5-1-1981

Zoning Law

Roy P. Cookston

Burt Bruton

Zoning Law

ROY P. COOKSTON* AND BURT BRUTON**

The authors survey recent judicial and legislative developments in the Florida law of zoning, including the impact of mandatory comprehensive zoning, various flexible zoning methods, and discriminatory and confiscatory zoning. They also examine the "taking" issue in the zoning context and possible solutions through compensable regulation.

I. MANDATORY COMPREHENSIVE ZONING

Ever since the Supreme Court of the United States approved zoning as a device to regulate the orderly growth of cities in *Village of Euclid v. Ambler Realty Co.*,[1] the antagonism between "piecemeal" zoning and the requirement of comprehensiveness has bedeviled practitioners. Relying on *Euclid,* Chief Justice Davis of

* B.A., Tulane University; LL.B., Southern Methodist University; member Texas and Florida bars; practicing attorney in Coral Gables, Florida; member of the Coral Gables Planning and Zoning Board; formerly Director of the Office of Interstate Land Sales, U.S. Department of Housing and Urban Development.

** Associate with the firm of Greenberg, Traurig, Askew, Hoffman, Lipoff, Quentel & Wolff, P.A., Miami, Florida; J.D., University of Miami School of Law; B.A., University of North Carolina, Chapel Hill; Executive Editor, *University of Miami Law Review.*

1. 272 U.S. 365 (1926).

the Supreme Court of Florida recognized in 1934 that zoning ordinances, to be constitutional, must implement "some 'plan' that is general and comprehensive in character."[2] In the five decades following *Euclid,* however, all grants of zoning power to local governments in Florida were optional, rather than mandatory.[3] Therefore, many Florida counties and cities had no master plan or zoning ordinances at all. Even in areas with good comprehensive plans, the inevitable changes in population density, land values, neighborhood character, and traffic patterns led to piecemeal rezoning, variances, and special permits—resulting in crazy-quilt patterns of zoning difficult to justify or defend.

These factors, coupled with concerns about energy and the environment, led the Florida Legislature to adopt the Local Government Comprehensive Planning Act of 1975 (LGCPA).[4] The LGCPA requires for the first time that all cities and counties adopt a comprehensive plan, including a land use element.[5] Striking a major blow against piecemeal zoning and for consistency between the plan and zoning, the LGCPA declares: "All land development regulations enacted or amended shall be consistent with the adopted comprehensive plan or element or portion thereof."[6]

The decision in *City of Gainesville v. Cone*[7] in 1978, although involving a comprehensive land use plan adopted in 1970 before

---

2. State *ex rel.* Henry v. City of Miami, 117 Fla. 594, 600, 158 So. 2d 82, 84 (1934) (Davis, C.J., concurring). The majority of the *Henry* court, however, rejected a landowner's challenge to an uncomprehensive ordinance because the particular zoning enabling statute was permissive rather than mandatory.

3. *See, e.g.,* FLA. CONST. art. VIII, § 2(b); FLA. STAT. § 176.04 (1971) (repealed 1973); *id.* § 133.03 (1969) (repealed 1971); County Government Act, *id.* § 125.01(1)(h) (1979); Municipal Home Rule Powers Act, *id.* §§ 166.021, .041(3)(c); County and Municipal Planning for Future Development Act, *id.* §§ 163.160-.315.

4. 1975 Fla. Laws ch. 75-257 (codified at FLA. STAT. §§ 163.3161-.3211 (1979)). The LGCPA provides the minimum requirements for planning and is superior to any conflicting statutes relating to local government land development regulations, unless the latter meet or exceed the LGCPA's provisions. FLA. STAT. §§ 163.3161(7), .3211 (1979).

5. FLA. STAT. § 163.3177(6)(a) (1979). In addition to a land use element, the comprehensive plan must include elements for traffic circulation, sanitary sewer, solid waste disposal, potable water, conservation, recreation, open space, housing, coastal zone protection, intergovernmental coordination, and utilities. *Id.* § 163.3177(6)(b)-(i). Additionally, the plan may include optional elements for mass transit, port and aviation facilities, bicycle paths and riding trails, off-street parking, public buildings and services, recommended community design, redevelopment, safety, historical and scenic preservation, and an economic guide for future commercial and industrial development. *Id.* § 163.3177(7).

6. *Id.* § 163.3194(1). Other jurisdictions lacking a statute like LGCPA that mandates consistency have nevertheless upheld comprehensive plans as the standard for determining the validity of existing zoning ordinances. *See* Note, *Land Use Planning, 1976 Developments in Florida Law,* 31 U. MIAMI L. REV. 1119 (1977).

7. 365 So. 2d 737 (Fla. 1st DCA 1978).

passage of the LGCPA, illustrates some of the problems encountered when comprehensive future planning concepts collide with existing zoning ordinances. In *Cone*, the District Court of Appeal, First District, rejected a landowner's demand that the city upzone his property for the multifamily uses designated in the comprehensive plan. Holding that the adoption of the plan had not amended the previous zoning classification, the court relied on language in the plan characterizing it as only a guide, the logic of which would encourage future zoning changes. Because the previous zoning remained unchanged, the inconsistency with the plan gave the landowner no vested right to demand multifamily zoning. Although the local planning board had recommended against changing either the zoning or the plan, the city commission achieved consistency between them by amending the comprehensive plan to reduce the designated density.[8]

In *City of Gainesville v. Hope*,[9] the First District applied its holding in the *Cone* case that the comprehensive plan did not affect existing zoning, but was only a guide for future zoning. In *Hope*, the city commission amended its plan to designate a landowner's parcels for more intensive uses, but the corresponding zoning change failed to garner a "super majority" of the commission, as required by the city charter and code.[10] The court rejected the landowner's argument that the resulting inconsistency between the amended plan and the unchanged zoning had unlawfully confiscated his property. It remains to be seen, therefore, whether the First District will attach any greater significance to inconsistencies between zoning ordinances and comprehensive plans adopted under the LGCPA.[11]

---

8. *Id.* at 738. The court focused on the commission's action rather than the advisory planning board's recommendation. A local ordinance required that changes recommended by the board be consistent with the comprehensive plan unless the board also recommended a change in the plan to maintain consistency. The planning board had first petitioned the commission to reduce the density designated in the plan, but later reversed its position and recommended against its own petition. Thus, although its recommendation would have maintained an inconsistency between the zoning and the plan, the board had recommended no inconsistent changes.

9. 377 So. 2d 736, 738 (Fla. 1st DCA 1979).

10. On interlocutory appeal in Hope v. City of Gainesville, 355 So. 2d 1172 (Fla. 1977), the supreme court upheld the "super majority" requirement of approval by a four-fifths vote of the commission whenever twenty percent of the land ownership in the immediate area objected to the proposed zoning change.

11. In contrast to inconsistent existing zoning ordinances, zoning changes have received more rigorous scrutiny by Florida courts when inconsistent with the comprehensive plan. For example, in Dade County Ass'n of Unincorporated Areas v. Board of County Comm'rs, 45 Fla. Supp. 193 (Dade Cty. Ct. 1975), the court struck down an inconsistent zoning change

Setting out the legislative intent and purpose in lyrical alliterative prose, the preamble to the LGCPA declares that it will help local governments

> preserve, promote, protect, and improve the public health, safety, comfort, good order, appearance, convenience, law enforcement and fire prevention, and general welfare; prevent the overcrowding of land and avoid undue concentration of population; facilitate the adequate and efficient provision of transportation, water, sewerage, schools, parks, recreational facilities, housing, and other requirements and services; and conserve, develop, utilize, and protect natural resources within their jurisdictions.[12]

The LGCPA also encourages cooperation and coordination between various governmental units and agencies and mandates the adoption of procedures to ensure the broadest possible public participation in the comprehensive planning process.[13] This populist approach to planning conjures up a "sea to shining sea" vision of Florida citizens rising up to plan their cities of tomorrow.

The LGCPA required all 390 cities, sixty-seven counties, and two special districts in Florida to adopt a comprehensive plan by July 1, 1979, subject to two one-year extensions ending July 1, 1981.[14] Many cities and counties initially took no action at all, perhaps expecting that the legislature would repeal the LGCPA. When it did not, 371 local government units had to request extensions of the first deadline for compliance. Many of them hurriedly drafted sketchy comprehensive plans in vague, convoluted language, apparently in the hope that whatever future governmental action they might take, the plan would contain some language to support it.[15] Despite five years' notice and two extensions of the

---

as illegal and void:

> The recommendations and conclusions contained within the comprehensive development master plan . . . may not be indiscriminately ignored in the exercise of the zoning power. . . . [T]he official recommendations and conclusions of the master plan and area restudy carry a presumption of correctness and they should be followed unless there are compelling reasons to depart therefrom.

Id. at 199.

12. *Id.* § 163.3161(3).

13. *Id.* §§ 163.3161(4), .3204, .3181.

14. FLA. STAT. § 163.3167(2), (3), (7) (1979). As of the date of publication of this article, The Florida Legislature was considering a proposal to extend the date for final compliance again to January 1, 1982. FLA. S.B. 958, 1981 Reg. Sess.; Fla. H.B. 1080, 1981 Reg. Sess.

15. Examples of vague drafting include one city's objective for its drainage element: "Developments should, to the extent feasible, give consideration to minimizing the extent of impervious surfaces with the view to encouraging natural groundwater recharge." Another

deadline, the box score on compliance has been disappointing. As of October 31, 1980, only 221 local government units had adopted comprehensive plans; the Florida Department of Community Affairs had evaluated 391 partial or completed plans; and 110 local government units had submitted no plans at all.[16] Although the good faith of cities and counties has produced plans by over half of them, the LGCPA provides virtually no mechanism to combat perfunctory or half-hearted compliance, since the Department's review, evaluation, and commentary procedure is merely advisory.[17]

One incentive for adopting a comprehensive plan is the potential loss of local control over planning, since a municipality or special district that fails to meet the deadline becomes subject to the comprehensive plan of the county.[18] Similarly, the Department will provide a comprehensive plan for any county that fails to prepare and adopt one by the deadline. For the actual work performed in preparing such a plan, the Department may request payment from as much as fifty percent of certain state funds allocated to a local government that fails to designate a local planning agency.[19] But if the city or county designates a local planning agency and then takes no other steps to adopt a plan by the deadline, the Department is without authority under the LGCPA to charge the local government for its planning services.[20]

Although the LGCPA is devoid of other penalties for noncompliance, enforcement remains possible through citizens who, with proper standing,[21] may attack local zoning ordinances or develop-

---

city drafted its parks and open space element with equal precision: "The continued maintenance and improvement of parks and recreation areas will contribute to planning goals by fostering low population densities, maintaining high aesthetic standards, creating scenic vistas, improving neighborhood characteristics and by assuring healthy and aesthetically pleasing surroundings." Memorandum from Div. of Land Resource Management, Fla. Dep't of Community Affairs, to Roy P. Cookston (Mar. 1981). These meaningless platitudes may well rise to haunt city officials who later seek to translate them into bricks and mortar or to sell bond issues for specific capital improvements.

16. Interview with Michael Garretson, Director, Div. of Local Resource Management, Fla. Dep't of Community Affairs (Apr. 1981). As of the date of publication, however, all but 25 cities and 1 county had taken some steps toward compliance.

17. FLA. STAT. § 163.3184(1), (2), (5) (1979).

18. *Id.* § 163.3167. This loss of control is not a great incentive, however, because a local government that fails to adopt its own plan remains free to amend the plan imposed by the next highest governmental entity. 1980 Op. Att'y Gen. Fla. 080-95 (Dec. 5, 1980).

19. FLA. STAT. § 163.3167(9) (1979).

20. 1980 Op. Att'y Gen. Fla. 080-95 (Dec. 5, 1980).

21. The Department of Community Affairs has proposed legislation to afford any citizen of the state the right to seek an injunction against any local government unit (regardless of whether the citizen resides there) that attempts to adopt a plan not meeting LGCPA requirements, or that fails to implement an adopted plan. Interview, *supra* note 16; *see*

ment permits by alleging deviation from the comprehensive plan. The LGCPA does not require the local government to adopt zoning ordinances as part of the land use element, but it does define zoning ordinances and building permits as "land development regulations" for purposes of requiring review and recommendation by the local planning agency. Although this provision of the LGCPA awaits judicial interpretation, it apparently requires the local planning agency or zoning board to find some supportive statement or objective in the plan before recommending even the most minor zoning amendment.[22] If the board bases its recommendation on some vague or meaningless platitude in the plan, then the court might overturn the ordinance under its power to review "the appropriateness and completeness of the comprehensive plan . . . or elements thereof in relation to the governmental action or development regulation under consideration."[23] Because the LGCPA instructs the courts to construe its provisions broadly, citizens thus have new grounds to complain of zoning enactments if the comprehensive plan is silent or sloppily drafted.[24]

Careful draftsmanship is also important because the procedure for amending an adopted comprehensive plan is elaborate and cumbersome.[25] An exception to this complexity is the LGCPA provision permitting a simple majority of the local governing body to amend the future land use element of the plan, after mailing notice to the affected property owners, if the amendment affects less than five percent of the total land area in the governmental unit.[26] At

---

notes 89-93 and accompanying text *infra*.

22. FLA. STAT. § 163.3194(2)(a) (1979) provides in part:

> After a comprehensive plan for the area, or element or portion thereof, is adopted by the governing body, no land development regulation, land development code, or amendment thereto shall be adopted by the governing body until such regulation, code, or amendment has been referred to the local planning agency for review and recommendation as to the relationship of such proposal to the adopted comprehensive plan or element or portion thereof.

23. *Id.* § 163.3194(3)(a).

24. For example, suppose the traffic circulation element of a city's comprehensive plan provides that "commercial building density shall be maintained at current levels until a new mass transit system is completed in 1985." The city then attempts to amend its zoning code to eliminate setback requirements and increase floor area ratios. In a challenge to the amendment, a court could look to the relationship of the plan to the amendment and find the latter repugnant and void. Could the city have achieved the same result by granting variances, since variances are neither "enactments" nor "amendments"? *See id.* § 163.3194(1); notes 55-72 and accompanying text *infra*.

25. For a description of the mechanics of the LGCPA amendment and adoption process, see Note, *supra* note 6, at 1140-45.

26. FLA. STAT. §§ 163.3184(7)(b), .3187 (1979).

first glance, this five-percent exception appears to give the governing body freedom to change one hundred percent of the plan in twenty meetings. With a change of only a few commission or council seats, a new regime could thus threaten the permanence of a carefully constructed, long-range comprehensive plan. But only the land use element of the plan is subject to this simplified amendment process; the other elements of the plan require the elaborate version.

In *Wolff v. Dade County*,[27] the District Court of Appeal, Third District, reaffirmed that the "fairly debatable" rule remains the standard for judicial review of a local government's refusal to amend its comprehensive plan. Because the county's plan established no criteria for the consideration of amendments, the landowner argued that his compliance with the criteria prescribed by the county planning department required the county to reclassify his property. Rejecting such a narrow inquiry and refusing to specify what criteria the commission must use, the court upheld the commission's legislative decision as fairly debatable because the entire record revealed a reasonable basis for denying the landowner's application to amend the plan.

The LGCPA produced a significant change in Florida law by reversing the common law rule that exempted governmental entities from their own zoning restrictions when pursuing a governmental, as distinguished from a proprietary, activity. For example, in *A1A Mobile Home Park, Inc. v. Brevard County*,[28] the District Court of Appeal, Fourth District, held that a county's zoning ordinances did not prevent it from constructing and operating a sewage treatment plant in a general use zone adjacent to the plaintiff's mobile home park. The LGCPA effectively nullifies this holding by requiring all development undertaken by a governmental agency to be consistent with the comprehensive plan or element thereof that the local government has adopted.[29] Unlike the *A1A* decision, this LGCPA provision makes no distinction between a governmental activity and a proprietary activity. Thus, like private landowners, local governments may not undertake development activities unless specifically permitted by the comprehensive plan and the zon-

27. 370 So. 2d 839 (Fla. 3d DCA), *cert. denied*, 379 So. 2d 211 (Fla. 1979).

28. 246 So. 2d 126, 131 (Fla. 4th DCA 1971).

29. FLA. STAT. § 163.3194(1) (1979). This provision conforms to the supreme court's "prospective" view in Parkway Towers Condominium Ass'n v. Metropolitan Dade County, 295 So. 2d 295 (Fla. 1974), that zoning ordinances should either anticipate or be duly amended to accommodate county or municipal facilities.

ing ordinances implementing it.

It appears that the framers of the LGCPA envisioned a broad planning and zoning manifesto—a kind of "constitution" for future growth. Substantial noncompliance by local governments, deadline extensions, and hastily drafted plans forecast difficulties for that vision in the years ahead. If not properly covered in the plan, for example, new capital improvements and recreational or transportation facilities may face lengthy delays because of broadened citizen standing, the elaborate amendment process, and other problems. As the deadline for final compliance approaches, time is running out for the careful draftsmanship necessary to avoid such difficulties.

II. Flexible Zoning Techniques

Various old and new labels—contract zoning, conditional zoning, incentive zoning, floating zones, planned unit developments, and variances—describe the flexible methods that local governments use to reconcile the competing interests affected by zoning. Through such techniques, zoning officials try to maintain a comprehensive yet dynamic zoning plan by approving proposed developments coupled with reasonable restrictions for the benefit of the public in general and the neighboring landowners in particular.[30] But the way in which the local government and the landowner strike their bargain over such restrictions may affect the validity of the resulting rezoning, for the courts sometimes engage in semantic contortions to find subtle distinctions among these similar devices. This section examines these devices and the legal pitfalls encountered when using them to ameliorate rigid zoning standards.

A. *Contract Zoning and Conditional Zoning*

The Supreme Court of Florida condemned contract zoning in 1956 in *Hartnett v. Austin*,[31] which held unconstitutionally vague a Coral Gables rezoning ordinance that was contingent upon the subsequent execution of contracts between the city and the developer. The ordinance called for contracts requiring the developer to build a wall around its proposed shopping center, to landscape a forty-foot setback, to protect the neighbors against glare from the

30. For example, in exchange for increased density or more intensive uses, developers often make concessions such as dedicating public streets or rights-of-way, donating school or park sites, and increasing open space or off-street parking.

31. 93 So. 2d 86 (Fla. 1956).

shopping center lights, and to pay for additional police protection. Agreeing with the complaining neighbors that Coral Gables had illegally bargained away its municipal police powers, the supreme court said: "[A] city cannot legislate by contract. If it could, then each citizen would be governed by an individual rule based upon the best deal that he could make with the governing body."[32] The principal vice of the ordinance was its use of private collateral contracts to impose conditions that, although intended to benefit the public,[33] would introduce ambiguity and destroy the comprehensive municipal zoning plan:

> If each parcel of property were zoned on the basis of variables that could enter into private contracts then the whole scheme and objective of community planning and zoning would collapse. The residential owner would never know when he was protected against commercial encroachment. The commercial establishments on "Main Street" would never know when they had protection against inroads by smoke and noise producing industries. This is so because all genuine standards would have been eliminated from the zoning ordinance. The zoning classification of each parcel would then be bottomed on individual agreements and private arrangements that would totally destroy uniformity. Both the benefits of and reasons for a well-ordered comprehensive zoning scheme would be eliminated.[34]

---

32. *Id.* at 89.

33. The court carefully pointed out that it objected not to the intended result but to the way Coral Gables had exercised its municipal powers: "This opinion is not to be construed as being adversely critical of the policy adopted by appellants in this instance. Conceivably, if effectuated, the plan might redound to the economic benefit of the community. We have dealt here solely with a question of municipal power, not policy." *Id.* at 89-90.

34. *Id.* at 89. The undesirable results foreseen by the supreme court would follow not from municipal bargaining with developers for concessions, but from municipal abandonment of uniform objective zoning standards. When a zoning amendment permits a use of property subject to restrictions other than those applicable to other similarly classified land, such preferential treatment arguably amounts to spot zoning and may discriminate against neighboring landowners, absent some other justification for rezoning the property. *See* Strine, *The Use of Conditions in Land-Use Control*, 67 DICK. L. REV. 109 (1963); note 146 and accompanying text *infra*.

Assuming that the developer and municipality bargain for a rezoning ordinance that is fairly debatable and nondiscriminatory, contract zoning is nevertheless illegal when they enter into a bilateral agreement involving reciprocal obligations. By binding itself to enact the requested ordinance (or not to amend the existing ordinance), the municipality bypasses the hearing phase of the legislative process. Moreover, even if the municipality holds a hearing, as in *Hartnett*, it cannot legally surrender its duty to keep its zoning power unfettered and amenable to changing conditions. *See* Schaffer, *Contract Zoning and Conditional Zoning*, 11 PRAC. LAW. 43, 43-44 (May 1965); Shapiro, *The Case for Conditional Zoning*, 41 TEMP. L.Q. 267, 269-70 (1968); Note, *The Validity of Conditional Zoning: A Florida Perspective*, 31 U. FLA. L. REV. 968, 970-72 (1979); Note, *Conditional Zoning in Texas*, 57 TEX.

In 1979, the District Court of Appeal, Fourth District, found no such flaw in the similar case of *Broward County v. Griffey*.[35] In *Griffey*, the county commission upzoned a tract for an apartment complex of 1700 units on the condition that the landowners would deed land to the county for roads, grant the county an option to purchase a portion of the tract, provide for parking and green space, and make other concessions. The owners transferred the requested parcels to the county but failed to construct their project for over two years. During this time, the county adopted a master plan that downzoned the tract. Rather than appeal the downzoning, the landowners sued for the return of their land, alleging that they were involuntary participants in an illegal contract and that the county had forced "conditional zoning" upon them.[36]

The trial court ordered the county to return the land, but the Fourth District reversed. Apparently equating the landowners' allegation of conditional zoning with the contract zoning found illegal in *Hartnett*, the Fourth District nevertheless distinguished *Hartnett* because "[i]n the case at bar there were no private contracts negotiated and certainly no bargaining away of the police power occurred."[37] Rather, the court characterized the county and

---

L. REV. 829 (1979).

35. 366 So. 2d 869 (Fla. 4th DCA 1979), *cert. denied*, 385 So. 2d 757 (Fla. 1980).

36. On appeal, the Fourth District adopted Professor Anderson's definition of conditional zoning: "A zoning amendment which permits a use of particular property in a zoning district subject to restrictions other than those applicable to all land similarly classified is sometimes referred to as conditional zoning." 366 So. 2d at 871 (quoting 2 R. ANDERSON, AMERICAN LAW OF ZONING § 9.20 (2d ed. 1976)). This definition, however, is broad enough to include "an inducement for the zoning change," which was the Fourth District's characterization of the property transferred by the Griffeys. 366 So. 2d at 870.

A narrower definition of illegal conditional zoning is a rezoning ordinance that remains ineffective until the landowner performs some act (such as developing the property as agreed), or that reverts the property to its previous zoning classification if the developer fails to perform within a specified period. *See* Schaffer, *supra* note 34, at 48-52. The first alternative shares the vices of contract zoning, *see* note 34 *supra*; the reversion feature of the second alternative, if activated, would amend the zoning code without a hearing and would facially demonstrate "that no reason existed to rezone the property in the first instance." 1974 FLA. ATT'Y GEN. ANN. REP. 223, 224 (No. 074-142); *see* 1972 *id.* 177 (No. 072-104); 1971 *id.* 462 (No. 071-333).

37. 366 So. 2d at 871. The *Hartnett* court actually condemned three wrongful municipal acts: 1) The illegal bargaining away of police power by contract; 2) The introduction of ambiguity into an ordinance by reference to an extraneous document; and 3) The change of zoning on an individual case basis. The frequent citation of *Hartnett* as authority for the first point gives the impression that subsequent decisions, such as *Griffey*, have "winked" at the *Hartnett* decision. *See, e.g.*, J. JUERGENSMEYER & J. WADLEY, ZONING ATTACKS AND DEFENSES, THE LAW IN FLORIDA 126 (1980). Undue emphasis on the first point should not divert attention from the vice that *Hartnett* points out with equal clarity—the municipal attempt to solve a unique zoning situation by negotiating a "deal" with the landowner on a

the landowners as "two parties coming to a *mutually satisfactory agreement.*"[38] This distinction is less than convincing, since it is difficult to understand how two parties could come to a mutually satisfactory agreement without having negotiated a contract.[39] A more valuable distinction may be that the *Hartnett* ordinance was conditioned upon the developer's subsequent performance of separate contracts; the *Griffey* ordinance contained all the terms of the agreement, which were to be performed simultaneously with the rezoning.[40]

The *Griffey* result is consistent with the rule in other jurisdictions, which invalidates a bilateral contract obligating the municipality to rezone in exchange for a certain performance by the de-

---

piecemeal, ad hoc basis.

This taint of dealmaking, even when intended for a worthy community purpose, has strained Florida courts into narrow distinctions and confusing definitions in order to uphold the resulting arrangement, or at least a part of it. For example, in New Products Corp. v. City of North Miami, 241 So. 2d 451 (Fla. 3d DCA 1970), the city agreed to rezone a parcel for multiple family residential use and to sell it to the plaintiff purchaser for $75,000. In the course of its specific performance suit against the city, the purchaser offered to pay the full price for the parcel with its existing zoning. The Third District found the contract severable and enforced the sale provisions without the illegal rezoning provisions. Similarly, in Walberg v. Metropolitan Dade County, 296 So. 2d 509 (Fla. 3d DCA 1974), the Third District upheld the county commission's refusal to roll back the permitted density on a tract developed by South Cutler Bay, Inc. Distinguishing *Hartnett*, the court rejected the plaintiff neighbors' allegations of illegal contract zoning:

> [I]t does not appear from this record that a private contract was made by the County with a property owner for a change or perpetuation of zoning. In the present instance, the most that can be said for appellants' position is that the Commissioners may have been influenced by representations made by South Cutler. A rule which would forbid owners from announcing concessions to the public interest in any proceeding before a zoning authority would not be in the best interest of the public.

Id. at 511 (citing Housing Auth. v. Richardson, 196 So. 2d 489, 492 (Fla. 4th DCA 1967) ("A good zoning ordinance may be the product of questionable or poor motives.")).

38. 366 So. 2d at 871 (emphasis added).

39. Indeed, *Griffey* is arguably closer to being a "contract" zoning case than *Hartnett*, since the Fourth District not only found the parties in a posture of "mutually satisfactory agreement," but held the landowners' performance—the deed of land to the county — binding on them. The agreement, presumably negotiated by the county planning staff, appeared to trade valuable assets for higher zoning density. That the county needed the land to build roads, a public benefit, should not alter the result. The illegality of such an agreement is the consideration—the government's promise, if any, to exercise its police power in a given manner. The *Griffey* decision, by binding the landowners while excusing the county, erodes both the equitable principles of estoppel and rescission. But finding enforceable *reciprocal* covenants would have produced an equally unacceptable result, since the landowners could freeze the zoning and bind the power of future governing bodies.

40. This reading emphasizes the narrow holding of *Hartnett* that the ordinance, because dependent upon the subsequent execution of private collateral contracts, lacked "the degree of clarity and certainty that is required of municipal legislation." 93 So. 2d at 88.

veloper.[41] In contrast, a municipality does not illegally bargain away its police power when it promises nothing, but unilaterally responds to concessions proposed by the developer as inducements to rezone.[42] Typically, the developer bargains over these concessions with the municipal planning staff, who have no authority to bind the municipality's police power, but whose expert recommendation carries great weight with zoning officials.[43] Absent some public outcry at the subsequent rezoning hearing, the municipal zoning board reviews and usually unilaterally approves the staff's recommendation. This procedure of staff negotiation attempts to reconcile the landowner's interest with the public interest in land use, while avoiding the *Hartnett* prohibition against compromising municipal police power.

B. *Incentive Zoning*

Incentive zoning is a comparatively new technique that avoids some of the difficulties inherent in other zoning techniques designed to allow local governments more flexibility and discretion in applying their zoning standards. Professor Anderson has characterized incentive zoning, also called "bonus zoning," as a " 'carrot-and-stick' technique which employs administrative concessions to induce needed construction or desired features."[44] By establishing a set of predetermined criteria, incentive zoning provides a measure of flexibility while neatly sidestepping the tangled web of distinctions between contract and conditional zoning.

An incentive zoning ordinance specifies predetermined "trade-offs" between two lists of development features and applies equally to any owner and any property in the zoning district.[45] In effect,

---

41. *See generally* Annot., 70 A.L.R.3d 125 (1976).

42. *See, e.g.*, Dade County Ass'n of Unincorporated Areas v. Board of County Comm'rs, 45 Fla. Supp. 193, 200 (Dade Cty. Ct. 1975); J. JUERGENSMEYER & J. WADLEY, *supra* note 37, at 132.

43. *See, e.g.*, Greenbelt v. Bresler, 248 Md. 210, 236 A.2d 1 (1967); Annot., *supra* note 41, at 144-48, 188-89.

44. 2 R. ANDERSON, *supra* note 36, at § 9.23. One should distinguish incentive zoning from another regulatory proposal called "environmental performance zoning." Under this proposed substitute for traditional Euclidean zoning, the permissibility of a development would depend upon its impact on the community environment, particularly the "carrying capacity" of the locality. *See* Fredland, *Environmental Performance Zoning: An Emerging Trend?* 12 URB. LAW. 678 (1980).

45. By establishing definite incentive zoning criteria that are available to all property owners in the district, the local government has neither bargained away its police power, enacted a vague ordinance, nor zoned on a piecemeal, ad hoc basis. *See* note 37 *supra*. Because these criteria are uniform throughout the district, incentive zoning also survives

the local government presents the developer a Chinese menu with instructions to choose an item from column A (which the zoning code does not permit) and to give the local government in return an item from column B (which the zoning code does not require). For example, a developer seeking to build an extra story above the allowable height might design a pedestrian mall or provide a fountain or sculpture garden. The length of the list of choices depends on the objectives of the governmental unit. The list may be short, as in the New York City plan for a special theatre district that permitted twenty percent more floor area ratio for an office building in exchange for the developer's inclusion of a legitimate theatre.[46] On the other hand, the local government might devise a longer list of possible exchange items, assigning objective point values to each item to assure equivalent exchanges.

One might argue that incentive zoning encourages cities to enact overly restrictive zoning codes to give themselves more exchange items that developers would desire, but this argument overlooks the legislative character of zoning bodies, which respond to political and economic pressures to keep zoning reasonable. Properly used, incentive zoning would reduce reliance on discretionary devices such as variances and special permits, for which the local government receives no benefit from the developer.[47]

C. *Floating Zones and Planned Unit Developments*

Floating zones and planned unit developments are two innovative devices that avoid some of the legal difficulties encountered with contract and conditional zoning. Their effect is similar, however, in that the local government may require performance of certain conditions and impose restrictions before approving the developer's plan.

---

attack as discriminatory spot zoning. *See* note 34 *supra*.

46. NEW YORK, N.Y., ZONING RESOLUTION art. VII, ch. 1, § 81-00 (1971); *see* Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574, 575-77 (1972); Weinstein, *How New York's Zoning Was Changed to Induce the Construction of Legitimate Theatres*, in THE NEW ZONING: LEGAL, ADMINISTRATIVE, AND ECONOMIC CONCEPTS AND TECHNIQUES 131 (N. Marcus & M. Groves eds. 1970).

47. One such benefit from incentive zoning techniques is the preservation of historic landmark buildings. An imaginative city council, rather than offering transferable development rights, might permit the owner to build a structure over the landmark and to support it on the surrounding public right-of-way, provided the supports did not interfere with pedestrian or vehicular traffic. The need for uniformity, however, limits the list of possible exchange items for incentive zoning. For example, if the city agreed to condemn an alternative site for the owner of a historic landmark in exchange for its preservation, this individual "deal" would involve many of the problems of contract zoning.

Similar to the incentive zoning concept, the floating zone involves a predetermined set of criteria, established in the zoning code but not yet affixed to any specific property.[48] Before the zoning authority will amend its zoning map and "settle" the floating zone on a particular tract, the developer must comply with the conditions, density, setback, height, and other specified requirements. The ordinance may require a minimum size for the proposed zone, generally five acres or more, and usually imposes conditions of the traditional Euclidean type.[49]

A planned unit development (PUD) resembles a floating zone, but allows a mix of different uses usually not permitted in close proximity, such as residential and commercial.[50] The zoning code may require a rezoning procedure to locate a PUD, but unlike a floating zone, a PUD may also be an authorized use in an existing district, or it may receive approval through a variance or special use procedure.[51] The authorizing ordinance usually defines the requirements and objectives only in general terms, relying on the developer's ingenuity to devise a combination of uses acceptable to the zoning authority.

In *City of Miami Beach v. Breitbart*,[52] the District Court of Appeal, Third District, upheld PUD zoning as a cure for lower density zoning previously invalidated. In the earlier case, the Third District had ordered the city to upzone the property from an arbitrary density classification of fourteen units per acre.[53] When the city responded with a PUD classification permitting twenty-three units per acre, the trial court struck it down again, finding that the PUD zoning "could effectively deny the plaintiff the use of his property."[54] The Third District reversed, finding that the city's rezoning was fairly debatable and had complied with the earlier mandate.

---

48. *See generally* Annot., 80 A.L.R.3d 95 (1977).

49. Floating zones are quite similar to "special exceptions," which permit certain uses of property in otherwise restricted districts when the owner satisfies an administrative body that his plan meets the requirements specified in the zoning code. *See* 2 R. ANDERSON, *supra* note 36, at § 9.17. One distinction between them is that when floating zones settle, they change the zoning map. *See* Annot., *supra* note 48, at 107-09.

50. *See Planned Unit Developments and Floating Zones*, 7 REAL PROP., PROB. & TR. J. 61 (1972) (report of subcommittee of ABA Section of Real Property, Probate and Trust Law on the validity of these two devices); Annot., 43 A.L.R.3d 888 (1972).

51. *See* Annot., *supra* note 48, at 111.

52. 358 So. 2d 564 (Fla. 3d DCA 1978).

53. 280 So. 2d 18 (Fla. 3d DCA 1973).

54. 358 So. 2d at 566.

D. *Variances*

Like the Ten Commandments, many zoning ordinances take a rigid "thou shalt not" approach to the regulation of human conduct.[55] Some such ordinances contain embedded fossils — anachronistic land use restraints, once considered sacrosanct, that have lost their justification as conditions changed.[56] The variance procedure is one method to which landowners resort for relief from these anachronisms and other onerous restrictions.

Yet the use of improper standards for granting variances can often lead to abuse of the procedure.[57] A county or municipal zoning authority may permit a variance from its zoning regulations if literal enforcement of the regulations would impose an unnecessary hardship that is unique to a particular property and not shared generally by other property owners in the area.[58] A hardship variance is improper when "the use to be authorized thereby will alter the essential character of the locality, or interfere with the zoning plan for the area and with rights of owners of other property."[59]

In *City of Coral Gables v. Geary*,[60] an unusual parcel in the shape of a triangle presented a "classic" hardship case because this peculiar physical characteristic made development in compliance

---

55. Professor Anderson describes zoning codes as having a basically negative impact. 2 R. ANDERSON, *supra* note 36, at § 9.23.

56. *See* Address by Fred H. Bair, *What Zoning Should and Should Not Be*, delivered before the Florida Planning and Zoning Association, in Orlando, Fla. (Oct. 5, 1980). Bair contends that the early justification for extensive side and back yards, at least in the South, was to provide room for a subsistence garden and to keep the smokehouse away from the main residence. Single-family detached residences later evolved into a suburban ideal. Bair also notes the proposal by the Anchorage, Alaska, planning board to permit homeowners to construct garages at their front lot lines to reduce the area they would have to clear from snow. Anchorage, Alaska, Proposed Zoning Ordinance Technical Report 64-1 (1964). Horrified residents rose up to defeat the proposal because their inherited model of suburbia dictated the preservation of front yards from encroachment, although no one could remember why. *See* F. BAIR, PLANNING CITIES 377 (1978).

57. Part of the blame for abuse of the variance procedure lies with planners who seek an uncomplicated, easily administered zoning code that leaves the hard issues for resolution on an ad hoc basis. For a discussion of the use of discretionary zoning power to achieve flexibility, as well as the difficulty of ad hoc handling of zoning matters, see Freilich & Quinn, *Effectiveness of Flexible and Conditional Zoning Techniques*, in PLANNING, ZONING & EMINENT DOMAIN INSTITUTE 167, 193 (1979) (criticizing the use of the "low-profile" variance procedure rather than a more complex bonus system to achieve beneficial goals, such as a public housing project).

58. Elwyn v. City of Miami, 113 So. 2d 849, 851 (Fla. 3d DCA), *cert. denied*, 116 So. 2d 773 (Fla. 1959). The appropriate remedy for a hardship common to the area would be to rezone the area rather than to grant a variance.

59. *Id.* at 852.

60. 383 So. 2d 1127 (Fla. 3d DCA 1980) (Schwartz, J.).

with city setback restrictions impossible. Conceding the uniqueness of the tract, the city nevertheless denied the variance on the ground that Geary had created his own hardship by purchasing it with knowledge of the existing building restrictions.[61] The District Court of Appeal, Third District, rejected the city's argument, holding that here the hardship arose not from "the conduct or . . . self-originated expectations of any of its owners or buyers," but from the unique features of the property alone.[62] Because the enactment of the setback lines had entitled the previous owner of the tract to a hardship variance, Geary did not lose that right simply by purchasing the property with knowledge of the restriction.[63]

The misapplication of the rule denying variances for "self-created" hardships derives from cases involving purchasers who, with knowledge of existing restrictions, nevertheless paid a premium price for land and gambled that obtaining a hardship variance would increase its value.[64] Language in these opinions arguably supports the city's position in *Geary* that one who purchases with knowledge of existing restrictions has created his own hardship. This reading, however, confuses hardship to property with personal hardship. Those decisions actually turned on the absence of any hardship unique to the particular parcels, in contrast to the personal disappointment of the purchasers' economic expectations.[65] A true "self-created" hardship would arise only if, after enactment of the zoning restriction, the owner or his predecessor in interest created some unusual condition or circumstance unique to that parcel.[66]

Even if the hardship is not self-created, a variance "generally is not justified unless the land can not yield a reasonable return

---

61. *Id.* at 1128. The city also made this "self-created hardship" argument in the similar case of Anon v. City of Coral Gables, 336 So. 2d 420 (Fla. 3d DCA 1976), which involved a variance for a lot platted with a 41.44-foot frontage 12 years before the city enacted a 50-foot minimum frontage requirement. The court ordered the variance granted because the purchaser had no knowledge of the restriction when he acquired the property. *Id.* at 422.

62. 383 So. 2d at 1128.

63. *Id.* at 1128-29.

64. *See* Josephson v. Autrey, 96 So. 2d 784 (Fla. 1957); Elwyn v. City of Miami, 113 So. 2d 849, 852 (Fla. 3d DCA), *cert. denied*, 116 So. 2d 773 (Fla. 1959).

65. *Cf.* Burger King Corp. v. Metropolitan Dade County, 349 So. 2d 210 (Fla. 3d DCA 1977) ("economic disadvantage" is insufficient hardship for variance).

66. *See* 383 So. 2d at 1128-29. For example, a property owner might subdivide a larger lot and sell a portion, leaving himself a triangular parcel. It is doubtful, however, that the city would approve the subdivision if its code would prohibit construction on the remaining parcel. It remains an open question whether the city, in approving a subdivision under such circumstances, would estop itself from later denying a variance for that parcel.

when used only for purposes authorized in its present zoning."[67] Except in unusual cases like *Geary*, setback and frontage restrictions rarely impose a hardship severe enough to meet this strict standard. For this reason, some zoning ordinances, such as the Metropolitan Dade County Code, distinguish between "use variances" and "non-use variances."[68] A use variance permits a use of land other than that prescribed in the zoning regulations and includes density changes.[69] A non-use variance, on the other hand, "involves matters such as setback lines, frontage requirements, subdivision regulations, height limitations, lot size restrictions, yard requirements and other variances which have no relation to change of use of the property in question."[70] Although an applicant for a use variance still must show an unnecessary hardship to the land, the ordinance expressly does not require such a showing for approval of a non-use variance.[71] By recognizing this distinction, the ordinance exempts adjustments of minor consequence from an otherwise harsh rule without threatening the overall comprehensiveness required of the zoning plan.[72]

---

67. Elwyn v. City of Miami, 113 So. 2d 849, 852 (Fla. 3d DCA), *cert. denied*, 116 So. 2d 773 (Fla. 1959).

68. METRO DADE COUNTY, FLA., CODE § 33-311(e) (1978). Absent a distinction between a use and non-use variance in the applicable zoning code, the courts require a showing of hardship as in the *Geary* case. *See, e.g.*, Hemisphere Equity Realty Co. v. Key Biscayne Property Taxpayers Ass'n, 369 So. 2d 996, 1001-02 (Fla. 3d DCA 1979); Allstate Mortgage Corp. v. City of Miami Beach, 308 So. 2d 629, 632 (Fla. 3d DCA 1975).

69. METRO DADE COUNTY, FLA., CODE § 33-311(e)(1) (1978).

70. *Id.* § 33-311(e)(2). Such restrictions are commonly known as "bulk" or "area" restrictions.

71. *Compare id.* § 33-311(e)(1) *with id.* § 33-311(e)(2). The applicant must show:

> that the non-use variance maintains the basic intent and purpose of the zoning, subdivision and other land use regulations, which is to protect the general welfare of the public, particularly as it affects the stability and appearance of the community and provided that the [non-use] variance will be otherwise compatible with the surrounding land uses and would not be detrimental to the community. No showing of unnecessary hardship to the land is required.

Id. § 33-311(e)(2).

72. Coral Gables, in contrast, forbids use variances entirely and permits other variances only upon a showing of seven factors, including persuading the Board of Adjustment "[t]hat literal interpretation of the provisions of the Zoning Code would deprive the applicant of rights commonly enjoyed by other properties in the same zoning district . . . and would work an unnecessary and undue hardship on the applicant." CORAL GABLES, FLA., ZONING CODE § 12.07(d) (1978). The city zoning code defines unnecessary hardship as "[a]rduous restrictions on the uses of a particular property which are unique and distinct from that of adjoining property owners in the same zoning district." *Id.* § 2.364.01. Despite the severity of this language, developers and homeowners routinely seek and receive variances based on a mere showing of practicality or desirability.

III. STANDING OF NEIGHBORHOOD ASSOCIATIONS

The issue of standing to contest zoning decisions is, in the words of Chief Justice Sundberg, an "area of the law [that] appears to be characterized by instability."[73] That issue manifested itself most recently in a series of cases on the standing of neighborhood, community, or civic organizations to participate in zoning controversies. Although such organizations rarely own property in their own right, their membership typically includes property owners affected by zoning decisions.

To achieve standing in state court, such organizations must meet one of three tests set forth by the Supreme Court of Florida in *Renard v. Dade County*.[74] First, for standing to remedy or prevent breaches of a valid zoning ordinance, the complaining party "must allege and prove special damages peculiar to himself differing in kind as distinguished from damages differing in degree suffered by the community as a whole."[75] Second, for standing to attack a validly enacted zoning ordinance as an unreasonable exercise of legislative power, one must have "a legally recognizable interest, which is adversely affected by the proposed zoning action."[76] Finally, "[a]ny affected resident, citizen, or property owner of the governmental unit" has standing to attack a zoning ordi-

---

73. Skaggs-Albertson's v. ABC Liquors, Inc., 363 So. 2d 1082, 1086 (Fla. 1978).

74. 261 So. 2d 832 (Fla. 1972). For a fuller discussion of the *Renard* case, see Rhodes & Haigler, *Land Use Controls, 1977 Developments in Florida Law*, 32 U. MIAMI L. REV. 1117, 1118-20 (1978).

75. 261 So. 2d at 835 (quoting Boucher v. Novotny, 102 So. 2d 132, 135 (Fla. 1958)). Typically, only adjoining property owners or those in the immediate vicinity (*i.e.*, across the street) can show such special damages. *Id.* at 834, 835, 838. The supreme court has recognized one exception to this rule in the case of regulated alcoholic beverage dealers. *See* Skaggs-Albertson's v. ABC Liquors, Inc., 363 So. 2d 1082, 1090-91 (Fla. 1978); Rayan Corp. v. Board of County Comm'rs, 356 So. 2d 1276 (Fla. 3d DCA 1978).

76. 261 So. 2d at 838. Other members of the affected neighborhood may share this recognizable interest in common with the complainant, "but not every resident and property owner of a municipality can, as a general rule, claim such an interest." *Id.* at 837. In determining the sufficiency of the complainant's interest, the court considers factors such as the proximity of his property to the rezoned tract, the character of the neighborhood (including restrictive covenants and setback lines), the proposed change, and the entitlement of the complainant to receive notice of the hearing under the zoning ordinance. *Id.*

As noted by the *Renard* court, the notice requirements of a zoning ordinance do not control the standing question. *Id.* Notice of a zoning hearing mailed to property owners as a courtesy, but not as a prerequisite to the validity of the hearing, is even less likely to confer standing on the recipient. In F & R Builders, Inc. v. Durant, 390 So. 2d 784 (Fla. 3d DCA 1980), the court denied standing to a property owner who received a courtesy notice but whose name did not thereby appear in the record of the zoning appeals board hearing, a prerequisite to standing as an aggrieved party under the applicable zoning code. *See* METRO DADE COUNTY, FLA., CODE § 33-313 (1980).

nance that is void because improperly enacted.[77]

Neighborhood organizations have little difficulty establishing standing to challenge a procedurally invalid zoning enactment under the third *Renard* test. For example, in *Save Brickell Avenue, Inc. v. City of Miami,*[78] a nonprofit corporation organized to safeguard neighborhood zoning had standing to assert that a city zoning ordinance was void or invalid because the "required notice was not given."[79] The District Court of Appeal, Third District, relied on its earlier decision in *Upper Keys Citizens Association v. Wedel,*[80] which recognized the standing of a private, nonprofit citizens' corporation to challenge a variance granted at a closed, unrecorded, and unadvertised meeting between the county zoning board and the developer of a planned unit development, in violation of both the county zoning regulations and the state "Sunshine Law."[81]

In both decisions, however, the court was careful to note that the neighborhood organizations had standing only to test the validity of the enactment.[82] A leading illustration of this limitation is *Hemisphere Equity Realty Co. v. Key Biscayne Property Taxpayers Association.*[83] In that case, the Third District denied a neighborhood organization standing to appeal a county commission decision granting non-use variances to a developer.[84] But individual

77. 261 So. 2d at 838. This rule of standing to challenge procedural defects may not apply to declaratory actions, in contrast to certiorari review, at least in the Second District. In Sumter County v. Davis, 356 So. 2d 899 (Fla. 2d DCA 1978), an owner of real property located within the county sued to declare invalid two county zoning ordinances allegedly enacted without complying with certain statutory formalities. Without mentioning *Renard,* the appellate court held that the landowner lacked standing for declaratory relief because his complaint failed to allege "that any right of the appellee has been invaded or affected by the ordinance." *Id.* at 900.

78. 393 So. 2d 1197 (Fla. 3d DCA 1981).

79. *Id.* at 1198 (quoting Renard v. Dade County, 261 So. 2d at 838).

80. 341 So. 2d 1062 (Fla. 3d DCA 1977).

81. FLA. STAT. § 286.011 (1979).

82. 393 So. 2d at 1198 n.2; 341 So. 2d at 1064. The neighborhood association's allegation in *Save Brickell Avenue* that the "required notice was not given" did not bar it from challenging other procedural defects as well. In a subsequent controversy between several of the same parties, the Third District clarified that it had not meant to limit the association's standing to the notice issue alone:

> An affected citizen such as Save Brickell Avenue, Inc., has standing to attack the resolution on the ground that it is void or invalid by reason of departure from any essential procedure preceding its enactment. It may, in short, attack how the resolution was enacted, but not what was enacted.

Save Brickell Ave., Inc. v. City of Miami, 395 So. 2d 246, 247 (Fla. 3d DCA 1981).

83. 369 So. 2d 996 (Fla. 3d DCA 1979).

84. *Id.* at 1001. The Third District upheld the circuit court's reversal of the county commission on the merits of the individual plaintiffs' suit because the developer failed to

property owners within the required notice area met the special damages requirement of the first *Renard* test "because of the proximity of their property to the subject property, the character of the neighborhood, and the type of zoning proposed."[85]

Similarly, in *Chabau v. Dade County*,[86] developers sought a writ of prohibition challenging the jurisdiction of the county commission to hear an administrative appeal by the same Key Biscayne neighborhood organization from a zoning appeals board decision that had approved variances sought by the developers. Relying on *Hemisphere Equity*, the Third District pointed out that the association lacked standing to sue in state court unless the association, in contrast to its members, had suffered some special injury. In granting the writ, the court declined to prescribe a lower standing requirement for administrative appeals, absent an amendment of the county zoning code making representative associations aggrieved parties: "If Dade County wishes to liberalize access to its local tribunals, it may undertake to do so."[87] Following the *Chabau* decision, the county amended its ordinance to provide for appeals to the county commission by "neighborhood, community and civic associations."[88]

Similarly, the legislature may statutorily abrogate the special injury requirement for judicial review. For example, in *Florida Wildlife Federation v. State Department of Environmental Regulation*,[89] the supreme court found that the legislature, by not mentioning special injury when it authorized suits by "citizens" under a new environmental protection statute,[90] had intended that the

---

demonstrate the requisite hardship for a variance under METRO DADE COUNTY, FLA., CODE § 33-311(e) (1977), which at the time in question did not distinguish use variances from non-use variances. 369 So. 2d 996. *See* notes 68-72 and accompanying text *supra*.

85. 369 So. 2d at 1001.

86. 385 So. 2d 129 (Fla. 3d DCA 1980).

87. *Id.* at 130.

88. Metro Dade County, Fla., Ordinance 80-88, § 1 (Sept. 2, 1980) (amending METRO DADE COUNTY, FLA., CODE § 33-313 (1978)). Since this enlargement of standing applies to local government appeals and cannot bind the courts, it is likely that an unfortunate appellant who fails at the local government level will be unable to take the matter to circuit court unless he meets the special interest or special damage tests.

Other cities, such as Coral Gables, extended standing not only to neighborhood associations but to members of various city boards and to individual commissioners. CORAL GABLES, FLA., ZONING CODE § 14.01 (1981). An interesting question is whether, by reason of his office and sworn duty, such a city official would have an adversely affected special interest sufficient for judicial standing, in contrast to the possessory or proprietary interest ordinarily required.

89. 390 So. 2d 64 (Fla. 1980).

90. Environmental Protection Act of 1971, 1971 Fla. Laws ch. 71-343, § 2 (codified at

special injury rule not apply.[91] Moreover, because it created new substantive rights, the statute was not an impermissible legislative incursion into the supreme court's power to adopt rules of practice and procedure.[92] To challenge the merits of zoning enactments, neighborhood organizations may thus find it necessary to resort to the legislative process to overcome the *Renard* barrier to standing.[93]

IV. EQUITABLE ESTOPPEL

The doctrine of equitable estoppel prevents a local government from downzoning a tract when an owner relying "(1) in good faith (2) upon some act or omission of the government (3) has made such a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right he acquired."[94] As a basic corollary of the rules of fair play, equitable estoppel applies when a local government induces a developer to step "onto a welcome mat" of favorable zoning and then tries "to snatch the mat away."[95] Equitable estoppel is an exception to the general rule that a mere purchase of property, without more, creates no vested right to a particular existing zoning classification.[96]

The District Court of Appeal, Second District, permitted a foreclosing mortgagee to assert equitable estoppel in *Jones v. U.S. Steel Credit Corp.*[97] In this case of "whipsaw" zoning, the Pinellas County Commission upzoned a landowner's tract valued at $475,000 under the prior classification, facilitating its sale to a developer for $2,300,000. Before loaning the purchase money to the

---

FLA. STAT. § 403.412(2) (1979)).

91. 390 So. 2d at 67. Because nonprofit corporations have the same capacity to sue and be sued as do natural persons, FLA. STAT. § 617.021 (1979), the court concluded that the legislative grant of standing to "citizens" also applied to the corporate plaintiff in this case. 390 So. 2d at 68.

92. 390 So. 2d at 66-67; *see* Kramer, Halpern, & Robbins, *Constitutional Law, 1979 Developments in Florida Law*, 34 U. MIAMI L. REV. 597, 602-08 (1980).

93. The *Florida Wildlife* case, however, indicates that unless the legislative body simultaneously creates a new "substantive" right, then mere zoning code provisions purporting to accord standing to a broad new category of persons may be insufficient to create standing for judicial review.

94. City of Hollywood v. Hollywood Beach Hotel Co., 283 So. 2d 867, 869 (Fla. 4th DCA 1973), *aff'd in part & rev'd in part*, 329 So. 2d 10 (Fla. 1976). *See* Sakolsky v. City of Coral Gables, 151 So. 2d 433 (Fla. 1963); Rhodes, *Vested Rights Update*, 54 FLA. B.J. 787 (1980).

95. Town of Largo v. Imperial Homes Corp., 309 So. 2d 571, 573 (Fla. 2d DCA 1975).

96. *See* City of Miami Beach v. 8701 Collins Ave., 77 So. 2d 428 (Fla. 1954); Epifano v. Town of Indian River Shores, 379 So. 2d 966 (Fla. 4th DCA 1979).

97. 382 So. 2d 48 (Fla. 2d DCA 1979).

developer in reliance on the rezoning, the mortgagee made the commissioners aware of the transaction, and the commissioners reaffirmed their decision. When the mortgagee foreclosed on the property two years later, the county commission promptly downzoned the tract back to its original classification. Under the extraordinary facts of this case, the court held the county equitably estopped from downzoning the property because the mortgagee had made the loan in good faith reliance on the upzoning ordinance. Although the doctrine is ordinarily available only to property owners, the court held that equity and good conscience permitted the foreclosing mortgagee to stand in the shoes of the developer. Such equitable subrogation, however, should not have increased the mortgagee's rights beyond those of the developer, who had commenced no construction or other use of the property in reliance on the upzoning.

The District Court of Appeal, Third District, refused to apply equitable estoppel in *Dade County v. United Resources, Inc.*,[98] when the county commission determined that a proposed large housing project was exempt from statutory provisions governing developments of regional impact (DRI).[99] The commission's resolution, however, expressly noted that the DRI exemption would not predetermine issues pertaining to the developer's future rezoning applications, which the county eventually denied. Reversing the trial court, the Third District found that the county's clear warning made equitable estoppel inapplicable in this case and that the denial of rezoning was fairly debatable.

Although municipal officials gave no such clear warning in *Smith v. City of Clearwater*,[100] the developer nevertheless failed to prove the requisite elements for equitable estoppel. In that case, members of the city planning department suggested that the developer first go to the Division of State Planning to secure DRI approval, which they privately urged the Division to withhold. By the time the developer's amended proposal finally received state approval, the city had proposed amendments to its zoning code that would downzone the property. The District Court of Appeal, Second District, held that the city planners' behind-the-scenes opposition to the project had not affirmatively misled the developer, who also had failed to show a substantial change of position.[101]

---

98. 374 So. 2d 1046 (Fla. 3d DCA 1979).

99. *See* FLA. STAT. § 380.06 (1979).

100. 383 So. 2d 681 (Fla. 2d DCA 1980).

101. *Id.* at 686. Even though the developer made no showing of substantial expendi-

Even if local officials affirmatively approve a construction project, however, the estoppel doctrine will not operate to sanction acts prohibited by law. In *Dade County v. Gayer*,[102] the county building and zoning department issued landowners a building permit for a coral rock wall with a ten-foot setback, but the landowners built it in the public right-of-way. The trial court held the county estopped from ordering removal of the wall and the District Court of Appeal, Third District, reversed. Estoppel does not apply to transactions forbidden by statute, and in this case, a county ordinance forbade building a structure in a mapped street.

V. Discrimination by Population Control

A. *Boca Raton Building "Cap"*

Local governments have experimented with new zoning ordinances designed to control city growth. Like all zoning regulations, growth controls "must find their justification in some aspect of the police power, asserted for the public welfare."[103] Permissible police-power objectives include "the preservation of . . . small town character and the avoidance of the social and environmental problems caused by an uncontrolled growth rate."[104] A municipality may, within limits, provide for phased growth and development in accordance with the availability of essential municipal services and facilities.[105] But if an absolute "cap" or moratorium restricting the number of dwelling units bears no rational relationship to the public health, morals, safety, and welfare, then such an arbitrary and unreasonable ordinance violates due process of law.

The District Court of Appeal, Fourth District, struck down an arbitrary density cap on due process grounds in *City of Boca Raton v. Boca Villas Corp.*[106] and its companion case, *City of Boca*

---

tures, the court opined that he would have been entitled to a building permit if the rezoning ordinance had not already been "pending" when he received DRI approval. *Id.* at 689.

102. 388 So. 2d 1292 (Fla. 3d DCA 1980).

103. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

104. Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897, 906 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

105. Golden v. Planning Board, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972). The Ramapo plan permitted subdivision development in advance of the town's 18-year capital improvements schedule if the developer agreed to provide such essential services. *See generally* Note, *Phased Zoning: Regulation of the Tempo and Sequence of Land Development*, 26 Stan. L. Rev. 585 (1974); Annot., 63 A.L.R.3d 1184 (1975).

106. 371 So. 2d 154 (Fla. 4th DCA 1979), *cert. denied*, 381 So. 2d 765 (Fla.), *cert. denied*, 101 S. Ct. 86 (1980).

Raton v. Arvida Corp.[107] By initiative and referendum, the citizens of Boca Raton had amended their city charter to limit the total number of dwelling units within the city to 40,000, forbidding further building permits beyond that limit.[108] In formulating the cap, its proponents had never consulted the city planning department, whose officials were unable at trial to show any compelling reason for a permanent fixed limitation, other than community choice. The trial court found that the testimony and the city's "after-the-fact" studies of the cap demonstrated no rational relationship to a valid municipal objective, such as adequate utility systems, uncrowded schools, municipal fiscal stability, regional water resources, air quality and noise levels, or preservation of the city's comprehensive plan.[109] The District Court of Appeal, Fourth District, affirmed the trial court, finding that there had been substantial competent evidence to support its finding of no rational relationship.[110] The appellate court found it unnecessary to consider the effect of the ordinance on specific parcels and thus did not reach the plaintiff's confiscation claim or the application of the fairly debatable rule.[111]

---

107. 371 So. 2d 160 (Fla. 4th DCA 1979), *cert. denied*, 381 So. 2d 765 (Fla.), *cert. denied*, 101 S. Ct. 86 (1980).

108. The city council implemented the charter amendment by reducing the density for all multifamily zoning categories by 50% across the board, and by limiting single-family density to the average pre-amendment level. The court found that this ordinance violated both due process and equal protection. 371 So. 2d at 155.

109. *Id.* at 155-57. The trial court acknowledged that the cap device could conceivably be "a firm planning goal embodied in legislation," but held that "legislation as far reaching as this Cap should not be adopted by trial and error." *Id.* at 157. For a discussion of the hazards of adopting zoning ordinances by referendum, see notes 121-42 and accompanying text *infra*.

110. 371 So. 2d at 157. We are thus left to speculate whether a Florida court would approve an absolute cap making residentially zoned land unbuildable, if expert testimony demonstrates that the cap on the number of dwelling units is vital to the public welfare. Other jurisdictions have approved municipal growth limitations less absolute than the Boca Raton cap. *See* cases cited notes 104 & 105 *supra*.

111. 371 So. 2d at 157-59. "The fairly debatable rule applies to the application of the ordinance and does not modify the requirement that the ordinance itself *and* the application thereof must have a reasonable relationship to the health, safety, morals or general welfare." *Id.* at 159 (quoting Davis v. Sails, 318 So. 2d 214, 217 (Fla. 1st DCA 1975)). The court opined, however, that if it had reached that issue, the mere introduction of expert testimony in support of the cap would not necessarily make the issue fairly debatable. "If it did, every zoning case would be fairly debatable and the City would prevail simply by submitting an expert who testified favorably to the City's position." *Id.* For a discussion of confiscatory zoning, see notes 143-58 and accompanying text *infra*.

B. *Coral Gables "Lot-Splitting" Ordinance*

A more successful technique for controlling population density has been the prescription of minimum sizes for residential lots.[112] The Coral Gables "lot-splitting" ordinance, first enacted in 1973, is one variation on this theme.[113] As an experimental attempt to limit the number of residences built within the city by restricting the traditional right to build on any legally platted lot, the ordinance has spawned three recent decisions.

When laying out Coral Gables in the 1920's, the original developer had platted thousands of 50-foot-wide lots. Many purchasers bought three or four lots and built their residences extending across the lot lines, creating a city of graceful homes with generous spacing between them. As property values in the city soared, it became attractive for speculators to tear down the older residences and to sell the underlying multiple lots as individual building sites. If unchecked, this process could destroy neighborhood integrity, vastly increase population density, and strain city services. The intent of the 1973 ordinance was plain and straightforward: a single-family residence, once constructed on two or more platted lots, forever tied the lots together as a single building site. No permit would issue to replace a demolished or removed residence with more than one building, even though the site would revert to three legally platted lots.

In *City of Coral Gables v. Puiggros*,[114] a homeowner removed from one of his underlying lots a part of a detached garage that did not appear on city records. Unaware of this demolition, the city zoning board approved the lot as a separate building site, provided the owner removed minor encroachments by the remaining residence. After the owner spent $3000 correcting these encroachments, irate neighbors described the prior demolition to the zoning board, which withdrew site approval. When the owner sued for the

---

112. *See generally* Annot., 95 A.L.R.2d 716 (1964). A minimum lot size of several acres, however, may effectively place the cost of acquisition beyond the means of lower income groups. Such "large-lot" zoning may be vulnerable to attack as "exclusionary" zoning. *See, e.g.*, Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975); Aloi, Goldberg, & White, *Racial and Economic Segregation By Zoning: Death Knell for Home Rule?* 1969 U. TOL. L. REV. 65; Bigham & Bostick, *Exclusionary Zoning Practices: An Examination of the Current Controversy*, 25 VAND. L. REV. 1111 (1972); Davidoff & Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 SYRACUSE L. REV. 509 (1971); Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971).

113. CORAL GABLES, FLA., ZONING CODE § 8.02 (1980).

114. 376 So. 2d 281 (Fla. 3d DCA 1979).

building permit, the trial court granted him summary judgment, holding the city equitably estopped because the owner spent funds in reliance on the first approval. The District Court of Appeal, Third District, reversed without approving or disapproving of the ordinance, finding unresolved issues in the record. On remand, the trial court again held for the homeowner, finding the ordinance inapplicable because a "single-family residence" as defined in the city code did not include this detached garage.[115]

The Third District had previously refused to reach the constitutionality of the lot-splitting ordinance in *King v. City of Coral Gables*.[116] In *King*, the plaintiff landowners attacked the ordinance as arbitrary and unconstitutional as applied to three unimproved 50-foot lots, which had been the site of the plaintiffs' home before its accidental destruction by fire. The court construed the statute as inapplicable to this casualty loss, holding that the intent of the ordinance was to prevent the voluntary or intentional demolition of residences on large sites by developers who would then build more residences on smaller lots.[117]

Curiously, the Third District later relied on the *King* decision in approving the lot-splitting ordinance as a proper exercise of the police power in *Holladay v. City of Coral Gables*.[118] The city zoning administrator had advised the prospective purchasers of a residence located on two 100-foot lots that they could demolish it and build two new residences because the ordinance at that time applied only to 50-foot lots. The zoning board then reversed the administrator, but the purchasers proceeded to close on the property and unsuccessfully appealed to the city commission. After the purchasers failed to seek timely review of the commission's decision, the city amended the lot-splitting ordinance and deleted its reference to the size of the lots it affected.

When the purchasers sued for declaratory relief, the Third District held that "what the plaintiffs sought to do with respect to this parcel was clearly and expressly prohibited"[119] under the amended ordinance, which was controlling at the time the plaintiffs filed suit. The court found it immaterial that the city commis-

---

115. Puiggros v. City of Coral Gables, No. 78-4552 CA 10 (Fla. 11th Cir. Ct. May 13, 1981).

116. 363 So. 2d 389 (Fla. 3d DCA 1978), *cert. denied*, 370 So. 2d 458 (Fla. 1979).

117. *Id.* at 392.

118. 382 So. 2d 92, 97 (Fla. 3d DCA 1980).

119. *Id.* at 96. The court quickly rejected the purchasers' equitable estoppel argument because the zoning board had reversed the administrator several weeks before the plaintiffs consummated their purchase.

sion might have improperly applied the former 50-foot ordinance to the 100-foot lots, since that decision had become final and binding on the purchasers. Indeed, the commissioners' difference of opinion about whether the former ordinance applied to such lots was a "reasonable basis for the rewriting of that zoning provision . . . to remove the ambiguity and make clear that the zoning policy expressed in the earlier ordinance was applicable to such improved multilot parcels without regard to the amount of foot frontage of the lots involved."[120]

VI. Zoning by Referendum

Another form of discrimination can result from the initiative and referendum process, which has increased in popularity as a method whereby the will of citizen groups can override the legislative decisions of state and local governments.[121] When applied to zoning decisions that govern individual property rights, the referendum process can deny procedural due process and produce discriminatory spot zoning in violation of equal protection. The affected property owner argues that the referendum deprives him of a proper forum to air and compromise the issues before a zoning board or city council.[122] It denies him the benefit of the staff's expertise and the board's due regard for preserving a comprehensive zoning plan. The referendum is least appropriate and most discriminatory in a zoning decision that affects only a single owner or a single tract. Such decisions are more adjudicatory than legislative in nature, in contrast to the adoption of a general comprehensive zoning ordinance. Thus, courts often determine the appropriateness of a referendum for deciding a zoning controversy by examin-

---

120. *Id.* at 97.

121. A referendum, however, is far more than an expression of ambiguously founded neighborhood preference. It is the city itself legislating through its voters—an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest.

Southern Alameda Spanish Speaking Organization v. Union City, 424 F.2d 291, 294 (9th Cir. 1970), *quoted in* City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 678 (1976).

For background on the current resurgence of the use of initiatives and referenda, see Sirica, *The Constitutionality of the Initiative and Referendum*, 65 Iowa L. Rev. 637 (1980); Comment, *The Direct Initiative Process: Have Unconstitutional Methods of Presenting the Issues Prejudiced Its Future?* 27 U.C.L.A. L. Rev. 433 (1979); Note, *Constitutional Constraints on Initiatives and Referendum*, 32 Vand. L. Rev. 1143 (1979).

122. One should distinguish the desirable "give and take" of the legislative process from the "dealmaking" condemned in contract zoning cases. *See* notes 31-43 and accompanying text *supra*.

ing the legislative or quasi-judicial nature of the decision.[123]

In *City of Coral Gables v. Carmichael*,[124] the District Court of Appeal, Third District, in 1972 held that the referendum provision of the city charter applied to an amendatory zoning ordinance that would have upzoned a Cocoplum Beach tract for more intensive development. The court characterized the rezoning decision as legislative, relying upon a supreme court pronouncement in *Schauer v. City of Miami Beach*:[125] "It is obvious to us that the enactment of the original zoning ordinance was a legislative function and we cannot reason that the amendment of it was of different character."[126] The referendum procedure was thus merely an alternative exercise of the city's legislative power and did not in itself violate due process or equal protection.[127]

But in 1976, in *Andover Development Corp. v. City of New Smyrna Beach*,[128] the District Court of Appeal, First District, expressly rejected the *Carmichael* case and the argument that an amendment to a zoning ordinance is necessarily legislative if the original ordinance was legislative.[129] In *Andover*, a citizens group passed a referendum rescinding the PUD zoning approved by the city commission for the developer's tract. The First District found that rezoning this tract by referendum violated due process by overruling the fact-finding function of the planning commission as well as the administrative decision of the city commission.[130] Quoting extensively from decisions in other jurisdictions, the court found that the role of the hearing and fact-finding tribunal that decided particular zoning controversies was administrative or

---

123. *See, e.g.*, Taschner v. City Council, 31 Cal. App. 3d 48, 107 Cal. Rptr. 214 (1973); West v. Portage, 392 Mich. 458, 221 N.W.2d 303 (1974); Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973); Fleming v. City of Tacoma, 81 Wash. 2d 292, 502 P.2d 327 (1972). *See generally* Annot., 72 A.L.R.3d 991 (1976); Annot., 72 A.L.R.3d 1031 (1976).

124. 256 So. 2d 404 (Fla. 3d DCA 1972).

125. 112 So. 2d 838 (Fla. 1959).

126. *Id.* at 839, *quoted in* 256 So. 2d at 408. The *Schauer* case involved not a referendum, but an alleged conflict of interest in a city council's decision to upzone a large area for hotel development when one of the councilmen owned a tract in the area. *Id.*

127. 256 So. 2d at 409. The *Carmichael* court relied on James v. Valtierra, 402 U.S. 137 (1971), which involved no procedural due process issue, and Dwyer v. City Council, 200 Cal. 505, 253 P. 932 (1927), which questioned the wisdom of using the referendum "in matters of zoning when the effect may be more acutely felt in a given district than by the community at large." *Id.* at 517, 253 P. at 937.

128. 328 So. 2d 231 (Fla. 1st DCA 1976).

129. *Id.* at 235. The *Andover* court pointed out that more recent California cases had repudiated the approach taken in the *Dwyer* case relied on by the *Carmichael* court. *Id.*

130. *Id.* at 238.

quasi-judicial; such matters were improper for decision by referendum.[131]

Four months after the *Andover* decision, the Supreme Court of the United States reversed an Ohio case relied upon by the First District, *Forest City Enterprises, Inc. v. City of Eastlake.*[132] The Supreme Court of Ohio had held that rezoning was indeed a legislative function, which was unlawfully delegated through the referendum process. Because they lacked standards to guide their decision, the voters would be exercising the police power in an arbitrary and capricious manner.[133] In a six-to-three decision delivered by Chief Justice Burger, the Court found the delegation doctrine inapplicable to a referendum, which is "a power reserved by the people to themselves."[134] Quoting Justice Black, the Chief Justice characterized the referendum procedure as "a classic demonstration of 'devotion to democracy,' "[135] and noted that "there is no more advance assurance that a legislative body will act by conscientiously applying consistent standards than there is with respect to voters."[136]

The Chief Justice was careful to note, however, that the referendum process would not immunize the zoning ordinance from a substantive due process challenge, which the developer had not raised: "If the substantive result of the referendum is arbitrary and capricious, bearing no relation to the police power, then the fact that the voters of Eastlake wish it so would not save the restriction."[137] He suggested that variances or other administrative relief could redress any hardship created by an arbitrary decision of the electorate.[138] Although this remark ignores the special hardship showing required of a variance applicant in jurisdictions like Florida,[139] it does implicitly recognize that the zoning process must afford individual property owners an opportunity to present a meri-

131. *Id.* at 237-38 (quoting with approval Fasano v. Board of County Comm'rs, 264 Or. 574, 580, 507 P.2d 23, 26 (1973)).

132. 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975), *rev'd*, 426 U.S. 668 (1976).

133. *Id.* at 198, 324 N.E.2d at 747.

134. City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 675 (1976).

135. *Id.* at 679 (quoting James v. Valtierra, 402 U.S. 137, 141 (1971) (Black, J.)).

136. *Id.* at 675 n.10.

137. *Id.* at 676. Justice Stevens objected to relying on a later substantive challenge to cure a procedural defect: "[I]f there is a constitutional right to fundamental fairness in the procedure applicable to an ordinary request for an amendment to the zoning applicable to an individual parcel, that right is not vindicated by the opportunity to make a substantive due process attack on the ordinance itself." *Id.* at 694 n.16 (Stevens, J., dissenting).

138. *Id.* at 674 n.9, 679 n.13.

139. *See* notes 55-72 and accompanying text *infra*.

torious case for relief. In other words, even assuming the propriety of deciding questions of community policy by referendum, "the popular vote is not an acceptable method of adjudicating the rights of individual litigants,"[140] as Justice Stevens pointed out in dissent. The majority avoided directly addressing this procedural due process issue, accepting instead the Ohio court's binding determination that the rezoning was legislative under state law.[141]

Ignoring the Supreme Court's *Eastlake* opinion, the District Court of Appeal, Fourth District, in *City of Tamarac v. Sabal Palm Golf Club, Inc.*,[142] invalidated a provision in the Tamarac city charter that required a referendum before rezoning recreational lands for any other purpose. The opinion cited no authority for this result, although it could have relied on the First District's well-reasoned *Andover* opinion, which had recognized that rezoning decisions applied to single owners or single tracts are quasi-judicial or administrative rather than legislative. By focusing on this procedural due process issue, rather than on the delegation doctrine relied upon by the Ohio court, one can readily distinguish *Eastlake*. The *Tamarac* court failed to make this distinction, thereby missing an opportunity to settle an important issue in Florida law.

Until the Florida courts adopt either the *Andover* or the *Carmichael* position, however, the Florida practitioner would be wise to question the validity of any zoning change adopted by a referendum that affects only one small tract or owner. Although highly democratic, the referendum bypasses the compromise and modification available with zoning boards and city councils, thus reducing the determination of the merits of the controversy to a single choice—approval or disapproval by the electorate. In such situations, the constitutional rights of due process and equal protection should prevail over an idealistic "devotion to democracy."

VII. CONFISCATORY ZONING

The Florida courts have wrestled with definitions to distinguish confiscatory zoning from arbitrary, capricious, and unreasonable zoning, and to determine the appropriate remedy for confiscatory zoning. "A zoning ordinance is confiscatory if it deprives an

140. 426 U.S. at 693 (Stevens, J., dissenting); *see id.* at 680 (Powell, J., dissenting).

141. *Id.* at 674 n.9.

142. 382 So. 2d 139 (Fla. 4th DCA 1980) (Anstead, J., concurred in the conclusion only).

owner of the beneficial use of his property by precluding all uses to which the property might be put or the only use to which it is reasonably adaptable."[143] As illustrated by the *Boca Villas* case,[144] however, the court may find a zoning ordinance unconstitutionally arbitrary and unreasonable without reaching the issue of its confiscatory application to specific parcels.[145]

Confiscatory zoning challenges often arise when a single tract remains in a highly restrictive zoning classification, but the character of the neighborhood has changed substantially. For example, the local government may have upzoned the surrounding property or granted variances or constructed highways or public facilities near the property. Because the old classification discriminates against the owner of the more restricted tract vis-a-vis his neighbors, one might call this neglect "inverse spot zoning."[146] In effect, the property owner argues that his tract is "the last rose of summer . . . left blooming alone"[147] in a zoning classification that is no longer fairly debatable.

This argument was successful in *City of Hialeah v. Cama Corp.*,[148] in which the District Court of Appeal, Third District, upheld a trial court order directing the city to upzone the plaintiff's property to a classification no more restrictive than high density multiple-family residential. The property, which fronted on a heavily travelled four-lane highway, had remained in a single-fam-

---

143. Moviematic Indus. Corp. v. Board of County Comm'rs, 349 So. 2d 667, 671 (Fla. 3d DCA 1977).

144. City of Boca Raton v. Boca Villas Corp., 371 So. 2d 154, 157-59 (Fla. 4th DCA 1979); *see* notes 103-11 and accompanying text *supra*.

145. One explanation for judicial reluctance to reach the confiscation issue is the spectre of money damages in an inverse condemnation action against the zoning authority. *See* notes 158-91 and accompanying text *infra*.

146. "Inverse spot zoning" is the other side of the coin from spot zoning, which Florida courts have uniformly condemned as a form of discrimination that unreasonably authorizes a heavier use of a single tract than is otherwise permissible within that zoning district. For example, in Allapattah Community Ass'n v. City of Miami, 379 So. 2d 387 (Fla. 3d DCA 1980), a meat packing company, located on the commercially zoned south side of a street, sought to rezone for commercial use its four lots located on the residentially zoned north side. Because the requested rezoning would produce undesirable spot zoning, the city zoning board denied the application. *Id.* at 390. When the city commission subsequently upzoned the entire north side of the street to accomplish the same purpose, the Third District struck down the rezoning as arbitrary and unreasonable because it bore no reasonable relation to the public health, safety, morals, or welfare. The court rejected the city's circumvention of the spot zoning rule by rezoning the entire neighborhood: "If it is improper to create a spot in a neighborhood, it is even more plainly unacceptable entirely to obliterate it." *Id.* at 395 n.9.

147. T. MOORE, *The Last Rose of Summer*, in IRISH MELODIES (1st ed. 1802).

148. 360 So. 2d 1155 (Fla. 3d DCA 1978).

ily residential classification despite substantial changes in the zoning and use of adjoining tracts for high density residential and commercial purposes. In view of the surrounding uses, the court concluded that maintenance of the present zoning classification was "confiscatory" and no longer fairly debatable.[149]

In *Dade County v. Florida Mining & Materials Corp.*,[150] another panel of the same district court of appeal was more careful in its use of the term *confiscatory*. The county had denied a landowner's request for an unusual use and variance for rock mining in an environmentally sensitive zone in the East Everglades. The county's master plan prohibited such a use. The trial court held that this denial was arbitrary, capricious, and discriminatory because the county had permitted essentially similar mining activities on surrounding tracts after adopting its plan. The Third District affirmed this result, but rejected the trial court's additional conclusion that the zoning was confiscatory and deprived the plaintiff of any beneficial use.[151]

Changed conditions, however, failed to motivate the court to order a residential tract upzoned for a motel in *Alachua County v. Reddick*,[152] despite the proximity of the property to a new highway interchange described as "probably one of the most important . . . in the state of Florida."[153] The county had denied the requested rezoning, determining that the proposed strip commercial development would create traffic hazards and depreciate neighboring residential tracts. The District Court of Appeal, First District, found that the county's decision was not arbitrary because it related to the public safety and general welfare. Furthermore, the existing classification was not confiscatory because the tract retained

---

149. *See also* Dugan v. City of Jacksonville, 343 So. 2d 103 (Fla. 1st DCA 1977); Olive v. City of Jacksonville, 328 So. 2d 854 (Fla. 1st DCA 1976); Davis v. Sails, 318 So. 2d 214 (Fla. 1st DCA 1975); Stokes v. City of Jacksonville, 276 So. 2d 200 (Fla. 1st DCA 1973).

Neighboring uses may make the classification of a particular tract objectionable even when the zoning authority first classifies it. For example, in City of Sanibel v. Goode, 372 So. 2d 181 (Fla. 2d DCA 1979), a newly incorporated municipality implemented its comprehensive land use plan by classifying as residential a lot that previously applicable county zoning had classified as commercial. The court found that commercial establishments, which were now nonconforming uses, virtually surrounded the lot, making its new classification arbitrary and unreasonable. The effect of ordering the city to reclassify the property for commercial use, however, was to imprint the hodgepodge of previous uses on the city's plan for future land use.

150. 364 So. 2d 31 (Fla. 3d DCA 1978).

151. *Id.* at 34.

152. 368 So. 2d 653 (Fla. 1st DCA 1979).

153. *Id.* at 654.

"value and utility as a single-family residence."[154] Although the owners' witness testified that the highest and best use of the property would be a motel or restaurant development, the court responded: "A zoning authority . . . is not obliged in all events, and irrespective of the detrimental consequences to public facilities and neighboring properties, to rezone private property for its 'highest and best use' or for its highest salability."[155]

Following this rationale of the *Reddick* court, the District Court of Appeal, Fourth District, upheld a county commission's refusal to rezone a tract for its highest and best use in *Broward County v. Capeletti Brothers.*[156] The holders of a purchase option sought to use the land as an excavation site, although all surrounding parcels were zoned for agricultural use. The trial court held for the optionees because the county had deprived them of "a reasonable use and enjoyment" of the property, but the Fourth District reversed: "A zoning ordinance is not confiscatory because *a* single reasonable use is denied; rather it becomes confiscatory when *all* reasonable uses are prohibited."[157] Even though the zoning board and planning commission had recommended the requested rezoning, the court held that the commission's denial was fairly debatable and therefore neither arbitrary nor unreasonable.

The rule that emerges from these cases is that substantial changes in a neighborhood, standing alone, may be insufficient to justify rezoning if the present zoning does not deprive the owner of all reasonable use of the property; the change in the surrounding area must be so substantial that the need for upzoning is no longer fairly debatable. Even if the need for some upzoning is no longer fairly debatable, the court will not require reclassification for the property's highest, best, or most economically feasible use.[158]

---

154. *Id.* at 657.

155. *Id.* In rejecting commercial rezoning, however, the court expressly left open the possibility of upzoning for noncommercial uses. *Id.* at 659.

156. 375 So. 2d 313 (Fla. 4th DCA 1979), *cert. denied,* 385 So. 2d 635 (Fla. 1980).

157. *Id.* at 315 (emphasis in original) (citing S.A. Healy Co. v. Town of Highland Beach, 355 So. 2d 813 (Fla. 4th DCA 1978)).

158. The court may only indicate the most restrictive permissible zoning classification; it may not order the zoning authority to rezone the property to one particular classification. An order for specific rezoning would violate the separation of powers doctrine because the choice among various permissible zoning classifications belongs to the legislative body. *See, e.g.,* City of Clearwater v. Curls, 366 So. 2d 1238 (Fla. 2d DCA 1979); Town of Longboat Key v. Kirstein, 352 So. 2d 924 (Fla. 2d DCA 1977).

VIII. REGULATORY TAKINGS

What remedies may an aggrieved landowner seek when a confiscatory zoning or land use regulation deprives him of the beneficial use of his property? Arguing that this deprivation violates due process of law and takes his property for public use without just compensation,[159] the landowner typically asks the court to declare the regulation invalid and enjoin its enforcement.[160] Such declaratory and injunctive relief is consistent with the classic Supreme Court "taking" decision, *Pennsylvania Coal Co. v. Mahon*,[161] in which Justice Holmes refused to sustain an exercise of the police power when the challenged statute would have diminished property values impermissibly, absent exercise of the eminent domain power and payment of compensation.[162]

Holmes' broad language characterizing excessive regulations as

---

159. "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

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

160. Economic considerations lead most landowners to prefer to keep the parcel and profit from its development, rather than surrender it to the municipality for compensation. As Professor Costonis has pointed out,

> [T]he goal of [challenges to regulatory measures] in conventional land use disputes is simply to preclude application of the measure to the restricted parcel on the basis of its constitutional infirmity. What is achieved, in short, is declaratory relief. The sole exception to this mild outcome occurs where the challenged measure is either intended to eventuate in actual public ownership of the land or has already caused government to encroach on the land with trespassory consequences that are largely irreversible.

Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COL. L. REV. 1021, 1035 (1975).

161. 260 U.S. 393 (1922).

162. Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. 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.

. . . .

. . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions.

Id. at 413, 416.

"takings" suggests a view of government power over property rights as a "continuum" running from noncompensable police power to compensable eminent domain power.[163] Thus, in Supreme Court parlance, a government action adjudicated a "taking" is one requiring judicial relief for the aggrieved property owner.[164] The continuum approach, however, offers little guidance on the appropriate remedy: should the court declare the government action unconstitutional and invalid, or should it award the property owner just compensation for the property taken?

Critics argue that Holmes erred in treating the police power and eminent domain power as merely different in degree rather than different in kind.[165] If different in kind, the two powers have predictable remedies: compensation is necessary to validate a government appropriation of property for public use under its eminent domain power, but an excessive police power regulation violating due process is unconstitutional and invalid.[166] A mere difference in degree, however, suggests a third possible alternative: "compensable regulation" restricting the use of property in the public interest without governmental acquisition of a fee interest, but without imposing the cost of the restriction on the property owner alone.[167]

---

163. The continuum approach thus describes not a test but judicial results based on the circumstances of each case. *See id.* at 413; Van Alstyne, *Modernizing Inverse Condemnation: A Legislative Prospectus*, 8 SANTA CLARA LAW. 1 (1967).

164. *See* notes 204-07 and accompanying text *infra*.

165. F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE 118-34 (1973). Bosselman and his colleagues argue that in *Pennsylvania Coal*, Holmes abandoned the Court's position in Mugler v. Kansas, 123 U.S. 623 (1887), which upheld under the police power a statute that banned the manufacture of intoxicating liquors and rendered the plaintiff's brewery valueless, distinguishing a compensable taking as an appropriation of property.

166. *See* 1 NICHOLS' EMINENT DOMAIN § 1.42[1] (3d rev. ed. 1975):

> Not only is an actual physical appropriation, under an attempted exercise of the police power, in practical effect an exercise of the power of eminent domain, but if regulative legislation is so unreasonable or arbitrary as virtually to deprive a person of the complete use and enjoyment of his property, it comes within the purview of the law of eminent domain. Such legislation is an invalid exercise of the police power since it is clearly unreasonable and arbitrary. It is invalid as an exercise of the power of eminent domain since no provision is made for compensation.

Although this oft-quoted passage recognizes that complete deprivation under the police power is equally objectionable as condemnation or physical appropriation without compensation, it identifies neither the power exercised nor the remedy required in a particular case.

167. This alternative preserves beneficial regulations while avoiding the unsatisfactory choice between full compensation and no compensation. For a comprehensive account of the scholarly debate in the 1960's and 1970's over the desirability and mechanics of compensable regulation, see Hagman, *Compensable Regulation: A Way of Dealing with Wipeouts from Land Use Controls?* 54 U. DET. J. URB. L. 45, 47-64 (1976).

A. *Compensable Regulation*

With the growth of environmental awareness in the 1970's and the corresponding increase in land use regulation, landowners have experienced more difficulty exempting their property from its impact.[168] If such regulation is unavoidable, one landowner alternative is to shift the cost back to the regulating entities—primarily local governments with scarce resources. Some commentators urge that a careful legislative balancing of public and private interests is necessary to allocate the cost of land use regulation properly.[169] But until the legislature strikes such a balance, the courts must resolve land use disputes as they arise. The most popular landowner vehicle for shifting the cost of land use regulation back to local governments is the inverse condemnation action,[170] although other theories for seeking compensation in the courts are possible.[171]

Inverse condemnation is "a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency."[172] Ordinarily, the "taking in fact" involves a physical intrusion or appropriation of the plaintiff's property.[173]

---

168. *Id.* at 48, 53.

169. *See, e.g.*, F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 165, at 302, 327; Costonis, *supra* note 161, at 1048-49; Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1971).

170. *See, e.g.*, Badler, *Municipal Liability in Damages—A New Cause of Action*, 5 URB. LAW. 25 (1973); Comment, *"Takings" under the Police Power—The Development of Inverse Condemnation as a Method of Challenging Zoning Ordinances*, 30 SW. L.J. 723 (1976).

171. *See, e.g.*, San Diego Gas & Elec. Co. v. City of San Diego, 101 S. Ct. 1287, 1306 n.23 (1981); Schnidman, *Lake Country Estates v. Tahoe Regional Planning Agency: Opening the Door to a Section 1983 Cause of Action in Land Use Litigation*, 54 FLA. B.J. 547 (1980).

172. D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 328 (1975), *quoted in* United States v. Clarke, 100 S. Ct. 1127, 1130 (1980).

173. It is essential, of course, to show that the governmental action took a private property interest belonging to the plaintiff. In Village of Tequesta v. Jupiter Inlet Corp., 371 So. 2d 663 (Fla. 1979), the Supreme Court of Florida rejected an inverse condemnation claim by a condominium developer alleging that a nearby municipality had pumped excessive quantities of water from a shallow aquifer underlying the developer's land. The excessive pumping had caused salt water from the intercoastal waterway to intrude into the aquifer, forcing the developer to drill wells into a deeper aquifer at greater expense. Reversing the lower court, the supreme court held that the right to use water from the shallow aquifer was not "property" comparable to an airspace easement, since the alleged taking "deprived [the devel-

For example, Florida courts have recognized a cause of action for damages in inverse condemnation when landowners alleged that public utility buildings encroached beyond a public easement,[174] that street improvements caused permanent flooding of their property,[175] that closing a street substantially deprived them of access to their property,[176] or that excessive noise from low-flying planes deprived them of all beneficial use of their property.[177] The court is even more likely to find a governmental appropriation when the landowner can show that the government restricted the use of his property in order to "reserve" it for future acquisition,[178] or to avoid condemning it altogether.[179]

---

oper] of no beneficial use of the land itself." *Id.* at 670. Rather, the right to use water was governed by the Florida Water Resources Act, FLA. STAT. §§ 373.012-.6 (1979), which the court found "no more objectionable than legislation forbidding the use of property for certain purposes by zoning regulations." 371 So. 2d at 670 (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)).

174. Alizieri v. Manatee County, 396 So. 2d 240 (Fla. 2d DCA 1981).

175. Thompson v. Nassau County, 343 So. 2d 965 (Fla. 1st DCA 1977) (landowners alleged that resurfacing by county had raised street elevation and diverted rainwater overflow to their property, constituting actual permanent invasion). *See* United States v. Cress, 243 U.S. 316 (1917) (upholding an award of compensation for repeated floodings of land caused by a government water project).

176. Pinellas County v. Austin, 323 So. 2d 6 (Fla. 2d DCA 1975) (county vacated dirt road leading to landowners' tract; only other access was over a small wooden bridge inadequate to support heavy vehicles such as firetrucks). Inverse condemnation was also the remedy for a denial of access in Bydlon v. United States, 175 F. Supp. 891 (Ct. Cl. 1959), when owners of resort property located in a roadless area of a national forest challenged an executive order prohibiting air travel over the forest below 4000 feet.

177. Hillsborough County Aviation Auth. v. Benitez, 200 So. 2d 194 (Fla. 2d DCA 1967) (overflights by commercial jet aircraft only 250 to 500 feet above property constituted taking of avigational easement). *See* Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946); Annot., 77 A.L.R.2d 1355 (1961).

178. For example, in Ventures in Property I v. City of Wichita, 225 Kan. 698, 594 P.2d 671 (1979), the court held that by approving a developer's plat only after reserving an undeveloped corridor for proposed highway construction at an indefinite future date, the city had taken the property and must respond in inverse condemnation damages. Recognizing the harshness of forcing an unanticipated expenditure, the court remanded to the trial court with instructions to suspend entry of the judgment for six months and to dismiss the action if either the city approved the plat without the corridor restriction or the highway department condemned the property. *Id.* at _, 594 P.2d at 683. *See also* notes 185-90 and accompanying text *infra*.

Similarly, in Peacock v. County of Sacramento, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969), a landowner received inverse condemnation damages when a county restricted development in anticipation of acquiring his tract for an airport but renounced the airport plans five years later.

In Lomarch Corp. v. Mayor of Englewood, 51 N.J. 108, 237 A.2d 881 (1968), the court awarded the value of a purchase option as compensation for a "temporary taking" imposed by a municipal ordinance reserving plaintiff's land for a park pending a decision to condemn it.

179. In Sneed v. County of Riverside, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963), a

From the municipal and environmental point of view, there are sound policy reasons for limiting a landowner's remedies to invalidation of the unconstitutional zoning ordinance. Opponents of inverse condemnation argue that landowners should not have the option "to convert an exercise of regulatory power that has been deemed unlawful into a lawful compensable taking,"[180] leading to judicial allocation of local governments' limited financial resources through possibly staggering damage awards. Furthermore, this threat of potential compensation liability would chill innovative land use planning.[181]

Commentators favoring compensable regulation, on the other hand, respond that awarding compensation will encourage more rational decisionmaking by regulatory agencies forced to weigh the benefits of the zoning plan against its true costs, which are arguably more staggering for the landowner who must otherwise bear them alone.[182] A further advantage of compensation is preservation of the comprehensive zoning plan, which judicial invalidation would otherwise debilitate.[183] Moreover, most scholars favoring

---

landowner stated a cause of action in inverse condemnation when a county enacted a zoning restriction forbidding structures or vegetation over three inches high, rather than acquire an air easement to operate flights over the property. As in other overflight cases, *Sneed* involved physical intrusion. *See* note 177 *supra*.

180. Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 STAN. L. REV. 1439, 1443 (1974).

The landowner who "opts" for compensation in inverse condemnation essentially concedes that but for the absence of compensation, the confiscatory zoning ordinance is constitutional. In Kasser v. Dade County, 344 So. 2d 928 (Fla. 3d DCA 1977), the court recoiled at an inverse condemnation plaintiff's inconsistency in challenging the ordinance as a taking while accepting its police power validity:

> We cannot allow the appellant to assert that the denial of rezoning was reasonable while simultaneously alleging that it was confiscatory. If we were to accept such contradictory claims as grounds for the relief which appellant sought in the trial court [inverse condemnation damages], we would debilitate the zoning review procedure established by Dade County and long accepted by this Court.

Id. at 929. The court pointed out that if a proper challenge to the constitutional validity of the underlying zoning ordinance had shown that the denial of the landowner's rezoning request was unreasonable and confiscatory, "the County would then have had the option of rezoning the property or condemning it via its eminent domain authority." *Id. See* notes 249-53 and accompanying text *infra*.

181. Note, *supra* note 180, at 1450-51; *see* F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 165, at 266-83 (advocating legislative solution rather than judicial determinations of regulatory taking); Beuscher, *Some Tentative Notes on the Integration of Police Power and Eminent Domain by the Courts: So-Called Inverse or Reverse Condemnation*, in LAND USE CONTROLS: CASES AND MATERIALS 538-50 (3d ed. 1964), *reprinted in* 1968 URB. L. ANN. 1.

182. *See, e.g.*, Badler, *supra* note 170; Dunham, *From Rural Enclosure to Re-Enclosure of Urban Land*, 35 N.Y.U. L. REV. 1238, 1253-54 (1960).

183. Dunham, *supra* note 182, at 1247; Hagman, *supra* note 167, at 103.

compensable regulation propose that the legislature, rather than the courts, take the lead in formulating compensatory remedies, which would include less expensive alternatives than outright purchase of the fee.[184]

For example, the Model Land Development Code proposed by the American Law Institute[185] provides for compensable regulation while eliminating the danger that overzealous land use planners might unwittingly purchase tracts they intended only to regulate. If the court agrees with the landowner that the challenged regulation

> constitutes a taking of his property without just compensation, the court shall retain jurisdiction if it further determines that the limitation on development could be lawfully imposed if compensation were paid, and request the local government to determine whether it wishes to institute proceedings under Article 5 to pay compensation.[186]

Article 5 of the Model Code provides for acquisition of an interest in the property for the difference between the property's value under the challenged regulation and its value with "the minimum development necessary to eliminate the unconstitutional taking."[187] If the local government fails to respond within ninety days, the court declares the regulation invalid.[188] Under this procedure, which reflects the concern of the draftsmen of the Code over judicially awarded compensation,[189] the local government would never involuntarily exercise its eminent domain power. Legislation more sympathetic to landowner interests would preserve local government choice between invalidation and validation with compensation, yet retain the power of the court to order compensation if

---

184. Hagman, *supra* note 167, at 48-64, 119-21; *see* note 169 *supra*. At first blush, it may seem contradictory that the same commentators who favor compensable regulation in some form also object to inverse condemnation awards from the courts. This objection only reflects dissatisfaction with the typical all or nothing results under the judicial taking analysis: it fails to distribute the increased costs of modern land use regulation equitably between the landowner and the public. As preferable as legislative balancing may be, however, a landowner presently burdened by a confiscatory regulation cannot wait for the legislature to fashion a statutory remedy, so he brings an inverse condemnation action for the court to decide.

185. ALI MODEL LAND DEVELOPMENT CODE (1975).

186. *Id.* § 9-112(3).

187. *Id.* § 5-303(5). *See* Hagman, *supra* note 167, at 68-69, 107-08.

188. ALI MODEL LAND DEVELOPMENT CODE § 9-112(3) (1975).

189. Professor Bosselman, who opposed judicially awarded compensation, is the Associate Reporter for the Model Code. *See* F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 165.

necessary.[190]

Absent a statutory solution, the courts have continued to struggle with the inverse condemnation issue in land use controversies, with four cases reaching the Supreme Court of the United States since 1978.[191] The following sections will discuss those cases in the context of the approaches taken by the New York, California, and Florida courts to this problem.

B. *New York Cases*

In *Fred F. French Investing Co. v. City of New York*,[192] New York responded to the question of remedies for confiscatory land use regulation by narrowing the definition of *taking*. Rather than award damages in inverse condemnation, the New York Court of Appeals invalidated a challenged ordinance that rezoned a private parcel as a public park and thereby deprived the owners of all reasonable income or other private use of their property. The court followed Professor Sax's distinction[193] between a compensable appropriation of private resources by the government acting in its "enterprise" capacity, and an unconstitutional regulation that "amounts to a deprivation or frustration of property rights without due process of law,"[194] which it promulgates in its "arbitral" capacity.

> In the present case, while there was a significant diminution in the value of the property, there was no actual appropriation or taking of the parks by title or governmental occupation. . . . There was no physical invasion of the owner's property; nor was there an assumption by the city of the control or management of

190. *See* notes 279-87 and accompanying text *infra*.

191. San Diego Gas & Elec. Co. v. City of San Diego, 101 S. Ct. 1287 (1981); Agins v. City of Tiburon, 100 S. Ct. 2138 (1980); Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

192. 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, *cert. denied & appeal dismissed*, 429 U.S. 990 (1976).

193. *See* Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964):

> This analysis rests upon the distinction between the role of government as participant and the government as mediator in the process of competition among economic claims. The losses to individual property owners arising from government activity of the first type result in a benefit to a government enterprise; losses arising from the second type of activity are the result of government mediating conflicts between competing private economic claims and produces no benefit to any government enterprise.

Id. at 62.

194. 39 N.Y.2d at 594, 350 N.E.2d at 385, 385 N.Y.S.2d at 8.

> the parks. . . . Absent factors of governmental displacement of private ownership, occupation or management, there was no "taking" within the meaning of constitutional limitations . . . . There was, therefore, no right to compensation as for a taking in eminent domain.[195]

Because the zoning ordinance destroyed the economic value of the property, the court invalidated it on due process grounds, even though the ordinance provided for the severance and transferability of development rights (TDRs) to other parcels.[196] Although professing sensitivity to innovative land use controls, the court found these "floating" development rights ineffective in preventing the destruction of economic value because they were contingent upon further administrative approval and were not readily attachable to a receiving parcel under common ownership.[197]

In contrast, the New York court in *Penn Central Transportation Co. v. New York City*,[198] found no denial of due process when a landmark preservation statute prevented construction of an office tower over Grand Central Station but provided for TDRs. Penn Central asked the court to declare the statute unconstitutional and sought damages, claiming there was a "temporary taking" as long as the statute applied to the property. The court applied a due process analysis to reject the temporary taking claim,[199] thus maintaining its distinction between compensable eminent domain takings and unconstitutionally oppressive regulations. The challenged landmark regulation permitted continued productive use of the property as a railway terminal,[200] unlike the park zoning that pro-

---

195. *Id.* at 595, 350 N.E.2d at 386, 385 N.Y.S.2d at 9-10.

Adopting the *French* rationale, the Supreme Court of Oregon in Fifth Ave. Corp. v. Washington County, 282 Or. 591, 581 P.2d 50 (1978), rejected a landowner's inverse condemnation claim for planning or zoning that designated land for a public use unless: "(1) he is precluded from all economically feasible private uses pending eventual taking for public use; or (2) the designation results in such governmental intrusion as to inflict virtually irreversible damage." *Id.* at 614, 581 P.2d at 63.

196. "Development rights transfer breaks the linkage between particular land and its development potential by permitting the transfer of that potential, or 'development rights,' to land where greater density will not be objectionable." Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75, 85-86 (1973); *see* Costonis, *supra* note 46. *But see* Note, *The Unconstitutionality of Transferable Development Rights*, 84 YALE L.J. 1101 (1975).

197. 39 N.Y.2d at 597-600, 350 N.E.2d at 387-89, 385 N.Y.S.2d at 11-13.

198. 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd*, 438 U.S. 104 (1978).

199. *Id.* at 329, 366 N.E.2d at 1274, 397 N.Y.S.2d at 917; *cf.* Lomarch Corp. v. Mayor of Englewood, 51 N.J. 108, 237 A.2d 881 (1968) (compensation for temporary taking).

200. The court also imputed to the terminal earnings from Penn Central's adjacent

hibited any productive use of the *French* parcel.[201] And unlike the TDRs left in "legal limbo" in *French*, the TDRs for the terminal tract were transferable to numerous adjacent tracts also owned by Penn Central.[202] The court found no due process violation, because both the regulation permitting some productive use and the TDR substitution were reasonable; it is unclear, however, whether either feature alone would have sufficed to sustain the statute.[203]

Although the United States Supreme Court relied upon the same factors in affirming the *Penn Central* decision, it used a more traditional approach to takings instead of the New York due process analysis.[204] Not surprisingly, the Supreme Court expressly declined to "embrace the proposition that a 'taking' can never occur unless government has transferred physical control over a portion of a parcel."[205] That "proposition," of course, is the narrow definition of *taking* adopted by the New York court in *French:* an exercise of the eminent domain power entitling an aggrieved owner to

---

properties.

201. 42 N.Y.2d at 336, 366 N.E.2d at 1278, 397 N.Y.S.2d at 921.

202. *Id.*

203. If continued productive use of the rail terminal was insufficient alone to sustain the statute, then by treating the TDRs as "reasonable" compensation necessary to provide due process, the court in effect recognized the constitutionality of a compensable regulation technique.

> Development rights, once transferred, may not be equivalent in value to development rights on the original site. But that, alone, does not mean that the substitution of rights amounts to a deprivation of property without due process of law. Land use regulation often diminishes the value of the property to the landowner. Constitutional standards, however, are offended only when that diminution leaves the owner with no reasonable use of the property. The situation with transferable development rights is analogous. If the substitute rights received provide reasonable compensation for a landowner forced to relinquish development rights on a landmark site, there has been no deprivation of due process. The compensation need not be the "just" compensation required in eminent domain, for there has been no attempt to take property . . . .

Id. at 335, 366 N.E.2d at 1278, 397 N.Y.S.2d at 921 (citing *French* and Costonis, *supra* note 160, at 1061-70).

204. 438 U.S. 104 (1978). Rather than discuss whether government must ever pay compensation for police power regulation, the Court treated the TDRs as pre-existing rights rather than compensation: "[I]t is not literally accurate to say that they have been denied *all* use of even those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable . . . ." *Id.* at 137. Under this rationale, the Court could consider the TDRs in the taking analysis without acknowledging it was a net-after-compensation calculus: "While these rights may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation." *Id.; see* note 203 *supra.*

205. 438 U.S. at 123 n.25.

recover compensation in an inverse condemnation suit.[206] The two definitions of *taking* differ because the two courts use them for different purposes. For the New York court, the taking issue addresses only whether just compensation is due for an eminent domain condemnation; a separate due process analysis tests the regulation against the police power. For the Supreme Court, the taking issue determines only whether the challenged government action is close enough to the eminent domain end of the continuum to warrant judicial relief.[207] The New York court thus engages in two analyses, each with an assigned remedy, but the Supreme Court engages in only *one*—delineating the limit of incompensable police power without predicting the remedy.

C. *California Cases*

A series of California decisions almost culminated in presenting to the Supreme Court of the United States the question whether the fifth and fourteenth amendments require a state court to afford a remedy in inverse condemnation damages for an unconstitutional regulatory taking of property when the remedies of declaratory relief and mandamus are available.[208] Accepting the rationale offered by opponents of inverse condemnation in zoning controversies, the Supreme Court of California has taken the position that invalidation of the challenged regulation is the landowner's exclusive remedy.[209] These cases are essentially repetitions of the *French* and *Penn Central* controversies in New York, without the TDR compensation element.

In *HFH, Inc. v. Superior Court*,[210] the Supreme Court of California held that landowners had failed to state a cause of action in inverse condemnation by alleging that an ordinance downzoning their property to single-family residential use had so diminished its market value as to take it without just compensation. Holding insufficient the landowners' allegations of mere diminution in value, the court effectively invited subsequent inverse condemnation suits by declaring: "This case does not present, and we therefore do not decide, the question of entitlement to compensation in the event a zoning regulation forbade substantially *all* use of the

206. 39 N.Y.2d at 595, 350 N.E.2d at 386, 385 N.Y.S.2d at 9-10.

207. *See* notes 163-65 and accompanying text *supra*.

208. San Diego Gas & Elec. Co. v. City of San Diego, 101 S. Ct. 1287 (1981).

209. *See* Agins v. City of Tiburon, 24 Cal. 3d 266, 276, 598 P.2d 25, 31, 157 Cal. Rptr. 372, 377 (1979) (quoting Note, *supra* note 180, at 1450-51), *aff'd*, 100 S. Ct. 2138 (1980).

210. 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975).

land in question. We leave the question for another day."[211]

In *Eldridge v. City of Palo Alto*,[212] the California Court of Appeal, First District, held that two landowners alleging that zoning ordinances had denied them any substantial or reasonable use of their property had stated a cause of action in inverse condemnation.[213] One landowner conceded the validity of the ordinances,[214] which zoned his tract for "permanent open space" uses, including public parks, hiking trails, recreation purposes, and wildlife habitats.[215] The court rejected the other landowner's alternative prayer for a declaration that the ordinances were unconstitutional and invalid because arbitrary and unreasonable; instead, the court upheld them as valid exercises of the police power for which the landowner's only remedy was compensation in inverse condemnation.[216]

In *Agins v. City of Tiburon*,[217] the Supreme Court of California expressly disapproved of the *Eldridge* result and declared that inverse condemnation would not lie to remedy a zoning ordinance even if it forbade substantially all use of a tract, thus ostensibly reaching the issue left open in *HFH:*

> [A] landowner alleging that a zoning ordinance has deprived him of substantially all use of his land may attempt through declaratory relief or mandamus to invalidate the ordinance as excessive regulation in violation of the Fifth Amendment to the United States Constitution and article I, section 19, of the California Constitution. He may not, however, elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid. . . . To the extent that *Eldridge v.*

---

211. *Id.* at 518, 542 P.2d at 244, 125 Cal. Rptr. at 372 n.16.

212. 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976).

213. The court of appeals had originally decided *Eldridge*, 51 Cal. App. 3d 726, 124 Cal. Rptr. 547 (1975), before the supreme court decided *HFH*. The supreme court agreed to hear *Eldridge*, vacated it, and retransferred it to the court of appeals for reconsideration in light of *HFH*. *See Eldridge*, 57 Cal. App. 3d at 635-36, 129 Cal. Rptr. at 588-89 (Sims, J., dissenting). The court of appeals majority then reaffirmed its original position, relying on the issue left open in *HFH*. 57 Cal. App. 3d at 624, 129 Cal. Rptr. 581.

214. Objecting to the landowner's option not to seek declaratory relief, the dissenting justice insisted that by conceding the validity of the ordinance, the landowner had "stipulated himself out of court." 57 Cal. App. 3d at 638, 129 Cal. Rptr. at 590 (Sims, J., dissenting). *See* note 180 *supra*.

215. 57 Cal. App. 3d at 638, 129 Cal. Rptr. at 584.

216. *Id.* at 631, 129 Cal. Rptr. at 586. For a spirited attack on the *Eldridge* decision from the environmentalist point of view as well as a discussion of the California inverse condemnation cases, see Bozung, *Judicially Created Zoning with Compensation: California's Brief Experiment with Inverse Condemnation*, 10 ENVT'L L. 67 (1979).

217. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979).

City of Palo Alto (1976) 57 Cal.App.3d 613, 129 Cal.Rptr. 575, is contrary, it is expressly disapproved.[218]

In *Agins,* landowners sought both declaratory relief and $2 million in damages when the city abandoned a condemnation proceeding to acquire their land and enacted a zoning ordinance designating it "Residential Planned Development and Open Space Zone," which would permit up to five single-family dwellings.[219] Declaring that "a zoning ordinance may be unconstitutional and subject to invalidation only when its effect is to deprive the owner of substantially all reasonable use of his property,"[220] the court held that because the owners could still build up to five houses, the invalidation remedy was not available.[221] The dissent pointed out, however, that this "mere diminution" holding made dictum of the majority's inverse condemnation ban, because if the ordinance did not forbid substantially all use of the property, *Agins* was controlled by *HFH* and did not squarely present the issue left open in that decision.[222]

When the Supreme Court of the United States agreed to review the *Agins* case,[223] many commentators expected the Court to resolve the controversy over zoning and inverse condemnation.[224] The Court dashed those expectations, however, by merely affirming on the basis that there was no taking because the zoning ordinance permitted limited residential construction.[225] Implicitly

---

218. *Id.* at 273, 598 P.2d at 28, 157 Cal. Rptr. at 375.

219. *Id.* at 271, 598 P.2d at 27, 157 Cal. Rptr. at 374. Although procedurally the issue was whether the landowners' allegations of no remaining reasonable beneficial use were sufficient against demurrer, the court looked behind the complaint and took cognizance of possible uses under the ordinance. *Id.* at 277, 598 P.2d at 31, 157 Cal. Rptr. at 378; *see id.* at 280, 598 P.2d at 33, 157 Cal. Rptr. at 380 n.2 (Clark, J., dissenting). The *Agins* case, like *HFH* and *Eldridge* before it, asked only whether landowners had stated a cause of action in inverse condemnation; *San Diego,* in contrast, went to trial.

220. 24 Cal. 3d at 277, 598 P.2d at 31, 157 Cal. Rptr. at 378.

221. The court also rejected the landowners' argument that the city's abandoned eminent domain proceeding amounted to "precondemnation activities" demonstrating that the city intended the zoning ordinance to accomplish the same purpose. *Id.* at 277-78, 598 P.2d at 31, 157 Cal. Rptr. at 378. The court distinguished Klopping v. City of Whittier, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972), as involving only damages from unreasonable conduct and delay before condemnation, a circumstance absent in *Agins.*

222. 24 Cal. 3d at 282, 598 P.2d at 34, 157 Cal. Rptr. at 381 n.3 (Clark, J., dissenting).

223. Agins v. City of Tiburon, *prob. juris. noted,* 444 U.S. 1011 (Jan. 7, 1980).

224. *See, e.g.,* Payne, *California Downzoning Controversy to Reach the U.S. Supreme Court,* 9 REAL EST. L.J. 48 (1980); *Key Land Case Confronts Court: Issue Is Whether Town Must Pay Compensation for Zoning Change,* L.A. Daily J., Apr. 30, 1980, at 1, col. 3; *Time Ripe for Review of Tiburon, Professor Says,* L.A. Daily J., Jan. 18, 1980, at 3, col. 1.

225. Agins v. City of Tiburon, 100 S. Ct. 2138, 2142 (1980). This result led some commentators to wonder why the Court had bothered to hear the case at all. *See, e.g.,* Smith, *An Inverse Condemnation Puzzle: The Agins Case Lands in Limbo,* NAT'L L.J., Aug. 4,

agreeing with the dissenting justice below that *Agins* did not present the inverse condemnation issue, the Court said: "Because no taking has occurred, we need not consider whether a State may limit the remedies available to a person whose land has been taken without just compensation."[226] As in the *Penn Central* decision, the challenged police power regulation never crossed the Court's line for a taking, excusing the Court from prescribing a remedy.[227]

In the meantime, another case that apparently presented the remedy issue squarely was progressing through the California courts. In *San Diego Gas & Electric Co. v. City of San Diego*,[228] the California Court of Appeal, Fourth District, upheld a verdict for a utility company of over $3 million in inverse condemnation damages for property designated "open space" by the city's general plan and zoning ordinances. *San Diego* presented the unique circumstance of a tract suited only for industrial purposes; but because such use was incompatible with open space, the designation effectively denied any economic use of the property.[229] Although the utility company also sought a declaration that the regulation was unconstitutional and void, the court quickly dismissed the opportunity to find a due process violation, finding no evidence of improper notice or arbitrariness.[230] The *San Diego* case thus apparently presented the issue left open in *HFH* and *Agins:* Would inverse condemnation lie when an otherwise valid zoning restriction forbade substantially all use of the property?

When the Supreme Court of California later barred the inverse condemnation remedy in *Agins,* it remanded *San Diego* to the appellate court for reconsideration. Reversing its prior deci-

---

1980, at 52, col. 3.

226. 100 S. Ct. at 2143.

227. *See* 438 U.S. at 122. The landmark preservation law in *Penn Central* arguably crossed the "taking" line, however, if one assumes that TDR compensation saved it from invalidity. *See* note 204 *supra.*

228. 146 Cal. Rptr. 103 (Ct. App. 1978) (opinion withdrawn from publication; appears only in unofficial reporter).

229. The utility company presented expert witnesses who testified that the property, a coastal tract,

> could not be used for agriculture because of the soil's high salt content; it could not be used for residences because the land is in a flood plan [*sic*]; it could not be used economically for grazing; it could not be used for a golf course because of poor drainage. In short, the only possible use of the land was for industrial.

Id. at 113.

230. *Id.* at 114. By challenging the validity of the zoning, the utility company avoided the inconsistency problem pointed out in the *Eldridge* dissent. *See* note 214 *supra.* On the other hand, the company's consistency did not redeem the appellate court's inadequate analysis of the due process issue.

sion, the appellate court held that, although the utility company could seek only declaratory relief, its availability depended upon "disputed fact issues not covered by the trial court" concerning the alleged arbitrariness of the city's exercise of police power.[231] These issues, said the court, "can be dealt with anew should [appellant] elect to retry the case."[232] On appeal to the Supreme Court of the United States, this remark indicated to the majority of the Justices that the California court had "not decided whether any other remedy is available because it has not decided whether any taking in fact has occurred."[233] Because there was no final judgment or decree below, the Court found itself without jurisdiction and dismissed the appeal.

Nevertheless, the opinions filed in *San Diego* indicate that at least five Justices[234] were prepared to reject the California position and hold "that government action other than acquisition of title, occupancy, or physical invasion can be a 'taking,' and therefore a *de facto* exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property."[235] Dissenting from the Court's dismissal of the appeal, Justice Brennan reached the merits of the taking question and rejected the notion of the New York and California courts[236] that because zoning is based on the police power, a zoning regulation remains an uncompensable exercise of the police power, no matter how confiscatory:

> Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. . . .

---

231. San Diego Gas & Elec. Co. v. City of San Diego, No. 16277 (Cal. Ct. App., unpublished opinion filed June 26, 1979), *quoted in* 101 S. Ct. 1287, 1293 (1981).

232. *Id.*

233. 101 S. Ct. at 1294 (Blackmun, J., joined by Burger, C.J., White, Rehnquist, & Stevens, JJ.).

234. *See id.* at 1296 (Brennan, J., joined by Stewart, Marshall, & Powell, JJ., dissenting); *id.* at 1294 (Rehnquist, J., concurring) ("If I were satisfied that this appeal was from a 'final judgment or decree' . . . I would have little difficulty in agreeing with much of what is said in the dissenting opinion of JUSTICE BRENNAN."); *id.* at 1294 (Blackmun, J.) ("[T]he federal constitutional aspects of that issue [denial of a monetary remedy] are not to be cast aside lightly . . . .").

235. *Id.* at 1304 (Brennan, J., dissenting); *cf. Penn Central*, 438 U.S. at 123 n.25 (Justice Brennan similarly rejected the New York court's limited definition of "taking.").

236. 101 S. Ct. at 1302 n.14 (criticizing *Fred French* as "tampering" with *Pennsylvania Coal* opinion); *id.* at 1303 n.17 (finding California reading of *Pennsylvania Coal* "unpersuasive").

> [The city] implicitly posits the distinction that the government *intends* to take property through condemnation or physical invasion whereas it does not through police power regulations. . . . But "the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*."[237]

Justice Brennan cautioned, however, that if the regulatory taking is temporary and reversible, then the just compensation clause does not require the government to condemn the property and pay the owner its full market value. Rather, the court should order the government to pay "just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation."[238] This "temporary taking" solution recognizes that mere "[i]nvalidation unaccompanied by payment of damages would hardly compensate the landowner for any economic loss suffered during the time his property was taken."[239] Yet, once the court determines that relief is necessary, the government could decide whether to pay compensation and continue the regulation, or to revoke or amend it. Under Justice Brennan's proposal, the government would retain the option between various prospective remedies, eliminating the need for the courts to make a choice between them.

D. *Florida Cases*

The Florida courts have produced mixed but reconcilable results in inverse condemnation actions by landowners seeking compensation for property taken by land use regulations. One appellate court, consistent with the California view, has limited the remedy for confiscatory regulation to invalidation.[240] The Supreme Court of Florida, however, has recently declined to endorse that position.[241] The Florida court thus appears to be closer than the New York or California courts to the views of the Supreme Court of the United States evidenced in the *San Diego* opinions.

---

237. *Id.* at 1304 (quoting Hughes v. Washington, 389 U.S. 290, 298 (1967) (Stewart, J., concurring) (emphasis in original)).

238. *Id.* (footnote omitted).

239. *Id.* at 1305.

240. 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).

241. Graham v. Estuary Properties, Inc., 1981 FLA. L. WEEKLY 275 (Fla. Apr. 16, 1981); *see* notes 260-65 and accompanying text *infra*.

The Supreme Court of Florida has held that a landowner may not opt for compensation without also challenging the validity of the land use regulation on due process grounds. In *City of Miami v. Romer*,[242] the court denied compensation to a landowner who alleged that a city street setback ordinance had condemned a ten-foot strip of property, but who failed to challenge the ordinance as unrelated to the public health, safety, and general welfare. After the landowner's lessee constructed a building on the setback line and added an adjacent sidewalk occupying half the strip,[243] the city paved the remaining five feet next to the original street. By awarding the landowner damages for the entire ten-foot strip, both pavement and sidewalk, the trial court in effect compensated the landowner for the mere enactment of a zoning ordinance. The supreme court reversed and remanded because his pleadings had conceded its validity. The supreme court hinted broadly, however, that compensation would be proper if the trial court were to find that the city had taken the five-foot strip that it had paved.[244]

On a subsequent appeal,[245] the supreme court found that the landowner's amended complaint sufficiently alleged that the ordinance was an improper exercise of the police power. The court opined that if the trial court now found the ordinance valid, the only question would be whether the city had taken the strip by paving it; but if the court found the ordinance invalid, the question would be whether the deprivation of beneficial use was sufficient to require compensation to the landowner.[246] Although commentators cite this second *Romer* opinion as recognizing a right to compensation for an unconstitutional zoning ordinance,[247] one should note that mere invalidation was insufficient to restore the beneficial use of the property after the landowner had constructed his building on the setback line. *Romer* is thus more properly regarded as a case of governmental encroachment with largely irreversible consequences justifying compensation.[248]

Similarly, the District Court of Appeal, Third District, held in

242. 58 So. 2d 849 (Fla. 1952).

243. *Id.* at 850. The 99-year lease required the lessee to construct the building, with an increased rental if the lessee obtained city permission to build closer to the street than the setback line.

244. *Id.* at 852. Because the lessee had constructed the sidewalk for his own use, the court held that the city had not appropriated that portion. *Id.* at 850-51.

245. 73 So. 2d 285 (Fla. 1954).

246. *Id.* at 287.

247. *See* Comment, *supra* note 170, at 740; Note, *supra* note 180, at 1445 n.25.

248. *See* Costonis, *supra* note 160, at 1035.

Kasser v. Dade County[249] that a landowner could not seek damages in inverse condemnation for denial of his rezoning application while conceding the validity of the underlying ordinance. The court noted that the landowner could have either sought certiorari review of the denial resolution or challenged the constitutionality of the ordinance directly. But he could not maintain a compensation action by asserting "that the denial of rezoning was reasonable while simultaneously alleging that it was confiscatory."[250] If either of the suggested due process challenges had invalidated the regulation, "the County would then have had the option of rezoning the property or condemning it via its eminent domain authority."[251] *Kasser* thus illustrates a principal objection to inverse condemnation actions: because the option to condemn property should remain with the governmental entity, the landowner may not "choose" the compensation remedy by taking inconsistent positions on the validity of the ordinance.[252]

The "temporary taking" solution proposed by Justice Brennan in *San Diego,* however, meets this objection to inverse condemnation by preserving the government's prospective options. The "inconsistency" argument is a false issue when raised by those who seek to predict the remedy by postulating that eminent domain and the police power are distinct theories rather than a *Pennsylvania Coal* continuum.[253] Their insistence on linking a separate remedy to each of two distinct powers conveniently impales the landowner on a two-horned dilemma. If the landowner challenges the ordinance as an improper exercise of both powers, then he is inconsistently seeking compensation for a concededly invalid ordinance. But if he seeks only compensation in eminent domain, then he has inconsistently conceded the police power validity of the ordinance. Under the two-power model, the landowner's only consistent position is to seek invalidation on police power grounds and forget about compensation. The "inconsistency" lies not in the landowner's pleadings, but in the two-power model, created by reasoning backwards from the government's desire to control the available remedies. In contrast, Justice Brennan's proposal, based on the continuum model, would compensate the landowner for the temporary taking that has already occurred, yet would preserve the

249. 344 So. 2d 928 (Fla. 3d DCA 1977).
250. *Id.* at 929.
251. *Id.*
252. *See* note 180 and accompanying text *supra.*
253. *See* notes 163-67 and accompanying text *supra.*

government's choices between various prospective remedies.

Justice Brennan's proposal, however, may not be feasible when rescinding or amending the restriction will no longer restore the beneficial use of the landowner's property.[254] In *Askew v. Gables-By-The-Sea, Inc.*,[255] the state sold a tract of bay bottom to a developer but then revoked permission to dredge and fill. Because another necessary permit from the Army Corps of Engineers expired during the litigation that followed, the court ordered the state to allow the dredging for a specified period, to begin upon the developer's successful application for an extension of the Corps permit. When other state agencies joined in a successful effort to dissuade the Corps from approving the project, the court ordered the state to condemn the tract, finding that it had permanently destroyed the value of the bay bottom as private property.[256]

Unless the injury is one that declaratory relief cannot cure, as in *Romer* or *Gables-By-The-Sea,* Florida courts remain reluctant to award compensation for a confiscatory land use regulation, at least in zoning cases.[257] By upholding the dismissal of an inverse condemnation count in *Mailman Development Corp. v. City of Hollywood,*[258] the District Court of Appeal, Fourth District, adopted the same position as the California and New York courts: zoning is not an exercise of the eminent domain power requiring just compensation. In *Mailman,* a developer challenged an ordi-

---

254. *See* 101 S. Ct. at 1306-07.

255. 333 So. 2d 56 (Fla. 1st DCA 1976).

256. *Id.* at 61. Rarely does a permit denial cause permanent damage, since the court could restore the economic potential of the tract by ordering the agency to allow its development. But the *Gables-By-The-Sea* development required permission from two regulating entities, only one of which was "estopped" as the seller of the tract. The state's inequitable delay cost the developer a valuable right—federal permisson to dredge—which the Corps was not obliged to renew.

In contrast, the Second District found no inverse condemnation in Smith v. City of Clearwater, 383 So. 2d 681 (Fla. 2d DCA 1980), when local officials deliberately frustrated construction of high rise units on wetlands in Tampa Bay through the interaction of local mangrove setback lines, state development of regional impact (DRI) restrictions, and federal flood plain regulations. Thus, the city's challenged downzoning denied no beneficial use of the property because, as already regulated, it had virtually no beneficial uses. *Id.* at 684-85.

257. *See, e.g.*, City of Sanibel v. Goode, 372 So. 2d 181 (Fla. 2d DCA 1979) (arbitrary and unreasonable downzoning to residential of vacant parcel surrounded by commercial establishments held deprivation of only beneficial use; rezoning ordered); City of Hialeah v. Cama Corp., 360 So. 2d 1155 (Fla. 3d DCA 1978) ("confiscatory" refusal to upzone when substantial neighborhood changes made residential classification no longer fairly debatable; rezoning ordered). *See also* Dade County v. Florida Mining & Materials Corp., 364 So. 2d 31 (Fla. 3d DCA 1978) (reversing trial court's "confiscation" finding, but striking down variance denial as "discriminatory"; remedy issue thus not presented).

258. 286 So. 2d 614 (Fla. 4th DCA 1973).

nance downzoning the developer's tract to less than half its former density and sought a declaratory judgment, injunctive relief, and compensation in inverse condemnation. Rejecting the compensation claim, the court drew a "clear distinction" between the appropriation of private property and the regulation of its use:

> We hold that enactment of a zoning ordinance under the exercise of police power does not entitle the property owner to seek compensation for the taking of the property through inverse condemnation. . . . If the zoning ordinance as applied to the property involved is arbitrary, unreasonable, discriminatory or confiscatory (as appellant has alleged in other counts still pending before the trial court), the relief available to the property owner is a judicial determination that the ordinance is either invalid, or unenforceable as pertains to plaintiff's property.[259]

In the brief opinion generated by the interlocutory appeal, *Mailman* looks identical to *Agins* and *HFH:* beneficial uses apparently remained after the downzoning. As in those cases, a Florida court is unlikely to find a taking without a deprivation of substantially all beneficial use; unless it finds a taking, it need not reach the remedies issue.

A recent illustration of this standard for a taking is the decision by the Supreme Court of Florida in *Graham v. Estuary Properties, Inc.*[260] In that case, a county rejected a developer's plan to construct an "interceptor waterway" to replace the ecological functions of black mangroves that the developer planned to destroy in building a coastal development of 26,500 units. The county indicated, however, that the developer could apply for a lower density development of about 13,000 units that would not destroy the mangroves. On appeal by the developer, the District Court of Appeal, First District, found that the county's determination to preserve the mangroves rendered the property virtually worthless and ordered the county either to approve the development or to begin condemnation proceedings within thirty days.[261]

The supreme court reversed, rejecting the developer's argu-

---

259. *Id.* at 615; *cf.* Rhodes, *Compensating Police Power Takings: Chapter 78-85, Laws of Florida,* 52 FLA. B.J. 741 (1978) (criticizing *Mailman*'s "clear distinction" in light of compensable regulation).

260. 1981 FLA. L. WEEKLY 275 (Fla. Apr. 16, 1981).

261. Estuary Properties, Inc. v. Askew, 381 So. 2d 1126, 1139-41 (Fla. 1st DCA 1979). Although the First District's order gave the county a choice between alternative remedies, it did not give the county an opportunity to modify the restrictions. *See* note 286 and accompanying text *infra.*

ment that it could make no beneficial use of the property. "[M]erely because Estuary may be allowed to build a development only half the size of its original proposal"[262] did not establish a taking. Similarly, the county had not taken the property by disallowing the interceptor waterway, which would have increased the value of the property but adversely affected the surrounding wetlands.[263] The court was careful, however, to limit its holding to the particular facts of that case:

> We do not hold that any time the state requires a proposed development to be reduced by half it may do so without compensation to the owner. We do hold that, under the facts as found by the commission, the instant reduction is a valid exercise of the police power.[264]

This qualification necessarily limits the scope of the *Mailman* statement that invalidation is the only available remedy for a regulatory taking. Although the supreme court's remarks about compensation may seem gratuitous in a case in which it found no taking, the court has given landowners a far better signal than did the Supreme Court of California, which, also in a case with no taking, purported to ban compensation for regulatory takings altogether.[265]

E. *Florida Legislation*

In not adopting the position of the California and New York courts that state restrictions on land use are never compensable, the supreme court in *Estuary* avoided potential conflict both with the Supreme Court's apparent position in *San Diego* and with a recent legislative determination that such restrictions may result in compensation in certain circumstances.[266] The Florida Legislature amended the Land and Water Management Act[267] in 1978, too late to affect the litigation in the *Estuary* case.[268] Essentially a reme-

---

262. 1981 FLA. L. WEEKLY at 279.

263. *Id.* (citing Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972)). The finding that the proposed development would pollute the surrounding bays was a major factor in the supreme court's analysis and makes the *Estuary* case an ill-suited vehicle for litigating regulatory taking issues.

264. *Id.*

265. Agins v. City of Tiburon, 24 Cal. 3d 266, 273, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 375 (1979).

266. 1978 Fla. Laws ch. 78-85.

267. FLA. STAT. §§ 380.012-.25 (1977) (amended by 1978 Fla. Laws ch. 78-85).

268. 1981 FLA. L. WEEKLY at 276 n.1.

dies bill, this amendment provides for judicial determination of the taking issue in specified land use regulation controversies. Like Justice Brennan's proposal, the statute leaves the initial choice of remedies with the regulating entity after the court determines that the regulation is a taking, but it does not expressly provide compensation for any prior temporary taking. The statute does not apply to zoning ordinances and differs in other ways from the Model Land Development Code.

Interestingly, the remedies statute began as a compensable land use regulation proposal. Two different bills introduced in the 1976 Legislature[269] resulted from the report of a Florida Senate committee created to study the taking issue.[270] Both bills died in committee, as did successor proposals in 1977,[271] but in 1978 sponsors introduced in both houses a proposal essentially identical to the 1977 House Bill. House Bill 889[272] and the Committee Substitute for Senate Bill 261 differed significantly from their predecessor, however, by specifically exempting zoning regulations from the proposed legislation, which otherwise covered all state, county, municipal, and other local government land use regulations.[273]

Under the proposal, a landowner could challenge the validity of the regulation in the circuit court by establishing an economic loss resulting either from a diminution in fair market value or from deprivation of certain land use rights.[274] The governmental authority then would have the burden of proving that the regulation was a proper exercise of its police power, with the court required to weigh the public benefit against the landowner's detriment.[275] If the regulation was adjudicated valid but imposed on the landowner an "inordinate burden" (defined as the loss "occasioned by a regu-

269. FLA. S.B. 1270, 1976 Reg. Sess. (requiring modification, variance, or compensation for coastal construction setback regulations and for legislation affecting areas of critical concern) (introduced by Senator Lewis); FLA. H.B. 3810, 1976 Reg. Sess. (requiring regulatory agencies to compensate for, withdraw, or waive police power land use regulations, including zoning, found procedurally valid, when the public benefit outweighs the landowner's detriment) (introduced by Representatives Morgan, Bloom, T. Lewis, and others).

270. *See* FLORIDA SENATE SELECT COMM. ON PROPERTY RIGHTS AND LAND ACQUISITION, 1976 REG. SESS., FINAL COMM. REPORT ON THE "TAKING ISSUE" (1976); Rhodes, *supra* note 259, at 741-42.

271. FLA. S.B. 788, 1977 Reg. Sess. (coastal construction setback lines) (introduced by Senators Ware, Gallen, and Barron); FLA. H.B. 571, 1977 Reg. Sess. (land use regulations, including zoning) (introduced by Representatives Morgan, Bloom, and others).

272. FLA. H.B. 889, 1978 Reg. Sess.

273. FLA. C.S./S.B. 261, 1978 Reg. Sess. § 2(1).

274. *Id.* § 3.

275. *Id.*

lation imposed on a specified area of land to provide a benefit to the public outside that area"[276]), then the court could direct the governmental authority to elect to: "(1) Compensate the landowner for the loss sustained; (2) Withdraw the regulation; (3) Waive the regulation as to that parcel of land; or (4) Modify the regulation to remove the inordinate burden."[277] If the governmental authority chose compensation, the court would determine the amount of the loss, less any enhancement in land value attributable to governmental action.[278]

As introduced, these bills were clearly proposals for compensable regulation, because the compensation remedy was triggered not by a "taking" that deprived the landowner of all beneficial use, but by a police-power distribution of public benefits beyond the regulated area. Like the Model Land Development Code, the proposal retained the regulating entity's control over its eminent domain power, since no provision authorized the court to order compensation.[279] Unlike the Model Code, the proposal exempted zoning ordinances, and it rebuttably presumed the preregulation fair market value to be the assessed value of the property.[280]

As revised and passed by the legislature,[281] however, the statute does not provide for partial compensable regulation. Rather, it gives the regulating entity the choice between alternative remedies in certain taking controversies. Although the revisions broadened the class of persons with standing to seek review from "landowners" to any persons "substantially affected," only land use regulations under five designated chapters of the Florida Statutes remained under the revised version.[282] The statute confines the

276. *Id.* § 2(3).

277. *Id.* § 4.

278. *Id.* § 5. By calculating the compensation net after regulatory enhancement, the proposal would recapture governmental "windfalls" not already taxed or assessed to the landowner. *See generally* D. HAGMAN & D. MISCZYNSKI, WINDFALLS FOR WIPEOUTS (1978).

279. ALI MODEL LAND DEVELOPMENT CODE § 9-112(3) (1975); *see* notes 185-90 and accompanying text *supra*. The failure expressly to authorize compensation without the agency's consent is deceptive, however, since the proposal's alternative remedies were cumulative with others provided by law. FLA. C.S./S.B. 261, 1978 Reg. Sess. § 8. Indeed, a state's attempt to bar the just compensation remedy altogether would probably be unconstitutional, as the *San Diego* opinions indicate.

280. FLA. C.S./S.B. 261, 1978 Reg. Sess. § 5. The assessed value provision would discourage the use of other regulations such as zoning to lower property values, thereby reducing the compensation.

281. 1978 Fla. Laws ch. 78-85, §§ 1-6 (codified at FLA. STAT. §§ 161.212, 253.763, 373.617, 380.085, 403.90 (1979)).

282. Beach and Shore Preservation, FLA. STAT. §§ 161.011-.45 (1979); Public Lands and Property, *id.* §§ 253.001-.785; Water Resources Act, *id.* §§ 373.012-.617; Land and Water

circuit court's review to determining whether the challenged action by the regulatory agency "is an unreasonable exercise of the state's police power constituting a taking without just compensation."[283] If the court finds a taking, it remands the matter to the agency, which within a reasonable time must:

> (1) Agree to issue the permit; or
>
> (2) Agree to pay appropriate monetary damages, provided however, in determining the amount of compensation to be paid, consideration shall be given by the court to any enhancement to the value of the land attributable to governmental action; or
>
> (3) Agree to modify its decision to avoid an unreasonable exercise of police power.[284]

If the agency chooses an alternative that is a reasonable exercise of the police power, then the court approves it; if the agency fails to propose a reasonable exercise of the police power within ninety days, however, the court may order the agency to perform one of the three listed alternatives.[285]

The substitution of the "taking without just compensation" standard for the "inordinate burden" standard effectively writes compensable regulation out of the statute. If one assumes that the legislature intended to incorporate judicial "taking" standards, then only a deprivation of substantially all beneficial use will now trigger the possibility of compensation. On the other hand, the opportunity for the courts to remand the regulation to the agency for modification, rather than make the harsh choice between no compensation, invalidation, and full compensation, may make the courts less reluctant to find "takings" in land use controversies. The statute permits the court to defer formulation of the particular remedy to the agency, assuming that unreasonable agency officials do not trap the landowner on a "treadmill" of repeated permit denials without constructive counter-proposals.[286] Unlike the Model Land Development Code, the Florida statute deters such

---

Management, *id.* §§ 380.012-.25; Environmental Control, *id.* § 403.011-.90.

283. 1978 Fla. Laws ch. 78-85 § 2.

284. *Id.* § 3.

285. *Id.* § 4.

286. *See Estuary*, 381 So. 2d at 1137. This potential for "treadmill" abuse may be why the First District did not give the agency the third statutory option of modifying its action on the requested permit: "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." *Id. See also* FLA. STAT. § 380.08(3) (1979) (requiring agencies to specify changes in development proposal necessary for agency approval).

abuse by authorizing the court to order compensation if the agency fails to respond with a reasonable police power regulation.[287]

Although the Florida remedies statute does not govern zoning ordinances, it does parallel the response of the courts in "confiscatory" zoning controversies: the regulating entity should retain the choice between condemnation and rezoning the property. Because the *San Diego* and *Estuary* opinions cast considerable doubt on the continued validity of *Mailman,* the Florida courts should now sustain inverse condemnation counts past the pleading stage and permit landowners to go forward with proof of deprivation of substantially all beneficial use of the property. Assuming that the landowner can prove such a deprivation, which would be rare in a zoning case, the proper judicial response would be a remand to the zoning authority to choose an appropriate remedy. It remains an open question whether the court, without statutory authority, could order compensation in the event of abusive delays indicating a governmental purpose to appropriate the property for public use under the guise of a zoning ordinance. Lesser deprivations of beneficial use will remain uncompensable until the legislature adopts a compensable regulation plan applicable to zoning. If the limited scope of the Florida Legislature's most recent effort is any guide, such a development is unlikely in the near future.

---

287. *Compare* ALI MODEL LAND DEVELOPMENT CODE § 9-112(3) (1975) *with* 1978 Fla. Laws ch. 78-85, § 4.

The Florida statute thus gives the agency one "free" opportunity to regulate unconstitutionally before it runs the risk of compensation. One commentator advocating injunctive relief rather than compensation to deter the treadmill effect has suggested that the answer is to limit the agency's opportunities to impose new invalid restrictions:

> Acceptance of the principle that in some cases compensation must be paid for regulation would have much less utility than would acceptance of the idea that municipalities do not get more than one chance to be wrong about the constitutionality of their land use regulations. If more state courts would accept the concept that the price municipalities must pay for invalid regulation is not compensation but judicial protection for the construction of the development forbidden by the regulations, then local councils and zoning officials might be more hesitant to risk regulations of questionable validity.

Smith, *supra* note 225, at 54, col. 1. The Florida statute also authorizes the court to order issuance of the permit if the agency's second attempt does not produce a valid police-power regulation. 1978 Fla. Laws ch. 78-85, §§ 3-4.

For a fuller discussion of chapter 78-85, see Rhodes, *supra* note 259.