Private Property Rights Legislation: The "Midnight Version" and Beyond

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I. INTRODUCTION

From the white sandy beaches outlining the state to the lush pine forests covering the state's interior, Florida abounds with natural

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1. Justice Holmes' words in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922), are possibly more true today than they were more than 70 years ago. As the language suggests, however, government's regulatory power is not absolute. This Comment will examine the Florida Legislature's recent attempts to define the extent of this power.
beauty. Confronted with the state's staggering population growth and corresponding urbanization, the Florida Legislature has taken the initiative and over the past twenty years has attempted to create a regulatory climate favorable to the protection of the state's environment. From the Comprehensive Planning Act of 1975 through the Growth Management Act of 1985 and to the recent merger of the Department of Natural Resources and the Department of Environmental Regulation, the Florida Legislature has continued to provide regulatory mechanisms to protect the natural beauty of the state for future generations.

These efforts, however, are often seen to be diametrically opposed to the private property rights which Floridians have long held sacred. While a property owner adversely affected by an environmental or land-use regulation may bring an inverse condemnation suit against the state, the "ad hoc" analysis courts use in determining these cases...

2. In fact, the name Florida means "land of flowers." The state was given this colorful name by the Spanish explorer, Juan Ponce de Leon, who discovered the State on April 2, 1513 in his search for the mythical Fountain of Youth. See Allen Morris, The Florida Handbook 1993-1994 391 (1993).


4. Ch. 85-55, 1985 Fla. Laws 207. One commentator noted that without the Growth Management Act, we would be continuing to "spread[] a thin veneer of development, like peanut butter, across our natural landscape." See Thomas G. Pelham, Shaping Florida's Future, 7 J. Land Use & Envtl. L. 321, 323 (1992) (discussing the Act's goal of containing "urban sprawl").


6. The importance of protecting Florida's environment is also emphasized throughout the State Comprehensive Plan. See, e.g., Fla. Stat. § 187.201(9)(a) (1993) ("Florida shall ensure that development and marine resource use and beach access improvements in coastal areas do not endanger . . . important natural resources."); id. § 187.201(10)(a) ("Florida shall protect and acquire unique natural habitats and ecological systems. . . ."); id. § 187.201(16)(a) ("In recognition of the importance of preserving the natural resources and enhancing the quality of life of the state, development shall be directed to those areas [which can] accommodate growth in an environmentally acceptable manner.").

7. See, e.g., Fla. Const. art. X, § 6 ("No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner. . . .""). While the language in the Florida Constitution is similar to that of the Takings Clause in the Fifth Amendment to the U.S. Constitution, the eminent domain provision in the Florida Constitution provides greater protection of private property rights. See Talbot D'Alemberis, The Florida State Constitution—A Reference Guide 140 (1991). The State Comprehensive Plan also recognizes the inherent conflict between private property rights and environmental protection. See Fla. Stat. § 187.201(15)(a) (1993) ("Florida shall protect private property rights and recognize the existence of legitimate and often competing public and private interests in land use regulations and other government action.").
creates additional uncertainty for property owners. In the 1993 Regular Session, the conflict between land-use regulation and private property rights again came to the forefront. House Bill 1437, introduced by Representative Burt Harris and cosponsored by over fifty members, proposed to statutorily define when a regulatory taking occurs. This bill did not pass, but it led to the creation of a study commission charged with assessing the balance between private property rights and land-use regulation within the state. The results of the commission's study were eventually incorporated into a piece of pro-private property rights legislation introduced in 1994. Although this proposed legislation died on the Calendar, the issue will likely resurface in upcoming legislative sessions. Therefore, the work product of the study commission and the subsequent legislative action on the taking issue warrant considerable discussion.

This Comment will attempt to assess the impact which the 1994 legislation could have had on the delicate balance between environmental protection and private property rights in Florida. Part II will provide an overview of the convoluted federal and Florida takings jurisprudence which initially prompted the introduction of House Bill 1437 in 1993. Parts III and IV will discuss previous legislative attempts to address the taking issue and will trace the history of the 1994 property rights legislation from its genesis in the 1993 Session, to the study commission, and to its development during the 1994 Session. Part V will suggest the path future legislatures should take in assessing the private property rights issue to provide a workable statutory balance between environmental protection and private property rights.

II. THE MUDDY WATERS OF TAKINGS JURISPRUDENCE

It is without question that a governmental entity which condemns property through its power of eminent domain must pay the owner "just compensation." The Fifth Amendment to the U.S. Constitution requires no less. When this power is exercised, there is said to have

8. For a discussion of judicial takings analysis and the lack of certainty provided by the "ad hoc" nature of this analysis, see discussion infra part II.
10. See Fla. HB 1437 (1993). The bill proposed a 40% reduction in value as the threshold for a regulatory taking. A regulation which decreased the value of property by 40% or more would trigger a requirement that the governmental unit promulgating the regulation must either purchase the subjected property or rescind the regulation.
13. See also FLA. CONST. art. X, § 6 (Eminent Domain Clause); FLA. STAT. ch. 73 (1993).
been a taking of the property. A taking may also result where the
government has not \textit{formally} condemned the property but has \textit{effectively}
done so through excessive regulation of the property.\textsuperscript{14} The
mechanism through which a property owner recovers compensation
for this type of taking is an inverse condemnation suit against the gov-
ernmental entity which promulgated the offensive regulation.\textsuperscript{15} This
Part describes the analysis which federal and Florida courts use to de-
terminate when such a taking occurs.\textsuperscript{16}

\section{A. Federal Cases}

Justice Holmes uttered the most famous words in takings jurispru-
dence in \textit{Pennsylvania Coal Co. v. Mahon}\textsuperscript{17} when he announced
"[t]he general rule at least is that while property may be regulated to a
certain extent, if regulation \textit{goes too far} it will be recognized as a tak-
ing."\textsuperscript{18} This phrase signaled the birth of a new type of taking claim—
the regulatory taking. The Court recognized that although a land use
regulation which \textit{"goes too far"} does not \textit{"take"} an individual’s
property in the physical sense, its effect is the same.\textsuperscript{19} The brevity and
simplicity of Holmes’ rule is its beauty, but also its blemish for it begs
the question of \textit{how far is too far}.

The United States Supreme Court has consistently recognized that
inherent in state police power is the authority to prevent public nuis-
ances.\textsuperscript{20} A public nuisance is defined as a property use which endan-
gers the public health, safety, or morals.\textsuperscript{21} For example, operation of a
brick mill or quarry in a residential area has been deemed a \textit{“noxious”} use of property and thus has been prohibited as a public nui-

\begin{enumerate}
\item[14.] See United States v. Clarke, 445 U.S. 253, 255-57 (1980) (discussing the legal and prac-
tical differences between an inverse condemnation suit and a condemnation proceeding).
\item[15.] While \"inverse condemnation\" is the precise title for these actions, the issue to be de-
termined by the court is whether the governmental action effected a \"taking\" of the property,
thereby implicating the constitutional requirement of just compensation. See \textit{id.} at 257. Accord-
ingly, inverse condemnation cases are often referred to as \"regulatory taking cases\" or simply
\"taking cases.\"
\item[16.] This Part does not attempt to provide an exhaustive discussion of takings jurispru-
dence, but will provide the reader with the background necessary to understand the issues ad-
dressed in the 1994 property rights legislation. For a more complete discussion of regulatory
takings, see Patrick Wiseman, \textit{When the End Justifies the Means: Understanding Takings Juris-
\item[17.] 260 U.S. 393 (1922).
\item[18.] \textit{Id.} at 415 (emphasis added).
\item[19.] \textit{Id.} at 414.
\item[20.] See Goldblatt v. Town of Hempstead, 369 U.S. 590, 592-93 (1962); Hadacheck v. Se-
bastian, 239 U.S. 394, 410 (1915); Mugler v. Kansas, 123 U.S. 623, 658, 667 (1887); Fertilizing
\item[21.] See \textit{Mugler}, 123 U.S. at 659.
\end{enumerate}
sance. It is a legislative function to define what constitutes a public nuisance, and courts are not at liberty to question the legislature's judgment so long as there is a "substantial relationship" between the regulation and the protection of the public health, safety, or morals.

Because "all property . . . is held under the implied obligation that . . . [its] use . . . shall not be injurious to the community," the bundle of rights making up an owner's property does not—and could never—include the right to use the property in a nuisance-like manner. Accordingly, where the legislature defines a property use as a public nuisance, the state has no duty to compensate the property owner when it prevents that use, notwithstanding a substantial or complete diminution in value resulting from the regulation of the property.

As the "substantial relationship" test suggests, the validity of a land-use regulation initially turns on whether the regulation is a legitimate exercise of the police power. In this regard, an "essential nexus" is required between the regulation's effect on the property and the public interest purportedly served by the regulation. Where no nexus exists, the regulation will be held invalid as an unreasonable exercise of the police power. A regulation found offensive under this analysis is void, and does not give rise to a just compensation claim; however, the property owner is entitled to compensation for damages suffered during the period in which the regulation deprived him all use of the property.

22. See Hadacheck, 239 U.S. at 405; Goldblatt, 369 U.S. at 593.
23. See Mugler, 123 U.S. at 661.
24. See id. at 665.
25. The ability of the legislature to "newly decree" a property use a public nuisance is now in question. See Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899 (1992) ("[T]he legislature's recitation of a [nuisance] justification cannot be the basis for departing from [the] categorical rule that total regulatory takings must be compensated.").
26. See Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987). In Dolan v. City of Tigard, 114 S. Ct. 2309 (1994), the Court expanded on the Nollan holding as it relates to exactions imposed on property owners as conditions for the grant of building permits and zoning changes. The Court held that in addition to an "essential nexus," the government is required to show a "rough proportionality" between the exaction and the proposed development's impact on the public. Id. at 2319. Although the impact need not be specifically attributable to the proposed development, the government must make some effort to quantify its findings that the exaction is necessary to protect the public interest. Id. In this regard, the government must prove that:

the requirement has some reasonable relationship or nexus to the use to which the property is being made [rather than that the requirement] is merely being used as an excuse for taxing property simply because at that particular moment the landowner is asking the city for some license or permit.

Id. (quoting Simpson v. North Platte, 292 N.W.2d 297, 301 (Neb. 1980)).
27. Nollan, 483 U.S. at 837; see also Wiseman, supra note 16, at 438 (describing the practical difference between a regulation declared invalid as a violation of due process and a regulation deemed unconstitutional because it goes "too far").
Even if the "essential nexus" requirement is met and the regulation furthers a legitimate public purpose, the regulation may still effect a taking of the property. Accordingly, the court's focus then shifts to assessing whether the regulation goes "too far." As Justice Holmes suggested in *Mahon*, this question involves a balancing of the public interest served by the regulation and the extent to which the individual's private property interest is affected. While the balancing test remains "ad hoc," the Court has identified various factors to be considered in the analysis.

The three-pronged balancing test set forth in *Penn Central Transportation Co. v. City of New York* is generally acknowledged as the genesis of the "modern" taking analysis. The issue in *Penn Central* was whether a New York historic preservation law which prohibited Penn Central from erecting a fifty story high-rise office tower on its property above historic Grand Central Terminal effected a taking of Penn Central's property. The Court determined that the law did not effect a taking of the property. The Court's analysis balanced the diminution in value to the property and interference with Penn Central's investment-backed expectations with the public interest served by the regulation.

The Court held that the city's designation of historic properties, such as Grand Central Terminal, as landmarks was a legitimate state interest since landmark preservation has a beneficial effect on the quality of life in the city, and the landmarks are economically and aesthetically valuable community resources. The Court also held that the diminution in value of Penn Central's property alone was not significant enough to effect a taking. Finally, the Court held that the preservation law did not interfere with Penn Central's investment-

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32. See *Penn Central*, 438 U.S. at 107.
33. Id. at 138.
34. Id. at 124.
36. Id. at 131-32 (comparing situations where the Court found no taking although market value declined by 75% to 87.5%). Additionally, the Court noted that to the extent Penn Central was burdened by the designation of its property as a historic landmark, there was a "reciprocity of advantage" received by Penn Central as a result of other properties in the city also designated as historic landmarks. Id. at 132.
backed expectations regarding the use of its property. Specifically, the Court noted that Penn Central could continue to use the property as a railroad terminal with office space just as it had for the past sixty-five years. The Court also noted that the prohibition of an office tower did not foreclose the possibility that construction of some other structure would be permitted.

In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, the Court again emphasized in its taking analysis the importance of interference with investment-backed expectations. In that case, a regulation restricting the mining of coal was held not to effect a taking of Keystone's property since only two percent of its total coal reserves would actually be affected by the regulation. Similarly, a recent case from the U.S. Court of Appeals for the Eleventh Circuit, *Reahard v. Lee County*, suggests that interference with investment-backed expectations is the most important factor in the taking analysis.

In 1992, the U.S. Supreme Court decided *Lucas v. South Carolina Coastal Council*, which many hoped would finally clarify takings jurisprudence, or at least provide the courts and legislatures greater direction in applying and weighing the factors set out in *Penn Central*. The decision did neither. Instead, the "missile" launched by the Court left a crater in the already moon-like surface of takings jurisprudence and its reverberations are being felt throughout Florida's land-use and environmental regulations.

The facts of *Lucas* are relatively simple. In 1986, developer David Lucas purchased two oceanfront lots on the Isle of Palms in South Carolina for $975,000 on which he intended to build single-family homes. In 1988 the South Carolina Legislature enacted the Beach Front Management Act (BFMA) which effectively made it impossible for Lucas to construct any permanent habitable structures on his properties. Lucas brought suit in state court claiming that the BFMA

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37. Id. at 136.
38. Id.
41. Id. at 496.
42. 968 F.2d 1131, 1136 (11th Cir. 1992) ("Perhaps most importantly, what was the diminution in the investment-backed expectations of the landowner, if any, after passage of the regulation?").
44. In his dissent, Justice Blackmun expressed concern over the breadth of the new "per se" rule and chastised the majority for "launch[ing] a missile to kill a mouse." Id. at 2904 (Blackmun, J., dissenting).
45. Id. at 2889.
46. Id.
rendered his tracts "valueless" and that the regulations went "too far" and effected a taking of his properties.47 The trial court agreed and ordered the state to pay Lucas "just compensation" of $1,232,387.50.48 The South Carolina Supreme Court reversed.49

In reversing the South Carolina Supreme Court, the Court announced a "new" takings rule by holding that a categorical taking occurs where a regulation deprives the property owner "all economically beneficial or productive use" of his property.50 As quickly as the Court announced this per se rule, however, it noted an exception to the rule.51 This exception allows the state to avoid compensation where the regulation is merely prohibiting a use which would not have been permitted under "background principles of [state] nuisance and property law."52

The Court did not clearly define what it meant by "background principles of [state] nuisance and property law," but a plain meaning of the language suggests that the exception includes only those principles which are inherent in the state's common law. This, however, grounds the determination of prohibited, nuisance-like uses in those uses prohibited at the time the owner purchased his property.53 In this regard, the legislature is restricted in defining a particular use as a "new" nuisance without having to compensate an owner who is thereby denied all economically beneficial use of his property. Stated another way, the exception provides that the only instance where the state can deprive a property owner all economically beneficial use of his property and avoid compensation is where the state is prohibiting a use which was not inherent in the owner's title when he purchased the property.54 If the owner never had the right to use the property in a given manner, nothing was "taken" when the state decreed that the owner could not use his property in that manner.

Although the Court noted that nuisance law is not static and that "changed circumstances or new knowledge may make what was previ-

47. Id. at 2890.
49. Id.
50. Id. at 2893-94. Although Justice Scalia claimed the "per se" rule was a long standing test of the Court, he cited no cases directly supporting this categorical rule.
51. See id. at 2901.
52. Id. at 2901-02. Arguably, the exception to the "per se" rule suffers from the same flaws which led the Court to reject the distinction between harm-preventing and benefit-promoting regulations. Specifically, the balancing test, which generally accompanies a nuisance determination, erodes the "objective, value-free basis" which the majority attempted to accomplish with a "per se" rule. See Florida Rock Indus. v. United States, 18 F.3d 1560, 1565 (Fed. Cir. 1994).
53. See Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899 (1992); id. at 2913 n.16 (Blackmun, J., dissenting).
54. See id. at 2899.
ously permissible no longer so," the exception to the categorical rule focuses on whether the use was prohibited by background principles of state nuisance law. Implicit in the exception is that there is a closed class of property uses which constitute nuisances and that the state can avoid compensation for a complete deprivation of value only where it is making one of these background principles explicit. Where a use is "newly legislated or decreed" to be a nuisance, however, the state must compensate an owner denied "all economically beneficial use" of his property. In reality, this should have little adverse impact on a state's ability to prospectively define a property use as a nuisance because both the majority and the dissent in Lucas acknowledged that the categorical rule is triggered only in the rare case where a regulation denies all economically beneficial use of property.

Arguably, this interpretation overrules cases such as Mugler v. Kansas and Hadacheck v. Sebastian in which the Court upheld legislative determinations of property uses that constitute a public harm and could therefore be prohibited under the state's police power. The Mugler line of cases is distinguishable, however, because in those cases the Court never upheld a legislative determination that a property use constitutes a nuisance where such a determination denies the property owner "all economically beneficial use" of his property.

Because the "per se" rule is applicable only in the narrow class of cases where all economically beneficial use of an owner's property is denied, in cases where the property owner retains at least some use of, or value in, his property, he may still be able to succeed in an inverse condemnation suit based on an analysis of the factors set out in Penn Central.

In Reahard, the court suggested additional issues which should be addressed in the takings analysis where the regulation deprives the property owner less than all use of his property.
In summary, the current federal takings jurisprudence consists of a three step analysis. **Step 1:** Is there a ‘‘nexus’’ between the public interest purportedly served by the regulation and the effect of the regulation on the property? If not, the regulation is an invalid exercise of the police power and is void. Even if the ‘‘nexus’’ exists, the regulation may still effect a taking of the property if, as determined in **Steps 2 or 3,** it ‘‘goes too far.’’ **Step 2:** Does the regulation deprive ‘‘all economically beneficial or productive use’’ of the property? If so, under *Lucas,* the owner is entitled to just compensation unless the regulation fits into the narrow ‘‘nuisance’’ exception. **Step 3:** If the regulation deprives the owner of less than all use of his property, the court will determine whether a taking occurred based on an ‘‘ad hoc’’ analysis considering the factors set out in *Reahard* and *Penn Central.*

### B. Florida Cases

An analysis of takings jurisprudence in Florida must begin with the landmark case of *Graham v. Estuary Properties, Inc.* Estuary Properties owned nearly 6500 acres of property near Fort Myers, Florida, on which it planned to construct a residential development. More than half of Estuary's property was covered by mangroves and only 526 acres of the property could be classified as nonwetlands. Estuary Properties applied for, and was denied a dredge and fill permit pursuant to section 380.06, *Florida Statutes.* After an unsuccessful administrative appeal, Estuary Properties brought suit against the state claiming that the denial of the permit constituted a taking.

The Florida Supreme Court held that the permit denial did not constitute a taking. The court noted that because Estuary Properties could amend its plan and still develop almost half of its property, the

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64. Subsequent to the Court's decision in *Dolan v. Tigard,* 114 S. Ct. 2309 (1994), however, *Step 1* actually consists of two “sub-steps” where conditions or exactions are involved. With the addition of the “rough proportionality” requirement, a regulation, condition, or exaction must be related both in *nature and extent* to the proposed development. *Id.* at 2317-20.

65. 399 So. 2d 1374 (Fla. 1981).

66. *Id.* at 1376.

67. *Id.*

68. *Id.* at 1377. The denial was based upon the adverse impact which the planned development would have on the surrounding water quality and ecosystem.

69. *Id.*

diminution in the value was not severe enough to establish a taking. The court also stated that the denial of the permit did not interfere with Estuary Properties’ investment-backed expectations regarding the use of its property. Specifically, the court noted that Florida’s extensive statutory scheme regulating the filling of wetlands could not give rise to a reasonable expectation that a permit to develop the property in any manner would be granted. Further, the court recognized that “[p]rotection of environmentally sensitive areas and pollution prevention are legitimate concerns within the police power.”

In the course of its analysis, the court noted that there is “no settled formula for determining when [a] valid exercise of police power stops and an impermissible encroachment on private property rights begins.” Thus, Florida courts also use an “ad hoc” analysis to determine whether governmental action effects a taking of private property. In this regard, the court in Estuary Properties identified a number of factors to be considered in the analysis. Although the analysis used by Florida courts is nearly identical to that used in federal courts, there are some issues which warrant discussion.

The court in Estuary Properties noted that a regulation which prevents a public harm is a legitimate exercise of the police power while a regulation merely conferring a public benefit is beyond the scope of the police power. In Lucas, however, the U.S. Supreme Court ridiculed the distinction between harm-preventing and benefit-conferring

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71. Id. at 1382. The county commission which denied Estuary’s permit application noted that a permit would be approved if Estuary reduced the density of its proposed development by half. Id. at 1377.

72. Id. at 1383.

73. Id. at 1382 ("[A]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injuries [sic] the rights of others.") (quoting Just v. Marinette County, 201 N.W.2d 761, 768 (Wisc. 1972)). But see Vatalaro v. Department of Envtl. Reg., 601 So. 2d 1223, 1229 (Fla. 5th DCA 1992) (constructive notice that the property is subject to environmental regulation is insufficient to defeat an owner’s taking claim where all economically viable use is precluded), rev. denied, 613 So. 2d 3 (Fla. 1992).

74. See Estuary Properties, 399 So. 2d at 1381.

75. Id. at 1374.

76. Id. at 1380-81. The factors stated by the court were whether there is a physical invasion of the property; whether the regulation precludes all economically reasonable use of the property; whether the regulation confers a public benefit or prevents a public harm; whether the regulation promotes the health, safety, welfare, or morals of the public; whether the regulation is arbitrarily and capriciously applied; and the extent to which the regulation curtails investment-backed expectations. Id. Interestingly, the court did not cite Penn Central as a basis for the factors used in its taking “formula” although the factors used by the court to balance the impact of the regulation on the property owner against the public purposes served by the regulation are essentially the same as those set out in Penn Central.

77. Id. at 1382.
regulations. The Court noted that the distinction is "often in the eye of the beholder" and "is difficult, if not impossible, to discern on an objective, value-free basis." Even in Estuary Properties the court admitted that the distinction is not often clear. Accordingly, the continued viability of this distinction in Florida law is doubtful.

In contrast, the issue of the conceptual severance which was mentioned, but not decided in Lucas, is well-settled in Florida. Conceptual severance effectively redefines the property interest subject to the taking claim and shifts the court's taking analysis from the regulation's effect on the property as a whole to its effect on the portion of the property burdened by the regulation. Application of the conceptual severance doctrine is typically beneficial to property owners because it narrows the property interest against which a taking is measured. This doctrine, however, is not recognized in Florida. In Department of Environmental Regulation v. Schindler, the court unequivocally stated that "[t]he focus is on the nature and extent of the interference with the landowner's rights in the parcel as a whole in determining whether a taking of private property has occurred." For example, where the denial of a dredge and fill permit for a 1.85 acres of a 3.5-acre tract is challenged as a taking of the property, the denial's

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79. Estuary Properties, 399 So. 2d at 1382.
80. See Lucas, 112 S. Ct. at 2894 n.7.
81. Id. Justice Scalia acknowledged that the "per se" rule announced by the majority is more "rhetorical" than helpful since the court did not address the conceptual severance issue and did not clarify the property interest subject to the rule. In Florida Rock Indus. v. United States, 18 F.3d 1560 (Fed. Cir. 1994), the court framed the conceptual severance (i.e., partial taking) issue as follows:

The question remains, does a partial deprivation resulting from a regulatory imposition, that is, a situation in which a regulation deprives the owner of a substantial part but not essentially all of the economic use or value of the property, constitute a partial taking, and is it compensable as such? [The] question has been much debated [but]... the Court's decisions to date have not provided an answer.

Id. at 1568. But see Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 130 (1978) ("Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.").

83. 604 So. 2d 565 (Fla. 2d DCA 1992), rev. denied, 613 So. 2d 3 (Fla. 1992).
84. Id. at 568 (quoting Fox v. Treasure Coast Regional Planning Council, 442 So. 2d 221, 225 (Fla. 1st DCA 1983)); see also Department of Transp. v. Weisenfeld, 617 So. 2d 1071, 1073 (Fla. 5th DCA 1993) ("[T]he owner's affected property interest must be viewed as a whole."); approved, 640 So. 2d 73 (Fla. 1994); Palm Beach County v. Wright, 641 So. 2d 50 (Fla. 1994); Department of Envtl. Reg. v. MacKay, 544 So. 2d 1065 (Fla. 3d DCA 1989); Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (Fla. 1981).
impact on the entire 3.5 acres should be considered as a whole in the taking analysis. 85

The Florida Supreme Court has not specifically adopted the Lucas rule; however, its analysis in Vatalaro v. Department of Environmental Regulation86 suggests that the rule will be adhered to in Florida cases. In that case, the court held that, notwithstanding the laudable purposes of wetland preservation, where a property owner is left with no ""economically viable use"" of her property as a result of a permit denial, the property has been ""taken.""87 The court distinguished Estuary Properties based on the fact that Estuary Properties could still develop half of its property whereas Vatalaro's use of her property was limited to ""just looking at it.""88 Accordingly, the court did not analyze the permit denial based on the factors set forth in Estuary Properties, but instead held that the permit denial triggered a ""per se"" taking of Vatalaro's property.89

III. PREVIOUS LEGISLATIVE ATTEMPTS TO ADDRESS THE TAKING ISSUE

As discussed above, the taking issue is not a recent phenomenon and judicial attempts to clarify the factors which lead to a takings determination have continued over the past seventy years. In recent years, legislation has been introduced in a number of states, including Florida, which attempts to statutorily define when such action ""goes too far.""90 Similarly, a bill is before Congress which would require

85. See Schindler, 604 So. 2d at 568.
86. 601 So. 2d 1223 (Fla. 5th DCA 1992), rev. denied, 613 So. 2d 3 (Fla. 1992). In this case, Vatalaro applied for a permit to construct two homes with septic tank systems on 11 acres of property she had purchased for over $125,000. Id. at 1224-25. The Department of Environmental Regulation (DER) denied the permit because the property was located within a wetland and it determined that Vatalaro's project would harm the wetland's ecosystem. Id. at 1225. Because the permit denial left the property suitable for only ""limited passive recreational use,"" Vatalaro brought suit against DER for inverse condemnation. Id. at 1227, 1229.
87. Id. at 1229. This suggests that even where a property owner has constructive notice that his property is subject to environmental regulation, he may still recover compensation for a taking where he is denied all use of his property. Cf. Estuary Properties, 399 So. 2d at 1382-83 (an owner's ""subjective expectation"" that the property may be used in a given manner does not give rise to a taking claim).
88. See Vatalaro, 601 So. 2d at 1228-29.
89. Id. at 1229. The court's adoption of a ""per se"" rule when all economically viable use is deprived proved to be prophetic since Vatalaro was decided a month before Lucas. The Florida Supreme Court declined to review the decision in light of Lucas and therefore it is uncertain whether the denial of the dredge and fill permit in a wetland would have fit into Lucas's ""nuisance"" exception. Vatalaro v. Department of Envtl. Reg., 613 So. 2d 3 (Fla. 1992) (denying review).
90. See Fla. HB 1437 (1993); Fla. SB 1000 (1993); Fla. CS for HB 485 & HB 1667 (1994). In 1993, ""takings"" bills were introduced in 30 other states; however, only Indiana, Nevada, and Utah passed some type of property rights legislation. See STATE TAKINGS BILLS/LAWS 1993 SESSIONS, AMERICAN RESOURCES INFORMATION NETWORK, at 1 (July 14, 1993) (on file with Florida State University Law Review, Fla. St. Univ. College of Law, Tallahassee, Fla.).
federal agencies to establish procedures to assess whether a proposed regulation may result in a taking of private property. This Part provides a history of the previous Florida legislation relating to the taking issue and highlights the pending federal legislation.

A. Governor's Property Rights Study Commission I

In the mid-1970's, both the legislative and executive branches of Florida government undertook studies of the taking issue. The Governor's Property Rights Study Commission (Study Commission) and the Senate Select Committee on Property Rights and Land Acquisition (Select Committee) focused on the uncertainty surrounding judicial treatment of the taking issue as well as the need for a process to challenge agency action which places an inordinate burden on an individual property owner. Although the recommendations of these studies were not immediately adopted, legislation enacted in 1978 set forth the remedies available to property owners "substantially affected by a final action of any agency with respect to a permit." In 1974, in light of the growing conflict between protection of the state's natural resources and individual property rights raised by the enactment of the growth management legislation, Governor Rubin Askew issued an executive order creating the Study Commission. The Study Commission was composed of a diverse group of interested parties and was charged with "conduct[ing] a comprehensive study of private property rights and the public need for land use regulations." Over its ten-week life, the Study Commission held several workshops and focused its attention on the "possibility and feasibility of compensating owners whose property interests are substantially diminished by stringent environmental regulations." On March 17, 1975, the Study Commission issued its final report in which it listed eight

91. See S. 2006, 103rd Cong., 2nd Sess. (1994). For a brief discussion of previous and pending federal legislation, see infra part III.C.
94. Id. The commission was composed of "[t]wenty-six legislators and private citizens, knowledgeable in the fields of law, taxation, property development, environmental protection, and agriculture. . . ." See *Final Report of the Governor's Property Rights Study Commission*, at 2 (Mar. 17, 1975) (available at Dep't of State, Div. of Archives, Tallahassee, Fla.) [hereinafter *Final Report of the Study Commission*].
"policy statements" relating to the taking issue. The Study Commission further recognized that the issues it was charged with addressing were complex and that additional consideration was necessary for a complete study. Accordingly, as its final policy statement, the Study Commission recommended that "[t]he work of the Governor's Property Rights Study Commission should be continued by the same or a similar group, for at least an additional twelve months with adequate funding."

Although the Study Commission's tenure was not extended, the Select Committee was created in 1976 to continue the study of private property rights. The Select Committee had two functions. Most important was the Select Committee's direction to examine the "taking issue." In the course of its study, the Select Committee reviewed the

96. The policy statements included:
   [1.] A system should be provided whereby compensation is paid for any regulation that unduly diminishes the value of property, even though it does not constitute an unconstitutional taking without compensation.
   [2.] Any system of compensable regulation should allow regulating governments an opportunity to modify, rescind or grant a variance in lieu of compensation.
   [3.] Diminution of pre-regulation market value that exceeds a certain threshold should be compensated.
   [4.] Compensation or other relief should be determined by a judicial proceeding rather than by administrative proceeding.
   [5.] Any system of statewide compensable regulation should speak to all governmentally imposed regulations.

Id. at 6-7 (policy statements numbers 1 through 5).

97. Id. at 11 (policy statement number 8).


99. The Select Committee's other function was to study the acquisition of environmentally endangered lands and outdoor recreational land programs. See Florida Senate Select Committee on Property Rights and Land Acquisition, Chairman's Opening Comments, at 3 (Sept. 16, 1975) (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.). As to the taking issue, the Select Committee was charged with answering the following questions:
   1. At what point does a valid land regulation change appearance and become a taking, requiring the government to compensate the landowner?
   2. Should landowners be compensated at all for diminution in value occurring because of land regulations?
   3. If landowners should be compensated, when and how will compensation be made?
   4. What is the correct balance that should exist between government's duty and authority to provide valid regulations and the private landowner's right to realize economic benefits from land and a landowner's privilege to recognize future goals
existing takings jurisprudence as well as the efforts of others who had studied the property rights issue and held several workshops on the taking issue. Committee staff prepared several reports and provided recommendations to the Select Committee regarding the need for legislation on the taking issue.100

The Select Committee staff recommended the enactment of legislation in the form of a “balancing test” which would codify a procedure for courts to use in determining whether a governmental regulation has “taken” private property.101 The final report of the Select Committee rejected this approach and concluded that “[e]xisting judicial procedures are adequate . . . [to] determine the validity of land use regulations imposed under the authority of the police power.”102 The final report did, however, recommend that a procedure be established to afford compensation or equitable remedies to a property owner upon judicial determination that an individual property owner has suffered an unequal burden as a result of a governmental regulation.103 The Select Committee’s recommendation was

without undue governmental influence or interference?

5. What are the rights of the public as a whole or as a more defined group in relation to land?

6. Is there a feasible and realistic alternative to the present situation of judicial interpretation?

Id. at 2-3.


101. Id. The staff report described the “balancing test” as follows:

If the landowner is able to establish a ___% diminution [in] value of his property based upon a fair market value (e.g., highest and best use, present use, reasonable use, etc.), or that he has suffered an economic loss as a direct result of the restriction, then a presumption of a “taking” arises. The burden of proof then shifts to the governmental entity imposing the restriction to prove to the court that the land use restriction is a valid exercise of the “police power.” If the governmental entity is not able to support the restriction in accordance with the “balancing test” the court shall find the restriction to be a “taking.” If the landowner cannot show that the value of the land use has been diminished by at least ___%, the burden remains upon him, as the challenger, to prove that the application of the balancing test will weigh in his favor and result in a finding that the restriction is invalid.

Florida Senate Select Committee on Property Rights and Land Acquisition, Final Staff Report on the “Taking Issue,” at 62 (Jan. 5, 1976) (emphasis added) (available at Fla. Dep’t of State, Div. of Archives, Tallahassee, Fla.) [hereinafter Final Staff Report]; see also Fla. HB 571 (1977) (proposing a similar burden-shifting procedure). The report then set forth 19 factors which should be considered by the court in its “balancing test,” including the economic impact on the property owner and importance of the public interest served by the regulation. Final Staff Report, supra, at 63-64.


103. Id. at 6, 8 (recommendations 12 and 20). The Select Committee recognized that a property owner who suffered a greater burden than the public as a whole as a result of governmental regulation is entitled to compensation or modification of the regulation. The decision of which to provide, they concluded, should be left to the regulating entity.
subsequently filed as Senate Bill 1270 in the 1976 Session. Although the bill did not pass, it further laid the groundwork for the enactment of Chapter 78-85, Laws of Florida (the Act).

In addition to Senate Bill 1270, as a result of the work of the Study Commission and Select Committee, several other pro-private property rights bills were introduced to address the taking issue. The bills proposed procedures for property owners to challenge land use regulations, criteria for judicial determination of a taking, and remedies for aggrieved property owners; however, the bills were uniformly unsuccessful. In the 1978 Session, however, legislation was enacted which established procedures by which an aggrieved property owner could challenge the denial of certain environmental permits as a taking. This legislation did not attempt to statutorily define a taking, but did set forth the remedies available to a property owner after a judicial determination that the agency’s action is "an unreasonable exercise of the state's police power constituting a taking without just compensation."

The Act implicitly adopts several of the policy statements of the Study Commission and conclusions of the Select Committee. The Act provides that any person "substantially affected" by a final agency action with respect to a permit may seek circuit court review to determine whether the agency’s action constitutes a taking. The action in circuit court must be filed within ninety days of the final agency action. Final agency action, as used in the Act, does not necessarily require exhaustion of administrative remedies. In Bowen v. Florida Department of Environmental Regula-

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104. The bill was filed by Senator Lewis, Chairman of the Select Committee; however, the bill died in the Senate Committee on Natural Resources & Conservation. See Fla. Legis., Final Legislative Bill Information, 1976 Regular Session, History of Senate Bills at 362, SB 1270.


106. Id. at 431-32.

107. Ch. 78-85, 1978 Fla. Laws 124 (codified at Fla. Stat. § 161.212 (beach and shore preservation); § 253.763 (state lands); § 373.617 (water resources); § 380.085 (land and water management); § 403.90 (environmental control) (1993)).

108. Id. (emphasis added). Thus, chapter 78-85 has been described as "a remedies bill" and "police power taking compensation legislation." See Rhodes, supra note 92, at 742. In the 1994 Session, an unsuccessful attempt was made to clarify the intent of the Act in reference to the emphasized language. See infra text accompanying notes 212-14.


111. Id.

112. See Bowen v. Department of Env'tl Reg., 448 So. 2d 566, 569 (Fla. 2d DCA 1984)
tion,\textsuperscript{113} the court held that a property owner could institute an inverse condemnation proceeding in circuit court following DER's denial, on its merits, of a dredge and fill permit application.\textsuperscript{114} The court noted that although the property owner could have appealed the denial to the Board of Trustees of the Internal Improvement Trust Fund, doing so would merely "postpone[] the effectiveness of final agency action . . . not alter the nature of that action."\textsuperscript{115} Accordingly, while the property owner must obtain a statement from the agency as to the permissible uses of his property before proceeding under the Act, the owner is not required to exhaust administrative appeals.

Once the court determines that the agency action constitutes a taking of property without just compensation, it remands the matter to the agency.\textsuperscript{116} On "remand," the agency may either issue the permit, compensate the property owner, or modify its decision to reduce the burden on the property.\textsuperscript{117} The agency's decision is submitted to the court as a proposed order which does not become final until approved by the court.\textsuperscript{118} Attorney's fees are awarded to the prevailing party.\textsuperscript{119}

The provisions of the Act are interesting in several respects. Specifically, the Act provides that "in determining the amount of compensation to be paid, consideration shall be given . . . to any enhancement to the value of the land attributable to government action."\textsuperscript{120} Thus,
as an element of compensation, the owner may receive the "fictitious" value resulting from the property-use expectations created by previous state and local zoning. Additionally, only final agency action with respect to permits required under chapters 161, 253, 373, 380 or 403, Florida Statutes, may be challenged pursuant to the Act. Thus, the utility of the Act is somewhat limited. For example, the Act does not apply to inverse condemnation claims resulting from a down-zoning of the property or a denial of a rezoning application. Finally, under the reasoning in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, an agency's decision on remand to modify its decision to avoid a taking may not absolve the agency from liability for a temporary taking of the property.

As noted above, the Act does not attempt to statutorily prescribe a formula for determining that agency action constitutes a taking. It leaves that determination to the courts. The "ad hoc" analysis used by the courts in takings cases, however, continues to saddle property owners and agencies with uncertainty as to constitutionally permissible land-use and environmental regulation. This unresolved uncertainty was the catalyst underlying the introduction of House Bill 1437 in the 1993 Session.

court determines the "appropriate monetary damages." Id. ("[I]n determining the amount of compensation to be paid, consideration shall be given by the court to any enhancement to the value of the land attributable to government action.") (emphasis added). This is consistent with the Study Commission's policy statement 4 which recommended that "[c]ompensation ... be determined by [a] judicial proceeding rather than by administrative proceeding." Final Report of the Study Commission, supra note 94, at 7. This also is consistent with Select Committee conclusion 16 relating to enhancement. See Final Report on the "Taking Issue," supra note 98, at 7.

121. See Ch. 78-85, §1(2), 1978 Fla. Laws 124. It is interesting to note that permitting under chapter 163, Florida Statutes, is excluded from this list. As discussed infra, legislation was discussed in the 1994 Regular Session which would have subjected chapter 163 permitting to the act. Since the act is only subject to specified chapters, it implicitly rejects the recommendations of both the Commission and the Select Committee. See Final Report of the Study Commission, supra note 94, at 7 (policy statement 5 recommended any remedies be applicable to all regulatory programs); Final Report on the "Taking Issue," supra note 98, at 9 (conclusion 22 recommended applying any remedy only to chapters 161 and 380).

122. In those circumstances, the requirement that the property owner exhaust all administrative remedies before instituting an inverse condemnation proceeding would apply. See Glisson v. Alachua County, 558 So. 2d 1030, 1035-36 (Fla. 1st DCA 1990), rev. denied, 570 So. 2d 1304 (Fla. 1990).


124. Since the circuit court has already determined that the agency's original action constituted a taking of the property, "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." Id. at 321.

125. But see Final Staff Report, supra note 101, at 63-65 ("balancing test"); Final Report of the Study Commission, supra note 94, at 7 (policy statement 3).
B. House Bill 1437 and the Governor's Property Rights Study Commission II

To establish a "bright line" taking standard, Representative Harris introduced House Bill 1437, the Private Property Rights Act, in the 1993 Regular Session.126 The bill would have defined in statute when a regulatory taking occurs by creating a conclusive presumption that any regulatory program which reduces the fair market value of private property by more than forty percent constitutes a taking of the property.127 In this regard, the traditional ad hoc judicial determination of "how far is too far" would have been replaced solely by a diminution of value formula. Once the forty percent threshold is crossed, the governmental unit which promulgated the regulation must either pay the property owner the judicially determined just compensation128 or rescind the regulatory program as it affects the subject property.129 The forty percent threshold would apply to all regulatory programs including those important land-use and environmental programs governed by Chapters 161, 163, 380, and 403, Florida Statutes.130

The Legislature did not pass the bill as it was introduced.131 Instead, it created the Study Commission on Inverse Condemnation Law to analyze the feasibility of a legislatively formulated "percentage of economic value diminution that would presumptively establish that a governmental regulatory program has taken private property."132 The Governor vetoed the Legislature's proposed commission and established his own commission with a more balanced, environmentally sensitive membership.133 The Governor's Private Property Rights

126. The bill received significant bi-partisan support and was cosponsored by more than 50 members. See Fla. Legis., Final Legislative Bill Information, 1993 Regular Session, History of House Bills at 268, HB 1437. The Senate companion, Senate Bill 1000, was sponsored by 13 members. See Fla. Legis., Final Legislative Bill Information, 1993 Regular Session, History of Senate Bills at 89, SB 1000.
127. Fla. CS for HB 1437, §1 (1993) (proposed Fla. Stat. §73.31(1)).
128. Id. (proposed Fla. Stat. §73.31(2)).
129. Id. (proposed Fla. Stat. §73.34(1)). However, the bill would provide an exception for any regulatory program which is preventing a property use that is "noxious in fact" or is harmful to public health or safety. Id. (proposed Fla. Stat. §73.32).
130. Id. (proposed Fla. Stat. §73.31(1)).
133. Fla. Exec. Order No. 93-150, §§ 1, 2 (June 4, 1993) (creating the Governor's Property Rights Study Commission II). In his veto message, Governor Chiles noted that the commission, created by the Legislature, purports to be another progressive step for Florida, but on the contrary, it appears to be the first step in undoing the state's important growth management and environ-
Study Commission II (Commission) was charged with essentially the same objective as the Legislature's, and was to present a report of its findings to the Governor by January 30, 1994.134 The Commission was composed of seventeen members and was chaired by former Supreme Court of Florida Justice Alan Sundberg.135 The Commission held meetings across the state and received public testimony from a number of individual property owners. Few owners mentioned a desire for compensation for governmental over-regulation of their property; rather, they merely complained of not being able to use their property as they wished.136 Sympathetic to these comments, the Commission focused its efforts on the creation of an inexpensive, expedited procedure by which a property owner could seek a variance or modification of the regulatory program as it affected his property so that the property could be used in some manner. The procedure recommended by the Commission is a hybrid of mediation and arbitration called “intermediation.”137

Any property owner who believes that a state, regional, or local development order has “inordinately limited the effective and practical use” of his property may petition for intermediation.138 This proce-
dure is voluntary and a property owner is not required to seek relief through intermediation before initiating an administrative challenge to the development order or bringing an inverse condemnation suit against the regulating entity. In intermediation, an impartial third party called the "intermediator" first attempts to mediate the dispute between the petitioning property owner and the regulating governmental entity. If mediation fails, the intermediator may recommend adjustment to the development order at issue if he determines that the order "inordinately limits" the owner's use of his property. As a last resort, where appropriate, the intermediator may recommend that the dispute be resolved by the governmental entity compensating the property owner and purchasing an interest in the property. A recommendation of adjustment or compensation may be made notwithstanding the fact that the development order's effect on the property does not rise to the level of a constitutional taking. The Commission recommended that in the event the intermediator recommends compensation, payment be made from a state fund and therefore suggested earmarking sixty million dollars annually from the Florida Communities Trust and documentary stamp tax revenues.

The Commission's final report contained proposed legislation to create the intermediation procedure described above. Representative Dean Saunders, a member of the Commission, filed an earlier form of this proposal as House Bill 1967. The Commission also recom-

139. Id. at 16-17 (Commission's proposed Fla. Stat. § 163.06(22)(a)).
140. Id. at 21 (Commission's proposed Fla. Stat. § 163.06(22)(b), (25)(b)).
141. Id. at 22 (Commission's proposed Fla. Stat. § 163.06(25)(c)). The intermediator may recommend that the property owner be compensated, but may not recommend the amount of compensation. This is determined by the Florida Communities Trust. Id. at 25-27 (Commission's proposed Fla. Stat. § 163.06(28)).
142. See id. at 22 (Commission's proposed Fla. Stat. § 163.06(25)(c)). Because the circumstances to be examined by the intermediator are the factors announced in Reahard, the intermediator is, however, effectively determining whether the governmental action amounted to a constitutional taking of the property.
143. Id. at 28 (Commission's proposed Fla. Stat. § 163.06(29)); see also id. at 88-92. The issue of payment of intermediator's claims was hotly debated in the discussion of Committee Substitute for House Bills 485 and 1967. See infra text accompanying notes 205-08.
144. The Commission approved the proposed legislation by a vote of 13 to 3. Members voting in opposition were Bob Parks, Laurie Mcdonald, and W.L. Thorton. Mr. Thorton submitted a substitute proposal in which he recommended the Commission adopt the first seven policy statements of the Study Commission. He also urged the adoption of legislation which would create a statutory diminution-in-value taking standard. Report of Commission, supra note 135 at Appendix B, 3 ("Such legislation should create a 'statutory taking' which would occur whenever... regulations reduce the fair market value of property... by more than a majority [(50%) of its value.").
145. Dem., Lakeland.
146. Because the deadline to file member bills was February 8, 1994 and the final report of
mended that a program be established "[t]o educate real property owners as to the procedural aspects of the environmental and growth management laws affecting their property and to assist them in complying with [those] laws."\textsuperscript{147} This recommendation received no additional discussion during the 1994 Session. Finally, the Commission adopted a conceptual statement endorsing the use of transfer of development rights (TDRs) as a "potential remedy for property rights concerns."\textsuperscript{148} The legislation proposed by the Commission authorizes the intermediary to use TDRs as an adjustment mechanism.\textsuperscript{149} A majority of the intermediation process proposed by the Commission was incorporated into a Committee Substitute for House Bills 485 and 1967 and received considerable debate during the 1994 Session; this legislation, however, did not pass.\textsuperscript{150}

C. Federal Legislation

In 1988, President Reagan issued Executive Order 12630 (Reagan Order). The Reagan Order requires each federal agency to review its regulations before they are issued "to prevent unnecessary takings and [to] account in decision making for those takings that are necessitated by statutory mandate."\textsuperscript{151} Specifically, it requires any potentially confiscatory federal regulation to be examined \textit{before} implementation to avoid the costs of defending subsequent inverse condemnation suits by affected property owners.\textsuperscript{152}

Senator Bob Dole\textsuperscript{153} introduced a bill in 1993 which would have effectively codified the Reagan Order. This bill, dubbed the Private Property Rights Act of 1993, provided that no federal land-use regula-

\textsuperscript{147} See \textit{REPORT OF THE COMMISSION}, supra note 135, at 87-88. This program would be established at the Department of Environmental Protection, the Department of Community Affairs, each water management district, and in each local government larger than 50,000 people.

\textsuperscript{148} \textit{Id.} at 93.

\textsuperscript{149} \textit{Id.} at 22 (Commission's proposed \textit{Fla. Stat.} § 163.06(25)(b)3.).

\textsuperscript{150} The bill died on the Calendar. \textit{Fla. Legis., Final Legislative Bill Information, 1994 Regular Session, History of House Bills at 248, HB 485} (filed Feb. 8, 1994). It was initially intended that House Bill 1967 be amended to incorporate the entire final proposal of the Commission; however, as discussed in part IV.A., \textit{infra}, House Bill 1967 was ultimately combined with House Bill 485 in a more pro-property rights form.


\textsuperscript{152} \textit{Id.} § (3)(e).

\textsuperscript{153} Repub., Kansas.
tion would become effective until the Attorney General certifies that the regulation complies with the Reagan Order. Senator Dole noted that notwithstanding the protection of private property rights embodied in the Fifth Amendment to the Constitution, legislation codifying the Reagan Order was necessary because "those working in government, those who have sworn to uphold our Constitution, are not always as vigilant as they need to be." Dole had hoped to force a role call vote on the bill before the summer of 1993; however, the bill never reached the floor. In 1994, Dole again filed the Private Property Rights Act and a number of other pro-private property rights bills have been introduced.

In a similar vein as the Reagan Order, as a part of the Growth Management Act of 1993, the Florida Legislature amended the intent language of the Local Government Comprehensive Planning and Land Development Regulation Act to provide:

It is the intent of the Legislature that all governmental entities in this state recognize and respect judicially acknowledged or constitutionally protected private property rights and that all rules, ordinances, regulations, and programs adopted under the authority of this act must be developed, promulgated, implemented, and applied with sensitivity for private property rights and not be unduly restrictive. Full and just compensation or other appropriate relief must be provided to any property owner for a governmental action that is determined to constitute a taking, as provided by law.

While similar to the underlying theory of the Reagan Order, this provision is obviously not as comprehensive, nor as binding as the Rea-

158. Ch. 93-206, 1993 Fla. Laws 1887.
159. Id. § 1, 1993 Fla. Laws at 1892. (Codified at Fla. Stat. § 163.3161(9) (1993)); see also Powell, supra note 5, at 269-70.
agan Order. It neither establishes specific factors for the governmental entity to consider nor provides guidelines for the entity to follow in recognizing or respecting property rights. Moreover, this amorphous, ideological intent language provides no bright-line guidance to governmental entities because it does not define a taking but merely refers to the current unsettled law.

IV. THE 1994 PRIVATE PROPERTY RIGHTS LEGISLATION

For legislation as for sausages, one should savor the result, but no one should observe the making.

A. Committee Substitute for House Bills 485 and 1967: The "Midnight Version"

Undaunted by the work of the Commission and without regard for its upcoming recommendations, Representatives Harris and Ken Pruitt refiled the "Private Property Rights Act of Florida" as House Bill 485. The bill is virtually identical to the legislation Representative Harris introduced in the 1993 Session; as in 1993, the bill garnered significant bipartisan support and had more than fifty sponsors. House Bill 485 was referred to the House Judiciary Committee

160. For example, if the Order is codified through a bill such as Senator Dole's Private Property Rights Act, a federal land-use regulation will not be effective until the Attorney General certifies that the regulation was scrutinized before promulgation to avoid the possibility of effecting a taking of private property. See S. 2006 103d Cong., 2d Sess. (1994); Exec. Order No. 12630, 3 C.F.R. 554, 557 (1988) reprinted in 5 U.S.C.A. § 601(3)(c) (1989).


162. This quotation is generally attributed Otto Von Bismark. See, e.g., Community Nutrition Institute v. Block, 749 F.2d 50, 51 (D.C. Cir. 1984). Notwithstanding the warning embodied in this cynical view of the legislative process, Part IV of this Comment attempts to provide a detailed legislative history of the 1994 private property rights legislation. Those with weak stomachs have been forewarned.

163. Repub., Port St. Lucie.

164. See also Fla. SB 630 (1994) (companion bill sponsored by Senators Myers, Republican, Hobe Sound; McKay, Republican, Bradenton; and Foley, Republican, West Palm Beach).

165. See Fla. HB 485 (1994). Representative Harris, addressing the Governor's Property Right Study Commission II, stated his intent to refile his bill and noted that he might be willing to incorporate the findings of the Commission depending upon their substance. See Governor's Private Property Rights Study Commission II, tape recording of proceedings, Sept. 23, 1994 (available at Div. of Admin. Hearings, Tallahassee, Fla.). Sponsorship of House Bill 485 is largely similar to that of House Bill 1437 in 1993. Compare Fla. LEIS., FINAL LEGISLATIVE BILL INFORMATION, 1994 REGULAR SESSION, HISTORY OF HOUSE BILLS at 247-48, HB 485 with supra note 126.
but was not placed on the Committee agenda until the sixth week of Regular Session in deference to the work of the Commission.  

1. The "Midnight Version" Moves Through the House and Senate

The private property rights battle was joined early in the 1994 Session. Supporters of House Bill 485 launched the first strike on the second day of Session by holding a rally on the steps of the Old Capitol. The keynote speaker at the rally was David Lucas of Lucas v. South Carolina Coastal Council fame. Mr. Lucas spoke of his victory over "faceless bureaucrats" who regulated his beachfront property and he emphasized the importance of fighting to protect private property rights. The Commissioner of Agriculture, Bob Crawford, and former Lieutenant Governor, Wayne Mixson echoed Mr. Lucas's comments. The message which supporters of House Bill 485 were sending to government regarding their property was simple: "If you want it—pay for it." In return, opponents of the bill claimed that the bill would bankrupt the state and lead to the destruction of the state's remaining natural environment. This argument, raised in opposition to House Bill

166. The bill was heard March 17, 1994, two weeks after the Commission issued its report. This delay was at the direction of the Speaker to give the Committee an opportunity to analyze the work of the Commission and to formulate a combination of House Bills 485 and 1967. See Fla. Legis., Final Legislative Bill Information, 1994 Regular Session, History of House Bills at 247-48, HB 485. At this meeting, the infamous "midnight version" combining House Bill 485 and Representative Dean Saunders' House Bill 1967 was discussed. See infra text accompanying notes 175-78.

167. A number of the sponsors of the private property rights legislation as well as 300 to 500 supporters attended the rally. See Cheryl Waldrip, Lines are Drawn in Land Fight, Tampa Trib., Feb. 10, 1994, at B1; David Damron, Property Rights at Issue, Fla. Times-Union, (Jacksonville), Feb. 10, 1994, at B1; Bill Moss, Rally Pumps Up Property Rights Act, St. Petersburg Times, Feb. 10, 1994, at 4B.

168. 112 S. Ct. 2886 (1992). Mr. Lucas has become somewhat of a private property rights cult figure and has founded the Council on Private Property Rights, a national legal-action lobby which campaigns against big government and excessive environmental regulation. See Brigid Schulte, Legal Victory Heats Up the Dispute, Tallahassee Dem., Jan. 3, 1994, at 7A.


172. In this regard, the Department of Environmental Protection noted that: [t]he bill would severely disable the state's environmental regulation programs, making many of them pointless. It would be much less costly to simply rescind the programs or reduce the level of protection they provide directly by law. Payments for investigations, litigation, and successful claims under [House Bill 485] would, without question, bankrupt the department, leave the state financially crippled, and force state legislators to impose a severe fiscal burden on the state's population in order to bene-
1437 in 1993, had been foreshadowed in 1976 when Senator Warren S. Henderson\(^7\) noted in a dissenting statement to the Final Report of the Select Committee:

Such a recommendation [authorizing the governmental entity to compensate the landowner, modify the regulation, or grant the landowner a variance] could be misleading unless proper appropriations are enacted establishing funds for compensation. Without a proper funding mechanism, the governmental entity is actually left with two alternatives: modification or variance. The granting of modifications or variances could weaken necessary environmental regulations.\(^7\)

In light of the fiscal impact of House Bill 485, the Speaker directed that Representatives Harris and Pruitt work with Representative Dean Sanders, the sponsor of the Commission’s bill, to formulate a less offensive property rights bill. From this directive evolved the Proposed Committee Substitute for House Bills 485 and 1967 (PCS).

The initial version of the PCS was simply a combination of the Commission’s proposed legislation and House Bill 485. Subsequently, the language of House Bill 485 was deleted from the PCS and was replaced with language amending the 1978 Act.\(^7\) At the same time, the Commission’s proposal was amended at the direction of the sponsors to give the intermediation process some “teeth.” This preliminary version of the PCS was made available to the public on March 11, 1994, and was placed on the Judiciary Committee agenda for March 17.\(^17\)

The PCS sponsors scheduled several workshops in which representatives from local government and environmental groups were invited to critique the proposal and suggest changes to make the PCS less offensive to their interests.\(^17\) As a result, numerous changes to the


\(^{75}\) Fla. PCS for HB 485 & HB 1967 (1994).


\(^{77}\) Attending these workshops were representatives from the Florida League of Cities, Florida Association of Counties, 1000 Friends of Florida, the Florida Audobon Society, the Department of Community Affairs, as well as several individual citizens.
PCS were suggested. Incorporating these changes was not finished until well after midnight the night before the Judiciary Committee meeting and thus the revised PCS came to be known as the "midnight version."  

At the Judiciary Committee meeting, opponents engaged in aggressive lobbying and political maneuvers. In light of misinformation and the political tactics being used by the opponents of the "midnight version," Committee Chairman Robert Trammell temporarily passed the bill so that it could be reviewed by all interested parties before the Committee's next meeting.

At the next Judiciary Committee meeting, after a brief discussion, the Committee passed the "midnight version" by a vote of 21 to 4. In the Senate, however, the property rights bill did not fare as well. Senate Bill 630 was on the agenda of the Community Affairs Committee on three separate occasions but was never voted upon. In the March 29 meeting, two amendments to the bill were discussed. The first, by Senator Locke Burt, would have conformed Senate Bill 630 to the "midnight version." The second, by Senator Howard For-
man,\textsuperscript{185} consisted of a "fine-tuned" version of the Commission's proposed legislation.\textsuperscript{186} Neither amendment was adopted, and the bill died in committee.

In the House, the "midnight version" languished in the Finance & Taxation Committee and appeared to be dead. On April 7, however, the bill was withdrawn from both the Finance & Taxation and the Appropriations Committees and placed on the Calendar.\textsuperscript{187} This move prompted speculation that the bill was on the Speaker or Rules Chairman's "must-pass list."\textsuperscript{188} The bill never reached the floor, however, and died on the Calendar.\textsuperscript{189}

2. The Substance of the "Midnight Version"

As noted above, the "midnight version" had two parts: (1) a beefed-up version of the Commission's proposed legislation,\textsuperscript{190} and (2) amendments to the 1978 Act.\textsuperscript{191}

The "midnight version" would provide that the rezoning of a specific parcel is an action reviewable through intermediation.\textsuperscript{192} This recognizes that a comprehensive plan amendment or zoning ordinance affecting a large parcel of property is a legislative act, whereas rezoning affecting a specific parcel is a quasi-judicial Act which should be subject to stricter review.\textsuperscript{193} Unlike the Commission's proposal, the "midnight version" defines "real property" as used throughout the bill.\textsuperscript{194} The sponsors decided to conform the definition in the "midnight version" to that in section 380.503, \textit{Florida Statutes}.\textsuperscript{195} In this

\begin{itemize}
\item \textsuperscript{185} Dem., Pembroke Pines.
\item \textsuperscript{186} \textit{Senate Panel Delays Property Rights Vote}, \textit{Orlando Sentinel}, Mar. 30, 1994, at C5. For example, the Forman amendment would apply the intermediation process only to "land" rather than "real property," delete the proposed amendments to the 1978 Act, and require that the intermediation be conducted by a certified circuit court mediator. \textit{See S. Comm. on Comm'y. Aff.}, Amend. 2 to Fla. SB 630 (on file with comm.). Commission Chairman Sundberg, Secretary Shelley, and former Secretary of the Department of Community Affairs Tom Pelham supported this amendment.
\item \textsuperscript{187} \textit{Fla. Legis., Final Legislative Bill Information, 1994 Regular Session, History of House Bills} at 248, HB 485.
\item \textsuperscript{188} \textit{See Wallace's "must-pass" bill?}, \textit{St. Petersburg Times}, Apr. 8, 1994, at 18A.
\item \textsuperscript{189} \textit{Fla. Legis., Final Legislative Bill Information, 1994 Regular Session, History of House Bills} at 248, HB 485.
\item \textsuperscript{190} Fla. CS for HB 485 & HB 1967, § 1 (1994).
\item \textsuperscript{191} \textit{Id.} §§ 2-7.
\item \textsuperscript{192} \textit{Id.} § 1 (proposed Fl.a. Stat. § 163.05(3)(c)).
\item \textsuperscript{193} \textit{See Board of County Comm'rs of Brevard v. Snyder}, 627 So. 2d. 469, 474-75 (Fla. 1993).
\item \textsuperscript{194} Fla. CS for HB 485 & HB 1967, § 1 (1994) (proposed Fl.a. Stat. § 163.05(3)(k)).
\item \textsuperscript{195} \textit{Id.} Accordingly, as used in the "midnight version," "real property" means "any interest in land and may also include any appurtenances and improvements to the land." Fl.a. Stat. § 380.503(6) (1993) (emphasis added).
\end{itemize}
regard, compensation for adversely affected "real property" would be available to owners of land, land with buildings, and possibly even billboards.196

To emphasize that intermediation is intended to be used by small property owners and not as a large land owner relief act, the maximum compensation an owner could receive would be $500,000.197 Thus, a small property owner could use the process to obtain a recommendation of compensation or adjustment of the regulation restricting the use of his property. Intermediation is still beneficial to owners whose property value exceeds $500,000 because the process could result in an adjustment of the regulation as well as "ripeness" for subsequent judicial action. Most of the time periods established by the Commission's proposal were shortened in the "midnight version" to streamline the process and make it more user-friendly for small property owners.198

One of the more controversial changes in the "midnight version" was the limitation placed on intervention. Where the Commission’s proposal allowed any substantially affected party to intervene, the "midnight version" limited this intervention to a substantially affected party "who submitted oral or written testimony . . . of a substantive nature which stated . . . objections to or support for the development order at issue."199 Thus, environmental groups such as 1000 Friends of Florida or the Florida Audobon Society would be barred from participating in any subsequent intermediation unless they actively participated in the initial hearings on the development order.

The "midnight version" would not alter the underlying intermediation process as envisioned by the Commission. The first goal of the intermediation process is to mediate a mutually acceptable solution.200 Where this fails, the "midnight version" would clarify that the mediator may recommend adjustment, compensation, or that the development order remain undisturbed.201 The "midnight version," however, would give the mediator a fourth option—adjustment

196. Id.
197. Fla. CS for HB 485 & HB 1967, § 1 (1994) (proposed Fla. Stat. § 163.05(4)). This $500,000 figure was an arbitrary attempt by the Commission to distinguish between "large" and "small" landowners. While some of the early drafts of the combination bill increased this figure to $1 million, the $500,000 figure was eventually restored.
198. See, e.g., id. (proposed Fla. Stat. § 163.05(11)(a)) (shortened from six months to four months).
199. Id. (proposed Fla. Stat. § 163.05(13)(b)).
200. Id. (proposed Fla. Stat. § 163.05(18)(a)).
201. Id. (proposed Fla. Stat. § 163.05(20)).
Pursuant to this option, the intermediator may recommend adjustment of the restriction and also that the owner be compensated if the governmental agency rejects the adjustment recommendation. The property owner would have a "ticket" to go directly to the Florida Communities Trust for compensation rather than first pursuing a taking claim in circuit court if the intermediator's adjustment recommendation is rejected.

Another controversial change in the "midnight version" relates to funding the intermediator's recommendation for compensation. The Commission recommended that a Property Owner's Compensation Fund of $60 million be established to pay for such recommendations. General revenue derived from the documentary stamp tax would generate this fund. In contrast, the "midnight version" would provide that one-half of the amount transferred each year to the Florida Communities Trust from the proceeds of Preservation 2000 bonds would be available to satisfy the intermediator's recommendations for compensation. The "midnight version" provides that title to property purchased by the Trust shall be vested in the Board of Trustees of the Internal Improvement Trust Fund.

The "midnight version" would allow the governmental entity to petition the Florida Land And Water Adjudicatory Commission (FLAWAC) to review an intermediator's recommendation of compensation. On review, FLAWAC could either determine that

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202. Id. (proposed Fla. Stat. § 163.05(20)(c)).
203. Use of this option would be appropriate where the intermediator determines that there is only one way in which the development order could be adjusted to remove the "inordinate limitation." Where the government rejects this recommendation, its only remaining option would be compensation.
204. Typically, where the intermediator's recommendation for adjustment is rejected, the owner is merely "ripe" to bring an inverse condemnation proceeding against the governmental entity. See Fla. CS for HB 485 & HB 1967, § 1 (1994) (proposed Fla. Stat. § 163.05(28)).
205. See REPORT OF THE COMMISSION, supra note 135, at 28 (Commission's proposed Fla. Stat. § 163.06(29)).
206. Much of the revenue is derived from the documentary stamp tax funds Preservation 2000, and to ensure that this project would continue notwithstanding the draw placed on the documentary stamp revenue by the Property Owner's Compensation Fund (Fund), the Commission recommended that the Fund's revenue be contingent on Preservation 2000 receiving $200 million per year. See id. at 91-92.
207. Fla. CS for HB 485 & HB 1967, § 1 (1993) (proposed Fla. Stat. § 163.05(27)). It was argued, however, that purchasing property interests for purposes other than those enumerated in the covenants of the Preservation 2000 bonds may be unconstitutional. It is also interesting to note that the funds in the Florida's Community Trust would be used to satisfy inverse condemnation awards obtained pursuant to the 1978 Act, as amended. Id. § 7.
208. Id. § 1 (proposed Fla. Stat. § 163.05(26)). Because State funds were used to purchase the property, it was argued that the state should own the property.
209. Id. (proposed Fla. Stat. § 163.05(23)).
the owner is entitled to compensation by the Trust or that the owner should be required to pursue his judicial remedies.\textsuperscript{210} This FLAWAC "appeal" was necessary because of the binding nature which was afforded to the intermediator's recommendation in the "midnight version." It is uncertain what record FLAWAC would base its determination upon because the intermediator would not be required to make specific findings of fact and conclusions of law in determining whether the governmental action constitutes an "inordinate limitation;" nor would the intermediator's recommendation be admissible in subsequent litigation.\textsuperscript{211}

The second part of the "midnight version" amends the 1978 Act in several respects. First, the definition of "permit" in the Act would be expanded.\textsuperscript{212} This change seems somewhat unnecessary because the current definition includes any permit required by the chapter in which the Act is incorporated. Second, the "midnight version" would clarify that the court is to examine whether the governmental action at issue is a taking pursuant to article X, section 6 of the \textit{Florida Constitution}.\textsuperscript{213} This does not substantively change the Act and comports with the original legislative intent.\textsuperscript{214}

The "ripeness" concerns of property owners also are addressed in the amendments to the Act in the "midnight version." Specifically, the amendments provide that "[f]ailure to pursue an administrative proceeding shall not be a bar or impediment to the pursuit of circuit court relief."\textsuperscript{215} This amendment would overrule the line of cases which require a final agency action and a final determination of the property uses available to the owner before initiation of an inverse condemnation suit.\textsuperscript{216}

Another controversial amendment to the Act relates to the attorneys' fees provisions. Currently, the Act provides that the prevailing party receives fees and costs.\textsuperscript{217} Arguably, this provision is a deterrent for property owners to use the Act. It was proposed that the Act be

\textsuperscript{210} Id.
\textsuperscript{211} Id. (proposed FLA. STAT. \S 163.05(21)). The recommendation is treated as an offer to compromise and is therefore inadmissible pursuant to section 90.408, \textit{Florida Statutes}.
\textsuperscript{212} Id. \S\S 3-6 (proposed amendment to FLA. STAT. \S\S 161.212, 373.617, 380.085, 403.90 (1993)).
\textsuperscript{213} Id.
\textsuperscript{214} For a discussion of the legislative intent of the 1978 Act, see Rhodes, supra note 92.
\textsuperscript{215} Fla. CS for HB 485 & HB 1967, \S\S 3-6 (1994) (proposed amendment to FLA. STAT. \S\S 161.212(2), 373.617(2), 380.085(2), 403.90(2) (1993)).
\textsuperscript{216} See, e.g., Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).
amended to award costs and fees to a prevailing property owner.\textsuperscript{218} Although this is similar to the award of fees and costs in eminent domain proceedings, this amendment was extremely controversial.\textsuperscript{219} Finally, the "midnight version" would have enabled property owners adversely affected by a development order required by part II of chapter 163, \textit{Florida Statutes}, to use the provisions of the Act.\textsuperscript{220}

\textbf{B. Potential Constitutional Amendments}

"Should government compensate owners when damaging the value of homes or other property?"

This "ballot title" could have appeared on the November 1994 general election ballot as the preface to a proposed amendment to the \textit{Florida Constitution}.\textsuperscript{221} If approved, this proposal could have seriously disrupted the delicate balance between private property rights and land-use regulation in Florida. The voters, however, did not have the opportunity to answer the question posed above because the Florida Supreme Court struck the proposal from the ballot.\textsuperscript{222} In the event this proposal gets on the ballot in the future, this Section will discuss the reasons that the voters should answer the question with a resounding "no."

This amendment would make two substantial changes to takings law. First, it would provide that any decrease in the value of property effectively constitutes a taking, thereby requiring "full compensa-


\textsuperscript{221}. The proposal would amend article I, section 2 of the \textit{Florida Constitution} by adding the following language:

\begin{quote}
Any exercise of the police power, excepting the administration and enforcement of criminal laws, which damages the value of a vested private property right, or any interest therein, shall entitle the owner to full compensation determined by jury trial with a jury of not fewer than six persons and without prior resort to administrative remedies. This amendment shall take effect the day after approval by the voters.
\end{quote}

\textit{See Tax Cap Committee, Property Rights, Florida Constitutional Amendment Petition Form} [hereinafter \textit{PETITION}] (on file with Florida State University Law Review, Fla. State Univ. College of Law, Tallahassee, Fla.). It is curious that this proposal is amending article I, section 2 of the \textit{Florida Constitution} relating to "Basic Rights" rather than article X, section 6 which is generally regarded as the Takings Clause of the \textit{Florida Constitution}.

tion” be paid to the owner. Clearly, this would overrule Mahon and its progeny which held that governmental regulation could decrease property value to an extent without rising to the level of a constitutional taking.\textsuperscript{222} Similarly, the fact that the amendment is applicable to “any exercise of the police power,” including nuisance prevention, will overrule the line of cases which held that all value in property could be removed where the government was preventing a nuisance.\textsuperscript{224}

By its terms, however, the amendment is only applicable to \textit{vested} property rights and is therefore somewhat limited. Under Florida law, an owner’s right to develop his property does not vest merely because of the existence of a zoning classification when the owner purchases the property.\textsuperscript{225} Instead, the owner is required to take some action with respect to his property in reliance on that zoning. The owner’s rights can vest, however, before the owner obtains a building permit.\textsuperscript{226} In \textit{Town of Largo v. Imperial Homes Corp.},\textsuperscript{227} the court stated that an owner’s rights vest where he has relied in good faith upon a zoning act of local government by making a substantial change in position or by incurring monetary obligations.\textsuperscript{228} Accordingly, the denial of an application to increase the density or change the zoning of the property may not give rise to a claim for relief under this amendment. Similarly, government’s decision to down-zone the property may not affect a vested property right where the owner is unable to establish that his rights in the previous zoning are vested by proving detrimental reliance.

The other substantive change in the law which would result from this amendment regards “ripeness.” Specifically, the amendment authorizes a property owner who is adversely affected by governmental action to seek just compensation for the impact on his property

\textsuperscript{223} The language of the amendment suggests that full compensation is due for the entire property subject to the governmental regulation even though the regulation may only affect a small portion of the property. Under this standard, a decrease in value of the property by as little as 10% could give rise to a claim by the owner for full compensation. Cf. Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (Fla. 1981) (finding no taking with a 50% diminution in value); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (finding no taking with a 87.5% diminution in value); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (finding no taking with a 75% diminution in value).

\textsuperscript{224} See Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 2897 (1992) (“[Harmful or noxious uses of property may be proscribed by government regulation without the requirement of compensation.”).

\textsuperscript{225} See City of Miami Beach v. 8701 Collins Ave., Inc., 77 So. 2d 428, 430 (Fla. 1954); Town of Largo v. Imperial Homes Corp., 309 So. 2d 571, 573 (Fla. 2d DCA 1975); Franklin County v. Leisure Properties, Ltd., 430 So. 2d 475, 480 (Fla. 1st DCA 1983).

\textsuperscript{226} See \textit{Town of Largo}, 309 So. 2d at 572-73; \textit{Collins}, 77 So. 2d at 430.

\textsuperscript{227} Id. at 572-73; see also Leisure Properties, 430 So. 2d at 479.
"without prior resort to administrative remedies." 229 By allowing the owner to bypass the administrative process, the amendment effectively abandons the requirement that the property owner must obtain a final decision regarding how he will be allowed to develop his property prior to a judicial determination that the property has been taken. 230 Thus, a reviewing court will have little or no record on which to base a determination that the property has been taken since there will be nothing to indicate the property uses available to the owner before and after the governmental action.

A less offensive constitutional amendment was proposed in a joint resolution introduced by Representative Harris in the 1994 Session. House Joint Resolution 1953 (resolution) would have amended article 10, section 6 of the Florida Constitution to provide:

A government regulation that effectively prohibits or restricts an economically viable use of private property in a manner that reduces the value of the property without the consent of the owner constitutes a taking for a public purpose, which shall entitle the owner to full compensation for the net diminution in fair market value resulting from the government regulation; however, no compensable taking results from regulatory action to prohibit or restrict a use of property that was, under principles of law existing prior to and independent of the regulation, already impermissible and subject to restraint as a nuisance or unlawful activity. 231

While less detrimental to land-use regulation and environmental protection than the proposed initiative, the resolution did not attempt to fairly balance the competing interests surrounding the taking issue. 232 The resolution was referred to the Judiciary Committee but was never placed on an agenda and ultimately died in committee. 233

229. See Petition, supra note 221.


231. Fla. HJR 1953 (1994) (proposed amendment to Fla. Const., art. X, § 6) (emphasis added). A cursory reading of the resolution gives the impression that it is merely codifying the Lucas decision; however, the resolution provides that restriction of an economically viable use constitutes a taking. This is a more lenient, property-owner-friendly standard than the "all economically viable or productive use" standard enunciated in Lucas as the threshold for a per se regulatory taking.

232. Specifically, the resolution does not consider the importance of the public purpose purportedly served by the regulation, nor does it consider any of the factors set out in Estuary Properties. Instead, it merely focuses on the reduction in the value of the property resulting from the regulation without the consent of the owner.

V. CONCLUSION AND RECOMMENDATIONS

Private property rights likely will remain an issue as the Legislature continues to expand Florida's growth management and environmental protection scheme to protect the state's remaining natural environment. In doing so, it is important that the Legislature remain focused on one of the founding principles of this state and nation—the right to own and use private property without unreasonable interference from government. Future legislatures should pay close attention to the work of Representatives Harris, Pruitt, and Dean Saunders during the 1994 Session on Committee Substitute for House Bills 485 and 1967. With some slight modifications to appease the environmental interests and local governments, the amendments to the 1978 Act found in the "midnight version" could level the playing field for property owners adversely affected by land-use and environmental regulations.

Specifically, remedies in the 1978 Act should be extended to property owners adversely affected by development orders issued under chapter 163, part II, Florida Statutes. Additionally, the provision in the Act awarding fees to the prevailing party should be amended to require both parties, the agency and property owner, to pay their own fees and costs unless the court provides otherwise. Finally, the Act's standard of "unreasonable exercise of police power constituting a taking" should be clarified to comport with the original intent of the Act and current takings jurisprudence by requiring the effect of the regulation to be a taking under article X, section 6 of the Florida Constitution.

These recommendations, however, fail to address the core of the taking issue. Specifically, they do not attempt to define the point at which the public, rather than the property owner, should bear the burden of the impact of an environmental or land-use regulation on an individual piece of property. As discussed above, however, it may be difficult—if not impossible—to identify such a precise point. A more feasible alternative is for the Legislature to adopt a statutory procedure for owners to challenge excessive regulation of their property as a "taking" and to provide the courts guidance in their "ad hoc" takings analysis. Such a procedure could be modeled on the recommendation of the staff of the Select Committee and could proceed substantially as follows:

234. These minor, relatively noncontroversial amendments will not provide a property owner with "ripeness" at an earlier stage, nor will they provide a clear definition of what constitutes a taking of property; they will, however, provide property owners greater access to remedies in the event a regulation is judicially determined to have taken their property.
(1) If the landowner establishes a 75% diminution in the fair market value of his property directly resulting from an environmental or land-use restriction, then a rebuttable presumption arises that the restriction has effected a "taking" of the property without compensation in violation of article X, section 6 of the Florida Constitution.

(2) The burden then shifts to the governmental entity imposing the restriction to demonstrate a legitimate "police power" justification for the restriction pursuant to the analysis set forth below. If the governmental entity cannot meet its burden of proof, the court shall determine that the restriction is a "taking" of the property.

(3) If the landowner cannot establish that the fair market value of his property has been diminished by at least 75%, the burden of proof remains on the landowner to demonstrate that the restriction constitutes a "taking" of the property pursuant to the analysis set forth below.

(4) Where the court determines the restriction has effected a "taking," the landowner shall pursue his available remedies under Chapter 78-85, Laws of Florida as amended above.

A "balancing test" should be added to help the courts identify and weigh the factors in its analysis. Such a "balancing test" should consist of the following elements:

Where the landowner has the burden of proof: the court shall determine that the restriction effects a "taking" if the landowner proves by a preponderance of the evidence that factors (a) and (b) outweigh factor (c).

Where the governmental entity has the burden of proof: the court shall determine that the restriction does not effect a "taking" of the property if the governmental entity proves by a preponderance of the evidence that factor (c) outweighs factors (a) and (b).

Factors:

(a) The degree of diminution in value of the property resulting from the land-use restriction. As the diminution approaches 100%, the court shall require a more important public purpose to justify the restriction as a valid exercise of the police power.

235. The rebuttable presumption should be of the type defined in section 90.302(2), Florida Statutes. Accordingly, the governmental entity will be required to prove the "nonexistence of the presumed fact" (i.e., that the 75% reduction does not effect a taking of the property).

236. There have been previous attempts to codify a burden-shifting taking analysis. See, e.g., Fla. HB 571 (1977). The analysis proposed in this Comment is distinguishable from House Bill 571 because the burden of proof is not shifted to the government until the property owner shows a 75% diminution in value. In House Bill 571, the burden was shifted once "the landowner [establishes] that the value of the land has diminished in value and that [he] has suffered an economic loss [as a result of land-use regulation]." Id. § 3.
(b) The extent to which the regulation curtails the owner’s investment-backed expectations. Affirmative answers to the following questions shall be evidence that the restriction is imposing an inordinate burden on the individual landowner:

(i) Whether the landowner’s expectations are consistent with the expectations and land use of neighboring property owners (i.e., whether the use prevented is the same as uses to which surrounding properties are devoted).
(ii) Whether the present use of the property is precluded.
(iii) Whether other reasonable alternatives exist to achieve the public purpose purportedly served by the regulation while imposing a less severe burden on the landowner.

(c) The public purpose supporting the land-use restriction. Affirmative answers to the following questions shall be evidence that the land-use restriction is furthering an important public purpose:

(i) Whether the restriction is imposed to abate a public nuisance.
(ii) Whether the restriction is imposed to protect a significant natural resource.
(iii) Whether the restriction affects a large number of property owners.\(^237\)

Except for the 75% rebuttable presumption, the proposed takings analysis is merely a clarification and codification of the current taking analysis. The intent of the rebuttable presumption is to recognize that there is a point at which governmental regulation is presumed to be excessive and unreasonable. The proposal arbitrarily establishes this point where government has taken three-fourths of the value of an individual’s property. If government affects property to such an extent, it should have the burden of justifying the restriction, rather than the property owner being required to show the impropriety of the restriction.

The presumption above is easily distinguished from the 40% threshold which doomed House Bill 1437 in 1993 and House Bill 485 in 1994 (Property Rights Acts). This presumption is rebuttable, whereas in the Property Rights Acts the 40% threshold acted as conclusive presumption. Pursuant to the recommended takings analysis the governmental entity would not be foreclosed from establishing a legitimate police power justification for the restriction’s extreme impact on the prop-

\(^{237}\) The factors to be considered in the “balancing test” are merely intended to summarize the factors considered under federal and Florida law. See Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899-2901 (1992); Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978); Reahard v. Lee County, 968 F.2d 1131, 1136 (11th Cir. 1992); Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1380-81 (Fla. 1981); see also Final Staff Report, supra note 101, at 63-66.
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Property. Unlike the Property Rights Acts where the 40% threshold could only be overcome where the restriction at issue was preventing a "nuisance," the presumption above can be overcome based on a case-by-case balancing of the impact of the restriction on the property owner and the public interest served by the restriction.

As the judicial decisions over the past seventy years indicate, there is no simple solution to the takings issue. Similarly, legislative attempts to address this issue in Florida have been hard fought and incomplete. As Florida's environmental and land-use regulatory scheme expands, however, the need for consistency and certainty in the taking analysis is heightened. The recommendations above will provide both property owners and governmental entities additional certainty and should help maintain the delicate balance between private property rights and environmental and land-use regulation well into the next century. Without some degree of statutory clarification to current takings law, property owners in Florida will be forced to rely on the proverbial light at the end of the tunnel offered by the court in *Florida Rock Industries v. United States* when it noted that "[o]ver time, . . . enough cases will be decided with sufficient care and clarity that the line [between permissive regulation and unconstitutional takings] will more clearly emerge." Property owners can only hope that this light is not an oncoming train.

238. 18 F.3d 1560 (D.C. Cir. 1994).
239. Id. at 1571 (emphasis added).
APPENDIX
THE INTERMEDIATION PROCESS
CS FOR HB 485 & HB 1967

OWNER BELIEVES DEVELOPMENT ORDER "INORDINATELY LIMITS THE EFFECTIVE AND PRACTICAL USE" OF HIS PROPERTY

OWNER FILES REQUEST FOR RELIEF WITH CLERK WHICH IS FORWARDED TO INTERMEDIATOR

OWNER IS "RIPE" FLAWAC "DON'T COMPENSATE" "COMPENSATE"

PAYS UNLESS LOCAL GOV'T PETITIONS FOR REVIEW: WITH FLAWAC

ORDER ADJUSTED

FLA. COMM. TRUST

OWNER DOESN'T LIKE AMT.

GOV'T SAYS "YES" FLA. COMM. TRUST PAYS

GOV'T SAYS "NO"

ADJUSTMENT (AND IF NOT, COMPENSATE)

COMPENSATE

GOV'T SAYS "YES" FLA. COMM. TRUST PAYS

GOV'T SAYS "NO"

ADJUSTMENT

IF NO SOLUTION IS REACHED

' MEDIATION

' DOES GOVT. ACTION CONSTITUTE AN "INORDINATE LIMITATION . . . ."?

YES

NO

DEVELOPMENT ORDER REMAINS UNDISTURBED

OWNER IS "RIPE"