Updating Eminent Domain for Environmental Control

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NOTES

UPDATING EMINENT DOMAIN FOR ENVIRONMENTAL CONTROL

I. INTRODUCTION

The growing concern with ecology and pollution control has increased the attention given environmental law in Florida and elsewhere. The newly-established Florida Department of Environmental Regulation¹ and such recent legislation as the Environmental Land and Water Management Act of 1972² and the National Environmental Policy Act of 1969³ evidence the heightened concern.

Eminent domain—the power to take private property for public use without the owner's consent—has long been used as a tool for environmental improvement. Much of Florida's park and forest land was acquired through the exercise of municipal, county, state, or federal eminent domain. Condemnation, however, has evolved as a rather inflexible means of environmental control. This traditional method of imposing the public's will on private property interests may be inadequate in its present form to satisfy growing ecological demands. Land use regulations—the other major means of subordinating private property interests to the public will—have proven a somewhat successful alternative. But as discussed later,⁴ regulation poses its own problems.

Despite its long and widespread use, the exercise of eminent domain for environmental purposes is a widely-debated topic in Florida. Each year new eminent domain legislation is proposed.⁵ The most recently enacted Florida legislation is a local act⁶ granting the governor and cabinet limited powers to exercise eminent domain to save environmentally endangered lands in Volusia County.⁷ At the same time,

¹. FLA. STAT. § 20.261 (1975).
². FLA. STAT. §§ 380.012–.12 (1975).
⁴. See text accompanying notes 55–57 infra.
⁵. Eminent domain legislation proposed for the 1975 regular session included bills which would provide for revisions of eminent domain compensation procedures (Fla. S. 128 (1975); Fla. H.R. 1895 (1975)); new procedures to be followed by the Division of Recreation and Parks relating to eminent domain (Fla. S. 5, 816 (1975); Fla. H.R. 1501, 1854 (1975)); and acquisition of environmentally endangered lands by the Governor and Cabinet. Only the last proposal was passed by both houses; the others died in committee.
⁶. FLA. STAT. §§ 259.01–.07 (1975).
⁷. Fla. Laws 1975, ch. 75-251 provides:

(d) The board is empowered and authorized to acquire by the exercise of the power of eminent domain, in accordance with chapter 73, any land or water areas, related resources and property, and any and all rights, title and interest in
stricter land use regulations are proposed and passed each year. Their implementation raises potential conflicts between efforts at environmental protection and the need to preserve individual property rights. Opposition to strict environmental regulation is growing.\(^8\)

In response to the controversy surrounding the two practices, Governor Askew appointed a Property Rights Study Commission\(^9\) in December 1974. The Commission was directed to develop policy guidelines to aid in the determination of where "the private prerogative should end and where the public prerogative should begin' relative to property rights."\(^{10}\) The Commission's recommendations were submitted in a final report in March 1975.

This current activity will significantly affect the nature and application of eminent domain. This note focuses on the present use and shortcomings of environmental eminent domain and land use regulation, suggests future developments based on current trends, and summarizes the recommendations of the Governor's Property Rights Study Commission.

II. Existing Eminent Domain Provisions

The Florida Legislature has granted certain authorities limited powers to exercise eminent domain. It has delegated condemnation such land or water areas, related resources and other property in the Volusia recharge area lying and being in Volusia County, Florida, and containing approximately 3,100 acres.\(\ldots\)

\(\ldots\) Expenditures incurred by acquisitions pursuant to this paragraph shall not exceed the two hundred million dollars for state capital projects authorized in § 259.02, Florida Statutes. No eminent domain proceeding for the project specified herein shall be commenced after July 1, 1977.

As originally proposed, Fla. H.R. 193 (1975) would have granted much broader powers:

(d) The board is empowered and authorized to acquire by the exercise of the power of eminent domain, in accordance with chapter 73, any land or water areas, related resources and property, and any and all rights, title and interest in such land or water areas, related resources and other property which it determines to be reasonably necessary for the execution of the comprehensive plan for the conservation and protection of environmentally endangered lands in this state.

8. For example, in January 1975, State Commissioner of Agriculture Doyle Conner called for a six-month moratorium on state acquisition of endangered lands because Governor Askew had failed to "formulate a plan of relief" for property owners who are denied the use of their land without compensation through environmental protection regulations; his effort failed. Tallahassee Democrat, Jan. 3, 1975, at 9, col. 1.

9. The Commission, which was established by Executive Order 74–71 (Dec. 20, 1974), was composed of 26 legislators and private citizens having knowledge in the fields of law, taxation, property development, environmental protection, and agriculture. The Commission began its ten-week effort on December 30, 1974, and submitted a final report containing recommendations on March 17, 1975.

10. Governor's Property Rights Study Commission, Final Report of the Governor's
authority to counties, municipalities, school boards, the Department of Transportation, railroad and canal companies, and the Trustees of the Internal Improvement Fund. The Florida Rules of Civil Procedure and chapters 73 and 74 of the Florida Statutes provide the general procedures these agencies are to follow.

Separate statutes provide for the exercise of eminent domain to preserve state forests, historical districts, land or water areas for outdoor recreation and conservation, and to control junkyards. The Florida Environmental Land and Water Management Act of 1972, provides for agencies with condemnation authority to purchase land and specifically authorizes the exercise of eminent domain in the Big Cypress Swamp while designating it an area of critical state concern. Eminent domain is not presently available in Florida for wilderness land preser-


16. Fla. Stat. § 253.02(4) (1975). The power of the Trustees of the Internal Improvement fund have been transferred to the Department of Natural Resources. Fla. Laws 1975, ch. 75-22, §§ 10, 15.
17. Federal eminent domain is exercised for environmental objectives under limiting statutes similar to those used by the state. The Coastal Zone Management Act, 16 U.S.C.A. § 1455(d)(2) (1974), provides:

Such authority shall include power—to acquire fee simple and less than fee simple interests in lands, waters, and other property through condemnation or other means when necessary to achieve conformance with the management program.

Under the provision establishing national forests, 16 U.S.C. § 517 (1970) provides:

The Secretary of Agriculture may do all things necessary to secure the safe title in the United States to the lands to be acquired . . .
22. Fla. Stat. § 380.08(2) (1975) provides:

If any governmental agency authorized to adopt a rule or regulation or issue any order under this chapter shall determine that, to achieve the purposes of this chapter, it is in the public interest to acquire the fee simple or lesser interest in any parcel of land, such agency shall so certify to the state land planning agency, the Board of Trustees of the Internal Improvement Trust Fund, and other appropriate government agencies.
23. Fla. Stat. § 380.055(7) (1975) provides:

The Governor and cabinet as the head of the Department of Natural Resources are empowered and authorized to acquire by the exercise of the power of eminent domain any land or water areas and related resources and property . . . lying within the boundaries of the Big Cypress Area.
vation; however, statutes in that area provide for the purchase of land without the exercise of eminent domain.\textsuperscript{24}

The legislature has delegated the power to condemn land for parks and recreational uses to municipal and county governments; no specific provision authorizes the state to do the same. Governor Askew has asked the legislature to return that power to the state.\textsuperscript{25}

\section*{III. Present Operation of Eminent Domain}

Eminent domain is sometimes said to be based on the idea that the sovereign retains ownership of all land and can resume possession whenever the public interest so requires.\textsuperscript{26} Although eminent domain is considered an "inherent power" of the state, and therefore exists independent of constitutional authorization,\textsuperscript{27} it is subject to federal and state constitutional limitations. The fifth amendment to the United States Constitution mandates that just compensation be provided when eminent domain is exercised; it also requires that the power be exercised only for a public use.\textsuperscript{28} That amendment's "taking clause" has been adopted in article X of the Florida Constitution.\textsuperscript{29}

When the "public use" issue is contested,\textsuperscript{30} the courts require a

\begin{itemize}
  \item 24. FLA. STAT. § 258.23(1) (1975).
  \item 25. In his opening address to the 1975 Regular Session of the Florida Legislature, Governor Askew said:
    
    In our purchase of lands for the State, we have too often been forced to buy only what was most available, and not what was most desirable. I urge you to give to the state a power already exercised by the cities and counties . . . the power of eminent domain in the acquisition of parks and recreational lands.
    
    Tallahassee Democrat, Apr. 8, 1975, at 3, col. 1. This request ultimately was denied by the legislature. See note 5 supra.
  \item 26. Daniels v. State Road Dep't, 170 So. 2d 846, 848 (Fla. 1964).
  \item 27. See Kohl v. United States 91 U.S. 367, 371-72 (1875); Peavy-Wilson Lumber Co. v. Brevard County, 31 So. 2d 483, 485 (Fla. 1947).
  \item 28. U.S. CONSTITUTION amend. V: "[N]or shall private property be taken for public use, without just compensation." "Public use" and "public purpose" are used interchangeably in Florida case law.
  \item 29. FLA. CONSTITUTION art. X, § 6(a) provides:
    
    No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner . . . .
  \item 30. One of the most-quoted definitions of "public use" is found in Demeter Land Co. v. Florida Pub. Serv. Co., 128 So. 402, 406 (Fla. 1930), where the court stated:
    
    A use to be public must be fixed and definite. It must be one in which the public, as such, has an interest, and the terms and manner of its enjoyment must be within the control of the State, independent of the rights of the private owner of the property appropriated to the use. The use of property cannot be said to be public if it can be gainsaid, denied, or withdrawn by the owner. The public interest must dominate the private gain.

Acceptable "public uses" include highways, slum clearance projects, drainage of swamps, flood control projects, public water supplies, public buildings, airports, parking facilities,
showing that the taking is a public *necessity*.\(^{31}\) The test can be met either by a legislative act declaring necessity,\(^{32}\) or specific evidence proving the need for a particular purchase.\(^{33}\) In one case a park's necessity was established by a showing that 250,000 residents lived within an 8-mile radius of the proposed site with no existing park.\(^{34}\) The state may not condemn property, however, if the necessity is created entirely by nonresidents.\(^{35}\)

In general, the condemning authority enjoys broad discretion in deciding what particular property the public needs,\(^{36}\) and the type of interest required. It can take a fee simple even if the necessity is only temporary and a lesser interest in the land would be sufficient.\(^{37}\)

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\(^{31}\) See Ball v. City of Tallahassee, 281 So. 2d 333 (Fla. 1973); Brest v. Jacksonville Expressway Authority, 194 So. 2d 658 (Fla. 1st Dist. Ct. App. 1967).

\(^{32}\) See Marvin v. Housing Authority, 183 So. 145 (Fla. 1938). In this case Fla. Laws 1937, ch. 17981 declared the necessity for exercising eminent domain for slum clearance projects:

Section 2. Finding and Declaration of Necessity.—It is hereby declared:

(a) that there exist in the State insanitary or unsafe dwelling accommodations and that persons of low income are forced to reside in such . . . accommodations; that within the State there is a shortage of safe or sanitary dwelling accommodations available at rents which persons of low income can afford . . . ; that the aforesaid conditions cause an increase and spread of disease and crime . . . ;

(d) that it is in the public interest that work on projects for such purposes be commenced as soon as possible in order to relieve unemployment which now constitutes an emergency; and the necessity in the public interest for the provision hereinafter enacted, is hereby declared as a matter of legislative determination.

\(^{33}\) Where the legislature has not declared a necessity, the question of necessity is a judicial one. The necessity need not be absolute, but only one that is reasonable. Wilton v. St. Johns County, 123 So. 527, 534 (Fla. 1929).

\(^{34}\) Dade County v. Paxson, 270 So. 2d 455 (Fla. 3d Dist. Ct. App. 1972). In this case a certified resolution of the Dade County Commission deemed the taking of three parcels of land necessary for the creation of Black Point Park. The Third District Court of Appeal said that the condemning authority is not required to prove “absolute” necessity when there appears in the record proof of some “reasonable necessity” for the taking. The court upheld the taking of the two larger parcels but denied condemnation of a third parcel, a one-acre lot somewhat removed from the main body of the proposed park, saying “that an acquiring authority will not be permitted to take a greater quantity of property . . . than is necessary to serve the particular public use for which [it] is being acquired.” Id. at 459.

\(^{35}\) Clark v. Gulf Power Co., 198 So. 2d 368 (Fla. 1st Dist. Ct. App. 1967). In this case Gulf Power Co. petitioned to condemn land in Florida for the construction of a transmission line to supply power for the exclusive use of Georgia residents. The court held that “property in one state cannot be condemned for the sole purpose of serving a public use in another state.” Id. at 371.

\(^{36}\) Staplin v. Canal Authority, 208 So. 2d 853 (Fla. 1st Dist. Ct. App. 1968).

\(^{37}\) Wright v. Dade County, 216 So. 2d 494 (Fla. 3d Dist. Ct. App. 1968), *cert. denied,*
Methods of valuing condemned land vary. The condemnee should receive the "'fair actual market value at the time of the lawful appropriation,'" including compensation for improvements and fixtures. This value, which is determined by jury in Florida, is usually expressed as the amount that a willing purchaser under no compulsion to buy would pay for the property. Special damages, such as moving costs and business losses, are also awarded.

In Florida, market value is generally based on the highest and best actual or reasonably possible use of the property. Some courts in other states have expressed this standard as the most profitable use to which the land can reasonably be put in the near future.

38. See Dade County v. General Waterworks Corp., 267 So. 2d 633 (Fla. 1972). The trial court dismissed the eminent domain proceedings in this case because the county had, in the court's opinion, committed itself to a particular valuation technique (capitalization of earnings) which the court felt was improper. The Supreme Court of Florida reversed, saying that the trial court was premature in making a pronouncement on the proper method of valuation since the method depends on the particular circumstances of the case, and those circumstances were not yet known.
40. See, e.g., Meyers v. Daytona Beach, 30 So. 2d 554, 555 (Fla. 1947). See also 29A C.J.S. Eminent Domain § 175(1) (1965); 12 FLA. Jur. Eminent Domain § 98 (1957).
41. FLA. STAT. § 73.071 (1975).
44. FLA. STAT. § 73.071(3)(b) (1975) provides:
(3) The jury shall determine solely the amount of compensation to be paid, which compensation shall include:

... (b) Where less than the entire property is sought to be appropriated, ... and the effect of the taking of the property involved may damage or destroy an established business of more than 5 years' standing, owned by the party whose lands are being so taken, ... the probable damages to such business which the denial of the use of the property so taken may reasonably cause ...
45. See State Road Dep't v. Chicone, 158 So. 2d 753 (Fla. 1963). In this case the threat of condemnation restricted the uses the owner could make of his property in the interim before the actual taking. The court said it would be unfair to base the compensation for the property on the value of such restricted use. See also Board of Comm'rs of State Institutions v. Tallahassee Bank & Trust Co., 116 So. 2d 762 (Fla. 1959). Here the court would not allow the valuation to be based on the fact that the property was adaptable to use as business properties since a zoning ordinance limited it to residential use.
46. See United States v. Carroll, 304 F.2d 300 (4th Cir. 1962). In this case the most "profitable" use of a portion of the land to be acquired was the cultivation of marketable sod. The decision of the district court was vacated and remanded by the Fourth Circuit because it was not clear from the record that that use had been adequately considered. Id. at 305.
ment potential is an important factor in valuation, but purely speculative uses are not considered.47 Where a zoning ordinance or other regulation limits the land's uses, only those uses permitted by the regulation need be considered.48

Although the landowner is paid for existing improvements and fixtures, he may not build on the land to increase his compensation after he has been advised that the land is to be condemned.49 A state might, for environmental reasons, use this rule to slow development by simply announcing an intention to condemn land in the future. The courts, however, would probably not allow any long-range control in this manner.50

IV. DRAWBACKS OF THE PRESENT EMINENT DOMAIN CONCEPT AS AN ENVIRONMENTAL CONTROL

In the past, eminent domain has been a somewhat effective tool for protecting parks, forests, and wildlife refuges from private development; however, its exercise cannot meet the present demand for wide-scale environmental controls. Property is expensive; land

47. See Rochelle v. State Road Dep't, 196 So. 2d 477 (Fla. 2d Dist. Ct. App. 1967). The respondent landowner in this case testified that she had bought the land in question for speculation because she had heard that a Florida Turnpike exit would be located at the site. Although the information was true (this was a proceeding to purchase land for that exit), the jury was not allowed to consider that speculative use in determining the land's value. Id. at 478. See also Board of Comm'rs of State Institutions v. Tallahassee Bank & Trust Co., 100 So. 2d 67 (Fla. 1st Dist. Ct. App. 1958). In this case the First District Court of Appeal listed the criteria for determining whether a use is too speculative:

To warrant admission of testimony as to the value for purposes other than that to which the land is being put, or to which its use is limited by ordinance at the time of the taking, the landowner must first show: (1) that the property is adaptable to the other use, (2) that it is reasonably probable that it will be put to the other use within the immediate future, or within a reasonable time, (3) that the market value of the land has been enhanced by the other use for which it is adaptable.

Id. at 69.

48. Langston v. Miami Beach, 242 So. 2d 481 (Fla. 3d Dist. Ct. App. 1971). In condemning land for an oceanfront park, the fact that there was no probability that the property would be rezoned for a higher economic use made it unnecessary for the jury to consider those uses when determining value. But see text accompanying notes 73, 74 infra.

49. See Cook v. Di Domenico, 135 So. 2d 245 (Fla. 3d Dist. Ct. App. 1961). In this case Dade County had listed the landowner's property as a prospective highway site. Construction on the land was permitted only if the landowner waived his right to compensation for such improvements in event of a later condemnation. The Third District Court of Appeal approved of the principle behind the requirement, but upheld the issuance of a writ of mandamus to compel issuance of a building permit without waiver of compensation because the condemnation had been proposed 9 years earlier and construction did not seem likely to begin soon. Id. at 246.

50. See notes 74–79 and accompanying text infra.
values are rising and inflation rates are high. State and federal funds available for land purchases are hardly adequate to purchase the vast areas necessary for environmental protection. For example, in 1973 the Florida Coastal Coordinating Council identified almost 1 million acres of privately owned coastal wetlands that should be preserved.\(^5\)

Because improvements are included in valuation, land purchase prices in fast-developing areas soon become too high for effective use of eminent domain. Yet these are often the areas with the greatest need for public facilities such as beaches and parks. In order to purchase and preserve lands in an overdeveloping area, the government ends up financing precisely what it seeks to prevent. If possible, the government condemns the least developed land in the area since it is also the least expensive.

When eminent domain is exercised to preserve beachlands, the stretches of beach with the most extensive residential, commercial, and industrial development—those most damaging to the quality of the environment—are left untouched. Landowners who exercise restraint in developing their property, and therefore cause the least environmental damage, find their lands condemned, and must sell at prices far below those enjoyed by their less cautious neighbors.\(^5\)\(^2\) Where landowners anticipate that the state or federal government plans to preserve certain areas, they may even accelerate development to avoid having their land selected for condemnation.

Eminent domain as presently practiced reflects the view that any land development is good and that society is better served by "improved" than undeveloped land.\(^5\)\(^3\) Viewed from this perspective, undeveloped land is "wasteful," and therefore the owner should receive less compensation. But attitudes toward land use are changing. Today many people view development as an evil rather than as a service to society, and undeveloped land is not always considered a waste. The actual value of natural beaches, unobstructed water recharge areas, and unmolested mangrove swamps is just beginning to be fully appreciated. As that appreciation grows, attitudes change toward such "improvements" as sea walls, parking lots, and land fill projects that directly

\(^{52}\) See note 40 and accompanying text supra.
\(^{53}\) The valuation scheme discussed in text accompanying note 40 supra, takes into consideration improvements and fixtures to the land. Paying an additional amount for any improvements reflects an underlying premise that developed land is of greater value to the state than undeveloped land. One who has developed his land is rewarded by higher compensation.
interfere with the natural functions of property. Viewed from this
new perspective, it is anomalous to compensate a landowner for im-
provements that are either of no service or a detriment to society.
Similarly, it is illogical to pay reduced compensation to those owners
who have served society by preserving the environment. If eminent
domain is to become a more effective tool for environmental control, it
must somehow incorporate these changing values and attitudes. A
possible approach would be to categorize permitted but noncom-
mensurable uses by statute.

V. THE INTERRELATIONSHIP OF EMINENT DOMAIN
AND LAND USE REGULATION

Compensation is required only when land is taken. Government
actions which injure property or decrease its value but fall short of a
taking (a judicial determination made on a case-by-case basis) are
usually not compensable.54 Since most land use regulations fall into
this category, they can be far less expensive than eminent domain pro-
ceedings. Zoning ordinances are an example.

Land use regulations, though, have shortcomings which prevent
their completely replacing eminent domain as an environmental tool. While regulations effect land control at less cost than does eminent
domain, the extent of control is limited.55 Only eminent domain can
assure that the land is not used for any purpose.56 Eminent domain
has two other advantages over land use regulation. It can spread the
cost of saving environmentally endangered lands over all of society
rather than burdening only the individual landowner. And it is un-
affected by statutory limitations on the extent of land regulation per-
mitted for specific purposes.57 Despite these limitations, regulations
used in conjunction with, or in place of, the exercise of eminent domain
can provide more efficient and less costly environmental control than
can condemnation alone.

A. General Scope of Land Use Regulation

Land use regulation is valid under a state's police power if it

54. See, e.g., Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); State Plant Bd.
v. Smith, 110 So. 2d 401, 404 (Fla. 1959).
55. See notes 80–97 and accompanying text infra.
56. Regulations prohibiting all uses are not permitted (see notes 89–91 and accompany-
ing text infra); yet total prohibition of development is often desirable where wildlife
preservation and other environmental objectives are sought.
57. For example, Fla. Stat. § 380.05(17) (1975) limits the acreage that can be de-
signated areas of critical state concern to 5% of the land of the state. Lands acquired
through eminent domain would not come under this limitation.
bears a substantial relation to the public health, safety, morals, or general welfare. All property is held subject to the police power of the state. Since *Village of Euclid v. Ambler Realty Co.*, courts have held that zoning regulations limiting land uses are not confiscatory even if they substantially reduce property value. Mere decrease in value is not conclusive evidence of a taking or otherwise grounds for compensation to the landowner; in *Euclid* the property value was reduced from $10,000 to $2,500 per acre.

Courts have upheld regulations exercising the police power even when they prohibit uses already being made and render existing developments worthless. They have also sustained prohibitions on all uses of certain portions of a landowner's property, such as are caused by beach setback lines.

Land use regulations must be within the substantive authority granted the particular agency by its enabling act. To be upheld, a regulation generally must benefit the entire population rather than

60. 272 U.S. 365 (1926). In *Euclid*, a village zoning ordinance regulated and restricted the location of trades, industries, apartment houses, lot sizes, building heights, etc. Ambler Realty sought an injunction against enforcement of the ordinance because the ordinance greatly reduced the value of Ambler's land. Ambler alleged that the ordinance confiscated and destroyed a great part of the land's value and deterred prospective buyers from purchasing the land. *Id.* at 384-85. The Court looked only to see whether the ordinance was a valid exercise of police power authority. Establishing that it was, the Court refused to grant the injunction. The Court found it unnecessary to consider the extent of Ambler's loss since the injuries complained of were merely speculative and not actually suffered.

61. *Id.* at 368, citing argument for appellants. See also *State Plant Bd. v. Smith*, 110 So. 2d 401 (Fla. 1959).
62. 272 U.S. at 384.
63. See *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). The land in question was a bed of clay which had long been used for the manufacture of bricks. The land was worth $800,000 ($100,000/acre) as a brickyard and only $60,000 if used for any other purpose, and it was totally unsuited for other uses because of deep excavations. Yet the United States Supreme Court upheld a Los Angeles ordinance making it a misdemeanor to establish or operate a brickyard within the city. See also *Mugler v. Kansas*, 123 U.S. 623 (1887), where state legislation prohibiting the manufacture of intoxicating liquors was upheld even though it made Mugler's brewery property decrease in value from $10,000 to $2,500. *Webster Outdoor Advertising Co. v. Miami*, 256 So. 2d 556 (Fla. 3d Dist. Ct. App. 1972), is in accord with the above cases. In most cases, however, a landowner will be permitted to continue such nonconforming uses of land and structures as were in existence at the time of the adoption of the regulations on the theory that it would be an injustice and unreasonable hardship to compel immediate removal of pre-existing structures or suppression of an otherwise lawful established business. *Fortunato v. Coral Gables*, 47 So. 2d 321 (Fla. 1950).
a special interest group;\(^{65}\) statewide or regional regulations have had more success in court than local regulations.\(^{66}\) It has been suggested that courts are more apt to uphold regulations if they prevent some type of harm.\(^{67}\) Such a conclusion is probably based on the tort concept that a landowner may not use his property in a manner that is harmful to others.\(^{68}\)

**B. Regulations in Conjunction with Eminent Domain**

As mentioned above,\(^{69}\) existing land use regulations preventing the "highest and best" use of land are relevant in determining the reasonable use of the property for eminent domain valuation purposes.\(^{70}\) In addition, improvements made in violation of existing regulations are not compensable;\(^{71}\) the landowner has a right to engage in and be compensated for only those uses which the law allows.\(^{72}\)

Where regulations limit or prohibit land uses, the jury considers the effect of the restrictions along with the probability that the parcel will be rezoned for other uses or that the regulation will be repealed in the foreseeable future.\(^{73}\) Prohibited uses can be considered only if there is a reasonable probability that the regulation will be changed or an exception made.\(^{74}\) This rule gives government the ability to reduce market values in an area considered for eminent domain simply by inhibiting development through zoning.\(^{75}\) There are, however, limitations to that power. Courts generally strike restrictive land use regulations where there is clear evidence that the authorities have imposed the regulations to prevent improvements on land destined for condemnation.\(^{76}\) Such regulations are held invalid as arbitrary, discriminat-

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65. F. BOSSelman, supra note 51, at 199.
69. See notes 45–48 and accompanying text supra.
70. See note 48 supra. See also Staninger v. Jacksonville Expressway Authority, 182 So. 2d 483 (Fla. 1st Dist. Ct. App. 1966).
71. 29A C.J.S. Eminent Domain § 175(1) (1965).
72. Id.
76. See Board of Comm'rs of State Institutions v. Tallahassee Bank & Trust Co., 108 So. 2d 74 (Fla. 1st Dist. Ct. App. 1958). See also Van Alstyne, Taking or Damaging
tory, and unreasonable. In one Florida case, state and local officials imposed strict zoning regulations to prevent expensive improvements on land which would ultimately be condemned. The court found that the zoning ordinance, if literally applied, would result in an arbitrary and unreasonable restraint on the use of property. It noted that since the ordinance was arbitrary, it probably would be changed in the future; it therefore held that the jury should have been allowed to consider prohibited uses in determining compensation. The court stated:

It appears to us that it would be totally unjustifiable to hold that the condemning authority could rely on the restrictive provisions of a zoning ordinance to depress land values and in the same litigation deny to the property owner an opportunity to defend himself and his property against the asserted ordinance on the ground of its alleged invalidity.

C. Regulations in Place of Eminent Domain

As courts have limited the use of regulations in conjunction with eminent domain, they have also limited the extent of regulations used in place of eminent domain. A regulation too restrictive will be deemed a taking.

The dominant standard for determining whether a regulation amounts to a taking of land is the "diminution of value" test established in Pennsylvania Coal Co. v. Mahon. In that case, Justice Holmes balanced the public benefit of the state action against the landowner's economic loss. Under this test, when the diminution in property value reaches a certain level, eminent domain must be exercised and compensation afforded. In the 54 years since Pennsylvania Coal was...
decided, the line between regulation and taking has remained vague; no generally accepted numerical limit exists regarding what diminution is allowable without compensation.84

Courts have found other classes of regulations to amount to a taking. These include regulations which result in private land becoming a public facility85 and those which discriminate against particular parcels of land.86 In making the latter determination, courts look to see if the regulations are applied to certain properties differently than to other land similarly situated,87 or if they prohibit uses which are allowed to be made of surrounding or nearby land.88

Courts nearly always find a taking where the ordinance or regulation completely deprives an owner of any beneficial use or the only use for which the land is suited.89 The key to that rule is the phrase

84. See F. Boselman, supra note 51, at 208-09; Nectow v. City of Cambridge, 277 U.S. 183 (1928).
85. See, e.g., Baker v. Planning Bd., 228 N.E.2d 831 (Mass. 1967). In this case the Supreme Judicial Court of Massachusetts held that a planning board could not restrict land uses by refusing to approve subdivision plans so that the town could continue to use the owner's land as the town's water storage area.
86. Mugler v. Kansas, 123 U.S. 623 (1887). In Mugler, legislation prohibiting the manufacture of alcoholic beverages affected only those parcels of land having breweries or distilleries on them.
87. Mayer v. Dade County, 82 So. 2d 513 (Fla. 1955). Here the court said that Dade County had "singled out" the particular parcel in question for an unusual application of its building setback line requirement. According to the zoning ordinance involved, buildings on property abutting public roads had to be 25 feet from the road's edge. The county had indefinite plans to widen the road adjacent to appellant's property and wanted to measure the setback based on the proposed street but the Supreme Court of Florida rejected the county's position. Id. at 519.
88. William Murray Builders, Inc. v. City of Jacksonville, 254 So. 2d 364 (Fla. 1st Dist. Ct. App. 1971). Appellant wanted to build an apartment complex on property that was restricted to single family dwellings. The First District Court of Appeal found that the zoning ordinance as applied to appellant's property was arbitrary and unreasonable since the property surrounding appellant's land contained railroad yards, a convenience store, a gasoline station, a large apartment complex, and a sewage disposal system. Id. at 366-67.
89. See, e.g., Dooley v. Town Plan & Zoning Comm'n, 197 A.2d 770 (Conn. 1964); Forde v. City of Miami Beach, 1 So. 2d 642 (Fla. 1941). In Dooley, a zoning change made the plaintiff's property part of a flood plain district and restricted uses to:
   1. Parks, playgrounds, marinas, boat houses, landings and docks, clubhouses and necessary uses.
   2. Wildlife sanctuaries operated by governmental units or non-profit organizations.
   3. Farming, truck and nursery gardening.
   4. Motor vehicle parking as an accessory to a permitted use in this district or an adjacent district.

The Supreme Court of Errors of Connecticut held that the regulation was confiscatory. 197 A.2d at 771 n.1.

In Forde, a Miami Beach zoning ordinance restricted appellant's vacant oceanfront property to single residences. The Supreme Court of Florida ruled that enforcement of the ordinance and refusal to permit appellant to build a hotel or apartment building on the
"only use for which the land is suited." Most jurisdictions have held that a regulation requires compensation as a taking if it prohibits all reasonable uses.\textsuperscript{90} Courts generally invalidate zoning enactments which cause property to be unimproved or lie idle for an indeterminable time.\textsuperscript{91}

Under the majority view, a regulation can validly deprive the owner of the most profitable use, but cannot be sustained if it deprives him of all practical uses,\textsuperscript{92} even if the land in question is a flood plain\textsuperscript{93} or wetlands.\textsuperscript{94} Other courts, however, have upheld regulations which absolutely prohibit residential or commercial structures on flood plains\textsuperscript{95} or limit uses to parks, recreation and agriculture,\textsuperscript{96} as well as wetlands acts which severely limit land uses.\textsuperscript{97} In this area, just as with eminent domain valuation procedures, changing public attitudes toward unrestrained development probably will have a significant impact on the law.

VI. THE IMPLICATION OF \textit{Just v. Marinette County}

A much-discussed\textsuperscript{98} 1972 Wisconsin Supreme Court case, \textit{Just v. Marinette County},\textsuperscript{99} suggests a mechanism by which wetlands, and perhaps other areas in which the public has an interest, can be strictly

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\textsuperscript{90} Florida is no exception. \textit{See}, e.g., Ocean Villa Apartments, Inc. v. City of Fort Lauderdale, 70 So. 2d 901 (Fla. 1954). In this case, the building setback requirement of a zoning ordinance limited the landowner's useful area to a depth of 17 feet. The Supreme Court of Florida hinted that this may have left no reasonable uses open to the landowner but found it unnecessary to decide that issue. \textit{Id.} at 903.

\textsuperscript{92} See, e.g., \textit{Roman Catholic Diocese of Newark v. Borough of Ho-Ho-Kus}, 220 A.2d 97 (N. J. 1966). In this case, the Catholic Diocese wanted to build a high school on land zoned R-1. After acquisition of the land, the municipality amended the zoning ordinance to prohibit schools in R-1 districts. The court held that this did not zone the area into idleness.


\textsuperscript{98} See, e.g., \textit{Just v. Marinette County}, 201 N.W.2d 761 (Wis. 1972).
regulated without compensation to landowners. The court held that a land regulation can be valid even if it restricts owners to "natural uses" of land.\textsuperscript{100} That holding permits more extensive land use control than the "reasonable use" test just described.\textsuperscript{101}

The \textit{Just} court distinguished between "natural" and "nonnatural" uses of property; it said that compensation is necessary only when all natural uses are prohibited. The opinion stated that a landowner "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 . . . ."\textsuperscript{102} The court defined "natural uses" as those requiring minimal artificial filling, draining, or other development.\textsuperscript{103}

The \textit{Just} court used the "diminution of value" test to determine whether the regulation constituted a taking, but ignored the land's development potential and compared the land's regulated value to its value in a natural state.\textsuperscript{104} This land valuation method might be applied in other regulation cases and could be used in eminent domain proceedings. The potential impact of the \textit{Just} decision warrants further discussion.

Marinette County had a shoreline zoning ordinance that required a permit for all but a very limited number of uses.\textsuperscript{105} The regulation

\textsuperscript{100} Id. at 768.
\textsuperscript{101} See note 90 and accompanying text supra.
\textsuperscript{102} 201 N.W.2d at 768.
\textsuperscript{103} Id. The \textit{Just} definition of "natural use" appears stricter than that used in other areas of the law. In an early nuisance case, for example, "natural use and enjoyment" of property was defined as:

\ldots such development of its resources, and such customary and appropriate employment of the property itself, as is needful for its complete utilization, according to its inherent qualities or contents and its surrounding, and does not include, in any other case, the bringing upon it artificially of substances not naturally found there.


\textsuperscript{104} Chief Justice Hallows explained:

The \textit{Justs} argue their property has been severely depreciated in value. But this depreciation of value is not based on the use of the land in its natural state but on what the land would be worth if it could be filled and used for the location of a dwelling. While loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling.

\textsuperscript{201} N.W.2d at 771.

\textsuperscript{105} The \textit{Just} court cited Marinette County, Wis., Ordinance 24, § 3.41, Sept. 19, 1967, which allowed the following uses without a permit:

(1) Harvesting of any wild crop such as marsh hay, ferns, moss, wild rice, berries, tree fruits and tree seeds.

(2) Sustained yield forestry subject to the provisions of Section 5.0 relating to removal of shore cover.
EMINENT DOMAIN

was patterned after a model ordinance published by the Wisconsin Department of Resource Development based on legislation authorizing counties to adopt zoning ordinances regulating the use of shorelands. The Justs owned "shoreland" under the regulation.

The county told the Justs that the ordinance forbade their already-begun land filling. It sought an injunction to prevent the Justs from placing fill material on their property without obtaining a permit; the Justs sought a declaratory judgment that the ordinance was unconstitutional.

The Justs argued that the ordinance, by prohibiting them from placing fill on wetlands property, amounted to a taking of land without compensation. The Wisconsin Supreme Court answered that filling was not a "natural use" of a swamp and that such filling created a public harm. The court also found that since the ordinance did not prohibit natural and indigenous uses, it was a constitutional exercise of the state's police power.

The court distinguished restrictions intended to restrain conduct harmful to the public from those designed to secure a public benefit

(3) Utilities such as, but not restricted to, telephone, telegraph and power transmission lines.

(4) Hunting, fishing, preservation of scenic, historic and scientific areas and wildlife preserves.

(5) Non-resident buildings used solely in conjunction with raising waterfowl, minnows, and other similar lowland animals, fowl or fish.

(6) Hiking trails and bridle paths.

(7) Accessory uses.

(8) Signs, subject to the restriction of Section 2.0.

Section 3.42 of the ordinance required a conditional use permit for the following:

(1) General farming provided farm animals shall be kept one hundred feet from any non-farm residence.

(2) Dams, power plants, flowages and ponds.

(3) Relocation of any water course.

(4) Filling, drainage or dredging of wetlands according to the provisions of Section 5.0 of this ordinance.

(5) Removal of top soil or peat.

(6) Cranberry bogs.

(7) Piers, Docks, boathouses.

201 N.W.2d at 765-66 n.4.


107. Wis. Stat. Ann. § 59.971 (Spec. Pamphlet 1975), defines "shorelands" as "all lands . . . in . . . unincorporated areas within the following distances from the normal high-water elevation of navigable waters . . . : 1,000 feet from a lake, pond or flowage; 300 feet from a river or stream or to the landward side of the flood plain, whichever distance is greater."

108. 201 N.W.2d at 770.

109. Id. at 768.

110. Id.
not presently enjoyed. Only in the latter case must the state compensate the landowner for a decrease in value caused by the restriction. Environmental protection can either secure a new public benefit or prevent public harm; the Just court viewed it as the latter, and therefore required no compensation. According to the court, the ordinance prevented harm by restricting unnatural uses, since “swamps and wetlands serve a vital role in nature, are part of the balance of nature and are essential to the purity of the water in our lakes and streams.” It found that the ordinance obtained no new benefits and only preserved something already the public’s by right.

Under the Just decision a restriction is not a taking if it prohibits an unnatural use which would harm the land’s natural characteristics and adversely affect the public. If the court finds that a public harm will result unless the land remains in its natural state, it will measure the landowner’s economic loss as the value of the natural and indigenous uses of the land—the most profitable use is irrelevant.

Whether Just will result in more courts accepting stricter environmental regulation without compensation is not clear. Navigable waters were involved in Just; public rights concerning lands adjacent to such waters are fairly well established. The decision can be extended to forests and other areas or limited to navigable waters. The Just court provided no specific guidelines as to what constitutes a “natural use.” The ambiguity of the term allows for a due process notice challenge: What are the “natural uses” of a beach, a forest, or a lake?

To date, most states have not adopted the “natural use” approach. Generally, the application of the Pennsylvania Coal “diminution of value” test to Just-type regulations, which seek to keep wetlands in their natural state, results in their being declared confiscatory. Courts have held that prohibiting fill amounts to a taking unless the filled

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111. *Id.* at 767.
113. 201 N.W. 2d at 767. The Pennsylvania Coal diminution of value test is usually used only when the regulation in question provides a public benefit. It could be argued that the two tests—benefit or harm—are in reality identical. The Just court may have decided against compensation first and then used the prevention of harm rationale to justify that decision.
114. 201 N.W.2d at 768.
115. *Id.* at 767–68.
116. Note that not all nonnatural uses are harmful.
land would have no value whatsoever;" yet *Just* has not been ignored. A California court sustained a regulation proscribing wetlands filling upon strong evidence of ecological danger. Wisconsin courts have followed *Just,* and one Florida court has cited it. Florida’s growing concern with environmental control and wetlands in particular make it likely that the state’s courts will take a closer look at the *Just* case.

**VII. Factors Influencing the Future of Eminent Domain**

Three interrelated trends are shaping the future course of environmental eminent domain: (1) increasing judicial willingness to uphold stricter land use regulations, as evidenced by the *Just* decision; (2) more landowner challenges to those regulations; and (3) broader and more frequent governmental exercise of eminent domain. More extensive regulation may lessen the need for outright purchases of private land for environmental control, but there is a growing landowner demand for more compensation. Authorities are responding by seeking to increase the use of eminent domain.

**A. Stronger Land Use Regulations**

Historically, courts have more strictly scrutinized land use regulations than other regulations. But judicial attitudes are changing toward exercises of the police power for environmental objectives. Courts are becoming more willing to support state and regional land regulation programs and to uphold stricter environmental controls; they are giving more weight to environmental purposes as balanced

121. *Omernik v. State,* 218 N.W.2d 734, 743 (Wis. 1974) (a statute prohibiting diverting water from streams for irrigational purposes was found to be a legitimate exercise of state police power to prevent possible harm to the public); *Kniec v. Town of Spider Lake,* 211 N.W.2d 471 (Wis. 1975) (the zoning ordinance limiting use to agriculture was found inconsistent with the natural characteristics of the land).
122. *Hillsborough County Environmental Protection Comm’n v. Frandorson Properties,* 283 So. 2d 65 (Fla. 2d Dist. Ct. App. 1973). The court said that “the Legislature possesses the power, in order to promote the quality of our environment, to forbid the destruction of the mangrove area even by a landowner upon his own property.” *Id.* at 68.
123. See note 25 *supra.*
124. See *F. Boswellman,* *supra* note 51, at 238.
125. *Id.* at 212.
126. See, e.g., *Associated Home Builders v. City of Walnut Creek,* 484 P.2d 606 (Cal. 1971); *Potomac Sand & Gravel Co. v. Governor of Maryland,* 293 A.2d 241 (Md. 1972); *In re Spring Valley Dev.,* 300 A.2d 736 (Me. 1973).
against private losses, and liberally construing statutes dealing with the protection of natural resources.\textsuperscript{127}

Eventually, some environmental purposes may outweigh any loss;\textsuperscript{128} the prohibition of uses resembling common law nuisances has neared that status already.\textsuperscript{129} Courts in a few states, including Wisconsin and California, are beginning to find such important environmental reasons for wetlands control that they uphold proscriptions against filling as within the police power.\textsuperscript{130} As values change, the criteria for “reasonable” land use regulations will change. Courts may find reason in stricter limitations such as the “natural uses” restriction of \textit{Just}, and sustain more ordinances against constitutional attack.

Another development may strengthen the government’s position in land use regulation cases. Courts are increasingly viewing regulations as not just quantitatively, but qualitatively different from eminent domain.\textsuperscript{131} With this perspective, as long as the public benefit received outweighs the private loss, the regulation is valid; mere reduction in land value is insufficient to justify holding a regulation to be a taking.\textsuperscript{132} Statutory standards could eliminate confusion over the line between taking and regulation.\textsuperscript{133} In the past, courts have deferred to reasonable legislative attempts to define that line.\textsuperscript{134}

\textbf{B. Opposition to Regulation}

The proliferation of strict environmental land use regulations is a fairly recent phenomenon; organized resistance to far reaching regula-

\begin{itemize}
\item \textsuperscript{127} This favored position was noted in \textit{Blumenfeld v. San Francisco Bay Conservation and Dev. Comm’n}, 117 Cal. Rptr. 327 (Ct. App. 1974):
\item It has also been stated that laws providing for the conservation of natural resources are of great public and remedial importance and thus, are given a liberal construction. \textit{See} 3 \textit{Southard, Statutory Construction} \textsection 71.14 (4th ed. 1974).
\item \textsuperscript{128} \textit{See} F. Bosseman, \textit{supra} note 51, at 256. The authors of \textit{The Taking Issue} feel that in practice the courts have made an exception to the balancing test when a regulation is designed to prevent a land use so harmful to the public safety or health that it presents a serious and immediate danger. In those cases the value to the public is so heavily weighted as to overbalance any loss to the property owner. They suggest that as awareness increases of the adverse ecological consequences of many more types of land uses, more types of land use regulations might be given this “heavyweight” status.
\item \textsuperscript{129} \textit{See} \textit{Goldblatt v. Town of Hempstead}, 369 U.S. 590 (1962). Here a town ordinance prohibited excavations below the water table because they filled with water and became safety hazards. \textit{See also} Adams v. Housing Authority, 60 So. 2d 663 (Fla. 1952).
\item \textsuperscript{130} \textit{See} notes 99, 120 \textit{supra}.
\item \textsuperscript{131} F. Bosseman, \textit{supra} note 51, at 266–83.
\item \textsuperscript{132} \textit{Id.} at 269.
\item \textsuperscript{133} \textit{Id.} at 266–67.
\item \textsuperscript{134} \textit{Id.}.
\end{itemize}
tions is just now mobilizing. Stories of the burdens of over-regulated and unmarketable property have angered land owners. Governments have responded to this growing opposition by seeking a more equitable balance between property rights and land use regulation. The Governor's Property Rights Study Commission was an attempt to devise ways to achieve that balance.

As ecological problems multiply and increase the urgency of environmental protection, the balance becomes more difficult to maintain; in many cases it becomes impossible. Governments can either ignore the imbalance and attempt to compromise constitutionally guaranteed property rights, or try to use eminent domain to provide compensation. Increased opposition to regulation will result in greater pressures on governments to provide compensation.

C. Changes in the Eminent Domain Concept and Methods of Compensation

As noted, public officials have responded to the opposition to strict regulation by seeking to expand the government's authority to use eminent domain for environmental reasons. Existing statutes limiting the exercise of eminent domain are narrowly construed, and expansion of condemnation authority usually requires new legislation.

In the future, governments will probably have broader condemnation powers to effectuate environmental objectives. The extent to which governments will exercise those powers is unpredictable. Strict land use regulation without compensation will remain government's basic environmental tool, but condemnation will probably be used more than in the past, especially where special circumstances would make regulation unfair. For example, regulations may be effective in preventing development and preserving land in its natural state, but they cannot validly be used to turn private lands into public facilities.

The major objections to increased exercise of environmental eminent domain are based on the enormous finances needed and the attendant potential for wasteful spending. The president of the 1975 Florida Senate voiced this concern when he announced the appointment of a special senate committee to investigate the use of funds set aside to purchase environmentally endangered lands.

135. See note 9 supra.
136. See note 25 supra.
137. See, e.g., note 7 and accompanying text supra.
138. See note 85 supra.
139. According to the senate president:
Along with a probable increase in the use of environmental condemnation, the nature of the eminent domain concept itself will continue to change. Some of the likely changes are directly related to the interrelationship of eminent domain and land use regulation discussed above.\footnote{140}

Since a landowner’s compensation for condemned land is based in part on use regulations,\footnote{141} court endorsements of more severe land use restrictions may result in lower purchase prices for the government. Where regulation has limited a landowner to “natural uses,” his compensation would be the value of the land in its natural state with no consideration of development potential. Further, it is possible that the Just value formula for diminution purposes—limiting the value to natural uses—would be used to determine compensation in all cases where the government finds an environmental need to preserve lands, even if no use regulation exists.\footnote{142} No court has taken that approach yet, but it is the next logical step after Just.

Compensable regulations have been suggested as an alternative system.\footnote{143} Under this method, landowners are compensated for strict regulations that severely limit property use; payment can be by cash, by tax credits, or by expansion of property rights on other land.\footnote{144} As discussed in the next section, the Governor’s Property Rights Study Commission recommended this approach.

Two basic systems of compensable regulations are presently in use. Several states use a modified system. They authorize an agency to make regulations and to exercise eminent domain only when the courts decide that the regulations are not a constitutional exercise of police power.\footnote{145} Compensation is determined on a lot-by-lot basis as litigated; unlitigated cases remain subject to the regulations without compensation. The stricter the regulation, the more likely the land-
owner is to go to court for compensation. This system of compensable regulations has been defined as "'a method of validating land use regulations that are so restrictive...that the courts would hold the regulations invalid in the absence of compensation paid to the land owner.' "146 The second compensable regulation approach is to compensate landowners for diminished use even though the regulation responsible may not be an unconstitutional taking. A recent Oregon proposal would compensate property owners for loss of value in excess of 20 percent based on pre- and post-regulated market value.147

Other possible methods of compensation include purchasing less than the fee simple (long-term leases, for example), government subsidies or tax advantages for "environmentally desirable" uses, and land swapping. Another method is payments by governments of nuisance damages for use of land or restriction of its use through regulation.148 Finally, authorities may be able to avoid compensation by seeking more injunctions against nuisance-type uses, especially as new, broader definitions of "nuisance" develop based on environmental considerations.

VIII. RECOMMENDATIONS OF THE FLORIDA PROPERTY RIGHTS STUDY COMMISSION

On March 17, 1975, the Governor's Property Rights Study Commission released its finding after a 10-week study of land use regulation and taking.149 After reviewing background materials and Florida contested land use regulation cases, the Commission focused on the possibility of compensation where property value is substantially diminished by stringent environmental regulations.150 It examined the two compensable regulation approaches discussed in the previous section of this note151 and chose the "Oregon" approach.152

The Commission made its recommendations in the following policy statements:

150. Id. at 2–3.
151. Id. at 3–5. See notes 145-47 and accompanying text supra.
152. Id. at 6.
Policy Statement No. 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.153

Policy Statement No. 2
Any system of compensable regulation should allow regulating governments an opportunity to modify, rescind or grant a variance in lieu of compensation. Such options should, however, be required to be exercised within a reasonable time, because delay itself can cause damage to the property owner.154

Policy Statement No. 3
Diminution of pre-regulation market value that exceeds a certain threshold should be compensated.155

Policy Statement No. 4
Compensation or other relief should be determined by judicial proceeding rather than by administrative proceeding.156

Policy Statement No. 5
Any system of statewide compensable regulation should speak to all governmentally imposed regulations.157

Policy Statement No. 6
Any system of statewide compensable regulation should not preclude existing methods of compensation.158

Policy Statement No. 7
The state should be granted the power to acquire environmentally endangered lands through exercise of the power of eminent domain, but only if accompanied by a more specific statutory definition of environmentally endangered lands.159

In addition to the seven policies above, the Commission concluded that property damage caused by a government agency's failure to make a timely decision should be compensable.160 It suggested the establishment of a voluntary public council to hear complaints regarding maladministration of state regulations and to advise the Governor or legislature.161

153. Id. (footnote omitted).
154. Id. at 7.
155. Id. (footnote omitted). No threshold percentage was recommended.
156. Id.
157. Id.
158. Id. Statement No. 6 is designed to assure that existing inverse condemnation remedies and eminent domain provisions will not be eliminated by any new program.
159. Id. at 9. This policy was put into limited statutory form and passed by the legislature 2 months after the Commission's report was issued. See note 6 supra.
160. PROPERTY RIGHTS REPORT, supra note 10, at 6.
161. Id. at 10.
In its final policy statement, the Commission urged that more study is needed and unanimously recommended that its own efforts continue:

Policy Statement No. 8

The 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.162

The Commission's recommendations appear to strike at the major problems of both environmental eminent domain and land use regulation. Compensation for specifically forbidden land uses would almost always be less than traditional eminent domain compensation. The state probably could afford to compensate landowners for strict regulation even where vast areas of land are involved; condemnation and purchase in such cases would be too costly. Since total market value would not be the formula used, improvements on the land would not greatly affect compensation. Extensive development would be less likely to take property out of the state's price range, and the state would be less likely to pay for unwanted improvements. Also, under the proposed system more property would remain owned by private citizens and on the tax rolls than under outright purchase through condemnation.

Compensation for regulation would lessen the resistance to needed environmental legislation. In addition to removing the landowners' main objection to regulation—that it lowers land value without compensation—such regulations would withstand legal attacks which have defeated noncompensable regulations. For example, one probably could not argue that such a regulation is too restrictive because it greatly diminishes value, is applied unequally to similarly situated lands, makes private property a public facility, or deprives an owner of all suitable land uses. Varying amounts of compensation could cure all these apparent injustices.

The system would require less strained judicial reasoning over whether a regulation amounts to a taking. That elusive distinction would no longer determine whether a landowner is compensated or financially ruined.

A potential problem with the recommended system would be to select a fair threshold diminution level that compensates for bona fide injury yet allows the state to exercise wide-scale control without undue expense. A threshold that is too high would merely perpetuate

162. Id. at 11.
the present regulation/taking controversy; a threshold that is too low would make the system financially impossible.

The apparent advantages of the Commission's recommended system demand that serious attention be given the feasibility of its implementation. Before it can be completely evaluated, the system must be more fully researched and defined. Inadequate funding has presently stopped this effort. The next move is clearly the legislature's.

IX. CONCLUSION

Increasing environmental awareness is changing society's values. Lands once thought worthless are now considered ecologically vital; many uses which before were generally accepted as a landowner's prerogative are now viewed as harmful. Since all legal concepts change to reflect society's shifting values, the tremendous rise in environmental concern will continue to significantly affect the future of eminent domain.

In addition, as the interest in ecology gains momentum, the number of judicial decisions and legislative acts in the environmental area will continue to increase. This stepped-up activity will speed the metamorphosis of environmental eminent domain and land use regulation.

The pressures building in this area cannot be ignored. Legislatures and courts must make a concerted effort to establish an equitable and workable environmental eminent domain policy. Environmental, budgetary, and property rights issues need study. Governments must define the parameters of when, where, and how eminent domain or some alternative compensation system will be used. The dissent in a recent California case explained the necessary balance:

In the equation between private expectancies and public use a balance must be struck which will allow the private owner adequate compensation for what he has irretrievably and categorically lost and at the same time permit the public to move against critical environmental problems without being saddled with exorbitant costs that could foreclose effective action.

Accomplishing this balance requires further efforts such as those of the Property Rights Study Commission. As previously mentioned, the Commission itself recommended continuing its operations, and

163. See, e.g., 201 N.W.2d at 768.
165. Id. at 316.
166. PROPERTY RIGHTS REPORT, supra note 10, at 11. See note 162 supra.
Governor Askew has asked the legislature for additional funds for that purpose. The feasibility of implementing the Commission's compensable regulation recommendations should be given careful consideration.

Many of the changes in the environmental eminent domain area probably will originate in Florida and neighboring states. As Chief Judge Brown of the United States Court of Appeals for the Fifth Circuit wrote in Zabel v. Tabb:

It is the destiny of the Fifth Circuit to be in the middle of great, oftentimes explosive issues of spectacular public importance. So it is here as we enter in depth the contemporary interest in the preservation of our environment.

Karl Jeffery Reynolds

167. Tallahassee Democrat, Apr. 8, 1975, at 3, col. 1. Continuation of the Property Rights Study Commission was requested in Fla. S. 382 (1975) (and companion Fla. H.R. 900 (1975)). Fla. S. 382 (1975) was passed by the legislature May 28, 1975, but was vetoed by Governor Askew June 19, 1975, because funds had not been appropriated.

168. The Commission recognized the need for a reliable revenue source for funding the compensable regulation program as the most significant issue relative to feasibility. PROPERTY RIGHTS REPORT, supra note 10, at 8.