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Environmental Law: Streamlining the Review of Proposed Development Under the Environmental Land and Water Management Act

BY

WILLIAM L. EARL,* WILLIAM TARR,** AND TIM SMITH***

Examining recent legislative and judicial changes in the law governing proposed developments, the authors find that a predominant trend has been the streamlining of the procedures by which proposed developments are reviewed. Although administrative efficiency and speedy review pose the risk of unchecked development, the authors suggest that the recent changes in the law have adequately accommodated the competing goals of environmental protection and economic growth.

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I. INTRODUCTION

Developments in the law seldom cut neat channels. Rather, as the needs of a free society ebb and flow, the law in turn adjusts to fit those needs. Anyone attempting to note every revision or new decision might well miss the general drift for all the twists and turns. Environmental law draws upon administrative law, property law, and constitutional law;¹ any development in these areas may also affect environmental law. Furthermore, a state's regulation of the environment arises in the context of federal environmental protection.² The recent proliferation of developments in environmental law calls for careful focus to find trends. One such trend has emerged from decisions³ on the issue of when environmental regulation becomes a compensable taking by the government. The trend has also appeared in recent legislative amendments to the Florida Environmental Land and Water Management Act (ELWMA)⁴ and in decisions on the standing of petitioners for formal entry into "binding letter" proceedings.⁵ The recent developments have tended to enhance administrative efficiency by removing or forbidding certain bars to speedy review of proposed development, especially development of regional impact (DRI).⁶

1. Thus, the usual doctrines of administrative procedure and review (e.g., "standing" requirements, or the rule requiring substantial competent evidence in the record for affirmance) apply to action taken by local governments and various state agencies under the numerous laws protecting the environment. Much of this article examines a question of constitutional and property law—the issue of when a state's exercise of police powers of regulation becomes a compensable taking of private property.

2. See, e.g., Clean Water Act of 1977, 33 U.S.C.A. §§ 1251-1376 (West Supp. 1979); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361 (1970); Clean Air Act Amendments of 1977, 42 U.S.C.A. §§ 7401-7428 (West Supp. 1979).

3. E.g., *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374 (Fla. 1981), cert. denied, 50 U.S.L.W. 3441 (U.S. Nov. 30, 1981).

4. FLA. STAT. §§ 380.012-.12 (1981).

5. *Peterson v. Florida Dep't of Community Affairs*, 386 So. 2d 879 (Fla. 1st DCA 1980); *Suwannee River Area Council Boy Scouts of America v. State Dep't of Community Affairs*, 384 So. 2d 1369 (Fla. 1st DCA 1980). For a discussion of these decisions and "binding letter" proceedings, see notes 14-27 and accompanying text *infra*.

6. Section 380.06(1) of the Florida Statutes continues to define a *development of regional impact* as "any development which, because of its character, magnitude, or location, would have a substantial effect upon the health, safety, or welfare of citizens of more than one county." FLA. STAT. § 380.06(1) (1981).

II. ACCESS TO REVIEW

Although Florida lacks any constitutional provision that parallels the Federal Constitution's restriction of federal judicial power to "cases" and "controversies,"⁷ Florida has developed a doctrine of standing both through case law⁸ and by special statutes.⁹ Standing is essentially a prudential limitation on citizens' access to courts and agencies. This doctrine permits a court to refuse access to a person whose vague or frivolous allegations of generalized grievances do not persuade the court that it would face a real and immediate dispute between parties then before it.¹⁰ In 1980 the Florida legislature granted standing to "any substantially affected" person to challenge new rules of the state land planning agency.¹¹ Furthermore, the Supreme Court of Florida upheld the statutory standing of any citizen to bring a private action to enjoin any violation of laws, rules, or regulations for the protection of the environment.¹² But in two decisions¹³ the District Court of Appeal, First District, announced restrictive requirements for standing to seek formal entry into "binding letter" proceedings. The court thus echoed the legislature's obvious concern for administrative efficiency in providing for speedy review of proposed development.

A. Intervention in "Binding Letter" Proceedings

Under ELWMA, a developer may seek a binding letter from the state land planning agency, determining that his proposed development would not have regional impact, or for other reasons

7. U.S. CONST. art. III, § 2.

8. *E.g.*, *Department of Administration v. Horne*, 269 So. 2d 659 (Fla. 1972) (individual taxpayer plaintiff need not allege special injury to have standing to bring action challenging the constitutionality of appropriations under constitutional provisions limiting the legislature's taxing and spending powers); *Brown v. Florida Chautauqua Ass'n*, 59 Fla. 447, 52 So. 802 (1910) (plaintiff must allege special injury to have standing to bring action to enjoin public nuisance).

9. *E.g.*, FLA. STAT. § 120.68(1) (1979) ("[a] party who is adversely affected by final agency action is entitled to judicial review.").

10. For a more extensive discussion of the development of Florida's doctrine of standing, see Dubbin & Dubbin, *1980 Developments in Florida Administrative Law: Access to Review of Official Action, or "Standing" Under the Florida APA*, 35 U. MIAMI L. REV. 815 (1981).

11. FLA. STAT. § 380.032(2)(b) (1981).

12. *Florida Wildlife Fed'n v. State Dep't of Env't'l Regulation*, 390 So. 2d 64 (Fla. 1980).

13. *Peterson v. Florida Dep't of Community Affairs*, 386 So. 2d 879 (Fla. 1st DCA 1980); *Suwannee River Area Council Boy Scouts of America v. State Dep't of Community Affairs*, 384 So. 2d 1369 (Fla. 1st DCA 1980).

would not have to undergo full DRI review.¹⁴ Although such letters "bind all state, regional, and local agencies, as well as the developer,"¹⁵ the statute expressly grants only the developer the right to participate in the state land planning agency's process of reaching that determination. Two recent cases¹⁶ in the District Court of Appeal, First District, have held that ELWMA does not give third persons an enforceable right to enter as formal parties into the agency's "binding letter" proceedings and does not grant third persons standing to demand a formal hearing under section 120.57¹⁷ of the Florida Statutes.

In *Suwannee River Area Council Boy Scouts of America v. State Department of Community Affairs*,¹⁸ the Council's apparently dilatory tactics undercut the argument for a liberal view of standing for persons not named in the statutory provision on binding letters. The Council, which owned land adjoining the proposed residential development, had pressed the local government's planning and zoning commission to withhold approval of the developer's plan until the state land planning agency (the Department of Community Affairs)¹⁹ determined whether the development would have a regional impact. When the developer sought a binding letter of determination from the Department of Community Affairs, the Council sent an attorney to the preapplication meeting and subsequently called the Department about the proposal from time to time.²⁰ The Council failed, however, to submit written comments or factual information despite the Department's invitation to do so.²¹ Thus, the Council did not seek special status as an

14. FLA. STAT. § 380.06(4)(a) (1981). The statute provides a quick procedure for resolving a developer's doubt about "whether his proposed development would be a development of regional impact, whether his rights have vested pursuant to subsection (18), or whether a proposed substantial change to a development of regional impact concerning which rights had previously vested would divest such rights." *Id.*

15. *Id.*

16. *Peterson v. Florida Dep't of Community Affairs*, 386 So. 2d 879 (Fla. 1st DCA 1980); *Suwannee River Area Council Boy Scouts of America v. State Dep't of Community Affairs*, 384 So. 2d 1369 (Fla. 1st DCA 1980).

17. FLA. STAT. § 120.57(1) (1981).

18. 384 So. 2d 1369 (Fla. 1st DCA 1980).

19. Until 1979, this agency was the Division of State Planning; an amendment in 1979 created the Department of Community Affairs and transferred to it all the functions of the former Division, changing the definition of *state land planning agency* in § 163.3164 of the Florida Statutes from the Division to the new Department. 1979 Fla. Laws ch. 79-190, §§ 47-49.

20. 384 So. 2d at 1371.

21. *Id.* The Department (then called the Division) had provided by rule for the participation of third persons in the binding letter proceedings: "The Division may solicit and

intervenor in the informal proceedings conducted by the Department. Instead, on the last day of the sixty-day statutory period²² during which the Department could issue a binding letter, the Council requested a formal hearing under section 120.57. Understandably, the Department denied the request for a formal hearing on the ground that the Council lacked standing, and the district court of appeal affirmed.²³

Although one might conclude that the "bad facts" in *Suwannee* help explain that decision, the First District subsequently held, in *Peterson v. Florida Department of Community Affairs*,²⁴ that even third persons who have filed timely petitions to intervene have no standing to participate as formal parties in binding letter proceedings. The court in *Peterson* declared that persons other than the developer "have no substantial interests that will be determined or affected by the Department's issuance of a binding letter,"²⁵ since the letter will determine only the issue "whether a proposed development is a DRI,"²⁶ and since Peterson and the other owners of land near the project failed to show "how or why a finding that the [development] is a DRI would affect their homes differently than the finding that the project is not a DRI."²⁷

Superficially, this latter point might appear to allow future petitioners to acquire standing to intervene in binding letter proceedings by specifically alleging the ways in which the issuance of a binding letter could cause them special injury. But the *Peterson* court pronounced that "[t]here is no legislative authority for [third] persons to obtain standing in such proceedings."²⁸ The court in *Suwannee* similarly stressed that the legislature had not intended ELWMA "to provide a forum for parties whose com-

accept submissions from any other third persons who may possess factual information relevant to the Division's investigation of an application." FLA. ADMIN. CODE § 22F-1.16(3). The council's failure to submit any factual information certainly could not justify its attempt to turn this accelerated form of review into a formal adversary proceeding.

22. Before its amendment in 1980, FLA. STAT. § 380.06(4)(a) provided that the agency had to issue a binding letter within 60 days of the developer's request. The amendment changed this period to 30 days from the date of the Department's acknowledgement of receipt of a sufficient application. FLA. STAT. § 380.06(4)(a) (1981). This change should encourage developers to submit adequate information with their initial request for a binding letter (to get the full benefit of the potential reduction in waiting time for a response) and thus should speed the issuance of binding letters.

23. 384 So. 2d at 1374.

24. 386 So. 2d 879 (Fla. 1st DCA 1980).

25. *Id.* at 880.

26. *Id.*

27. *Id.* at 881.

28. *Id.* at 880.

plaints focus on alleged detriment to activities they wish to conduct on adjoining land."²⁹ Both courts noted that individuals owning adjacent land affected by a potential development still have the opportunity to raise objections at the local level.³⁰ Since impacts on adjacent lands are local rather than regional, owners with such special interests should seek redress from the local government, not the state land planning agency. This reasoning ignores the strong possibility that a proposed development with both regional and local impacts might remain all but unknown to the general public when the developer requested a binding letter. Thus, owners of adjacent land may well be in the best position to learn of proposed development and raise timely objections. In *Suwannee River*, the Council's delay belied that supposition. Yet one may approve of the court's concern for increased administrative efficiency without agreeing with the Department's and the *Peterson* court's position that binding letters affect the rights only of the developer.

In *Suwannee*, the court did not expressly approve of this view, but its holding that "third persons have no enforceable right . . . to participate as formal parties in binding letter proceedings"³¹ depends on the same reasoning—that the statute names only the developer and the state land planning agency as parties to the proceeding.³² This argument loses force, however, in light of the

29. 384 So. 2d at 1374.

30. As the *Peterson* court stated: "A binding letter only determines whether a proposed development is a DRI; it is not a permit to begin any development activity and does not protect the developer from any state, federal, or local restrictions applicable to its development. It does not supplant any local requirements." 386 So. 2d at 880-81.

Note that § 380.07(2) of the Florida Statutes limits standing for an appeal of a DRI development order to the Adjudicatory Commission. Only the developer, the owner, the regional planning council, and the state land planning agency have standing. Even after *Peterson* and *Suwannee*, however, if the courts take a similarly restrictive view of standing under § 380.07(2), an adjacent landowner should continue to have the right to petition a circuit court for a writ of certiorari to review the purely local impacts of the order. The decision in *General Elec. Credit Corp. v. Metropolitan Dade County*, 346 So. 2d 1049 (Fla. 3d DCA 1977), does not preclude this course. That case merely required a mortgagee who stood in the shoes of the owner (and therefore had standing under § 380.07(2)) to take an available administrative appeal before pursuing judicial remedies, "to the extent that Section 380.07 . . . provides what [the Court] determined to [be] the uniform statewide procedure for reviewing development orders." *Id.* at 1054 (emphasis added). For purely local impacts local remedies should continue, unpreempted by chapter 380.

31. 384 So. 2d at 1373.

32. See FLA. STAT. § 380.06(4)(a) (1981). In dictum, the First District had taken this position in 1975, in *Sarasota County v. Beker Phosphate Corp.*, 322 So. 2d 655 (Fla. 1st DCA 1975) (parties other than those specifically enumerated in the statute have no right to seek review of a development of regional impact order). *Cf. Compass Lake Hills Dev. Corp. v. State*, 379 So. 2d 376 (Fla. 1st DCA 1979) (the Department and the developer are the only parties involved) (dictum); *South Fla. Regional Planning Council v. Florida Land & Water*

statute's provision that the agency's issuance of such a letter binds "all state, regional, and local agencies, as well as the developer."³³ If residents of neighboring counties fail for whatever reasons to submit adequate studies, reports, or other information during the restricted period, the Department may well issue a letter that removes the project once and for all from DRI review. This precludes the issue of regional impacts from being raised in proceedings before the local government. Thus, some property rights may suffer for the sake of administrative efficiency and judicial economy. Much depends, then, on the Department's interpretation of what constitutes a "sufficient application"³⁴ from a developer. The court in *Suwannee River* cautioned that permitting "formal entry of third persons into the binding letter proceeding . . . would so delay and complicate the procedure as to" discourage developers from resorting to this accelerated processing of proposals for developments.³⁵ Ultimately, however, the Department retains the duty to balance the interest in a speedy resolution and the need for an accurate determination to protect the environment.

B. *Challenging the Adoption of New Rules*

Although the courts have hesitated to allow standing when the law does not expressly provide for it, the legislature has changed the law to provide for standing in at least one instance. Under section 380.032(2)(a) of the Florida Statutes,³⁶ the Department of Community Affairs can promulgate rules to implement ELWMA. In 1980, the Florida Legislature added subsection (2)(b)³⁷ to pro-

Adjudicatory Comm'n, 372 So. 2d 159 (Fla. 3d DCA 1979) (having failed to seek judicial review of issuance of binding letter by Division of State Planning, Council had no standing either to attack binding letter collaterally or to appeal Commission's denial of petition to review subsequent development order (zoning resolution) approving the development); *Sarasota County v. General Dev. Corp.*, 325 So. 2d 45 (Fla. 2d DCA 1976) (county had no standing to appeal development order issued by city located within county, because city alone was the local government with jurisdiction over the proposed development, as required for standing under FLA. STAT. § 380.11 (1979)).

33. FLA. STAT. § 380.06(4)(a) (1981).

34. *Id.* Of course, the Department's interpretation of sufficiency may be subject to review—but not at the instigation of mere neighbors of the proposed development. A substantial number of residents in the area, if united in their opposition to a project, might bring about such review by exerting pressures on the local government with jurisdiction, which would have standing to challenge the Department's ruling under *Sarasota County v. General Dev. Corp.*, 325 So. 2d 45 (Fla. 2d DCA 1976). But this course still places too great a burden on the general public to challenge the ruling.

35. 384 So. 2d at 1374.

36. FLA. STAT. § 380.032(2)(a) (1981).

37. *Id.* § 380.032(2)(b). New subsection (2)(b) reads as follows:

vide that "any substantially affected party" may ask the Administration Commission³⁸ to review the Department's adoption of any rule or, by implication, any modification of a rule that interprets guidelines and standards that have been adopted by the Administration Commission and approved by the legislature.³⁹ This statutory grant of standing will enable persons such as a developer concerned about excessive restrictions on the use of his private property, or a resident worried about the potential injury to his property from new development (approved under permissive rules), to delay the rule from taking effect. This is possible because the initiation of review automatically stays the effectiveness of the rule while the Commission takes up to forty-five days to consider whether to adopt, amend, or reject the rule under review.⁴⁰ Providing for such accelerated review of new rules, however, avoids requiring a challenge to arise in the context of a dispute between an agency or a group of citizens committed to a cause and a developer who has fully planned his development without knowing whether a challenge to the rules might succeed in changing the framework for the planning. The amendment thus increases the certainty of the rules on which developers may base their planning and avoids the possibility of much protracted litigation in the future. After all, hard cases can make bad rules, too.

C. *Enjoining Pollution Under the Environmental Protection Act*

In *Florida Wildlife Federation v. State Department of Environmental Regulations*,⁴¹ the Supreme Court of Florida recently

(b) Within 20 days following adoption, any substantially affected party may initiate review of any rule adopted by the state land planning agency interpreting the guidelines and standards by filing a request for review with the Administration Commission and serving a copy on the state land planning agency. Filing a request for review shall stay the effectiveness of the rule pending a decision by the Administration Commission. Within 45 days following receipt of a request for review, the commission shall either reject the rule or adopt the rule, with or without modification.

Id.

38. The Governor and the Cabinet sit as the Administration Commission in their capacity as promulgators of standards and guidelines under ELWMA. *See id.* § 380.031(1). In their role as settlors of disputes over the granting or denial of permits, the Governor and the Cabinet act as the Adjudicatory Commission. *See id.* § 380.07.

39. *See id.* § 380.06(4)(a) (providing for stricter legislative control over the adoption of guidelines and standards).

40. *Id.* § 380.032(2)(b).

41. 390 So. 2d 64 (Fla. 1980).

upheld the statutory grant of access to the courts under the Environmental Protection Act (EPA).⁴² This statute allows any citizen of the state to bring an original action to enjoin violations of the state's laws for protecting the environment,⁴³ and provides for judicial review of any agency actions that allegedly cause unlawful harm to the environment. In *Florida Wildlife Federation*, the Federation brought an action under the EPA against the State Department of Environmental Regulations and the South Florida Water Management District, charging that the operation of a certain spillway was polluting a canal and nearby waters used by federation members for recreational purposes. On appeal from a dismissal of the complaint for the Federation's lack of standing, the Water Management District argued for affirmance on the ground that in passing the EPA, the legislature had exceeded its powers by abrogating the supreme court's "special injury rule of standing to sue,"⁴⁴ thus infringing the "[c]ourt's power to adopt rules of practice and procedure."⁴⁵

The supreme court rejected this argument, holding first that apart from its procedural requirements, the EPA also provides "an entirely new cause of action" that grants a new substantive right to the citizens of Florida to protect their environment.⁴⁶ Thus, the

42. See FLA. STAT. § 403.412 (1981).

43. E.g., Florida Coastal Management Act of 1978, FLA. STAT. §§ 380.21-.25 (1981); Florida Water Pollution Control & Sewage Treatment Plant Grant Act of 1970, FLA. STAT. §§ 403.1821-.1833 (1981).

44. *Id.* at 66. Under the court-made special injury rule, a person has no standing to enjoin a public nuisance, to challenge zoning decisions, or to maintain a taxpayer's suit, unless he can show that the challenged action has caused him some special "injury different both in kind and [in] degree from that suffered by the public at large." *Id.* at 67; see, e.g., *Brown v. Florida Chautauqua Ass'n*, 59 Fla. 447, 52 So. 802 (1910) (clarifying and extending equitable principle of granting relief to property owner injured by unlawful obstruction in highway); *Pinellas County v. Lake Padgett Pines*, 333 So. 2d 472 (Fla. 2d DCA 1976) (private owner of land near well field supplying water to two counties could suffer special injury of lowered level of water in lakes and wells on private owner's land, and therefore had standing to challenge county's pumping of water from well field as not complying with the requirements of chapter 380 of Florida Statutes).

45. 390 So. 2d at 65; see FLA. CONST. art. V, § 2(a).

46. 390 So. 2d at 66. The court contrasted this creation of a new cause of action to the attempted statutory grant of standing to condominium associations to bring class actions on behalf of their unit-owner members, which the court in *Avila S. Condo. Ass'n. v. Kappa Corp.*, 347 So. 2d 599 (Fla. 1977), rejected as an "impermissible incursion" into the court's power to determine rules of procedure. The court in *Avila South* had recognized the value of the statute's solution to the problem of providing affordable access to the courts for individual owners of condominium units, but invalidated the statute as a legislative attempt to redefine proper parties in class actions ("rather than to set out substantive rights," said the court in *Florida Wildlife*, 390 So. 2d at 67 (emphasis added)). The court concurrently adopted the same solution as new FLA. R. Civ. P. 1.220(b). 347 So. 2d at 608.

EPA "is not an impermissible incursion into this Court's power" to establish those procedural requirements.⁴⁷ Second, and with apparent inconsistency, the court held that the special injury rule did not apply to the new cause of action.

Before passage of the EPA, only citizens who could show a special injury had standing to seek an injunction against a public nuisance such as water pollution. The court correctly perceived that the legislature could not have intended that its grant of a cause of action to *any* citizen of the state would be subject to a standing requirement that would annul the effect of creating a new cause of action. Requiring a showing of special injury would leave plaintiffs in the same position as before the passage of the EPA, thereby rendering the statute meaningless. But one might wonder why the court laid such stress on the proposition that the EPA established new substantive rights rather than procedural rights,⁴⁸ since, as the court implicitly recognized, the sole right created by the provision at issue had both the substantive effect of creating a new cause of action and the procedural effect of abrogating the special injury rule: "The district . . . contends that approval of the statute should not extend to abrogating the special injury rule in this instance. Again, we disagree because the legislature has manifested its intent that that rule of law not apply to suits brought under the EPA."⁴⁹ This EPA provision simply carved out a cause of action as an exception to the special injury rule.⁵⁰ The provision necessarily invaded the court's exercise of its "power over practice and procedure in the state's courts."⁵¹ In this context the distinction between substantive and procedural effects seems spurious. The key to resolving this apparent confusion appears upon closer scrutiny of the court's language: this provision is an incursion but "not an *impermissible* incursion into [that] power."⁵² Significantly, the court noted that certain procedural requirements other than the special injury rule will apply to actions under the EPA.⁵³

47. 390 So. 2d at 67.

48. *Id.* at 66-67; see note 46 *supra*.

49. *Id.* at 67.

50. *Id.*

51. *Id.*

52. *Id.* (emphasis added).

53. *Id.* at 67-68. The court will require any plaintiff bringing an action under the EPA to allege specific facts that support the necessary allegation of irreparable injury; moreover, "it must appear that the question raised is real and not merely theoretical and that the plaintiff has a bona fide and direct interest in the result." *Id.* at 68 (citing *Miami Water Works Local No. 654 v. City of Miami*, 157 Fla. 445, 26 So. 2d 194 (1946)).

The decision in *Florida Wildlife Federation* qualifies, rather than belies, the current trend of streamlining the process of reviewing proposed development. The court upheld the right to a cause of action granted by the EPA⁵⁴ and thus ensured the continued monitoring of developers' operations and agencies' actions by concerned citizens acting as private attorneys general. But the decision establishes no new undercurrent against the main trend. Indeed, with the continued effectiveness of this basic safeguard ensured, the legislature and the courts may well feel justified in further streamlining the laws, rules, and regulations that any citizen may enforce in an action under the EPA.

III. SMOOTHING THE REVIEW OF PROPOSED DEVELOPMENT

A. *Land Use: Developments in the Law of Compensable Takings*

The significant recent decision in *Graham v. Estuary Properties, Inc.*,⁵⁵ points out a problem in current Florida environmental law. Although the legislature has been steadily working to streamline the permitting process, a developer still faces a long, sometimes even circular, path to the completion of a development. The environmental permitting process, although necessary for adequate protection of the land, must have a definite point of termination to protect the public's interest in housing. In *Graham v. Estuary Properties, Inc.*, the Supreme Court of Florida reversed the District Court of Appeal, First District, and held that no taking had occurred through denial of development approval under chapter 380 of the Florida Statutes.⁵⁶ After deciding that a taking had not occurred, the supreme court sent the case back to the First District for a remand to the agency so that, as mandated by statute, the agency could tell the developer how to change its proposal to make the development permissible.⁵⁷ The decision indicates a keen awareness of the necessity of protecting environmentally sensitive lands, but it leaves several crucial questions unanswered.

In part because Estuary had been seeking approval of its DRI for at least six years and now had to return to the same agency for

54. See FLA. STAT. § 403.413 (1981).

55. 399 So. 2d 1374 (1981), *cert. denied*, 50 U.S.L.W. 3441 (U.S. Nov. 30, 1981). *Editorial Note*: Two of the authors, Mr. Earl and Mr. Tarr, worked on an amicus curiae brief submitted in this case on behalf of Deltona Corporation.

56. FLA. STAT. § 380.012-.12 (1979).

57. 399 So. 2d at 1380.

another round of evaluations, the First District concluded that a taking had occurred when the hearing officer denied Estuary's application for a development without stating the changes necessary for approval as required by the statute, "or any meaningful changes in the proposed development that would enable [Estuary] to make any economically beneficial use of its land."⁵⁸ The lower court reached that conclusion in part to avoid the "unduly restrictive result" of exposing the "landowner to the treadmill effect of repeated denials without any indication from governmental agencies of [such] changes."⁵⁹ At the time of the First District's decision, of course, Estuary had submitted just one application, and the treadmill had circled only once. In taking away the government's option to modify its denial of any permit and allow Estuary some development consistent with environmental protection, the First District would have exacted a heavy penalty for apparent recalcitrance by the government, which the court construed as reflecting an intent to take Estuary's property in "a concerted determination to preserve the mangroves."⁶⁰ The court seemed to overlook the changes specified by Lee County's development order as necessary for the approval of Estuary's development.⁶¹ Moreover, the court's prescription of a rigid all-or-nothing dichotomy of remedies misinterpreted the federal and Florida case law on the appropriate remedy for a state's imposition of excessive restrictions on private property⁶² and ignored the flexible approach recently formulated by the Florida Legislature.⁶³ Because courts in various other jurisdictions⁶⁴ are beginning to recognize that government may turn the permitting process into a treadmill that deprives the developer of the use of his property for a substantial

58. *Estuary Properties, Inc. v. Askew*, 381 So. 2d 1126, 1139 (Fla. 1979), *rev'd sub nom. Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374 (1981).

59. *Id.* at 1137 (emphasis added).

60. *Id.* 1139.

61. *Id.* at 1130.

62. See cases cited at note 74 *infra*. One should note that the Court has shown reluctance to find that mere regulation has caused a taking. See, e.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). But see *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 636 (1981) (Brennan, J., dissenting).

63. See 1978 Fla. Laws Ch. 78-85 (codified at FLA. STAT. § 380.085 (1981)). Of course, § 380.085 did not control the resolution of *Estuary Properties*, since the case arose before the passage of the statute. Nevertheless, the court was free to follow the policy implicit in § 380.085. The court apparently chose not to do so.

64. E.g., *Brecciaroli v. Connecticut Comm'r of Env't'l Protection*, 168 Conn. 349, 362 A.2d 948 (1975); *Prince George's County v. Blumberg*, 44 Md. App. 79, 407 A.2d 1151 (Ct. Spec. App. 1979); *Spears v. Berle*, 48 N.Y.2d 254, 397 N.E.2d 1304, 422 N.Y.S.2d (1979); see notes 199-210 and accompanying text *infra*.

period, the decision of the First District in *Estuary Properties* is noteworthy. Had the Supreme Court of Florida affirmed the case, it would doubtless have spawned numerous other challenges to denials of permits, both in Florida and in other states. At a minimum, that threat would have discouraged careless denials and excessive restrictions. But the policy against circular permitting may point to a doctrine whose case has not yet come. On the facts of record in *Estuary Properties*, at least, the supreme court properly ignored the district court's remarks about a potential treadmill effect and reversed under the prevailing principles of takings law.

1. THE TEST AND THE REMEDIES FOR A TAKING

Both the United States Constitution⁶⁵ and the Florida Constitution⁶⁶ forbid government from taking private property without fair compensation to the owner. Since the fourteenth amendment makes the federal Just Compensation Clause applicable to the states,⁶⁷ the Supreme Court of the United States often reviews state cases involving the validity of claims that government has taken private property, and thus has influenced state courts in their formulation of tests for a taking. Accordingly, the federal and the Florida approaches are similar, and recent Supreme Court decisions⁶⁸ can provide a framework for evaluating what remedies a court should grant for a taking.⁶⁹

In general, a government⁷⁰ may accomplish a taking of private property in any of several ways, some of which are unintentional. A government may exercise its inherent power of eminent domain to condemn and purchase private property.⁷¹ In Florida, the state constitution requires the government to prove that the taking was necessary for a public purpose,⁷² and a court needs no other test to find a compensable taking when the government has voluntarily

65. U.S. CONST. amend. V: "nor shall private property be taken for public use, without just compensation."

66. FLA. CONST. art. X, § 6(a): "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner"

67. See, e.g., *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158 (1896).

68. E.g., *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

69. See notes 90-127 and accompanying text *infra*.

70. A state or the federal government or any of a state's subdivisions, such as a county or municipality, may appropriate private property to public use, subject to the Just Compensation Clause and its state equivalent.

71. See, e.g., *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896).

72. *Ball v. City of Tallahassee*, 281 So. 2d 333 (Fla. 1973).

commenced proceedings in eminent domain. Commonly, however, government accomplishes a de facto taking, either through physical action⁷³ or through regulation.⁷⁴ For example, a government may carry out some valid function that has the collateral effect of damaging or trespassing upon private property.⁷⁵ Government regulation may also deprive an owner of the only practical use for his property, as in *Pennsylvania Coal Co. v. Mahon*,⁷⁶ in which a statute forbade any mining of coal that would cause damage to streets and houses from subsidence of the surface. The regulation in effect precluded the owner of mineral rights from mining any coal and therefore from making the only possible use of its property.

In the absence of statutes abrogating the government's sovereign immunity against tort suits, many courts have formulated a remedy for property owners by extending the concept of compensable takings to cover de facto confiscation,⁷⁷ as well as eminent domain. Through the device of "inverse condemnation,"⁷⁸ a court

73. *E.g.*, *United States v. Causby*, 328 U.S. 256 (1946) (easement taken by frequent and regular low overflights); *State Road Dep't v. Tharp*, 146 Fla. 745, 1 So. 2d 868 (1941) (destruction of profitability of mill because of flooding from new bridge and fill).

74. The Supreme Court recognizes the possibility of such taking by regulation: *e.g.*, *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (dictum); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (holding). Florida courts have limited the remedy for confiscatory regulation to a declaration of its invalidity and an injunction against its enforcement. This eliminates the need to find a compensatory, permanent taking. *See, e.g.*, *Village of Tequesta v. Jupiter Inlet Corp.*, 371 So. 2d 663 (Fla. 1979) (no recovery under de facto taking theory for mere consequential damages not caused by physical intrusion); *Weir v. Palm Beach County*, 85 So.2d 865 (Fla. 1976) (same); *Selden v. City of Jacksonville*, 28 Fla. 558, 10 So. 457 (1891) (same); *Mailman Dev. Corp. v. City of Hollywood*, 286 So. 2d 614 (Fla. 4th DCA 1973), *cert. denied*, 293 So. 2d 717 (Fla.), *cert. denied*, 419 U.S. 844 (1974) (expressly rejecting possibility of recovering damages for taking from mere passage of zoning regulations).

For an indication that the Court may be ready to uphold the availability of a third remedy (interim damages) for a temporary taking by regulation, see note 79 *infra*, discussing *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981).

75. *See* note 73 *supra*.

76. 260 U.S. 393 (1922).

77. *See, e.g.*, *State Road Dep't v. Tharp*, 146 Fla. 745, 1 So. 2d 868, 869 (1941) (explaining that sovereign immunity cannot prevent recovery for an unconstitutional taking). In a recent decision the First District turned to the tort theory of continuing nuisance to support its affirmance of injunctive relief, in the absence of facts to sustain a ruling that recurrent flooding caused by road ditching already completed before the present owner had bought the property could amount to a taking of this owner's property. *Department of Transp. v. Burnette*, 384 So. 2d 916 (Fla. 1st DCA 1980) (noting the recent abrogation of sovereign immunity in Florida, under FLA. STAT. § 768.28 (1979)).

78. In contrast to proceedings in eminent domain, which the government initiates to condemn property, "inverse condemnation" is a remedy in an action brought by an owner of private property to compel the government to pay compensation for the property it has already taken in fact. For other discussions of the applicability of inverse condemnation to

can find that the government has taken the property and therefore must pay for the taking. The remedy for confiscatory conduct by the government, however, is not always compensation. When a court determines that a taking has occurred, it may order the government to restore the owner's beneficial use of his property, if possible.⁷⁹ But perhaps because the government's failure to exer-

regulation with reversible confiscatory effects, see Cookston & Bruton, *Zoning Law*, 35 U. MIAMI L. REV. 581 (1981); Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 STAN. L. REV. 1439 (1974).

79. *E.g.*, *United States v. Causby*, 328 U.S. 256 (1946) (requiring compensation); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (denied injunction sought to enforce the statute; dictum recognized the usual alternative remedy for taking by regulation—conditional declaratory and injunctive relief against the invalid regulation, with the option left to the state to validate the regulation by commencing eminent domain proceedings to pay for the taking: "When [regulation has caused a taking], in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act." 260 U.S. 413).

Even if the invalidation of a statute or other regulatory conduct of the government restores the owner's beneficial use of his property, however, the owner may have suffered substantial damages during the time when the government's conduct has temporarily taken his property. In *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981), five Justices indicated that they would permit such an owner to recover interim damages for a temporary taking. A majority of the Court dismissed the appeal because an apparent lack of finality in the judgment deprived the Court of jurisdiction under 28 U.S.C. § 1257 (1976). In dissent, however, Justice Brennan reached the merits and argued for the availability of interim damages. Three Justices joined his dissent, and Justice Rehnquist noted in his concurring opinion that if the Court had had jurisdiction over the case he "would have [had] little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan." 450 U.S. at 636.

In *San Diego Gas*, after a nonjury trial found liability for a taking, a jury awarded more than three million dollars in inverse condemnation damages. The company had alleged that about one-half of its property, lying within or near an estuary on the Pacific Ocean, was taken by (1) the downzoning of a portion of the property, (2) the adoption of an open space element of the city's general plan, and (3) the placing on the ballot of a bond issue for acquisition of a piece of property (and other owners' properties as well; the bond issue failed). 450 U.S. 624-31. The trial court concluded that because the downzoned property proposed for acquisition had thereby become "unmarketable," the city had taken the property and must pay just compensation. Following an initial affirmance by the California Court of Appeal, Fourth District, the trial court's ruling on liability and remedy were later reversed by the same court of appeal on orders of the state supreme court in light of its recently announced opinion in *Agins v. City of Tiburon*, 24 Cal. 3d 366, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 447 U.S. 255 (1980). In *Agins*, the state court had held that a zoning ordinance permitting the construction of five residences on the plaintiff's land had not constituted a taking because the ordinance had not deprived the company of substantially all beneficial use of the property. Moreover, the California Supreme Court had limited the remedy to invalidation (rather than damages), even when a regulation did deprive an owner of substantially all reasonable use of his land.

On remand, the court of appeal stressed this limitation on the remedy, declaring that the company's exclusive "remedy is mandamus or declaratory relief, not inverse condemnation." 101 S.Ct. at 1292 (quoting from the unpublished opinion). Thus, the court of appeal reversed its earlier decision, and the state supreme court denied review. Because a majority

cise its power of eminent domain raises an implicit presumption that government did not intend to take the property, the courts have carefully tested the factual basis for claims of de facto takings and have fostered the policy of requiring the government to "buy" the property only in the clearest cases of de facto confiscation.⁸⁰

Spectrum Analysis. Courts are least likely to find a taking when the government action that injures private property rights is merely regulatory, unaccompanied by any physical trespass on the

of the Supreme Court of the United States interpreted the court of appeal's opinion as permitting further proceedings in the case, the Court held that the court of appeal had not yet rendered an appealable final judgment within the meaning of 28 U.S.C. § 1257. Consequently, the Court dismissed for want of jurisdiction and avoided reaching the taking issue.

Commentators have already begun construing the case as more or less a clarion call for a case in which the Court will uphold the awarding of temporary damages in an action for inverse condemnation. See, e.g., Hagman, *Comment*, 6 LAND USE L. & ZONING DIG. 5 (May 1981); Kanner, *Comment*, 6 LAND USE L. & ZONING DIG. 8 (May 1981). Justice Rehnquist's pointed agreement with the four dissenters who reached the merits suggests as much at first glance. The decision in *San Diego*, however, remains ambiguous. The majority quoted the lower court's findings and conclusions on the taking issue at great length, as though sympathizing with the company's plight. Yet the majority of the Justices went out of their way not to find finality of judgment. At the least, this bespeaks their deep reluctance to embrace the sensible but novel remedy of interim damages except in the clearest case. Prediction also seems premature when the Court's composition threatens to change rapidly within the near future. Already one of the dissenters (Justice Stewart) has retired, and his replacement (Justice O'Connor) may side with the *San Diego* majority on this issue. The Court may have an opportunity to resolve the matter very soon. See *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981) (following the dissenters in *San Diego*); note 82 *infra*.

80. Note that even if the government has not intended to take the affected property, a court may find that the effects of the government's regulatory conduct have taken the property. No conscious intention or implied promise to pay is necessary. See, e.g., *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 636 n.21 (1981) (Brennan, J., dissenting); *United States v. Dickinson*, 331 U.S. 745, 748 (1947).

Professor Tribe notes three tests for such a taking: "Physical Takeover, Destruction of Value, and Innocent Use." TRIBE, *AMERICAN CONSTITUTIONAL LAW* 459 (1978). Tribe illustrates the "innocent use" test by elaborating on an explanation of the Court in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926): "[A] nuisance may be merely a right thing in a wrong place, like a pig in a parlor instead of the barnyard—even if the parlor has come to the pig rather than the other way round." TRIBE at 462.

Professor Michelman has identified four such tests for a taking: (1) whether the government's action has physically invaded the property; (2) the degree to which the action has diminished the value of the property; (3) whether the government's action has produced social benefits that outweigh the injuries to private ownership caused by the action; and (4) whether the law merely regulates private conduct to prevent social harms, or instead seeks to gain positive benefits for society from the restricted use of the private property. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967). Michelman's third test really subsumes his second and fourth tests and parallels this article's discussion of the Court's balancing approach. See, e.g., notes 97-103 and accompanying text *infra*. It is such balancing of burdens and benefits that in the Court's practice links the two factors listed separately by Tribe as his second and third tests. See also Sax, *Takings and the Police Power*, 74 YALE L. REV. 36, 61-62 (1964), discussed in note 81 *infra*.

property.⁸¹ In exercising its police power of regulation to protect the health, safety, and welfare of its citizens, a government may impose reasonable, necessary, and uniform restrictions on private property without having to compensate landowners, even though an extensive deprivation of the beneficial use of their property has occurred.⁸²

Some cases⁸³ suggest, however, that an otherwise valid action may pass beyond mere regulation to the point of taking property in the constitutional sense. Both the language⁸⁴ and the results⁸⁵ in

81. *E.g.*, *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Forde v. City of Miami Beach*, 146 Fla. 676, 1 So. 2d 642 (1941). At the threshold, of course, the government must show that it had a rational basis for the regulation, related to a constitutionally permissible purpose. *See, e.g.*, *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928). Actions by an administrative agency, moreover, must lie within the scope of its statutory authority under a proper delegation from the legislature. *See, e.g.*, *Askew v. Cross Key Waterways*, 372 So. 2d 913 (Fla. 1978). If an action passes this qualitative, definitional test of a valid regulation, then a court would undertake a second level of analysis of the government's action, essentially a quantitative weighing of several factors. *See Penn Central*, 438 U.S. at 124, 130; note 80 *supra*.

82. *E.g.*, *Goldblatt v. City of Hempstead*, 369 U.S. 590, 594 (1962); *Miller v. Schoene*, 276 U.S. 272, 279 (1928); Florida cases cited at note 69 *supra*. Other cases shift the emphasis: a taking occurs if regulatory conduct of the government creates a substantial or burdensome interference with the use and enjoyment of property. *See, e.g.*, *United States v. Dickinson*, 331 U.S. 745 (1947); *United States v. Causby*, 328 U.S. 256 (1946); *Benenson v. United States*, 548 F.2d 939 (Ct. Cl. 1977). In *Hernandez v. City of Lafayette*, The United States Court of Appeals for the Fifth Circuit cited *Agins* and *Penn Central* for the principle that an owner suffers a regulatory taking if a zoning "ordinance denies the owner an economically viable use of his land." *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1197 (5th Cir. 1981) (emphasis added). The Fifth Circuit then applied the reasoning of the dissenters in *San Diego*, reversed a summary judgment for the city, and held that the landowner could seek interim damages under 42 U.S.C. § 1983 (1976), in "an amount equal to just compensation for the value of the property during the period of the taking." *Id.* at 1200.

83. *E.g.*, *Penn Central*, 438 U.S. at 1; *Goldblatt*, 369 U.S. at 594; *Pennsylvania Coal*, 260 U.S. at 413; *Zabel v. Pinellas County Water & Nav. Control Auth.*, 171 So. 2d 376, 381 (Fla. 1965); *Northcutt v. State Road Dep't*, 209 So. 2d 710, 713 (Fla. 3d DCA 1968).

84. For example, many cases and comments quote the following language of Justice Holmes:

Government hardly could go on if to some extent values incident to property could not be diminished without payment for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts.

.....

The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.

Pennsylvania Coal, 260 U.S. at 413, 415 (Holmes, J.).

these cases suggest a kind of spectrum analysis, or continuum theory,⁸⁶ that can help to explain the approach of state and federal

The inference that in some cases the quantitative measure of the injury to property may suffice to establish a taking retains vitality in the current approach of the Court. For example, in *Penn Central* the Court noted that "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose . . . or perhaps if it has an unduly harsh impact upon the owner's use of the property." 438 U.S. at 127. The Court's reasoning in *Kaiser Aetna* and in *Agins* suggests that the determination of what constitutes "an unduly harsh impact" may involve qualitative analysis as well as quantitative measuring. Thus, categorizing the asserted deprivation as "the best use" of the property or a "fundamental attribute of ownership" may swing the balance toward requiring compensation. *Agins*, 447 U.S. at 262. Or it may not, because of other factors entering the balance. For example, the *Agins* opinion emphasizes that in determining the validity of zoning regulations, the Court must consider the benefits from the regulation shared by the private owners and the general public, "along with any diminution in market value that the [private owners] might suffer." *Id.* The diminution-in-value test, then, like the other tests discussed in note 75 *supra*, is but one factor in the Court's overall approach.

85. See notes 73-74 *supra*.

86. Cf. Van Alstyne, *Modernizing Inverse Condemnation: A Legislative Prospectus*, 8 SANTA CLARA LAW. 1, 28 (1967) (cautioning that the notion of a "legal continuum" of takings cases arranged by degrees of impact on private property is a mere "description of results" rather than a test, failing to account for the role of policies or of qualitative differences in the interests asserted by government in each case).

Similarly, Professor Sax has criticized the traditional tests as unworkable and thus uncertain in predictive value. In particular, Sax rejects both the formalism of the elder Harlan (based on "traditional [qualitative] legal concepts") and the purely quantitative approach suggested by Justice Holmes in *Pennsylvania Coal* but not followed by Holmes himself. Sax, *supra* note 80, at 37. Sax goes on to propose his own qualitative test for a taking:

The precise rule to be applied is this: when an individual or limited group in society sustains a detriment to legally acquired existing economic values as a consequence of government activity which enhances the economic value of some governmental enterprise, then the act is a taking, and compensation is constitutionally required; but when the challenged act is an improvement of the public condition through resolution of conflict within the private sector of the society, compensation is not constitutionally required.

Id. at 67. Sax thus distinguishes between government's role as a mediator (resolving the claims of competing neighbors, by noncompensable regulation) and its function as an "enterpriser" (actively, though not necessarily commercially, competing with private individuals for resources, and having to compensate owners for taking resources belonging to them). For example, under Sax's rule, if a county makes road improvements that cause flooding of some private property, the county has acted as an enterpriser in direct competition with the owners of the affected property and must pay compensation.

One may question the predictive value of Sax's own proposed qualitative test, Sax's concept of governmental "enterprise" really embodies just one policy value (the unfairness of permitting the government to compete with an individual, absent compensation) and ignores the role of other policies in determining whether a taking has occurred—i.e., whether the government ought to pay for its action. This leads Sax to urge that the Court decided *United States v. Central Eureka Mining Co.* wrongly, despite recognizing that in *Central Eureka*, the government's "order shutting the mines was designed to force the miners into essential war work." *Id.* at 71 (commenting on *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958)). Rather than recognize the validity or the overriding importance of the policy of preserving the government's extraordinary war powers free from the chilling effect

courts in determining whether a taking has occurred. A wide band at one end of the spectrum represents cases of valid, noncompensable regulation. At the other end of the spectrum lies the band of cases in which government has either commenced condemnation proceedings or permanently invaded or destroyed property,⁸⁷ in the absence of overriding public necessity such as the exigencies of war⁸⁸ or the survival of a significant part of the state's economy.⁸⁹ (The presence of overriding exigencies so colors the judicial view of the validity of government action that a court would likely see any such action as falling within the band of noncompensable regulation). Shading away from the band of clear cases for compensation is a band of cases in which government action has caused reversible physical effects (*e.g.*, excessive noise from low overflights⁹⁰ or flooding caused by road improvements)⁹¹ on private property,⁹² substantially depriving the owner of its beneficial use. In these cases the courts allow government the option of either ceasing the offensive activity or condemning and paying for the property

of requiring compensation in such a case, Sax omitted any application of his test to *United States v. Caltex*, 344 U.S. 149 (1952), in which the Court refused to hold that the government had taken certain oil depots that the army had completely destroyed to prevent their capture by the Japanese during World War II.

The "spectrum analysis" of the present article seeks to avoid the pitfalls of either a purely qualitative conceptualism or a purely quantitative continuum by combining the two. Calling the continuum a spectrum is more than a mere metaphor or relabelling. By taking account of such policies as discussed in *Van Alstyne, supra*, at 31-36, and by interrelating these policies to certain qualitative categories of takings and to the triggering of other qualitative classifications by quantitative effects, spectrum analysis helps to explain and to chart the consistency of the Court's overall balancing approach. (A chart for each individual Justice, though lying beyond the scope of this article, would undoubtedly improve the predictability of the Court's decisions on the taking issue.) Spectrum analysis is also more than mere description. As a rule founded in the usage of the Supreme Court, this mode of relational analysis gains clarity from the image of a spectrum, but transcends it. As a mode of analysis used by the Court, it attains prescriptive effect for lower courts whose decisions face Supreme Court review, and it holds potential predictive value for lawyers.

87. *E.g.*, *United States v. Cress*, 243 U.S. 316 (1917) (recurrent floodings); *State Road Dep't v. Tharp*, 146 Fla. 745, 1 So. 868 (1941) (flooding of millrace).

88. *E.g.*, *United States v. Caltex*, 344 U.S. 149 (1952) (destruction of oil depots in Philippines to prevent enemy capture held not a taking).

89. *E.g.*, *Miller v. Schoene*, 276 U.S. 272 (1928) (destruction of ornamental cedars to save apple orchards from cedar rust held not a taking).

90. *E.g.*, *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *City of Jacksonville v. Schumann*, 167 So. 2d 102 (Fla. 1st DCA 1964), *cert. denied*, 172 So. 2d 597 (Fla. 1965).

91. *E.g.*, *State Road Dep't v. Tharp*, 146 Fla. 745, 1 So. 2d 868 (1941). *Cf.* *United States v. Cress*, 243 U.S. 316 (1917) (water project caused taking by flooding).

92. Of course, if the government action deprives the plaintiff of a use to which he has no vested right, the government has not taken *his* property. *See, e.g.*, *Village of Tequesta v. Jupiter Inlet Corp.*, 371 So. 2d 663, 670-71 (Fla. 1979) (plaintiff "owner" had not yet received statutorily required permit to use water taken by Village).

affected.⁹³

The availability of these alternative remedies depends on the possibility and desirability of reversing the confiscatory action of the government. That policy determination requires a weighing of the costs and benefits to the public and to the private owners involved.⁹⁴ Abutting this band of cases of reversible government action are cases in the upper end of the spectrum in which the alleged taking derives solely from regulation.⁹⁵ Quantitative distinctions may trigger a qualitative classification here. By measuring the degree of deprivation of property interests caused by a regulation, a court may find that a regulation has reversibly "taken" the property and hold the regulation invalid to avoid that effect.⁹⁶ Alternatively, the government may pay the price that is constitutionally required to validate the regulation by compensating each affected owner. But the important point is that courts have hesitated to order an unconditional award of damages in inverse condemnation for such an easily reversible taking.

Recent Cases. Although one may push the metaphor too far, this spectrum analysis does help to illuminate the way in which takings cases have combined qualitative and quantitative factors into one consistent method of determination.⁹⁷ In *Penn Central*

93. See, e.g., *United States v. Causby*, 328 U.S. 256 (1946) (remanding to determine whether taking was permanent, and if not, then limiting the damages to a temporary easement); *State Road Dep't v. Tharp*, 146 Fla. 745, 1 So. 2d 868 (1941) (affirmed injunction to compel removal of road fill causing flooding of millrace, or else to commence proceedings in eminent domain).

94. E.g., *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980). See notes 208-210 and accompanying text *infra*.

95. E.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Forde v. City of Miami Beach*, 146 Fla. 676, 1 So. 2d 642 (1941).

96. See, e.g., *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Forde v. City of Miami Beach*, 146 Fla. 676, 1 So. 2d 642 (1941); *Mailman Dev. Corp. v. City of Hollywood*, 286 So. 2d 614 (Fla. 4th DCA 1973), *cert. denied*, 293 So. 2d 717 (Fla. 1974), *cert. denied*, 419 U.S. 844 (1974) (expressly rejecting possibility of recovery of damages from mere passage of zoning regulations). *But see* *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981) (apparently five Justices favored awarding interim damages in inverse condemnation); *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374 (1981) (suggesting that compensation may be allowed in some instances). For a thorough discussion of the proper remedy in the specific context of zoning, see *Cookston & Bruton*, *supra* note 78. See also *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981).

97. The metaphor also suggests that the proper remedy for a reversible taking by regulation must depend on this same interplay of qualitative classifications and quantitative evaluation, reflected in the related color and position of a band in the spectrum. Policy may so color certain kinds of factors (e.g., physical intrusion) that by themselves they qualify government action as a "taking," in the absence of sufficiently countervailing policies that give the action a contrary shading. Moreover, differences in degree, increased far enough, become differences in kind, coloring the Court's view of whether government action fairly

Transportation Co. v. City of New York,⁹⁸ the Supreme Court of the United States discussed its general approach as focusing on "several factors that have particular significance" in the "essentially ad hoc, factual" evaluation of circumstances to determine whether an action of the government amounts to a taking.⁹⁹ In considering "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations,"¹⁰⁰ the Court must measure the degree of economic harm to the property as a whole, thereby applying quantitative analysis.¹⁰¹ In examining "the character of the governmental action," with a physical invasion more likely to result in the finding of a taking than would a regulatory interference that simply adjusted "the benefits and burdens of economic life to promote the common good,"¹⁰² the Court must draw qualitative distinctions as well. The overall approach "focuses . . . on the [qualitative] character of the action and on the nature and the [quantitative] extent of the interference with [the landowner's] rights."¹⁰³

The mesh of qualitative and quantitative factors appears again in two Supreme Court cases decided last term. In *Kaiser Aetna v. United States*,¹⁰⁴ the lessors of Kuapa Pond in Hawaii dredged a preexisting channel (increasing its average depth from two to six feet) to provide access to the pond from Maunalua Bay and the Pacific Ocean; the Corps of Engineers had assented to the lessors' plans. The lessors also raised the clearance level of a bridge to per-

requires compensation. Of course, policies color each Justice's view, though differently: General analysis of the decisions produces an abstract spectrum of the approach of "the Court"; precise prediction must depend on the charting of each Justice's particular approach.

98. 438 U.S. 104 (1978) (involving a "takings" challenge to New York City's Landmarks Preservation Law).

99. *Id.* at 124.

100. *Id.*

101. *Id.* at 130-31. This includes consideration of offsetting benefits, such as the transferrable development rights granted by the city here, that reduce the overall impact on the regulated property. See note 103 *infra*.

102. *Id.* at 124.

103. *Id.* at 130. In *Penn Central* the Court emphasized that although the Commission's denial of plaintiffs' application precluded its constructing a high-rise building on the site of the designated landmark (Grand Central Station), it could still transfer the development rights for that site "to at least eight parcels in the vicinity of the Terminal," *id.* at 137, and could continue to receive a "reasonable return" on their operation of the Terminal itself. *Id.* at 136. Thus, the Court concluded that no taking had occurred; that the Landmark Preservation Law imposed only "restrictions . . . substantially related to the promotion of the general welfare" (a permissible purpose) and provided opportunities to use and even improve the Terminal site as well as other nearby properties. *Id.* at 138.

104. 444 U.S. 164 (1979).

mit boats to pass under the highway on the barrier beach that isolated the pond from the ocean. Kaiser Aetna then completed the development of a large marina, in which the company leased waterfront lots and through which the company controlled all access to and from the ocean. The Corps later insisted that the developers could not deny "public access to the pond because, as a result of the improvements, it had become a navigable water of the United States,"¹⁰⁵ subject to the "navigational servitude" of the government to protect navigation, under the power of Congress to regulate interstate commerce.

The Court rejected the government's argument "that the navigational servitude creates a blanket exception to the Takings Clause,"¹⁰⁶ and noted that if Congress did choose to exercise its power under the Commerce Clause to "assure the public a free right of access to the Hawaii Kai Marina," the regulation might amount to a compensable taking.¹⁰⁷ Furthermore, the Court used language of degree in concluding that the government's assertion of power here, "the 'right to exclude,' so universally held to be a fundamental element of the property right,"¹⁰⁸ a property interest "that has the law back of it to *such an extent*"¹⁰⁹ that a court should classify it as one of the "interests that the Government cannot take without compensation."¹¹⁰ Thus, quantitative considerations contributed to the Court's classification of the disputed right of access as an infringement of the marina's protected property interest (the right of exclusion). That qualitative determination in turn tipped the overall balance in favor of private interests and against the government's proposed imposition of an easement ("an actual physical invasion") that would not "cause an *insubstantial* devaluation of petitioners' private property."¹¹¹

The Court's recent decisions had thus restated and clarified its overall balancing approach by the time the district court of appeal

105. *Id.* at 168.

106. *Id.* at 172.

107. *Id.* at 174-75. Whether the regulation would amount to a taking would ultimately depend on the outcome of the Court's inquiry, described in terms that closely parallel the language used *Penn Central*.

108. *Id.* at 179-80 (emphasis added).

109. *Id.* at 178 (emphasis added).

110. *Id.* at 180.

111. *Id.* (emphasis added). The three Justices in dissent likewise applied a test that balanced public and private interests, *id.* at 188, but suggested that the government's "paramount power" to regulate navigation, *id.*, outweighed these private property interests. *Id.* at 190-91 (Blackmun, J., dissenting).

decided *Estuary Properties*.¹¹² In 1980 the Supreme Court again applied an explicit balancing test in *Agins v. City of Tiburon*¹¹³ to determine whether the "mere enactment of [certain] zoning ordinances constitute[d] a taking,"¹¹⁴ paralleling the issue in *Estuary Properties* whether denial of approval for a DRI of the scope requested by the developer could amount to a regulatory taking.¹¹⁵ First, the Court in *Agins* restated the general principle that a zoning restriction "effects a taking if the ordinance does not substantially advance legitimate state interests"¹¹⁶ or if it "denies an owner economically viable use of his land."¹¹⁷ Then, after reiterating its settled position that "no precise rule"¹¹⁸ distinguishes compensable takings from noncompensable regulations, the Court noted that this determination "necessarily requires a weighing of private and public interests."¹¹⁹

Because the appellants had not yet even applied for a permit to develop their property, the issue before the Court was not a concrete application of a zoning ordinance but instead whether the passage of a restrictive ordinance had already so burdened the appellants' property as to constitute a taking. The zoning ordinances, enacted (as required by a new California statute)¹²⁰ after the appellants had acquired their property, restricted development of their five-acre tract of land to the construction of not more than five single-family residences. The Court found that the ordinances did substantially advance a legitimate state interest, as "exercises of the city's police power to protect the residents of Tiburon from the ill effects of urbanization."¹²¹ Furthermore, the ordinances limited but did not entirely preclude the "best use" of the land, nor

112. The Supreme Court decided *Penn Central* in 1978 and *Kaiser Aetna* on December 4, 1979, 15 days before the First District issued its opinion in *Estuary Properties*.

113. 447 U.S. 255 (1980).

114. *Id.* at 260.

115. A corollary issue is whether repeated denials in a circular permitting process could amount to a taking; another issue posed by the First District's disposition of *Estuary Properties* is whether the court properly limited the state's options by precluding the possibility of replacing the excessive restrictions with more reasonable regulation, thus reversing the confiscatory effects. The Court disposed of *Agins* by determining that no taking had occurred, thereby avoiding the need to decide the related issue of whether a state could preserve that option, in effect, by limiting an owner's possible remedies to invalidation of the regulation and mandamus against its enforcement. *Id.* at 263.

116. *Id.* at 260 (citing *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928)).

117. *Id.* (citing *Penn Central*, 438 U.S. at 138 & n.36).

118. *Id.* (citing *Kaiser Aetna*, 444 U.S. 164); see *Penn Central*, 438 U.S. 104 (1978).

119. *Id.* at 261 (emphasis added).

120. CAL. GOV'T CODE § 65302(a) & (e) (West Supp. 1979).

121. 447 U.S. at 261.

did they "extinguish a fundamental attribute of ownership,"¹²² since the landowners could still build as many as five houses on the land if they wished.

Although the Court made a passing nod to the "diminution-in-value" test for a taking,¹²³ it emphasized that these ordinances were nondiscriminatory and part of a general zoning plan that would provide the benefits of orderly development and open spaces—benefits that must be weighed along with any diminution in value of the private property affected. Not surprisingly, the Court upheld the ordinances as fair and facially valid regulations,¹²⁴ emphasizing that the landowners retained the freedom "to pursue their reasonable investment expectations"¹²⁵ by applying for permission to develop their property within the limits allowed by the ordinance. In *Penn Central* the Court had also stressed that the regulation under attack permitted the landowner a "reasonable beneficial use" of the property and a "reasonable return" on its investment.¹²⁶ After *Agins*, the Court's subjective measure of the reasonableness of an owner's investment expectations that have been injured by a challenged regulation will probably weigh heavily in its determination of the regulation's validity. The clear inference from this proposition is that if the Court views an owner's investment expectations as unreasonable, it will hold that even a regulation entirely destroying those expectations does not amount to a taking.¹²⁷

2. TAKING AND THE PERMITTING PROCESS: A CRITIQUE OF *Estuary Properties*

a. Summary of the Case

In *Graham v. Estuary Properties, Inc.* the Florida Supreme Court reversed the finding of the District Court of Appeal, First District, that the state had taken land owned by Estuary Properties (Estuary) when it rejected Estuary's application for development without identifying the modifications needed for approval.¹²⁸ Estuary had acquired the "Windsor Tract" (mostly wetlands) by

122. *Id.* at 262.

123. *Id.*; see note 80 *supra*.

124. *Id.* at 259, 262-63.

125. *Id.* at 262.

126. 438 U.S. at 136, 138.

127. See also note 79 *supra*, discussing the recent *San Diego* decision.

128. *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374 (1981), *rev'g* Estuary Properties, Inc. v. Askew, 381 So. 2d 1126 (Fla. 1st DCA 1979).

assignment from Windsor, who had reached an agreement in 1970 with the Trustees of the Internal Improvement Fund of Florida;¹²⁹ the agreement set the boundary between state land and the Windsor Tract and provided that the Trustees would not object to the granting of a bulkhead line and various specified dredge-and-fill permits to Windsor or his assigns upon application.¹³⁰ Estuary then bought lands next to the Windsor Tract, expanding its holdings to about 6,000 acres, and sought permission to commence developing a DRI of "some 26,500 residential units to accommodate 73,500 people."¹³¹

Estuary's ambitious plan proposed to preserve water quality by building an interceptor waterway along the seaward side of a natural levee (only about six to eight inches above the rest of the land) on the property that separated a large coastal forest of red mangroves from a somewhat smaller black mangrove forest between the coast and the uplands.¹³² Although Estuary intended to build the development on the site of the black mangrove forest as well as on the uplands, the company argued that the interceptor waterway and a system of twenty-seven lakes (dredged to provide fill for the development) would perform the draining and cleaning functions presently performed by the black mangroves.¹³³

The Southwest Florida Regional Planning Council¹³⁴ had recommended denial of the DRI application, emphasizing that the proposal omitted some data needed for the crucial determination of whether the proposed drainage system would in fact function properly. The Council noted that no one had ever tested such a system "in actual usage . . . [or in] a pilot project of suitable scale"¹³⁵ and that the proposal failed to take into account "the

129. Under chapter 253 of the Florida Statutes (1981), the Governor and the Cabinet manage the preservation, acquisition, and disposition of state land in their capacity as the Board of Trustees of the Internal Improvement Trust Fund of Florida.

130. *Estuary Properties, Inc. v. Askew*, 381 So. 2d 1126, 1128 (Fla. 1st DCA 1979).

131. *Id.*

132. *Id.*

133. *Id.* at 1129, 1131-32.

134. Under the Environmental Land and Water Management Act, an applicant for a DRI permit must file an application with the local government that has jurisdiction over the proposed development, FLA. STAT. § 380.06(6) (1979) (amended by 1980 Fla. Laws ch. 80-313, § 3), as well as with the appropriate regional planning agency or council, FLA. STAT. § 380.06(7)(b) (1979) (amended and renumbered as § 380.06(9)(b) by 1980 Fla. Laws ch. 80-313, § 3) (formerly by implication and practice; now expressly required as concurrent filing). See notes 233-34 and accompanying text *infra*. See also T. PELHAM, STATE LAND-USE PLANNING AND REGULATION at 36-44 (1979).

135. *Estuary Properties*, 381 So. 2d at 1129.

complex mix of urban effluents that would be entering the waterways."¹³⁶

The Board of County Commissioners of Lee County then held several public hearings, eventually adopting the findings of the planning council and denying the application and the requested rezoning.¹³⁷ Listing numerous reasons for the denial, the Board called attention to the unpredictable but highly risky detrimental impact on the environment that the proposed development could cause, as well as virtually certain impacts on the transportation and education systems of the county and the tourist and commercial fishing industries in the area. The County Board, however, did specify what changes were necessary to make the application eligible for approval.¹³⁸ Essentially, the Board would have required Estuary to reduce the size of the proposed development by about one-half and to provide greater assurance of preserving water quality by planning for an adequate sewage treatment system (that the county would construct and operate) instead of the interceptor waterway. The Board also insisted that Estuary eliminate its proposed "destruction of large acreages of red and black mangroves"¹³⁹ and include "a proposal to aid Lee County in funding the cost of the [other] impact[s] the proposed development will have."¹⁴⁰

After Estuary appealed to the Adjudicatory Commission,¹⁴¹ the Commission appointed a hearing officer to consider the application de novo and make new findings and conclusions. The hearing officer found, in general, that although the development would not have a more adverse impact on the county's economy and environment than any other similar development, the specific destruction of the black mangroves would have a special adverse effect, since the preponderance of the evidence showed that the proposed interceptor waterway would not effectively prevent the deterioration of the water quality in the surrounding bays.¹⁴² At the same

136. *Id.*

137. *Id.*

138. *Id.* at 1130-31. The statute (ELWMA) requires specification of such changes. See FLA. STAT. § 380.08(3) (1981).

139. 381 So. 2d at 1131 (emphasis by the court deleted).

140. *Id.* at 1130.

141. The Governor and the Cabinet sit as the Adjudicatory Commission in their role as settlers of disputes over the granting or denial of permits. See FLA. STAT. § 380.07 (1981). In their capacity as promulgators of standards and guidelines under ELWMA, the Governor and the Cabinet act as the Administration Commission. See *id.* § 380.031(1).

142. 381 So. 2d at 1131-32.

time, however, the hearing officer noted that some of the reasons the County Board gave for rejecting the application would be unreasonable restrictions on Estuary's use of the land. For example, the Board's requirement of a funding proposal was unprecedented, since impact fees had never been required from any other developer.¹⁴³ Nevertheless, the hearing officer recommended denial of the application without suggesting possible changes that would make it eligible for approval. Adopting the hearing officer's recommended order, the Adjudicatory Commission denied the application, similarly failing to suggest the changes necessary to make the development permissible, as required by section 380.08(3) of the Florida Statutes.¹⁴⁴

Estuary sought judicial review as provided by ELWMA.¹⁴⁵ The First District held in favor of Estuary on almost all counts, openly declaring that it was following Estuary's framing of the issues and phrasing of the conclusions.¹⁴⁶ At the outset, the court discussed at length, but did not decide, the validity of Estuary's assertion that the denial of the application had violated chapter 380 of the Florida Statutes because the evidence did not support the hearing officer's conclusion that the "removal" of the mangroves would harm the quality of water in the area.¹⁴⁷ The court then held first that the permitting authorities had failed to balance the potential costs and benefits of the proposed development, and had instead imposed an unfair ultimate burden of proof on Estuary by requiring extensive testing and documentation to demonstrate that no adverse impact on the environment would occur, a burden of proof neither justified by the statute nor permissible under the Constitution.¹⁴⁸ Second, the court held that the Commission had failed to explain how Estuary could have changed the proposal to make it eligible for approval, thus violating the mandate of ELWMA.¹⁴⁹ Next, the court agreed with Estuary that the denial of the DRI permit amounted to a taking without compensation.¹⁵⁰ The court then abstained from deciding Estuary's constitutional challenge of section 380.06(8) of the Florida Statutes on grounds of vagueness

143. *Id.* at 1132.

144. FLA. STAT. § 380.08(3) (1981).

145. The district court cited § 380.07(5) of the Florida Statutes, which the Florida Legislature amended in 1978.

146. 381 So. 2d at 1132.

147. *Id.*

148. *Id.* at 1134, 1137.

149. *Id.* at 1137; see FLA. STAT. § 380.08(3) (1981).

150. 381 So. 2d at 1140.

and improper delegation, and ordered the Adjudicatory Commission either to grant the permit or to begin condemnation proceedings.¹⁵¹

b. The Supreme Court's Decision

The Adjudicatory Commission and Lee County petitioned the Florida Supreme Court for a writ of certiorari to review the case.¹⁵² In partially reversing and partially affirming the First District's decision, the supreme court divided its opinion into two parts: First, the court discussed Estuary's allegation that the permit denial violated chapter 380 of the *Florida Statutes*; second, the court considered whether the denial constituted a taking of private property for public use without payment of just compensation.¹⁵³ The court agreed with the First District that the legislative intent behind chapter 380 requires that an agency balance both the state's interest in protecting the public health, safety, and welfare, and the landowner's interest in constitutionally protected private property.¹⁵⁴ But the court disagreed with the lower court's decision that because the Adjudicatory Commission had denied DRI approval despite finding favorably for Estuary on four of the six requisite considerations, the agency had not properly balanced those considerations.¹⁵⁵ Because the legislature did not place specific values on each consideration, "it would have been permissible for the hearing officer to determine that the adverse environmental impact and deviation from the policies of the planning council outweighed the other more favorable findings."¹⁵⁶ The supreme court cited *Askev v. Cross Key Waterways*¹⁵⁷ for the proposition that flexibility was essential to the administrative process. Citing *Florida State Board of Architecture v. Wasserman*,¹⁵⁸ the court also emphasized that the agency may exercise discretion when balancing applicable considerations.¹⁵⁹

The supreme court next overruled the First District's decision that forcing the landowner to prove the absence of adverse envi-

151. *Id.*

152. 399 So. 2d at 1377.

153. *Id.* at 1377, 1380.

154. *Id.* at 1377.

155. *Id.* at 1378.

156. *Id.*

157. 372 So. 2d 913, 924 (Fla. 1978).

158. 377 So. 2d 653, 656 (Fla. 1979).

159. *Estuary Properties*, 399 So. 2d at 1378.

ronmental impact constituted an unconstitutional burden of proof.¹⁶⁰ After factually distinguishing *Zabel v. Pinellas County Water & Navigational Control Authority*,¹⁶¹ on which the First District had relied, the court stated that "*Zabel* stands for the proposition that the burden is on the state to show that an adverse impact will result if a permit is granted."¹⁶² After the state shows a potential adverse impact, the burden of proof shifts to the property owner to prove that curative measures will be adequate.¹⁶³ In placing the initial burden on the state to show that a proposed DRI will have an adverse impact, the court stated that it was not ignoring or altering the established rule that one seeking administrative relief carries the burden of proof, but that it was simply reaffirming that the "exercise of the state's police power must relate to the health, safety, and welfare of the public and may not be arbitrarily and capriciously applied."¹⁶⁴ The court found that the state had clearly met its burden and that there was competent, substantial evidence to support the agency's finding that the curative measures would not be adequate. Although the evidence might have supported an opposite conclusion, the court refused to substitute its judgment for the agency's, and accordingly held "that the district court incorrectly reversed the adjudicatory commission's finding that the proposed DRI would have an adverse impact."¹⁶⁵ In fact, however, the district court had avoided the necessity of reversing the agency's finding on the ground of insufficient evidence, relying instead on the agency's improper allocation of the burden of proof.¹⁶⁶

The supreme court agreed with the First District that the hearing officer and the Adjudicatory Commission had improperly failed to include specific changes that would allow the development to go forward.¹⁶⁷ The court also noted that the hearing officer deemed some of the Council's recommendations "so vague and indefinite that it [is] doubtful that Estuary could ascertain what it would be required to do to obtain approval."¹⁶⁸ But the supreme court characterized the agency's failure to indicate the requisite

160. *Id.* at 1379.

161. 171 So. 2d 376 (Fla. 1965).

162. *Estuary Properties*, 399 So. 2d at 1379. (emphasis added).

163. *Id.*

164. *Id.*

165. *Id.*

166. *See* 381 So. 2d at 1134, 1137.

167. 399 So. 2d at 1380.

168. *Id.* (quoting *Estuary Properties*, 381 So. 2d at 1132) (brackets by supreme court).

changes as a mere procedural error that impaired the fairness of the proceeding.¹⁶⁹ The court therefore remanded the case to the district court with directions to remand for further agency proceedings.¹⁷⁰

In reversing the First District's finding of a taking, the court noted several factors to be considered: (1) whether there had been a physical invasion; (2) whether the result was a reduction in value or the denial of "all economically reasonable use"; (3) whether the regulation created a public benefit or prevented a public harm; (4) whether the regulation was consistent with the police power; (5) whether it was arbitrary and capricious; and (6) whether the property owner had investment-backed expectations to use its property.¹⁷¹ Three of these, however, were central to the opinion: The harm-benefit test, the denial of reasonable use, and the investment-backed expectations of the property owner.

Another important aspect of the decision was the court's agreement with observations made in a Wisconsin decision, *Just v. Marinette County*,¹⁷² which concluded that "[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 [injures] the rights of others."¹⁷³ Noting the "sensitive nature" of Estuary's lands, the Supreme Court of Florida stated that the denial of development approval sought the prevention of a public harm, which made it a reasonable exercise of police power.¹⁷⁴ The court observed: "It is true that the public benefits in that the bays will remain clean, but that is a benefit in the form of maintaining the status quo."¹⁷⁵

In addition to this analysis, the court focused on the extent of the resulting reduction in value and denial of use of Estuary's property. The hearing officer had not heard the taking issue, so there was no real evidence on record going to these questions.¹⁷⁶ The court discussed the lack of evidence and decided that, by it-

169. *Id.*

170. *Id.*

171. *Id.* at 1380-81.

172. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

173. *Estuary Properties*, 399 So. 2d at 1382 (quoting *Just*, 56 Wis. 2d at 17, 201 N.W.2d at 768) (emphasis added). Note that without the emphasized portion this statement would mislead. The attempt by government to preserve existing public benefits from private land may still amount to a taking, absent the need to prevent harm to the public. See *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981) (all three opinions).

174. *Id.*

175. *Id.*

176. *Estuary Properties*, 381 So. 2d at 1131.

self, the reduction of the development by half did not establish a taking: "We . . . hold that, under the facts as found by the commission, the instant reduction is a valid exercise of the police power."¹⁷⁷ There having been a valid exercise of the police power, and no evidence of reduced value or lost use, the court held that no taking had occurred.¹⁷⁸

One commentator hailed the First District's decision in *Estuary Properties* as "a potential watershed . . . in the development of the Florida DRI process."¹⁷⁹ The supreme court's reversal should have even more significant impacts on land use and environmental law in Florida. These impacts cannot now be accurately predicted, however, because the supreme court left several key questions unanswered.

c. The Issue of the Burden of Proof

One reason why the supreme court reversed the First District in *Estuary Properties* was that it disagreed with the First District's handling of the burden of proof issue.¹⁸⁰ Relying on *Zabel*¹⁸¹ and *Askew v. Gables-By-The-Sea*,¹⁸² the First District implicitly placed the ultimate burden of proof on the state, starting with the premise that the state was required to prove that the property

177. *Estuary Properties*, 399 So. 2d at 1382. The court also considered Estuary's investment-backed expectations for use of the property and, distinguishing the case from *Zabel* and *Gables-By-The-Sea*, stated that Estuary "had only its *subjective expectation* that the land could be developed in the manner it now proposes." *Id.* at 1383 (emphasis supplied). Interestingly, the supreme court failed to discuss or even mention the mean high water line, which traditionally has been recognized as the boundary line between private ownership rights and public interests. See *Borax Consol. v. City of Los Angeles*, 296 U.S. 10 (1935); *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293 (5th Cir. 1976); *Trustees of Internal Improvement Fund v. Wetstone*, 222 So. 2d 10 (Fla. 1969); *Florida Board of Trustees of Internal Improvement Trust Fund v. Wakulla Silver Springs Co.*, 362 So. 2d 706 (Fla. 3d DCA 1978). Instead, the court focused on wetlands in its discussion of the public interest in preserving the environment and apparently did not consider Estuary's expectation of being able to use its property landward of mean high water consistently with traditional Florida property law.

Note that Justice Adkins dissented, urging that Justice Brennan's dissenting opinion in *San Diego Gas* controlled the decision in *Estuary Properties*. 399 So. 2d at 1383. Justice Adkins viewed the denial of DRI approval as depriving "Estuary of the beneficial use of almost three-quarters of its property," to preserve a public benefit from the mangroves. *Id.* at 1384-85. He did not address the issue of the public harm that removal of the mangroves would cause.

178. 399 So. 2d at 1382.

179. T. PELHAM, *supra* note 134, at 62.

180. *Estuary Properties*, 399 So. 2d at 1379.

181. 171 So. 2d 376 (Fla. 1965).

182. 333 So. 2d 56 (Fla. 1st DCA 1976).

owner was not entitled to use its property in the proposed way.¹⁸³ After balancing all evidence, the court held that the state had failed to carry its burden.¹⁸⁴

Distinguishing *Zabel* and *Gables-By-The-Sea*, however, the supreme court decided that the state needs to make only a prima facie case that the proposed development plans will have some adverse environmental effect before the owner must come forward with evidence of effective curative measures.¹⁸⁵ The supreme court found sufficient evidence in the record to uphold the state's initial finding of adverse environmental impact, and refused to substitute its judgment for that of the agency that the property owner had not provided sufficient countervailing evidence.¹⁸⁶

The supreme court's decision that under chapter 380 the burden is initially on the state to make a prima facie case of adverse environmental impact, and then shifts to the owner to establish curative measures, is fair and reasonable, but only so far as it goes: The supreme court did not expressly determine which party has the ultimate burden of proof. In any evidentiary trial, there are two types of burdens of proof: The first and most important is the burden of persuasion, by which a trier of fact weighs all evidence and determines which party has established its case, under the applicable standard of proof: by a preponderance of the evidence, clear and convincing evidence, or beyond all reasonable doubt.¹⁸⁷ In contrast, the burden of producing evidence changes constantly during trial. One party has the initial burden of showing a prima facie case, after which the adverse party must come forward with evidence rebutting the prima facie case, and so on throughout the trial.¹⁸⁸ The decision in the case does not necessarily go to the party that ended with effective countering evidence but depends on whether the party with the burden of persuasion has met that burden.¹⁸⁹

183. *Estuary Properties*, 381 So. 2d at 1136-37.

184. *Id.* at 1137.

185. *Estuary Properties*, 399 So. 2d at 1379.

186. *Id.*

187. McCORMICK, *LAW OF EVIDENCE* § 336 (2d ed. 1972).

188. *Id.*

189. *Id.* The First District recently discussed this distinction in *Florida Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778 (Fla. 1st DCA 1981). But the *J.W.C.* case arose under chapter 403 of the Florida Statutes and differs from cases like *Estuary Properties* arising under chapter 380. Part I of chapter 403, the "Florida Air and Water Pollution Control Act," in effect establishes a presumption that polluting activities will adversely affect the public interest. Because of that presumption, the ultimate burden of proof appropriately rests on the applicant for a permit, as was the situation in *J.W.C.* Under chapter 380, on the

One problem with the supreme court's decision is its confusing treatment of the burden of proof. Although the court suggested that Estuary had not met its "burden,"¹⁹⁰ the court failed to identify clearly which of the two kinds of burdens it meant. If it was referring to the burden of producing evidence, then the decision creates little controversy. Requiring a property owner to come forward with countervailing evidence after the state has properly established that a proposed development will create significant adverse environmental impacts is a fair and reasonable restriction on the use of property. Requiring the property owner to carry the burden of persuasion on that issue, however, would have the questionable effect of creating a presumption against the free and reasonable use of property. Since the court referred to a burden which "shifted to Estuary,"¹⁹¹ the court may have meant the burden of producing evidence. Alternatively, the court may have simply allocated the burden of persuasion to each party on different issues. The state had met that burden by proving that the development would cause an adverse impact. Estuary then had the ultimate burden of proving that its curative measures were adequate, in view of the proven potential impact. Despite the apparent fairness of this putative allocation, however, there is no evidence that the agency so allocated the burden of proof. To the contrary, the Adjudicatory Commission adopted the order and findings of the hearing officer, who seemed to have assigned the burden of persuasion to Estuary on both of the intertwined issues of impact and curative measures.¹⁹² Thus, the objection stands.

d. The Bureaucratic Revolving Door

The district court in *Estuary Properties* highlighted a takings issue of growing importance: whether repeated denials of permits each time on differing grounds can eventually amount to a taking of the affected property. It is in the public interest that the development approval process have a clear point of termination. Although comprehensive environmental regulation is essential, exces-

other hand, the legislature established a scheme through which local governments consider and balance both the positive and negative impacts of development, so that no presumption of adverse impact can be inferred. Under chapter 380, therefore, it would be inappropriate to place on a property owner the ultimate burden of proving no adverse environmental impacts.

190. *Estuary Properties*, 399 So. 2d at 1379.

191. *Id.*

192. 381 So. 2d at 1131-32.

sive and circular permitting is costly and ultimately harms the public. The First District recognized this problem when it decried what it called the "treadmill effect": "The potential for abuse . . . is readily apparent. County commissioners and the Adjudicatory Commission could entrap a developer in a virtual bureaucratic revolving door, until he finally collapses from financial exhaustion, or withdraws his application from simple frustration."¹⁹³

Regulatory risk has become a substantial factor in the scarcity of affordable, desirable planned communities and residential home sites. Beyond the considerable expense the developer will necessarily incur by repeated submittals to local and state agencies, the developer must constantly reconsider the economic risk of never receiving a permit. Lenders and investors require some degree of certainty before risking their capital. They are unlikely to do this if the developer is trapped in an endless regulatory circle. The "revolving door" to which the district court referred can do more than just revolve; it can destroy any chance of financing a new community.

In *Estuary Properties* the supreme court did not address this aspect of the case, probably because the facts did not squarely present the issue, since *Estuary* had suffered only one round of denials of a development permit. Cases in other jurisdictions, however, have expressed a concern similar to that of the First District. For example, the Court of Appeals of New York in *Spears v. Berle*¹⁹⁴ stressed that when a statute gives a permitting authority the discretion to grant permits for uses other than those listed in the statute, an applicant facing a possible denial of a permit "should be afforded a reasonable opportunity to obtain notice of the uses, if any"¹⁹⁵ that would be permissible. Furthermore, in some circumstances a court should even require the permitting authority to indicate unlisted but permissible uses, although this affirmative relief still would stop short of mandating the grant of a permit, as the district court required in *Estuary Properties*. Otherwise, the court in *Spears* implied, the delays caused by official reticence might amount to a taking.¹⁹⁶ In contrast, the Supreme Court of Connecti-

193. *Estuary Properties*, 381 So. 2d at 1137.

194. 48 N.Y.2d 254, 397 N.E.2d 1304, 422 N.Y.S.2d 636 (1979).

195. *Id.* at 264 n.4, 397 N.E.2d at 1308 n.4, 422 N.Y.S.2d at 640 n.4.

196. 48 N.Y.2d at 264 n.4, 397 N.E.2d at 1308, n.4, 422 N.Y.S.2d at 640 n.4. The *Spears* court stated that under the New York test for a taking by regulation, "a land use regulation . . . is deemed too onerous when it 'renders the property unsuitable for any reasonable income[,] productive or other private use for which it is adapted and thus destroys its economic value, or all but a bare residue of its value. . . .'" *Id.* at 262, 397 N.E.2d at 1307, 422

cut suggested in *Brecciaroli v. Connecticut Commissioner of Environmental Protection*¹⁹⁷ that the denial of a specific application for a permit does not automatically require the finding of a taking, because “[s]hort of regulation which *finally* restricts the use of property for any reasonable purpose resulting in a ‘practical confiscation,’ the determination of whether a taking has occurred must” rest on a traditional balancing approach.¹⁹⁸

There is no apparent reason why a court should not consider the detrimental impact on property caused by dilatory official action, along with other relevant factors, in deciding takings issues. Recently, Justice Brennan suggested that “interim damages” be awarded for the duration of a regulatory taking.¹⁹⁹ Perhaps by labelling this statutory violation of chapter 380 as a “treadmill effect,” the First District in *Estuary Properties* will discourage “repeated denials without any indication from governmental agencies of changes in [an applicant’s] proposal that would permit an economically beneficial use of his property.”²⁰⁰ The statutory violation could escalate into an unconstitutional taking. The quantitative measure of the delay and its resultant harm may properly trigger a qualitative classification that receives special weight in an overall balancing.²⁰¹ But the label for the qualitative category (the “treadmill effect”) should not be misread as a dispositive litmus test for a taking.

As noted previously, the factual context of *Estuary Properties* dissipated the force of the important policy that the law must discourage officials from deliberate nondisclosure of modifications that are necessary to make the proposed development permissible. Although the First District correctly noted that section 380.08(3)

N.Y.S.2d at 639 (quoting from *Fred F. French Inv. Co. v. City of New York*, 39 N.Y.2d 587, 596, 350 N.E.2d 381, 387, 385 N.Y.S.2d 5, 10, *cert. denied & appeal dismissed*, 429 U.S. 990 (1976)) (brackets contained in *Spears* opinion). As the Supreme Court has emphasized in *Penn Central*, 438 U.S. at 130-31, the *Spears* court declared that an owner seeking to establish that a regulation has taken his property must show “that under no permissible use would the parcel as a whole be capable of producing a reasonable return or be adaptable to other suitable private use” 48 N.Y.2d at 263, 397 N.E.2d at 1308, 422 N.Y.S.2d at 640. See also *Maryland-National Capital Park & Planning Comm’n v. Chadwick*, 405 A.2d 241 (Md. 1979) (deferral of subdivision approval held a taking); *City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978) (city liable for damages caused by its arbitrary and wrongful denial of waterway permits).

197. 168 Conn. 349, 362 A.2d 948 (1975).

198. *Id.* at 356, 363 A.2d at 952 (emphasis added).

199. See *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. at 636 (Brennan, J., dissenting).

200. 381 So.2d at 1137.

201. See notes 81-92 and accompanying text *supra*.

of the Florida Statutes²⁰² requires any agency denying a permit to specify whatever changes in the application would make it eligible for approval, it is not entirely true that Estuary was "left to wonder what changes" were necessary.²⁰³ The hearing officer had specified the precise reasons for his recommended rejection of the application; the County Board had indicated in great detail what changes it would require. In this context, regardless of the wording of the Commission's final order, Estuary knew that a drastically reduced and better documented proposal would stand a good chance of approval by the Commission. The supreme court was also troubled by the Commission's failure to comply with the statute. The court stated that although "the commission [may have] intended to adopt the changes specified by the planning council . . . the commission's order should have expressly so indicated."²⁰⁴ Because the order did not so indicate, the supreme court remanded to the district court with instructions to remand, in turn, to the Commission for an indication of the changes necessary for approval.²⁰⁵

Finally, the prematurity of presuming that Florida courts now may be ready to find "treadmill" regulatory takings is suggested by the First District's failure to show how a single denial (and the affirmance of that denial on review) of this specific permit could result in a treadmill effect, let alone constitute a permanent taking²⁰⁶ of private property under the proper balancing test. The First District itself later emphasized the requirement of permanency in the taking in *Department of Transportation v. Burnette*.²⁰⁷ In *Estuary Properties*, however, it instead stressed the policy underlying the takings law—namely, that the public must

202. FLA. STAT. § 380.08(3) (1981).

203. 381 So. 2d at 1137.

204. *Estuary Properties*, 399 So. 2d at 1380.

205. *Id.*

206. See, e.g., *Askew v. Gables-By-The-Sea, Inc.*, 333 So. 2d 56, 61 (Fla. 1st DCA 1976) (per curiam opinion) (quoting and adopting the trial court's opinion that taking must be permanent). Of course, the First District stopped short of holding that the denials of Estuary's permit had amounted to a treadmill constituting a regulatory taking.

207. 384 So. 2d 916 (Fla. 1st DCA 1980). In *Burnette*, the Department of Transportation had reversed the drainage flow from State Road 10, which potentially could cause the flooding of about half the acreage of Burnette's property "once every 25 years, on the average, as the result of a '25-year six-hour storm'." *Id.* at 919. The court chose to affirm the grant of injunctive relief against maintenance of the drainage system, but did so on the tort ground of a continuing nuisance, rather than "attenuate the 'taking' concept by finding a (compensable) taking rather than (incompensable) damage, as by holding that this raw acreage is 'permanently' appropriated because . . . half of it will be . . . intermittently and wrongfully damaged by water." *Id.* at 922 (parentheticals in original).

pay for the benefits it receives from the appropriation of private property or from regulation that destroys the owner's beneficial use of his property.²⁰⁸ But only a prior finding of a permanent appropriation or destruction of the property implicates that policy. Moreover, the court implicitly rejected the balancing method of determining that a taking has occurred in favor of the "universally accepted" principle that "the state may legitimately regulate wetlands development to achieve an efficient allocation of resources, but it should ordinarily compensate landowners for wealth redistributions resulting from the regulation imposed."²⁰⁹ The court cited no case suggesting that this policy overrides the need of government to impose reasonable regulations without having to compensate owners for every significant deprivation of property uses.²¹⁰ The court seemed unaware that the policy of compensating for reallocating wealth plays less of a role in determining whether a taking has occurred than in pointing to the proper remedy once the court has found a taking. But because the district court did not actually hold that a treadmill of denials had taken Estuary's property, the court's discussion of the treadmill effect is mere dictum, with great potential significance not fulfilled by the facts of this case. No wonder the supreme court responded to that dictum with a resounding silence.

e. The Supreme Court's Reliance on *Just v. Marinette County*²¹¹

Another controversial aspect of the supreme court's decision was its reliance on the Wisconsin Supreme Court's 1972 decision in *Just v. Marinette County*.²¹² In *Just*, the local government had enacted an ordinance requiring permits for dredging and filling activities in sensitive environmental areas.²¹³ Subsequent to the enactment of the ordinance, the Justs, who owned acreage in an

208. 381 So. 2d at 1139. The court refused to balance the public benefits against the private injury—or any other factors, for that matter—because it viewed the Commission's categorical denial of the requested permit as (automatically and categorically qualifying as a taking of Estuary's property, depriving it of the possibility of making "any economically beneficial use of its land." *Id.* (emphasis added).

209. *Id.* (quoting Note, *State and Local Wetlands Regulation: The Problem of Taking Without Just Compensation*, 58 U. VA. L. REV. 876, 905-06 (1972)) (emphasis added by the court).

210. See note 84 *supra* (comments of Holmes, J., in *Pennsylvania Coal*).

211. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

212. *Id.*

213. *Id.* at 12, 201 N.W.2d at 765-66.

environmentally sensitive area, proceeded to fill a portion without first obtaining a permit.²¹⁴ The county sued to enjoin this filling, and the Justs defended on the ground that the ordinance caused a taking of their property.²¹⁵

In its analysis of the alleged taking, the Supreme Court of Wisconsin refused to consider the land's potential for development in determining its economic value, and instead focused on the economic value of the land in its natural state.²¹⁶ Reasoning that natural rather than economic uses were the status quo, and deciding that development of the property would harm the environment, the Wisconsin court determined that the purpose of the statute and ordinance was the prevention of harm.²¹⁷ Thus, relying on the theory that statutes enacted to prevent public harm are valid exercises of the police power and not compensable, the court held that the Justs were not entitled to compensation.²¹⁸

Because of the court's reliance on the harm-benefit test and its failure to consider economic value in the face of environmental sensitivity, one commentator described *Just* as an example of "doctrinal schizophrenia."²¹⁹ The main problem with the harm-benefit test arises from the absence of an objective method for determining whether a statute is aimed at preventing harm or securing a benefit.²²⁰ The Supreme Court of Florida apparently has added this test to the balance of factors it will consider when deciding takings issues. The court recognized that "the line between the prevention of a public harm and the creation of a public benefit is not often clear," since "the public benefits whenever a harm is prevented."²²¹ Nevertheless, the court endorsed the use of this somewhat slippery dichotomy that may lead to confusion in the lower courts and further uncertainty among developers.

B. *Legislative Streamlining of DRI Review*

In 1980, the Florida Legislature substantially amended

214. *Id.* at 14, 201 N.W.2d at 766.

215. *Id.*

216. *Id.* at 23, 201 N.W.2d at 771.

217. *Id.* at 16-17, 201 N.W.2d at 768-69.

218. *Id.* at 17, 201 N.W.2d at 769.

219. Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021, 1047-48 (1975).

220. *Id.*; Michelman, *supra* note 80. For example, a statute preventing the placement of billboards along the sides of highways simultaneously prevents the harm of blighting the landscape and also secures the benefit of an unrestricted view.

221. *Estuary Properties*, 399 So. 2d at 1382.

ELMWA,²²² perhaps in part to avoid the problem of circular permitting and the risk of results foreshadowed by the First District's decision in *Estuary Properties*. Among other things, the legislation provided a procedure for the monitoring and approval of urban renewal or development projects undertaken by a downtown development authority²²³ and established an experimental program for reviewing proposed development in Dade County for one year.²²⁴ Another provision of the amending act²²⁵ repealed former section 380.10 of the Florida Statutes.²²⁶ That section, in part, had authorized the Administration Commission to make emergency changes in the standards and guidelines relating to developments of regional impact, which would be effective immediately but subject to the subsequent approval or disapproval by the legislature.²²⁷ The legislature now will assume tighter control over the adoption of new standards and guidelines.²²⁸ Most importantly, the legislature streamlined the review of proposed developments of regional impact, clarifying the roles of the regional planning agency, the local government, and the developer,²²⁹ and providing an optional coordinated review conducted simultaneously by all affected agencies.²³⁰

222. 1980 Fla. Laws ch. 80-313.

223. *Id.* §§ 1 & 3 (creating FLA. STAT. §§ 380.031(19) & 380.06(21)(a)-(d) (1981)).

224. *Id.* § 2 (amending FLA. STAT. § 380.032(3) (1979)).

225. *Id.* § 4 (repealing FLA. STAT. § 380.10 (1979)).

226. FLA. STAT. § 380.10 (1979) (repealed 1980).

227. FLA. STAT. § 380.06(2)(a) (1979) (amended 1980). Section 380.10 had required legislative approval of guidelines and standards adopted by the Administrative Commission pursuant to FLA. STAT. § 380.06(2) (1979) (amended 1980). Section 380.06(2)(a) authorized the Commission to "adopt guidelines and standards to be used in determining whether particular developments shall be presumed to be of regional impact." *Id.*

228. 1980 Fla. Laws ch. 80-313, § 3 (amending FLA. STAT. § 380.06(2) (1979)).

229. *See id.*, especially the amendments to FLA. STAT. §§ 380.06(3)-(4), (7)-(11), (14)-(17), (20) & (22) (1979)).

230. FLA. STAT. § 380.06(8) (1979) (as amended 1980).

The streamlining trend in Florida law is also evidenced by the recent enactment of three statutes in which the legislature has placed all permitting control in one or two agencies. Pure "one-stop permitting" schemes, in which one lead agency coordinates and is responsible for all state and local permits, was established in the Florida Electrical Power Plant Siting Act, FLA. STAT. §§ 403.501-517 (1981) and the Transmission Line Siting Act, FLA. STAT. §§ 403.52-536 (1981). In the Florida Industrial Siting Act, FLA. STAT. §§ 288.501-518, (1981) one state agency coordinates all state permits, but necessary local approvals (including chapter 380 development orders) are excluded from statutory coverage. Thus, the Industrial Siting Act attempts to streamline the environmental permitting process for industry and simultaneously recognizes the important interests of the public in retaining local control over industries that may have immediate and longlasting impacts on the community.

1. CLARIFIED ROLES OF PARTICIPANTS

a. The Regional Planning Agency

The ELWMA amendments clarify and somewhat modify the powers and duties of regional planning agencies and councils. Regional planning agencies now have the power to recommend for adoption by the Department of Community Affairs not just the kinds of development that should be designated as DRI²³¹ but *any* modifications to existing guidelines and standards.²³² To promote general coordination of review, the amending act explicitly requires a developer to submit applications for approval of proposed development to the state and the regional planning agencies at the same time the developer files an application with the local government.²³³ The statute previously prohibited local governments from scheduling a public hearing on an application until the regional planning agency determined that the application contained sufficient information, but the statute was otherwise silent on the subject of the timing of the three filings.²³⁴ A possible initial source of delay appears in the provision giving the regional planning agency thirty days to notify the developer and the local government if it decides that the information supplied in the application is inadequate.²³⁵ Formerly, this period was fifteen days.²³⁶ This extension of time, however, should enhance the accuracy of the agency's initial review and may ultimately avoid litigation over unnecessary denials of DRI status, thereby increasing administrative efficiency in the long run. Reinforcing this effort to improve the accuracy of agency decision, new subsection (11)(b) authorizes the regional planning agency to require other government agencies to submit reports on applications.²³⁷

The amendments also modify and clarify the duties of regional planning agencies. Formerly, the statute did not specify what criteria the agency should follow in reviewing proposed changes to pre-

231. *Id.* § 380.06(3).

232. 1980 Fla. Laws ch. 80-313, § 3 (amending FLA. STAT. § 380.06(3) (1979)).

233. *Id.* (amending FLA. STAT. § 380.06(9)(a) (1979)).

234. FLA. STAT. § 380.06(7)(a) (1979). Note that new subsection (9)(c) requires the agency to notify the local government that it may set the date for the hearing when the agency either "determines that the application is sufficient or . . . receives" notice that the developer will not supply further information as requested. 1980 Fla. Laws ch. 80-313, § 3 (creating FLA. STAT. § 380.06(9)(c)) (1981).

235. 1980 Fla. Laws ch. 80-313, § 3 (amending FLA. STAT. § 380.06(7)(b) (1979)).

236. FLA. STAT. § 380.06(7)(b) (1979) (amended 1980).

237. 1980 Fla. Laws ch. 80-313, § 3 (creating FLA. STAT. § 380.06(11)(b) (1981)).

viously approved DRI applications. As amended, subsection 380.06(4)(b)²³⁸ now requires the agency to apply the criteria listed in new subsection (17)(b),²³⁹ the same criteria specified for local government review. The amending act also adds a new provision that requires a developer to arrange a preapplication conference with the regional planning agency.²⁴⁰ At this conference the regional planning agency must supply the developer with information about the reviewing "process and the use of preapplication conferences to identify issues, coordinate appropriate state and local agency requirements, and otherwise promote a proper and efficient review of the proposed development."²⁴¹ With the same goal of streamlining DRI review,²⁴² new subsection 380.06(7)(b) requires that each regional planning agency establish a procedure for reaching "binding written agreements" between the developer and the agency to eliminate irrelevant issues from consideration.²⁴³ The amended act, by imposing certain duties on the regional planning agency, suggests the issues that the agency should consider. The agency not only must apply the general criteria formerly applicable under ELWMA,²⁴⁴ but also must "identify regional issues" in its report to the local government on an application²⁴⁵ and develop a list of such issues for reviewing all DRI applications.²⁴⁶ Because it

238. FLA. STAT. § 380.06(4)(b) (1979), as amended by 1980 Fla. Laws ch. 80-313, § 3.

239. 1980 Fla. Laws ch. 80-313, § 3 (renumbering former FLA. STAT. § 380.06(7)(h) (1979) as § 380.06(17)(b) (1981)).

240. *Id.* (creating new FLA. STAT. § 380.06(7)(a) (1981)).

241. *Id.*

242. The amendment contains this comment: "It is the legislative intent of this subsection to encourage paperwork reduction, to discourage unnecessary data gathering and to encourage the coordination of the development of regional impact review process with federal, state, and local environmental reviews when such reviews are required by law." *Id.* (creating new FLA. STAT. § 380.06(7)(b) (1981)).

243. *Id.*

244. See FLA. STAT. § 380.06(8) (1979) (amended 1980).

245. 1980 Fla. Laws ch. 80-313, § 3 (amending and renumbering FLA. STAT. § 380.06(8) (1979) as § 380.06 (11)(a) (1981)).

246. *Id.* (creating new FLA. STAT. § 380.06(22)(b) (1981)). This amendment limiting the regional planning agency to identification and consideration of only *regional* issues supports the authors' opinion that the legislature intended chapter 380 development orders to remain legally separate and distinct from local governmental zoning decisions. Maintaining such a distinction allows the local government to protect the substantial public interest in preserving local control of land use within its jurisdiction, while simultaneously compelling consideration of regionally significant issues created by developments of regional impact. For a discussion supporting this opinion, see Kavanaugh, *Florida Land & Water Management Act: Local Decision Making and the DRI Process*, 50 FLA. B.J. 459 (1981). *Contra*, Pelham, *The Regional General Welfare: Florida's Need For a Landmark Judicial Decision*, 50 FLA. B.J. 319 (1981).

is more specific than the general criteria of former subsection (8)²⁴⁷ and is applied uniformly to all proposed developments of regional impact within an agency's jurisdiction, the list of regional issues should promote efficient review.

b. The Local Government

The amending act underscores the importance of the local government's role after the issuance of a development order. The local government shall assume the primary responsibility "for monitoring the development and enforcing the provisions of the development order."²⁴⁸ In other ways the amendments clarify or modify the role of local government in the review of DRI applications. One change expands the number of local governments that can review such applications. Local governments without zoning ordinances formerly had no authority to undertake the review; now, "a local government that has adopted subdivision regulations"²⁴⁹ will review any proposed DRI within its jurisdiction.²⁵⁰ As part of that review, the local government must hold a hearing on the application, now required to be a public hearing "recorded by tape or a certified court reporter and made available for transcription at the expense of any interested party."²⁵¹ Furthermore, in its notice of the hearing, the local government now must specify where interested persons may review relevant information about the DRI application.²⁵² These changes should help ensure that residents in an affected region raise informed objections early in the review process, sharpening the issues and testing the sufficiency of the information provided with the application. Addressing issues of public interest early in the review process might avoid subsequent litigation, resulting in improved administrative efficiency. Such an improvement should also result from the new requirement that "local governments . . . issue development orders concurrently with any other [applicable] local permits or development approvals."²⁵³ Finally, the introduction of five specific guidelines for the

247. See FLA. STAT. § 380.06(8) (1979) (renumbered as § 380.06(11)(a) in 1980)).

248. 1980 Fla. Laws ch. 80-313, § 3 (creating FLA. STAT. § 380.06(15) (1981)).

249. *Id.* (amending FLA. STAT. § 380.06(5)(a) (1979)).

250. *Id.* (amending FLA. STAT. § 380.06(6) (1979)).

251. *Id.* (amending and renumbering FLA. STAT. § 380.06(7) (1979) as § 380.06(10) (1981)).

252. *Id.* (amending and renumbering FLA. STAT. § 380.06(7)(c) (1979) as § 380.06(10)(b) (1981)).

253. *Id.* (creating new FLA. STAT. § 380.06(14)(b) (1981)).

development order²⁵⁴ should increase certainty and efficiency in the monitoring process after the order's issuance.²⁵⁵

c. The Developer

The amending act imposed several new duties on developers and granted them several new rights. As noted above, new subsection 380.06(7)(a) requires a developer to arrange a preapplication conference with the regional planning agency.²⁵⁶ At the developer's request, other agencies must take part in this conference and provide information on the processes of reviewing the application and granting permits.²⁵⁷ The thrust of such a consolidated pre-review procedure is anti-adversarial, intended to curtail the pointless delays that result from serial reviewing²⁵⁸ by separate agencies whose requirements change without notice or remain vague until specified in a rejection. To the same effect is the new provision for a generally coordinated review process, discussed below.²⁵⁹ Even if the developer fails to opt for coordinated review, another amendment prevents the developer from causing undue delay, by requiring the developer to send copies of his DRI application to the regional and state planning agencies concurrently with the filing of the application with the local government.²⁶⁰

For developments initially approved under amended ELWMA, after July 1, 1980, developers must record notices of a development order's adoption or subsequent modification.²⁶¹ Furthermore, a developer who has received development approval must submit an annual report on the DRI to the local government and all affected agencies, or face a temporary suspension of the development order.²⁶² These changes intensify the scrutiny a DRI must undergo and shift to the developer some of the costs of monitoring the development. Developers no doubt will urge the promulgation of a

254. See *id.* (amending and renumbering FLA. STAT. § 380.06(7)(e) (1979) as § 380.06(14)(c) (1981)).

255. Note that even if another local jurisdiction annexes the property for the proposed development, the annexing jurisdiction must issue a new development order equivalent to the one granted by the local government formerly having jurisdiction over the proposed development. See *id.* (creating new FLA. STAT. § 380.06(14)(e) (1981)).

256. *Id.* (creating new FLA. STAT. § 380.06(7)(a) (1981)).

257. *Id.*

258. See notes 192-210 and accompanying text *supra*.

259. See 1980 Fla. Laws ch. 80-313, § 3 (creating new FLA. STAT. § 380.06(8) (1981)); notes 230-42 and accompanying text *infra*.

260. See 1980 Fla. Laws ch. 80-313, § 3 (creating new FLA. STAT. § 380.06(9)(a) (1981)).

261. *Id.* (creating new FLA. STAT. § 380.06(14)(d) (1981)).

262. *Id.* (creating new FLA. STAT. § 380.06(16) (1981)).

rule establishing a short form for reporting on developments with no substantial changes.²⁶³ Finally, assuming that a developer has made no substantial changes in a development built in stages, but requires approval of "incremental applications," review of the incremental applications will be limited to the information required and the issues raised by the master development order.²⁶⁴ The amending act thus emphasizes the importance of a carefully detailed master development order to ensure the effectiveness of such accelerated incremental review.²⁶⁵

2. OPTIONAL COORDINATED REVIEW

The most important right the amended act granted to the developer is the option to have all affected state agencies coordinate their review of a proposed DRI.²⁶⁶ Although the developer may choose to have only some of the affected agencies participate in the coordinated review,²⁶⁷ the clear gain of speed and efficiency from an all inclusive review process will probably outweigh any reason for excluding an affected agency. The developer must exercise this new option at the preapplication conference²⁶⁸ with the regional planning agency, which will be responsible for coordinating the review by whatever agencies the developer selects.²⁶⁹ Central to this new procedure is the idea that the regional planning agency will encourage those agencies to develop coordinated schedules for permit processing and to conduct concurrent review²⁷⁰ of applications submitted simultaneously to all the agencies.²⁷¹ To help ensure application approval on first review, the amending act allows the developer to ask agencies for a nonbinding identification of any problems with the proposal that could require its modification or result in the denial of permits.²⁷² For the same purpose the regional planning agency may call for additional preapplication con-

263. Of course, if the developer plans (or has made) substantial deviations from the approved proposal, new subsection (17)(a) applies. *See id.* (amended and renumbering FLA. STAT. § 380.06(7)(g) (1979) as § 380.06(17)(a) (1981)).

264. *Id.* (creating new FLA. STAT. § 380.06(20)(b)(2) (1981)).

265. *See id.* (creating new FLA. STAT. § 380.06(20)(b)(1) (1981)).

266. *See id.* (creating new FLA. STAT. § 380.06(8)(a) (1981)).

267. *Id.*

268. *See id.* (creating new FLA. STAT. § 380.06(7)(a) (1981)); notes 205 & 220-22 and accompanying text *supra*.

269. 1980 Fla. Laws ch. 80-313, § 3 (creating new FLA. STAT. § 380.06(8)(d) (1981)).

270. *See id.*

271. *See id.* (creating new FLA. STAT. § 380.06(8)(e) (1981)).

272. *See id.* (creating new FLA. STAT. § 380.06(8)(c) (1981)).

ferences.²⁷³ The amending act also assists this goal by permitting the developer and any of the agencies to reach a binding agreement on any of the following: (1) The agency's "jurisdiction over the proposed development,"²⁷⁴ (2) the agency rules that will affect the review of the proposed DRI,²⁷⁵ (3) the kinds of information that each agency may require for approving the DRI application and granting permits,²⁷⁶ and (4) "[a]ny other appropriate [subject under] appropriate state or federal law or regulation."²⁷⁷ Since the coordinated review includes the processing required for issuing permits that otherwise would follow the approval of the DRI application, and because the single DRI application now may serve "as a substitute for permit data requirements or plans" in some circumstances,²⁷⁸ this new procedure should significantly reduce the time and paperwork required before construction may begin.

IV. CONCLUSION

From this selective sampling of recent developments in Florida environmental law, one may perceive an important though not unwavering trend. Both the legislature and the courts have sought to purge from the administrative process the delays due to fumbling or maneuvering by the applicants or the agencies, or by would-be participants in the review of proposed development. Of course, to change the law is to take risks. Removing bars to growth may erode essential protections of the environment and rush the state into unchecked development. But the careful recent streamlining of review procedures seems to avoid the opposing dangers of economic stagnation and environmental disaster.

273. *See id.* (creating new FLA. STAT. § 380.06(8)(d) (1981)).

274. *Id.* (creating new FLA. STAT. § 380.06(8)(b)(1) (1981)).

275. *See id.* (creating new FLA. STAT. § 380.06(8)(b)(1) (1981)).

276. *See id.* (creating new FLA. STAT. § 380.06(8)(b)(3) (1981)).

277. *Id.* (creating new FLA. STAT. § 380.06(8)(b)(4) (1981)).

278. *See id.* (creating new FLA. STAT. § 380.06(8)(d) (1981)).