, 34 NAT. RESOURCES J. 781 (1994).

233. Wiener & Dagon, *supra* note 204, at 578.

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

235. Wiener & Dagon, *supra* note 204, at 579 (citing CATHLEEN SHORT, MITIGATION BANKING 1-2 (1988)).

236. *Id.*

237. *Id.*

238. *Id.*

obtain the credit. Instead, the credits are transferable and are used to develop other wetlands areas.

Governmental entities may use mitigation banking as a means of providing reasonable alternatives to the landowner for developing a wetland. Mitigation banking may provide relief from otherwise inordinately burdensome regulations.²³⁹ The PPRPA states:

"[I]nordinately burdened" mean[s] that an action . . . has directly restricted . . . the use of real property such that the property owner is *permanently* unable to attain the reasonable, investment-backed expectation for the existing use of the real property . . . or that the property owner is left with existing . . . uses that are unreasonable . . . [and] bears permanently a disproportionate share of a burden imposed for the good of the public . . .²⁴⁰

Thus, the issues regarding whether mitigation banking relieves a landowner from an otherwise inordinately burdensome regulation become: (1) whether the mitigation banking process retains the property's investment-backed expectations; and (2) whether requiring a landowner to expend funds by accumulating or purchasing credits elsewhere results in a landowner bearing "a disproportionate share of a burden imposed for the good of the public."²⁴¹

Courts will likely find that the mitigation-banking process retains a property's reasonable investment-backed expectations because this process gives a landowner the ability to engage in land use activities that may otherwise be prohibited by wetlands regulations. Thus, mitigation banking preserves a property's value. Also, since compensation under the PPRPA hinges on whether a regulation *permanently* restricts a land use,²⁴² mitigation banking relieves a governmental entity from paying compensation for any temporary restrictions that may result while the landowner obtains the mitigation credits necessary to develop the property.

However, since mitigation credits are obtained by creating, restoring, or preserving other wetlands, a landowner may argue that

239. The importance of mitigation banking as a means of minimizing adverse impacts of wetlands regulation has been recognized by the Florida Legislature.

The Legislature finds that the adverse impacts of activities regulated under this part may be offset by the creation and maintenance of regional mitigation areas of mitigation banks. Mitigation banks can minimize mitigation uncertainty and provide ecological benefits. Therefore, the department and the water management districts are directed to participate in and encourage the establishment of private and public regional mitigation areas and mitigation banks.

FLA. STAT. § 373.4135 (1995).

240. FLA. STAT. § 70.001(4)(e)1 (1995) (emphasis added).

241. *Id.*

242. *Id.*

mitigation banking places an "inordinate burden" on the "existing uses" of the wetlands subject to the mitigation.²⁴³ Thus, the mitigation banking process may relieve the inordinate burden of the property which the landowner seeks to develop, while simultaneously creating a secondary inordinate burden on the mitigating property. The landowner may then attempt to seek compensation under the PPRPA for the secondary burden placed on the mitigating property.

Landowners may also argue that governmental entities are required to pay compensation for requiring the creation, restoration, or preservation of another wetland because this requirement unreasonably results in the landowner's disproportionately sharing a burden imposed for the public good—the cost of creating, restoring, or preserving wetlands. Thus, the landowner may also seek compensation for these costs under the PPRPA. *If courts determine that these costs are compensable under the PPRPA, governmental entities should choose mitigation sites that have no, or very little, "existing uses."*²⁴⁴

However, courts may determine that secondary burdens are not compensable under the PPRPA because the PPRPA treats such burdens as viable forms of settlement offers²⁴⁵ which are designed to relieve any inordinate burdens placed on a property and which must be accepted by the landowner in order to be implemented. Since the landowner must accept the settlement offer in order for the offer to become effective, a court may find that the landowner waived any right to assert that a secondary burden on the mitigating property is compensable under the PPRPA.

D. Ripeness Decisions

If a settlement offer is not accepted by the landowner during the 180-day period, governmental entities must issue a written ripeness decision describing the property's allowable land uses.²⁴⁶ The

243. This article refers to burdens placed on properties used for mitigation banking as secondary burdens. Mitigation banking creates burdens by requiring landowners to offset the environmental impact of a property's "existing uses" by restricting the "existing uses" of other wetlands through creation, restoration or preservation. See *supra* notes 235, 240-42 and accompanying text.

244. FLA. STAT. § 70.001(3)(f) (1995) (defining the term "existing use" as including the property's current use and any suitable "reasonably foreseeable, non-speculative land uses"). *Id.*

245. *Id.* § 70.001(4)(c).

246. *Id.* § 70.001(5)(a). A governmental entity's failure to issue a ripeness decision during the 180-day period "shall operate as a ripeness decision that has been rejected by the property owner." *Id.*

ripeness decision, as a matter of law, deems the landowner's claim ripe for review.²⁴⁷ This provision significantly differs from normal takings jurisprudence by allowing the landowner's claim to become ripe at the end of the 180-day period, regardless of whether other administrative remedies are available.²⁴⁸ Generally, under takings jurisprudence, a landowner must exhaust all administrative remedies before a takings claim for compensation becomes ripe.²⁴⁹ However, under the PPRPA, once the written ripeness decision is filed, the landowner may seek compensation. A claim under the PPRPA must be presented within one year "after a law or regulation is first applied by the governmental entity to the property at issue."²⁵⁰

E. Judicial Involvement in the PPRPA

The circuit court of the county where the land is located has jurisdiction to hear claims arising from the PPRPA.²⁵¹ The court must determine: (1) "whether an existing use of the real property or a vested right to a specific use of the real property existed" prior to the existence of the regulation at issue; and, if so, (2) whether, "considering the settlement offer and the ripeness decision, the governmental entity . . . inordinately burdened the real property."²⁵² If a court determines that the governmental action inordinately burdens the property, a jury is impaneled to determine the amount of compensation that the landowner should be awarded.²⁵³

Compensation is determined by calculating the difference between the property's fair market value prior to the governmental action and the fair market value after the governmental action, taking into account the settlement offer and the ripeness decision.²⁵⁴ Compensation also includes prejudgment interest, attorney's fees, and reasonable costs associated with the litigation.²⁵⁵

247. *Id.*

248. *Id.*

249. See discussion *supra* part III.B.3 and part III.C.2.

250. FLA. STAT. § 70.001(11) (1995). However, the statute of limitations for bringing a claim under the PPRPA is tolled until any administrative or judicial proceedings that the landowner brings against the governmental entity are concluded. *Id.*

251. *Id.* § 70.001(5)(f).

252. *Id.* §§ 70.001(6)-(9). If more than one governmental entity inordinately burdens the land, then the judiciary must determine "the percentage of responsibility [that] each governmental entity bears with respect to the inordinate burden." *Id.*

253. *Id.*

254. *Id.* The fair market value prior to the governmental action includes any reasonable investment-backed expectations. *Id.*

255. *Id.* §§ 70.001(6)(b)-(c)1. The award of prejudgment interest dates back to the date that the landowner presented the claim to the governmental entity. *Id.* § 70.001(6)(f).

The prevailing party is entitled to recover attorney's fees and court costs if the court determines that the settlement offer, including the ripeness decision, either failed to constitute a bona fide offer to resolve the claim²⁵⁶ or constituted a bona fide claim that the landowner should have accepted.²⁵⁷

This provision is important because it gives landowners and governmental entities the incentive to resolve the dispute equitably without requiring a judicial determination. Since attorney's fees may be substantial, landowners may be more willing to accept reasonable settlement offers rather than pursue judicial determinations that may subject them to liability for the government's attorney's fees and court costs. Similarly, governmental entities faced with paying substantial attorney's fees and court costs for both sides may be more inclined to offer reasonable solutions to regulations that impose inordinate burdens on the landowner's property.

V. CONCLUSION

The PPRPA should have a considerable effect on Florida's ability to regulate wetlands. Although the PPRPA subjects governmental entities to another cause of action requiring compensation for inequitable restrictions on land uses, the PPRPA may result in more good faith efforts by landowners and the state to find reasonable solutions to these restrictions. Thus, the PPRPA's effects on the duty of all governmental entities to regulate wetlands may not be all negative. The PPRPA also provides governmental entities with many options to eliminate the inordinate burdens that wetlands regulations may place on private property.

Whether the PPRPA is successful in converging the interests of private landowners and governmental entities depends largely upon judicial interpretations of the act. The PPRPA encourages parties to sit at the negotiating table by softening compensation and ripeness requirements, but discourages parties from seeking judicial determinations by subjecting each party to potentially costly attorney's fees and court costs. When determining whether compensation should be paid under the PPRPA, courts should focus on the reasonableness of any mitigating alternatives offered by the governmental entity. This approach would give both landowners

256. *Id.* §§ 70.001(6)(c)1-2. A determination that the settlement offer failed to constitute a bona fide offer to resolve the issue results in attorney's fees and court costs being awarded to the landowner. *Id.* § 70.001(6)(c)1.

257. *Id.* A determination that the landowner failed to accept a bona fide settlement offer results in attorney's fees and court costs being awarded to the governmental entity. *Id.* § 70.001(6)(c)2.

and governmental entities a strong incentive to offer and accept reasonable solutions.