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Land Use Controls

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The authors examine recent decisions in land use law during the survey period. The areas considered include: inverse condemnation; lake ownership under the Marketable Record Title Act; developments of regional impact; standing requirements to challenge land use; the continued vitality of the fairly debatable rule; and other developments dealing with zoning.

I. ZONING 1117
A. *Standing Requirements* 1117
B. *The Fairly Debatable Rule* 1122
C. *Zoning Objectives* 1125
D. *Discriminatory Zoning Effects* 1126
II. DEVELOPMENTS OF REGIONAL IMPACT 1131
III. INVERSE CONDEMNATION 1133
IV. LAKE OWNERSHIP 1134

I. ZONING

A. *Standing Requirements*

In *Dugan v. City of Jacksonville*,[1] a property owner ultimately was granted relief from a zoning ordinance which he claimed was unreasonable, discriminatory, arbitrary and unconstitutional.[2] The District Court of Appeal, First District, found that uncontradicted evidence showed that the appellant's property was no longer reasonably suitable for single-family residential purposes and was not even suitable for multi-family usage.[3] In addition, it was not "fairly debatable" that the subject zoning classification promoted public health, safety, morals or general welfare.[4] The court, therefore, held the zoning ordinance unconstitutional in its application and remanded the case with instructions to enjoin the imposition of any zoning classification more restrictive than commercial.

Of particular interest in this case is an issue the First District

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1. 343 So. 2d 103 (Fla. 1st Dist. 1977).
2. *Id.* at 104.
3. *Id.* at 105.
4. *Id.*

felt "constrained to comment upon."[5] Appellee city contended it was necessary for the property owner to show peculiar injury to himself resulting from the surrounding uses authorized by the existing zoning, that is, injury different from that suffered by other neighboring property owners. The city argued that such peculiar damage was a requirement of standing to challenge the existing zoning. The First District rejected the city's argument on the basis that the relief sought was not from a violation of an ordinance by another party, but from the imposition of an existing zoning classification upon the property owner. The court concluded that the plaintiff-appellant need only be adversely affected by the existing zoning classification in order to maintain standing to challenge. The court specifically determined that "[t]he fact that other neighboring property owners are also adversely affected by the same conditions which adversely affect a complaining property owner will not defeat the latter's right to relief if the evidence reveals invalidity of the ordinance in general or in its application to him."[6]

Standing requirements for challenging land use decisions provide a fertile area for legal imagination. The Supreme Court of Florida attempted to unravel the disparate common law requirements in *Renard v. Dade County*[7] by establishing three categories of challenges based on the nature of the governmental action at issue.

The first *Renard* category involves a challenge to zoning ordinances alleged to have been improperly enacted contrary to applicable procedural rules. With respect to standing to attack an improperly enacted ordinance, the court simply stated: "Any affected resident, citizen or property owner of the governmental unit in question has standing to challenge such an ordinance."[8] The court did not define the term "affected," implicitly acknowledging the susceptibility of such ordinances to procedural challenges.[9]

A second standing criterion offered by the court in *Renard* applies to validly enacted ordinances. To attack the substantive validity of an ordinance, such as a change in land use classification[10] or

5. *Id.* at 106.

6. *Id.*

7. 261 So. 2d 832 (Fla. 1972).

8. *Id.* at 838.

9. *See* Upper Keys Citizens' Ass'n v. Wedel, 341 So. 2d 1062 (Fla. 3d Dist. 1977). Standing, however, is conferred *"only* for the above limited purpose of testing the validity of the enactment itself." *Id.* at 1064 (emphasis added).

10. The "adversely affected" standing requirement applies to those challenging a zoning decision that changes land use classifications. The challenged change may be effectuated by a rezoning ordinance or resolution, Hartnett v. Austin, 93 So. 2d 86 (Fla. 1956), or by a variance granting a nonconforming use, Friedland v. City of Hollywood, 130 So. 2d 306 (Fla.

the imposition of an existing classification, a party must show that he is aggrieved or adversely affected, the two standards being synonymous.[11] The court defined an aggrieved or adversely affected party as one

> who has a legally recognizable interest which is or will be affected by the action of the zoning authority in question. The interest may be one shared in common with a number of other members of the community as where an entire neighborhood is affected, but not every resident and property owner of a municipality can, as a general rule, claim such an interest. An individual having standing must have a definite interest exceeding the general interest in community good share [sic] in common with all citizens.[12]

To be adversely affected according to the *Renard* test, a person in the posture of the *Dugan* plaintiff must show an interest exceeding in degree, although not necessarily in kind, that of the general community. In determining the sufficiency of interest, the court in *Renard* suggested that courts consider:

> the proximity of his property to the property to be zoned or rezoned, the character of the neighborhood, including the existence of common restrictive covenants and setback requirements, and the type of change proposed . . . . The fact that a person is among those entitled to receive notice under the zoning ordinance is a factor to be considered on the question of standing to challenge the proposed zoning action.[13]

The third *Renard* criterion involves alleged violations of a zoning ordinance, such as administrative action relating to special exceptions and variances. In such cases, a complainant "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."[14]

2d Dist. 1961); Elwyn v. City of Miami, 113 So. 2d 849 (Fla. 3d Dist. 1959). Prior to *Renard*, two district courts of appeal had applied the "special injury" rule to challenges to a rezoning decision. Florida Palm-Aire Corp. v. Delvin, 230 So. 2d 26 (Fla. 4th Dist. 1969), *appeal dismissed*, 234 So. 2d 357 (Fla. 1970)(per curiam); Janko v. City of Hialeah, 212 So. 2d 800 (Fla. 3d Dist. 1968).

11. The terms "aggrieved" and "adversely affected" were equated since the court could find no reason for a distinction in standing requirements based on whether the case originated in the court system or as an appeal to a zoning board, where such boards exist. 261 So. 2d at 837. In addition, standing criteria are the same for declaratory judgments or injunctions as for a request of certiorari regarding a zoning appeals board determination. *Id.* at n.12.

12. *Id.* at 837.

13. *Id.*

14. Boucher v. Novotny, 102 So. 2d 132, 135 (Fla. 1958). In *Boucher*, plaintiffs alleged that the zoning violation would depreciate their own land value and the land values of other

Special injury appears to be assessed by the courts based on the proximity of the plaintiff's property to the defendant's property. In *Boucher v. Novotny*,[15] plaintiff's home was across the street from and facing defendant's property. Such proximity was deemed insufficient to show special injury.[16] Where lands were adjoining, however, plaintiff has been able to prove a special injury.[17]

Although the courts since *Renard* have consistently granted standing to adjoining homeowners under the special injury rule, neighboring businesses have not been able successfully to assert loss of business as special injury.[18] Moreover, an allegation that a variance deprives a business of the opportunity to obtain federally sponsored flood insurance was deemed insufficient to show special injury.[19]

Notwithstanding *Renard*, the County and Municipal Planning for Future Development Act[20] provides a less stringent standard for challenges to administrative action. This legislation authorizes local governments to create boards of adjustment empowered to hear challenges to decisions made by administrative officials relating to special exceptions and variances.[21] Appeals to a board of adjustment may be taken by "any person aggrieved . . . by any decision of an administrative official under any zoning ordinance."[22] Any person

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property owners. They therefore failed to show an injury different in kind from the community. The Supreme Court of Florida affirmed the dismissal of plaintiffs' cause of action because "the complaint failed to present factual allegations that would sustain the granting of the relief requested." *Id.* at 137. Of interest is the fact that in *Renard* the supreme court reconsidered its decision in *Boucher:*

> The *Boucher* rule requiring special damages still covers this type of suit. However, in the twenty years since the *Boucher* decision, changed conditions, including increased population growth and density, require a more lenient application of that rule. The facts of the *Boucher* case, if presented today, would probably be sufficient to show special damages.

261 So. 2d at 837-38.

15. 102 So. 2d 132 (Fla. 1958).

16. But in a case where the plaintiff homeowner lived across a waterway from the defendant's property the court held that there was a special injury because defendant's action "would build a 'chinese wall' across the waterway from the [plaintiff's] property, thereby, obstructing their view and possibly causing delay in recession of storm waters which could aggravate the risk of flooding the home of the plaintiff." State v. Sailboat Key, Inc., 306 So. 2d 616, 618 (Fla. 3d Dist. 1974).

17. Carroll v. City of West Palm Beach, 276 So. 2d 491 (Fla. 4th Dist. 1973).

18. Skaggs-Albertson's Properties, Inc. v. Michels Belleair Bluffs Pharmacy, Inc., 332 So. 2d 113, 116 (Fla. 2d Dist. 1976); *cf.* S.A. Lynch Inv. Corp. v. City of Miami, 151 So. 2d 858 (Fla. 3d Dist.), *cert denied*, 155 So. 2d 695 (Fla. 1963) (allegation of loss of desirability and value of plaintiff's facilities insufficient to prove special damages).

19. Jack Eckerd Corp. v. Michels Island Village Pharmacy, Inc. 322 So. 2d 57 (Fla. 2d Dist. 1975).

20. FLA. STAT. §§ 163.160-.3211 (1977).

21. *Id.* §§ 163.220, .225.

22. *Id.* § 163.235.

aggrieved by a decision of the board of adjustment may then appeal to the appropriate circuit court for judicial relief by trial de novo or by petition for writ of certiorari.[23] Hence, in contrast to case law which requires special injury as a condition to challenging invalid administrative implementation of an ordinance, the County and Municipal Planning for Future Development Act merely requires that the challenger be aggrieved.

The *Renard* rules should come under renewed scrutiny with the implementation of the Local Government Comprehensive Planning Act of 1975 (LGCPA).[24] By July 1, 1979, every county and municipality must adopt a comprehensive land use plan.[25] Of particular significance is the legislative mandate that following the adoption of a comprehensive plan, "all developments undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by" the plan must be consistent with the plan.[26] Any land development regulations must also be consistent with the adopted comprehensive plan.[27] In addition, the legislature enacted a statement of intent that "adopted comprehensive plans or elements thereof shall be implemented, in part, by the adoption and enforcement of appropriate local regulations on the development of lands and waters within an area."[28]

Standing requirements for challenging local land use decisions are not provided in the LGCPA. However, legislative establishment of a firm legal basis for the land use plan will prompt reconsideration and perhaps reinterpretation of the *Renard* rules. In accordance with *Renard,* a challenge to a rezoning decision, for example, could be initiated by an adversely affected person. With the implementation of the LGCPA, a number of localities will include authorized land use and density criteria in their plans.[29] As a result, the basic legislative decision regarding land use traditionally reflected in the zoning ordinance will be incorporated in the land use plan and an adversely affected person, following *Renard* guidelines, could challenge the substantive land use decisions included in such a plan.

Once the land use plan is adopted, all implementing action must be consistent with the plan, including zoning and subdivision regulations. If such regulatory implementation measures must con-

23. *Id.* § 163.250.

24. *Id.* §§ 163.3161-.3211.

25. *Id.* §§ 163.3167(2), .3177(6)(a).

26. *Id.* § 163.3194(1).

27. Land development regulations include "zoning, subdivision, building and construction or other regulations controlling the development of land." *Id.* § 163.3194(2)(b).

28. *Id.* § 163.3201.

29. *Id.* § 163.3177(6)(a).

form with the plan, it is arguable that these measures are merely administrative. *Renard* requires a showing of a special injury in a challenge to such administrative action. Following this reasoning, a plaintiff alleging that a rezoning is inconsistent with an adopted land use plan would have to show special injury. On the other hand, a complainant might argue that failure of the local government to properly amend the land use plan, as a condition precedent to granting a rezoning, constitutes noncompliance with the procedural requirements of the LGCPA. Under this argument, any affected resident, citizen or taxpayer would have standing to bring such a challenge. A plaintiff's standing to challenge a land use plan may, therefore, depend upon how he frames his complaint.

It is apparent from this brief discussion that the Local Government Comprehensive Planning Act of 1975 is likely to stimulate renewed interest in standing requirements for land use challenges. Under the LGCPA, the land use plan is binding and regulatory measures are simply implementing measures. This significant modification of the renewable planning-regulatory relationship may demand a concomitant modification of traditional rules of standing to challenge land use decisions.

B. *The Fairly Debatable Rule*

In *Dade County v. Yumbo*,[30] the District Court of Appeal, Third District, stated the appropriate evidentiary standard to be applied in judicial review of a zoning body's administrative actions. In reviewing the Dade County Board of County Commissioners' refusal to grant a rezoning, the trial court had applied the substantial competent evidence standard. The appellate court reversed, holding that in "cases involving Dade County zoning actions, which are universally considered administrative in nature, the trial court shall employ the fairly debatable rule."[31]

Appellee-Yumbo, the owner of a 400 acre tract located in unincorporated Dade County between a military air base and a bay, petitioned the County Commission for a rezoning of its property to permit residential and business uses. Rezoning would have necessitated a change of district boundaries. The natural aspects of the tract, however, would have been preserved by putting the housing units on stilts.[32]

Relying on recommendations of the county planning depart-

30. 348 So. 2d 392 (Fla. 3d Dist. 1977).
31. *Id.* at 394.
32. *Id.* at 393.

ment, the commissioners denied the application for rezoning. Reasons for the denial included: direct conflict between the proposed uses and the master development plan, overflights of the land stemming from its proximity to the air base and insufficient public facilities to support the proposed development.[33]

Granting Yumbo's petition for writ of certiorari, the trial court found that the refusal of rezoning was not supported by substantial competent evidence.[34] The court's application of that evidentiary standard was a departure from the commonly applied and long recognized fairly debatable doctrine.

The fairly debatable rule requires that a zoning regulation be upheld if there exists a fairly debatable substantial relationship to the public welfare.[35] First formulated in the landmark decision of *Village of Euclid v. Ambler Realty Co.*,[36] the doctrine places on the challenger the onerous burden of showing that the challenged regulation is not fairly debatable. Minimally, the dispute as to the ordinance must be "on grounds that make sense."[37] A fairly debatable regulation is one based on reason or logical deduction. The substantial competent evidence rule, on the other hand, places a greater burden on the zoning body to justify its action.

The trial court in *Yumbo* held that the fairly debatable rule had been abrogated by recent cases, notably *Baker v. Metropolitan Dade County*.[38] The theory behind the trial court's decision was that zoning actions previously considered administrative in nature had been recharacterized by the courts as quasi-judicial, thereby compelling use of the substantial competent evidence standard. In *Baker*, the District Court of Appeal, Third District, had held that the zoning authority's use of a resolution as a means for denying a request for rezoning was quasi-judicial in nature.[39]

In *Yumbo*, the Third District explained that cases such as *Baker* had not dealt with the evidentiary standard applicable to review of zoning actions but rather with the procedure or method utilized to seek judicial review.[40] Until 1966, the appropriate method of judicial review of zoning actions was determined by reference to whether the action was administrative or quasi-judicial in nature.

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33. *Id.*
34. *Id.*
35. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
36. *Id.*
37. City of Miami Beach v. Lachman, 71 So. 2d 148, 152 (Fla. 1953).
38. 237 So. 2d 201 (Fla. 3d Dist. 1970).
39. *Id.* at 202. *See also* Dade County v. Marca, 326 So. 2d 183 (Fla. 1976); Centex Homes Corp. v. Metropolitan Dade County, 318 So. 2d 149 (Fla. 3d Dist. 1975).
40. 348 So. 2d at 393.

Zoning actions that were administrative in nature were subject to direct attack by equitable proceedings; on the other hand, quasi-judicial orders were reviewable by certiorari.[41] Then, in *Dade County v. Metro Improvement Corp.*,[42] the District Court of Appeal, Third District, held that the sole method of review of a zoning decision of the Dade County Board of County Commissioners was by certiorari.

Requests for rezoning traditionally have been considered as administrative actions. In *Baker*, however the Third District, while discussing the proper method of review of a request for rezoning, stated that the Commission's utilization of a resolution as a means of denying a request for rezoning was quasi-judicial in nature.[43] Hence, it appeared from *Baker* that zoning matters previously considered administrative in nature had been recategorized as quasi-judicial.

Recognizing this as a logical interpretation of *Baker*, the court explained that it had not abandoned the fairly debatable rule.[44] The Third District cited language in *Baker*[45] and cases decided subsequent to *Baker*[46] which indicated that the fairly debatable rule had not been abandoned in Dade County zoning actions.

The Third District also found error in the trial court's determination that a navigational easement and a taking had resulted from the rezoning.[47] The court found unquestionable "the incompatibility of residential development in close proximity to an airport."[48] The decision, however, did not foreclose the appellee from obtaining relief by way of inverse condemnation.[49]

The court found it unnecessary to rule upon the validity of the master zoning plan as it affected appellee's property.[50] The court did indicate that to be successful an owner would have to show that his property could not be put to a "reasonable use compatible with the master plan."[51]

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41. *Id.* at 393-94.

42. 190 So. 2d 202 (Fla. 3d Dist. 1966).

43. 237 So. 2d at 202.

44. 348 So. 2d at 394.

45. "The latter zoning is, at the very least, fairly debatable, and as such should be sustained." 237 So. 2d at 202.

46. *See, e.g.*, Renard v. Dade County, 261 So. 2d 832 (Fla. 1972); Marca v. Dade County, 332 So. 2d 142 (Fla. 3d Dist. 1976); Metropolitan Dade County v. Fletcher, 311 So. 2d 738 (Fla. 3d Dist. 1975).

47. 348 So. 2d at 394.

48. *Id.*

49. *Id.* at 395.

50. *Id.*

51. *Id.*

C. *Zoning Objectives*

Moviematic Industries Corp. v. Board of County Commissioners[52] concerned the validity of a rezoning resolution for the protection of the affected area's fresh water system and natural ecological systems. The two fold challenge asserted that the resolution did not bear a reasonable relationship to the public health, safety, morals and welfare, and constituted an impermissible taking of real property.

Appellee had imposed a building moratorium in an unincorporated area of Dade County to allow a comprehensive study directed to the protection of the natural ecological systems and fresh water supply in the affected area. Following the study and a public hearing, appellee adopted a resolution that terminated appellant's previously granted special permit for business airport uses and rezoned its property from heavy industrial use to single family residence. The trial court denied appellant's petition for a writ of certiorari.

Affirming the trial court's decision, the District Court of Appeal, Third District, first considered whether preservation of adequate drinking water supplies and natural ecological systems are valid zoning objectives.[53] The court recognized the established rule that zoning regulations reasonably related to the preservation of essential governmental services, such as water supply, are valid.[54]

More notable was the court's recognition that the preservation of existing ecological systems is a valid zoning objective.[55] Zoning regulations that tend to preserve the residential or historical character of a neighborhood have long been recognized as valid.[56] Zoning measures designed to enhance the aesthetic appeal of a community have also been recognized as valid exercises of the police power.[57] If these are legitimate zoning objectives, the court concluded, "then certainly the irreversible effect on the area's ecological balance as the result of urban development can be and should be considered and reflected in zoning codes."[58]

The court announced that recognition of ecological considerations as legitimate concerns of zoning regulations was long overdue

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52. 349 So. 2d 667 (Fla. 3d Dist. 1977).

53. *Id.* at 669.

54. *See* R. ANDERSON, AMERICAN LAW OF ZONING § 7.26 (2d ed. 1968).

55. 349 So. 2d at 669.

56. *See, e.g.*, Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975); Sunad, Inc. v. City of Sarasota, 122 So. 2d 611 (Fla. 1960).

57. *See, e.g.*, Merritt v. Peters, 65 So. 2d 861 (Fla. 1953); City of Miami Beach v. Ocean & Inland Co., 147 Fla. 480, 3 So. 2d 364 (1941); City of Coral Gables v. Wood, 305 So. 2d 201 (Fla. 3d Dist. 1974).

58. 349 So. 2d at 669.

in Florida.[59] Noting that other jurisdictions had accepted ecological objectives as appropriate zoning considerations, the court quoted extensively from a New York decision, *Nattin Realty, Inc. v. Ludewig*.[60]

> Respecting ecology as a new factor, it appears that the time has come—if, indeed, it has not already irretrievably passed—for the courts . . . to take "ecological notice" in zoning matters.
>
> . . . .
>
> The court is not unmindful that zoning changes prompted by such environmental considerations may appreciably limit the uses and profitability of land; yet if both factors were to be placed upon the scales, the *pro bono publico* considerations must prevail. If there is substantial evidence sustaining the muncipality's determination to rezone because of ecology, the court should not void such legislative determination.

The court then reviewed the evidence presented to the commission and concluded that it substantiated the county's position that the resolution was reasonably related to the public health and welfare and would confer a public benefit.[61]

The court further held that appellant had not shown the resolution to be an unlawful taking of property. Appellant had failed to present sufficient evidence demonstrating its property could not be put to any reasonable use compatible with the rezoning. At best, the appellant had shown that the rezoning had resulted in a reduction of the property's market value. Noting that the appellant had owned the property for over ten years without taking concrete steps toward developing it, the court left open the possibility that compensation would be possible if appellant, after taking positive steps to develop its property, became deprived of the beneficial use of the property.[62]

D. *Discriminatory Zoning Effects*

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[63] the Supreme Court of the United States established a standard for determining whether a municipality's decision to deny a rezoning request is unconstitutionally discriminatory. In order to build racially integrated low and moderate income housing, Metro-

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59. *Id.*

60. 67 Misc. 2d 828, 324 N.Y.S.2d 668, 672 (Sup. Ct. 1971).

61. 349 So. 2d at 670.

62. *Id.* at 671.

63. 429 U.S. 252 (1977), *rev'g* 517 F.2d 409 (7th Cir. 1975), *rev'g* 373 F. Supp. 208 (N.D. Ill. 1974).

politan Housing Development Corporation (MHDC) contracted to purchase a tract within the boundaries of petitioner-village. The purchase was contingent upon securing rezoning and federal housing assistance. Accordingly, MHDC applied to the village for the rezoning from single family to multiple family (R-5) classification. Although the fact that the project probably would be racially integrated was discussed, opponents of the rezoning stressed two arguments: first, the area had always been zoned single family and the village citizens had purchased in reliance thereof; and second, the village apartment policy only permitted R-5 zoning to serve as a buffer between single family and commercial or manufacturing districts, none of which bordered the proposed location. The village denied rezoning.

MHDC and three black individuals sought declaratory and injunctive relief, alleging violations of the equal protection clause of the fourteenth amendment and the Fair Housing Act of 1968.[64] The district court held that the village rezoning denial was motivated by a "legitimate desire to protect property values and the integrity of the village's zoning plan."[65]

Although approving the district court's finding that the village was not motivated by racial discrimination, a divided Court of Appeals for the Seventh Circuit reversed, finding that the "ultimate effect" of the village's decision was racially discriminatory in that it would disproportionately affect blacks.[66]

The Supreme Court reversed and held that MHDC had standing to bring the action but failed to carry the burden of proving that racially discriminatory intent or purpose was a motivating factor in the rezoning decision. The Court concluded that MHDC had met the constitutional standing requirements by showing an injury which was fairly traceable to the denial of rezoning and capable of redress if injunctive relief were granted.[67] Despite the contingency provisions in its contract, MHDC suffered economic injury, based upon expenditures made on plans for the housing project and studies submitted in support of its rezoning petition, and noneconomic

64. 42 U.S.C. §§ 3601-19 (Supp. IV 1974).

65. 373 F. Supp. at 211.

66. 517 F.2d at 409.

67. In Warth v. Seldin, 422 U.S. 490 (1975), the Court emphasized that "a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the court's intervention." *Id.* at 508. However, the injury may be indirect, United States v. SCRAP, 412 U.S. 669, 688 (1973), as long as it is an "injury that fairly can be traced to the challenged action of the defendant." Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41 (1976).

injury,[68] based upon the defeat of its objective to provide suitable low cost housing.[69] The denial of rezoning by the village "stands as an absolute barrier to constructing the housing."[70]

There is no doubt that MHDC's economic and noneconomic injury gave it standing to challenge an arbitrary or irrational zoning action. The heart of the claim, however, was racial discrimination, not arbitrary zoning by the village. The Court determined that it was unnecessary to decide whether MHDC, a corporation with no racial identity, had standing to assert the constitutional rights of its prospective tenants. At least one of the respondents, a black working in the village and desirous of securing low cost housing there, had standing.[71] This prospective tenant alleged an "actionable causal relationship" between the village's zoning decision and his asserted injury.[72]

After concluding that standing was not a barrier to MHDC, the Court addressed the burden of proof required to show an equal protection violation. Although proof of a racially discriminatory intent or purpose is required, MHDC did not need to show that the challenged action rested solely or even predominantly on racially discriminatory purposes.[73] Since racial discrimination is not just another competing consideration to be balanced by legislators or administrators, there is no need for judicial deference when there is proof that a discriminatory purpose has been a motivating factor. Even pursuant to this standard, the Court held that MHDC failed to carry its burden of proving that such an intent or purpose was a motivating factor in the rezoning decision.

The decision reaffirmed the principle that official action will not be held unconstitutional solely because it has a racially disproportionate impact.[74] To determine whether an invidiously discriminatory purpose was a motivating factor, a careful inquiry must be made into circumstantial and direct evidence of intent, such as disproportionate impact, the historical background of the challenged decision, legislative or administrative history, specific antecedent events, contemporary statements of the decisionmakers and

68. United States v. SCRAP, 412 U.S. 669, 686 (1973).

69. The Court distinguished Sierra Club v. Morton, 405 U.S. 727 (1972), by noting that "[t]his is not mere abstract concern about a problem of general interest." 429 U.S. at 263.

70. 429 U.S. at 261.

71. *Id.* at 264.

72. Warth v. Seldin, 422 U.S. 490, 507 (1975).

73. 429 U.S. at 265.

74. Washington v. Davis, 426 U.S. 229 (1976). The Supreme Court decided, after the issuance of the circuit court opinion in *Arlington Heights*, that a showing of discriminatory intent is a prerequisite to establishing a violation of the equal protection clause of the fourteenth amendment. *Id.*

departures from normal procedures.[75] Applying these criteria, the Court concluded, as both courts below had found, that there was no proof that the rezoning decision was racially motivated. The case was reversed and remanded to the circuit court to decide whether the rezoning decision violated the Fair Housing Act of 1968.[76]

On remand, the Seventh Circuit reaffirmed its earlier holding that the village's refusal to rezone had a discriminatory effect.[77] The court concluded that the project would create a substantial number of federally subsidized low cost housing units not presently available in Arlington Heights. Since a greater percentage of black than white people in the Chicago metropolitan area satisfied the income requirements for federally subsidized housing, the village's refusal to rezone had a greater impact on blacks than on whites.

After determining that the village's action had a discriminatory effect, the court focused on the basic question as to whether the refusal to rezone violated the Fair Housing Act of 1968, even though the action was taken without discriminatory intent. Section 3604(a) of the Fair Housing Act of 1968 provides in part: "it shall be unlawful [t]o . . . make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin."[78] The key language construed by the court was the phrase "because of race." The court adopted the broad effect-oriented view instead of the narrow intent-oriented view to determine whether there had been a section 3604(a) violation. In the broad effect-oriented view "a party commits an act 'because of race' whenever the natural and foreseeable consequence of that act is to discriminate between races, regardless of his intent."[79]

To establish a violation of the Federal Housing Act of 1968 without a showing of discriminatory intent, the court identified four factors which must be examined: (1) the strength of plaintiff's showing of discriminatory effect; (2) the amount of evidence showing a discriminatory intent; (3) the defendant's interest in taking the action complained of; and (4) the plaintiff's requested relief.[80]

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75. "In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege." 429 U.S. at 268.

76. 42 U.S.C. § 3604(a) (Supp. IV 1974).

77. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977). The reversal by the Supreme Court did not require the Seventh Circuit to change its conclusion that the rezoning decision had a racially discriminatory effect, but only that such a conclusion is irrelevant for a violation of the equal protection clause.

78. 42 U.S.C. § 3604(a) (Supp. IV 1974).

79. 558 F.2d at 1288.

80. *Id.* at 1290.

To find the requisite discriminatory effect in the first prong of the test, the court established that there may be a greater adverse effect on one racial group than on another. Alternatively, a discriminatory effect may result solely from the perpetuation of segregation in the community. The court determined that there was not a strong showing of a discriminatory effect of the first kind, since sixty percent of the persons in the Chicago metropolitan area eligible for federal housing subsidies in 1970 were white. However, as to the second kind of racially discriminatory effect, the court noted that the district court left unresolved the question as to whether the village's action had a discriminatory effect upon the community by perpetuating segregation. The court found no evidence that the village's decision was racially motivated but concluded that this was the least important of the four factors.[81] Great deference was given to the defendant's interest since the defendant was "a governmental body acting within the ambit of legitimately derived authority."[82] Finally, the court noted that MHDC's requested relief sought only to enjoin the village from interfering with its effort to construct a housing project and did not seek to compel the village to take affirmative action.

After reviewing these four factors, the court concluded that the case should be decided primarily on the basis of whether the governmental action, in denying the rezoning, would result in a discriminatory effect on the community. If there were no other land within the village "which is both properly zoned and suitable for federally subsidized low-cost housing, the Village's refusal to rezone constituted a violation of section 3604(a)."[83]

The Seventh Circuit then remanded the case to the district court with specific instructions that MHDC must carry the burden of showing both that subsidization would be available and that its project would be racially integrated.[84] The village, however, must carry the burden of proving that there was other property within Arlington Heights that was both properly zoned and suitable for low cost housing under federal standards.[85] In the event that the defendant-village failed to meet its burden on remand, the circuit court directed the district court to hold that the village's denial of

81. *Id.* at 1292.

82. *Id.* at 1293.

83. *Id.* at 1294.

84. MHDC hoped to obtain subsidization under § 8 of the United States Housing Act of 1937, 42 U.S.C.A. § 1437f (West Supp. 1978).

85. In his concurring opinion, Justice Fairchild urged that the burden of showing the existence of other property suitable for low cost housing be allocated to MHDC. 558 F.2d at 1296.

rezoning effectively precluded MHDC from constructing low cost housing within the village and to grant MHDC the requested relief.[86]

II. DEVELOPMENTS OF REGIONAL IMPACT

In *Sarasota County v. Department of Administration*[87] a petition for writ of certiorari filed by the county was denied by the District Court of Appeal, Second District, for lack of standing. Sarasota County had originally petitioned the Department of Administration for a declaratory statement[88] that a proposed crude oil splitter refining facility in Manatee County be declared a development of regional impact (DRI).[89] The Department of Administration issued a declaratory statement ruling that DRIs are limited to those projects identified by specific guidelines and standards in section 22F-2 of the Florida Administrative Code (1976). Oil splitters were not included within the DRI rule's guidelines and standards.

Since "[a]gency disposition of petitions [for declaratory statements] shall be final agency action,"[90] and "[a] party who is adversely affected by final agency action is entitled to judicial review,"[91] it would appear that Sarasota County's lack of standing would have to be based upon a holding that the county was not adversely affected by the declaratory statement. While noting these specific provisions of the Administrative Procedure Act,[92] the Second District framed the issue as whether the county had standing to invoke the procedures of the Florida Environmental Land and Water Management Act of 1972.[93] In focusing the issue as such, it would seem that the Second District was implying that only those entities authorized to initiate the DRI process could be adversely affected by the declaratory statement.

Initially, the Second District determined that the issuance of an unfavorable declaratory statement did not itself confer standing for *judicial* review upon the recipient, especially when a court was hearing the standing issue for the first time.[94] After recognizing that oil splitters were not identified within existing DRI guidelines and

86. *Id.* at 1295.

87. 350 So. 2d 802 (Fla. 2d Dist. 1977).

88. FLA. STAT. § 120.565 (1977).

89. *Id.* § 380.06(1) defines a development of regional impact as: "[A]ny development which, because of its character, magnitude, or location, would have a substantial effect upon health, safety or welfare of citizens of more than one county."

90. *Id.* § 120.565.

91. *Id.* § 120.68.

92. 350 So. 2d at 805. *See also* FLA. STAT. §§ 120.50 -.73 (1977).

93. FLA. STAT. §§ 380.012-.10 (1977).

94. 350 So. 2d at 805.

standards, the court attempted to determine appropriate entities involved in the DRI process which would have standing if a proposed development did not fall within the guidelines and standards. The court noted that regional planning agencies, pursuant to section 380.06(3) of the Florida Statutes (Supp. 1976), may recommend to the state land planning agency, types of development to be designated as DRIs. In addition, section 380.06(4)(a) of the Florida Statutes (Supp. 1976) affords a developer an opportunity to receive a binding determination from the state land planning agency as to whether his proposed development would be a development of regional impact. Based on these provisions, the Second District determined that only the regional planning agency, an appropriate local government, or the state planning agency may initiate the DRI process with respect to developments that are not included within the DRI guidelines and standards.[95] Consequently, the court concluded that the "[c]ounty's position that the DRI process applies to the Project is, in essence, an attempt to force the Department to make an ad hoc determination of the status of the Project where it has no authority to initiate such a process."[96] Consistent with prior appellate holdings, the Second District found that Sarasota County was not one of the entities authorized to initiate the DRI process under section 380.06.[97]

A concurring opinion presented two viable alternatives to the county that would not abrogate section 380.06. First, it was suggested that the county recommend to a regional planning agency additional types of development to be identified as DRIs.[98] In addition, the county could initiate proceedings under section 403.412 of the Florida Statutes (Supp. 1976), which would require Manatee County to comply with the DRI process.[99]

In dissent, Judge Scheb argued that the issuance of a declaratory statement is final agency action reviewable pursuant to section 120.68 of the Florida Statutes (Supp. 1976). On the merits, he contended that the declaratory statement issued by the Department of Administration holding that the oil splitter is not a DRI was incorrect as a matter of law.[100] Judge Scheb took exception to the department's conclusion that the projects itemized in section 22F-2 of the

95. *Id.* at 806.

96. *Id.*

97. *See* Pinellas County v. Lake Padgett Pines, 333 So. 2d 472 (Fla. 2d Dist. 1976); Sarasota County v. General Dev. Corp., 325 So. 2d 45 (Fla. 2d Dist. 1976); Sarasota County v. Beker Phosphate Corp., 322 So. 2d 655 (Fla. 1st Dist. 1975).

98. 350 So. 2d at 807.

99. *Id.*

100. *Id.*

Florida Administrative Code (Supp. 1976) "are all-inclusive with no discretion left in the state and planning agency to consider whether an unlisted project is or is not a DRI."[101]

Judge Scheb concluded that the Department of Administration may, and should, consider whether developments not listed in existing DRI guidelines and standards comply with the statutory definition of development of regional impact provided in section 380.06(1) of the Florida Statutes (Supp. 1976). Failure to consider the application of the statute to new types of DRIs unduly restricts legislative intent.

III. INVERSE CONDEMNATION

Jupiter Inlet Corp. v. Village of Tequesta[102] presented the question of whether a plaintiff has a cause of action against a municipality which destroyed the plaintiff's water source while pursuing a public purpose. The District Court of Appeal, Fourth District, answered in the affirmative.

Jupiter Inlet Corporation owned condominiums which drew their potable water from a shallow aquifer located directly beneath the corporation's land. The aquifer extended beyond the limits of the plaintiff's land so that defendant Tequesta was able to place pumps into that aquifer as well. The alleged injury to the corporation resulted from such a high volume of water removal by Tequesta for public use that the aquifer became depleted and allowed a salt water intrusion to occur. In order to continue supplying its condominiums with fresh water, the corporation was forced to pump water from a deeper aquifer at considerably greater expense.

When a governmental entity takes private property for a public purpose without formally exercising its eminent domain power, the aggrieved owner has a cause of action for inverse condemnation to obtain just compensation for the property taken.[103] The rule is easily stated, but its application through multiple theoretical bases has led to a judicial juggling of rationale so that in a particular fact situation the result may turn upon the rationale applied. In the court's words: "[M]uch hinges on how the word 'take' is interpreted. Florida courts have not, over the years, been in consistent agreement on this matter, particularly where—as in this case—there was no actual entry by the governmental authority on the owner's land."[104]

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101. *Id.* at 808.

102. 349 So. 2d 216 (Fla. 4th Dist. 1977).

103. City of Jacksonville v. Schumann, 167 So. 2d 95 (Fla. 1st Dist. 1964), *cert. denied*, 172 So. 2d 597 (Fla. 1965), *cert. denied*, 390 U.S. 981 (1968). FLA. CONST. art. X, § 6(a).

104. 349 So. 2d at 217.

Even though there had been no actual entry by the Village of Tequesta, the court concluded that a taking had occurred. "It seems apparent . . . that when something is removed from its owner's property by a governmental agency and put to a public use, it has been taken."[105] It is irrelevant to the fact of "taking" whether it was accomplished by a physical entry onto the property or by pumping. "In either event, the owner has been deprived of the beneficial use of his property by government action for a public purpose."[106]

Essential to the holding was the recognition that the aquifer does constitute private property.[107] Though not recognized by the court, the determination of whether a taking has occurred often hinges on the meaning given to the word "property."[108]

The opinion is noteworthy for its explicit recognition of the difficulty encountered by Florida courts in resolving "taking" matters. For example, resolution of the case turned on whether a taking could occur absent physical intrusion onto the land. Yet as early as 1887, the Supreme Court of the United States explained that a taking occurs when "property is *taken away* from an innocent owner."[109] Since then, it has become well settled that a taking may occur through land use regulations which do not entail a physical invasion of private property.[110] Nonetheless, the court was unable to rely upon a cohesive doctrine to resolve the issue. The lack of a unified approach, of course, causes legal and policy uncertainty. The court's opinion is not likely to provide a rationale for resolving future inverse condemnation cases, but rather demonstrates the need for legislative definition of the term "taking."[111]

IV. LAKE OWNERSHIP

Odom v. Deltona Corp.[112] raised the issue of whether certain nonmeandered lakes were the private property of a corporation or sovereign lands held in trust by the state for the public. Deltona, which held paper title to the lakes, had attempted to alter the shores, bottoms and waters of the lakes to develop the lands for community purposes. State officers and agents interfered with those

105. *Id.*
106. *Id.*
107. *Id.*
108. United States v. Willow River Power Co., 324 U.S. 499, 502 (1945).
109. Mugler v. Kansas, 123 U.S. 623, 669 (1887) (emphasis added).
110. *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Forde v. City of Miami Beach, 146 Fla. 676, 1 So. 2d 642 (1941).
111. *See generally* Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727 (1967).
112. 341 So. 2d 977 (Fla. 1977).

activities. The corporation then sought declaratory and injunctive relief.

In response to the state's assertion that the land areas in question lay beneath navigable sovereign waters granted Florida upon becoming a state in 1845, the Supreme Court of Florida declared that the federal title test is the proper test for determining whether a particular lake was navigable in 1845, so as to vest sovereign title in the state.[113] Under this test, navigability is based on whether the water body has potential for commercial use in its ordinary and natural condition without any artificial improvements.[114] The court recognized that meandering[115] is evidence of navigability and creates a rebuttable presumption of navigability;[116] conversely, nonmeandered lakes and ponds are rebuttably presumed nonnavigable.[117] Moreover, a water body should be regarded as being nonnavigable absent evidence of navigability.[118] Based on these propositions, the court implicitly confirmed the lower court's determination that the lakes were nonnavigable and privately owned. A divided supreme court concluded by holding that even if navigable waters were involved, the state's claim to beds underlying the waters previously conveyed to Deltona was extinguished by the Marketable Record Title Act.[119]

The court addressed the argument that a grantee of swamp and overflowed lands under a trustee deed[120] takes with "notice" that the conveyance did not include sovereign land. Conceding that the "notice of navigability" concept is applicable in the case of a large lake such as Lake Okeechobee, the court refused to apply the concept to small nonmeandered lakes.[121]

The court emphasized that the state, like its citizens, should be estopped from denying the effect of the Marketable Record Title Act if it has failed specifically to reserve public rights in the conveyed

113. *Id.* at 988.

114. *Id.* The Florida test for navigability is almost the same as the federal title test. *Id.*

115. "To meander a lake means to survey along its shores, as opposed to running the survey lines directly across the body of water itself." F. MALONEY, S. PLAGER, & F. BALDWIN, WATER LAW AND ADMINISTRATION 400 n.337 (1968).

116. *Cf.* Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909).

117. 341 So. 2d at 989.

118. *Id.*

119. FLA. STAT. §§ 712.01-.10 (1977). The court confirmed the trial court's finding that Deltona and its predecessors held title for more than 30 years and that the state neither reserved any interest in, nor made any effort to reclaim, the conveyed property. 341 So. 2d at 989-90.

120. "Trustee deed" refers to a deed issued by the Board of Trustees of the Internal Improvement Fund, an agency of the State of Florida and one of the defendants in *Odom.*

121. 341 So. 2d at 988.

land. Neither new standards of value relating to ecological and recreational needs nor a change of personnel can justify upsetting the stability of title.[122] In addition to the state's failure to reserve rights in the land, estoppel should be applied because "public officials operating under color of law acquiesced in the development of the land surrounding the lakes indicating a willingness for residential development contiguous to the waters, including necessary modification of lake bottoms."[123] Neither the supreme court nor the trial court cited particular activities engaged in by state officials "under the color of law" which formed the basis for applying equitable estoppel. It may be presumed, therefore, that the state's failure to assert its title claim for an extended period of time, coupled with its apparent notice of Deltona's claim to title and intended development activity were sufficient to trigger a finding of equitable estoppel.[124]

The court specified that only the status of sovereign title was addressed in *Odom*. Accordingly, this case is not dispositive of claims regarding pollution or damage to other property when the claims are not dependent upon ownership.[125] Hence, the question of applicability of constitutionally permissible police power regulations to Deltona's lakes and related development was explicitly reserved by both the trial court and the supreme court.[126]

Justice Sundberg, with the concurrence of Chief Justice Overton and Justice England, submitted a vigorous dissent to the majority's application of the Marketable Record Title Act "to divest the people of the State of Florida of lands held in public trust for them."[127] The dissent was bottomed on the proposition that "it should be presumed that all conveyances of submerged land areas by the Trustees are made with implicit reservation to the state of navigable water."[128]

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122. *Id.* at 989.

123. *Id.*

124. Rhodes, Haigler & Brown, *Land Use Controls, 1976 Developments in Florida Law*, 31 U. MIAMI L. REV. 1083, 1098 (1977).

125. Of general interest is the supreme court's restatement of governmental authority to regulate in the public interest "development of all public and private water areas" prefacing the body of its opinion. 341 So. 2d at 987.

126. The court reaffirmed its prior judgment that FLA. STAT. § 253.151 (1975), providing standards for determining the boundary line of navigable meandered fresh water lakes, was unconstitutional, State v. Florida Nat'l Properties, Inc., 338 So. 2d 13 (Fla. 1976), but it stressed that the trial court's reliance on this section did not affect the result. 341 So. 2d at 989. The court also invalidated the criminal provisions of §§ 253.124 and 370.035 based on a finding that the term "navigable" was so vague that it was not reasonably possible to determine if a permit was required for activity in and around a nonmeandered lake. Failure to secure a permit for such activity was subject to criminal penalties. *Id.* at 987, 990.

127. 341 So. 2d at 990.

128. *Id.*