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## Planning for Platted Lands: Land Use Remedies for Lot Sale Subdivisions

Frank Schnidman

R. Lisle Baker

*Suffolk University Law School*

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# FLORIDA STATE UNIVERSITY LAW REVIEW

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## PLANNING FOR PLATTED LANDS: LAND USE REMEDIES FOR LOT SALE SUBDIVISIONS\*

FRANK SCHNIDMAN\*\* AND R. LISLE BAKER\*\*\*

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\*\*B.S. Springfield College, 1970; J.D. Union University-Albany Law School, 1973; LL.M. in Environmental Law, George Washington University, 1974. Lincoln Fellow, Lincoln Institute of Land Policy, Cambridge, Massachusetts. Of Counsel, Milledge & Hermelee, Miami, Florida. Member of the California, Florida, New York and District of Columbia Bars.

\*\*\*A.B. Williams College, 1964; LL.B. Harvard Law School, 1968. Professor of Law, Suffolk University Law School, Boston, Massachusetts. Member of the Massachusetts Bar.

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## I. INTRODUCTION TO THE PLATTED LANDS ISSUE

The problem of what can be done with previously subdivided land which has not yet been constructed upon or built out, and which no longer complies with subdivision rules and regulations, has become quite serious in jurisdictions all over the United States. Real estate in many areas was platted in small-lot residential subdivisions with little consideration for the impact on water supply, sewage disposal, transportation, etc., which would accompany build-out. When initially platted, these subdivisions were the dream of real estate developers. Today, these areas present numerous current and potential problems. An increasing influx of settlers has awakened a recognition that some remedial measures must be initiated to protect not only those who have already moved in, but also those who have invested in a lot and hope someday to retire there or sell the lot for profit.

This article examines the range of legal issues raised by selected public responses to such problems. These responses include actions by which government may require or encourage the modification, deplattling, or restriction of the use of existing platted lands. The article also explores the legal issues raised by options which would allow new development through reassembly. It does this in the context of the general Florida experience and in the specific context of the three county Charlotte Harbor area (see Figure 1). The analysis, however, is generally applicable, and the discussion highlights options available based upon the experience of other jurisdictions.<sup>1</sup> The approach is comprehensive, and it is hoped that this article will serve as a reference guide to those in both public and private sectors seeking management solutions to equitably deal with the myriad of problems created by large scale subdivisions.

This article is organized into three sections (each further subdivided) and a conclusion. The first section contains introductory material addressing the general character of the three county area and the concerns posed by large subdivisions sold by lot.<sup>2</sup> Section

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1. The research includes both federal and Florida law, and discusses the experience of other selected jurisdictions which have addressed similar problems.

2. The information presented in the introductory section is derived primarily from personal interviews with informed individuals in the Charlotte Harbor area, as well as from information contained in *SOUTHWEST FLORIDA REGIONAL PLANNING COUNCIL (SWFRPC), LAND USE POLICY PLAN (1980)*; and *CHARLOTTE HARBOR: A FLORIDA RESOURCE (1980)*. The authors caution the reader that they have not made an independent evaluation of the apparent problems cited in the text because no such evaluation fell within the scope of this research. It is important, however, that such groundwork be done. In the meantime, assum-

II introduces in a general way the types of responses which government may undertake to address these concerns. Section III constitutes a detailed legal examination of the responses outlined in Section II. The conclusion provides a closing comment concerning what actions might be undertaken.

*A. An Overview of Lot Sale Subdivisions in the Charlotte Harbor Area*

Between the late 1950's and early 1970's, almost 900,000 subdivided lots were platted in Charlotte, Lee, and Sarasota counties. This "plating" was the formal procedure taken by the original landowners to officially record maps of their subdivisions. Recording of the plats consisted of filing the appropriate surveyed maps with the county involved and showing that all the existing requirements had been fulfilled. Approval of the plats simply consisted of a county commission confirming that the plat requirements had been fulfilled, and usually included an agreement to accept dedication to the public of any roads and canals once they were constructed according to county standards. The filing of a plat was also necessary before the lots could be legally and effectively marketed. Once the plat was accepted, land development activity began. The creation of these subdivisions constituted a significant physical undertaking because many areas within the subdivisions were wetlands which required excavating canals to both drain the land and provide the necessary fill.

A substantial majority of these lots are contained in only five vast subdivisions. Together, these five subdivisions cover approximately 277 square miles, an area of land four times the size of the City of Miami. The City of Cape Coral is the only incorporated subdivision. The other four lie within the unincorporated jurisdiction of the three counties. (See Figure 1 and Table 1 for details.)

While Florida readers may be familiar with the scale of development involved in these large lot sale subdivisions, readers from other parts of the country may require a leap of imagination to understand the size of the land area affected. An overflight of the subdivisions produces an astonishing vista of treeless blocks of land stretching to the horizon, marked off by hundreds of miles of roads, often without a house in sight. (See Figure 2.)

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ing these concerns to be legitimate for part or all of the platted lands area, the authors have focused on identifying and evaluating potential responses, based on research in the planning and legal literature, meetings and interviews, and the personal experience of the authors.

FIGURE 1: Detail of Three County Area

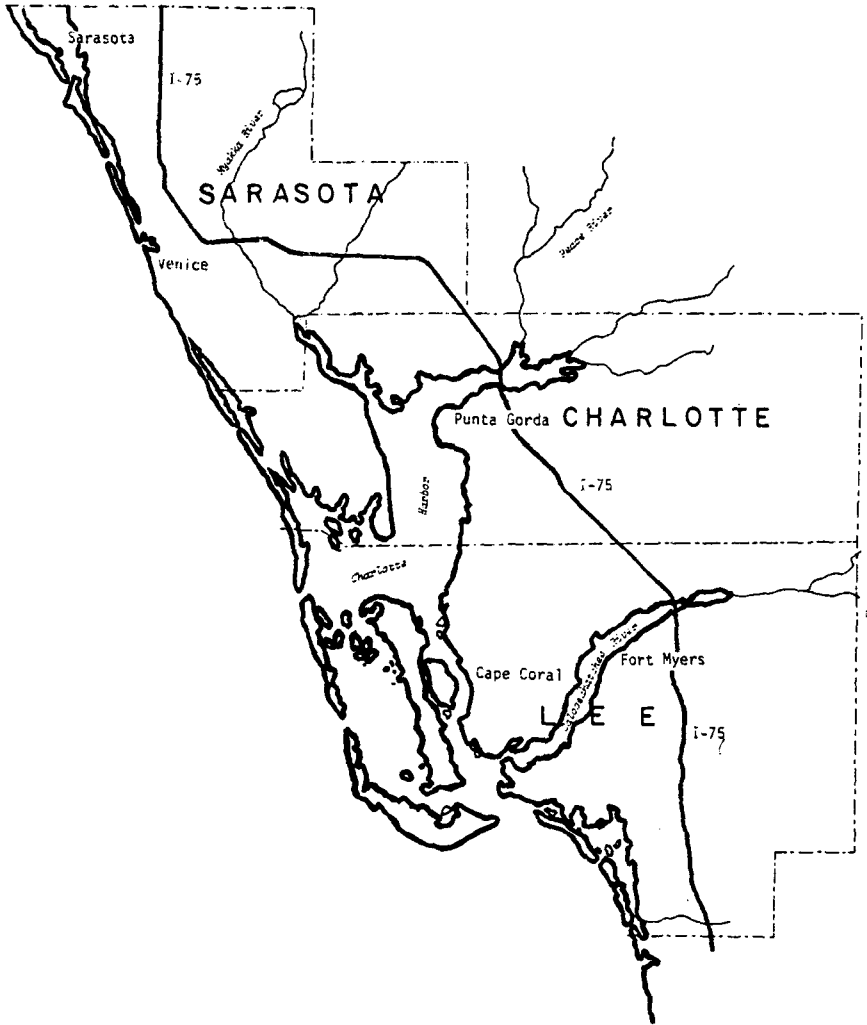


TABLE 1

Inventory of Plats with 100 or More Lots in the Three County Area\*

<u>County</u>	<u>Subdivision</u>	<u>Lots</u>	<u>Acres</u>	<u>Approx. Sq. Miles</u>
<u>Charlotte</u>	Port Charlotte	121,024	33,339	52.1
	Rotunda	32,791	10,117	15.8
	Punta Gorda Isles	18,555	4,906	7.7
	Harbor Heights	11,256	1,550	2.4
	(all others)	<u>80,839</u>	<u>20,693</u>	<u>32.3</u>
Sub-total		264,465	70,606	110.3
<u>Lee</u>	Cape Coral	287,869**	36,778	57.4
	Lehigh Acres	132,512	47,338	74.0
	(all others)	<u>60,077</u>	<u>14,358</u>	<u>22.4</u>
Sub-total		480,458	98,474	153.8
<u>Sarasota</u>	North Port	55,428	44,669	69.8
	South Venice	19,587	2,247	3.5
	(all others)	<u>65,540</u>	<u>23,279</u>	<u>36.3</u>
Sub-total		140,555	70,195	109.6
<b>TOTAL</b>		<b>885,478</b>	<b>239,275</b>	<b>373.7</b>

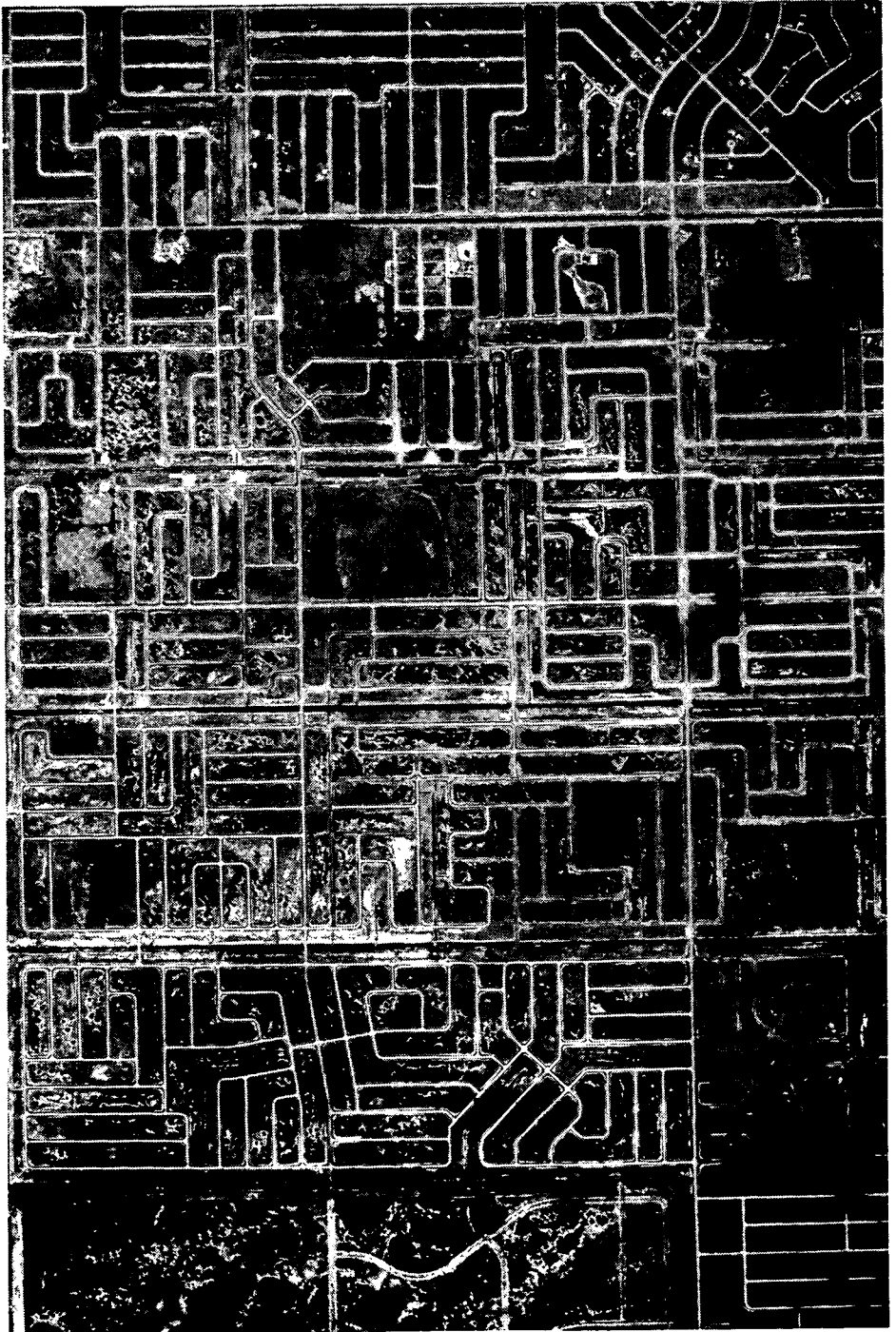
\* There are a total of 44,866 lots covering 39,888 acres on plats composed of 100 or less lots.

\*\*Deed restrictions in Cape Coral require two lots to make one homesite. Also, 3,768 lots are considered "non-developable."

NOTE: The information in this table has been provided by the Southwest Florida Regional Planning Council.



**FIGURE 2: Aerial Photo of Platted Lands**



While the extraordinary amount of subdivided yet undeveloped land appears to constitute a needless waste, it represents an inventory available for future population needs and reflects a recent example of what has been an historic process of real estate development in the United States.

With few exceptions, the cities of America are gigantic grid subdivisions. They reveal streets laid out by surveyors in advance of intense settlement. More often than not, these are streets delineated so that a large landowner or group of landowners could sell subdivided land with a minimum of effort at maximum prices. They are subdivisions of terrain which ignore the picturesque, which ignore the character and quality of the land. They are subdivisions intended to foster profit from the land itself.<sup>3</sup>

The lots in these subdivisions were marketed for single-family residential development throughout the three county area in aggressive promotional campaigns, and have now been sold to thousands of owners scattered throughout the United States and abroad. Many of these owners have apparently purchased their lots for investment and not for personal use since, after many years, fewer than 50,000 of the subdivided lots (approximately five percent) have homes on them. Yet the potential population of the platted lands exceeds the projected total population of the three county area well into the next century, implying that a significant number of lots may never be built upon at all.

Many of the subdivisions fail to meet contemporary standards for development design and natural resources management. The planning, by today's standards, was poor. Some were not planned for complete basic services, and lot purchasers were often promised only roads and a canal system. Furthermore, the platting and sale of the lots were not phased to coincide with any expected rate of occupancy. Instead, virtually all of the lots were marketed as fast as the companies could plat them. It also appears that the developers of the large subdivisions failed to undertake studies to determine whether the hydrological systems in the areas were adequate. In sum, the absence of sophisticated public regulation, which itself reflected a general lack of public awareness, allowed developers to proceed with subdivisions which were designed to produce lot sales, as opposed to viable long-run communities. Although many of the developers later began to respond to the need for commu-

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3. P. WOLF, *LAND IN AMERICA* 209 (1981).

nity stability, these early actions have made the task a difficult one to accomplish.

As population pressure on the Charlotte Harbor area increases and building on the subdivided lots intensifies, these large subdivisions appear to present three major concerns for state and local government authorities, planners, and present and future residents of the area—both for the lots in their current state and if built out. These concerns are: the provision of basic public services; the protection of the physical environment; and the quality of community life.<sup>4</sup> The remainder of this section outlines these concerns.

### *B. Platted Lands Issues*

#### *1. Issues Associated with Maintenance of the Subdivisions in their Current State*

**SCALE.** The lot sale subdivisions are so vast that they pose a problem of environmental impact from size alone. Large tracts of land have been so altered that they contribute little to the natural environment and economic growth of the region, other than by generating tax revenue to local governments.

**LAND USE FLEXIBILITY.** Single-family lots comprise the bulk of the subdivided lands. The subdivisions were designed, developed, and marketed primarily as leisure-oriented retirement communities. The premature commitment of this land to detached single-family housing prevents developers from responding to market demand for different types of dwelling units as the area grows. One possible result is that developers will turn to other tracts of land to meet the new market demands, causing much of the subdivided lands to remain undeveloped. The platted lands are overcommitted to a particular form of development in a format which precludes other types of land uses. A paradox thus exists. Development which is not single-family residential, such as multi-family, com-

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4. During one of the meetings held while this article was being prepared, the attendees were asked: "What is the platted lands problem?" Richard Smith of Sarasota County provided a comment which summarizes the response of many to that question: "The problem is the premature commitment of land to residential use in locations, lay-outs and densities which are fiscally and environmentally unsound to an extent that will unnecessarily degrade the quality of life in Southwest Florida."

Also, Richard Hamann of the University of Florida Center for Government Responsibility summarized his views by saying that: "The most tragic thing . . . about the current situation is that so much land has been ruined, but is not being used except as a commodity for speculative exchange." Letter from Richard Hamann to Frank Schnidman (August 18, 1982).

mercial, or industrial, might take place on the platted lands if they were not in subdivided lots. Instead, developers turn to undeveloped land outside the subdivisions. Also, a number of innovative large single-family residential developments are now targeted for areas outside the platted lands where more flexible design can occur. In short, it appears that the inflexibility of the land plan for the platted lands may be inducing development to take place in areas of the counties which might otherwise remain untouched.

**ESTUARINE DEGRADATION.** The canals which facilitated creation of the subdivided lands (together with agricultural canals) have altered the estuarine fresh and salt water mix in Charlotte Harbor. The rapid water transportation created by the canals has resulted in fluctuations in salinity which, in the context of several species of marine life, is a condition with potentially adverse impacts on important Charlotte Harbor fisheries.

**WATER QUALITY.** The road and canal systems of the subdivisions enhance stormwater runoff, which may contaminate receiving waters with pollutants formerly "filtered" through vegetation and soil.

**WATER SUPPLY.** The canal systems have affected not only the fresh and salt water mix in Charlotte Harbor, but may also adversely affect future water supplies since rainfall formerly retained to recharge aquifers (underground water tables) is now drained into the Harbor. Aquifer recharge, however, is not as critical an issue in the Charlotte Harbor area as it is elsewhere in the state, apparently because much of the local water is drawn from the Floridian Aquifer, which is recharged in central Florida. Also, the headwaters of available surface water resources are in central Florida.

## *2. Issues Associated with the Build-out of the Subdivisions*

A substantial population increase is expected in the Charlotte Harbor area. By the end of this decade, the three counties anticipate a thirty-six percent increase in population. Realizing that this growth will occur, local officials and present residents of the area fear that these platted lots will be built out in a manner which will strain fiscal and environmental resources, consequently resulting in a lower quality of life.

Public and private sector planners feel that a great amount of conventional individual single-family residential construction will still gravitate towards the large, outdated yet cheaper subdivisions which, unlike new subdivisions, predate and thus need not meet

Florida's recently enacted extensive development review and permitting processes.

**GROWTH CAPACITY.** It will become difficult for local governments to make services available as home building increases. The unpatterned "leap-frog" type of development that is expected makes it expensive to provide adequate public facilities and services to new residents. In this respect, future service expenditures have been labeled a "time bomb." For example, the current population of Cape Coral is 42,000 and the capacity of the subdivided lots is 350,000 to 400,000. Cape Coral presently has one waste-water facility, and it is anticipated that three more would be needed to accommodate full development. Police substations, fire houses, schools, libraries, playgrounds, etc., will also have to be provided.

At the same time, if existing roads and canals are not maintained, they will deteriorate to the point of needing complete replacement or restoration. It appears therefore that local governments are in a situation of either maintaining existing roads and canals long before they are useful, or allowing them to deteriorate and having to rebuild them later. Also, many of these roads and canals were poorly designed and, even if maintained, would still require substantial expenditures to upgrade them to meet contemporary needs and safety standards.

**HURRICANE EVACUATION.** The ability to move residents to safe areas before a hurricane strikes is an important planning consideration. Because the major subdivisions are so large, but have so few arterial streets, their existing road network may prove inadequate to move a large population on short notice.

**WATER QUALITY.** As homes are built on the subdivided lots, the increased number of septic systems may create a water pollution hazard. Apparently, the soil in some of the subdivisions cannot accept septic systems. Therefore, unless the developer, the owners, or the local governments provide the needed sewers, building permits may be denied. An additional water quality problem may occur because local governments cannot insure that those septic systems which are actually permitted will be properly installed and maintained.

Another by-product of residential development which can adversely affect water quality is the construction of seawalls. This practice, which has apparently been encouraged in some communities, increases the erosion process and ultimately results in sediment pollution of local waters.

**WATER SUPPLY.** If the build-out of the subdivisions increases, the

public water systems and the local governments in the Charlotte Harbor area will be faced with the increasingly difficult task of meeting rising demands for fresh water with limited water resources. Additional expenditures may help resolve the problem. For example, as increases in population require drilling into deeper aquifers of lower water quality, the water can still be purified through sophisticated water purification systems. As water quality decreases, however, it becomes increasingly expensive to provide an adequate supply of water and the rising cost may make home ownership prohibitively expensive for some lot owners.

The problem for local government, however, will be timing and revenue sources. As the population increases, expenditures for increased water supply capacity may have to be made before the tax base is in place to support the cost of such expenditures. This same situation applies for most of the public facilities and services which will be needed by the increasing population.

### *C. Action to Date*

The problems outlined above are the result of land use decisions made to foster sales of land as a commodity, largely to non-residents. Local governments which were not then equipped to adequately review and regulate the subdivisions gave the initial approval without realizing the cumulative impact of what they were doing. What has begun to occur is an awareness on the part of Florida public officials that the platted lands, whether built out or undeveloped, pose problems which must be addressed.

The federal government, the State of Florida, the Southwest Florida Regional Planning Council (SWFRPC), Charlotte County, Lee County, Sarasota County, and selected local governments have been examining the problems associated with these subdivisions. Now that the rate of building is increasing, there is additional pressure to decide on a course of action before inaction forecloses any important options. A number of individuals, however, perceive the platted lands as a substantial local tax resource which consumes an insignificant share of service costs, making continued inaction attractive in the short term.

In 1975, in response to a nomination by a confederation of environmental interests desiring Area of Critical State Concern (ACSC) status for the Charlotte Harbor area, a Charlotte Harbor study committee was formed. If such an ACSC designation were made, it would allow the state to review and approve land use and related decisions made by local governments within the designated

boundaries, according to a framework of state criteria.

Following the ACSC nomination to the Division of State Planning, the state undertook a study of the Charlotte Harbor area and several meetings were held among state and regional agencies. The result was a decision in 1977 by the state to develop solutions for land use and water-related problems in the area, but not to designate the Charlotte Harbor area as an Area of Critical State Concern.<sup>5</sup>

A second Charlotte Harbor committee was established in 1979 to again examine Charlotte Harbor issues. Thirty-nine members representing state, regional, and local governments, as well as various local interest groups, were appointed to the committee by the Governor. On December 11, 1981, this Charlotte Harbor Resources Planning and Management Committee held its final meeting and approved final recommendations.<sup>6</sup> One of those recommendations was that the ACSC designation be used solely for those local governments that fail to adopt committee recommendations for the protection of Charlotte Harbor by July, 1982. Since that time, all

5. At that time, the First District Court of Appeals, in *Cross Key Waterways v. Askew*, 351 So. 2d 1062 (Fla. 1st DCA 1977), had placed the constitutionality of the enabling legislation in doubt by ruling that the critical areas section of the Florida Land and Water Management Act, FLA. STAT. § 380.05(2)(a)(b) (1975), was an unconstitutional delegation of legislative authority to the executive branch of state government. 351 So. 2d at 1063. After affirmation by the Florida Supreme Court, *Cross Key Waterways v. Askew*, 372 So. 2d 913 (Fla. 1978), that section of Chapter 380 was amended to conform with the court's guidelines for constitutionality.

6. The immediate priorities of the committee's recommendations include floodplain, stormwater runoff, drainage, and wastewater regulations, and wetlands/barrier island protection. The committee recognized that as population growth continued, the platted lands would be built out. Its Management Plan, adopted June 5, 1981, had as Objective No. 10 that "[f]uture [l]and development decisions by local government should be in accord with the goals and objectives of the Charlotte Harbor [c]ommittee, and existing platted areas should also be encouraged to develop in accord with these goals and objectives." Under the discussion of suggested implementation actions to achieve this goal were:

a) Local Government: Require [that] all development coincide with the ability of public and private sectors to provide community services and facilities as based on studies employing methods of reasonable predictability generally acceptable in the planning profession.

b) Local Government/All [A]gencies: [E]ncourage land use changes for platted but undeveloped areas to protect those environmentally sensitive and to assist in the provision of governmental services, to discourage urban sprawl and to protect agricultural lands.

c) Local Government/DOT: Highway corridor planning for undeveloped areas shall consider suitability of adjacent land for urbanization and directing construction away from environmentally sensitive areas.

d) Legislature: [E]xplore ways to encourage voluntary reassembly by development of platted and sold subdivisions where environmental or other public benefits could result from a redesign of such subdivisions.

jurisdictions have complied with the recommendations and there have been no ACSC designations.

Recommendations for local government action resulting from the committee study include both planning and regulation aimed at improving the quality of stormwater and wastewater that enter the estuary of Charlotte Harbor, promoting coordinated development on the mainland, and discouraging further development on barrier islands and other high-hazard flood zones. The comprehensive planning effort following up on these recommendations remains to be done.

#### *D. Problem Definition and Establishment of Goals—The Need for a Plan for the Platted Lands*

The foregoing statement of issues and concerns needs to have substantial scientific research undertaken to examine the real extent of the problem, though much useful work has already been done. Once that effort is complete, appropriate responses can be more clearly defined.

For example, once the current status on numbers of lots and their ownership pattern is determined and mapped, some careful estimates will need to be made of the build-out rate and location of anticipated future development. When both the current situation and projected future of the platted lands are determined, it will then be feasible to begin to determine what conditions will require a government response if a different future is desired. For example, it may appear that the anticipated level of growth is not desirable, or that the location should be altered, or that physical environmental considerations require other changes to be made. The goals and objectives should be clarified and incorporated in a carefully drawn plan for the platted lands.

The importance of credible information and a comprehensive planning process serving as a basis for governmental response cannot be overstated. While past decisions of Florida courts are useful in gauging government response to new initiative, the decisions are not conclusive because the scope of the platted lands situation is unique and new to the courts. Consequently, a court reviewing a challenge to a program to address platted lands problems needs to be persuaded that the public initiative is appropriate to the circumstances. As will be discussed below, there are a range of responses worthy of consideration, though the specific choice for an area is likely to vary depending upon the results of the planning inquiry. It is to an overview of these responses and the legal con-



text in which they are found that this article will now turn, followed by a more detailed discussion of how they are likely to be treated as a matter of Florida and federal law.

## II. AN OVERVIEW OF PUBLIC RESPONSES TO PLATTED LANDS PROBLEMS ONCE THE GOAL DEFINITION AND PLANNING EFFORT HAVE BEEN COMPLETED

### A. *Introduction*

The platted lands issue evolved because of a number of individual decisions which collectively resulted in a scale of subdivision beyond any expectation. It may be that a comprehensive set of responses is now required. In short, if the problems are found to be substantial, they may require a substantial remedy. It may prove, however, that the identified problems of the platted lands can be divided into discrete and isolated subsidiary problems which can be addressed independently.

Until the planning is done, the choice of responses will be uncertain. But it is possible, in light of the foregoing information, to select a variety of actions and discuss them in the legal context in which they are found. The responses which follow are roughly ordered in ascending degree of government intervention and public cost.

For example, it might prove relatively simple to require a permit before further development may take place on a portion of the platted lands which have a specific environmental problem, with the requirement that the problem be remedied before building could take place. At the other end of the spectrum, it may prove necessary for some of the terrain alterations that produced the platted lands in the first place to be reversed and the land restored to something close to its pre-existing natural condition. That kind of intervention obviously involves not only legislative action, but a change in the landscape as well.

Each of these options for public response is discussed below, followed by an overview of key legal issues.

### B. *An Outline of the Range of Potential Responses to Identified Platted Lands Problems*

As indicated above, public responses will grow out of the planning process for the platted lands and the information base upon which the plan is constructed. While the specific choice of re-

sponses to identified problems for specific areas of the platted lands will probably vary, the following have been selected as worthy of consideration. These responses are outlined at this point and are explored in greater detail after this summary review.

### *1. Continuing to Do What is Already Being Done*

The platted lands are already subject to a variety of land use controls and regulations either at the local or state level. It might be feasible in some areas of the platted lands to leave these regulations virtually untouched and allow development to continue in the current regulatory environment. If the planning process for the platted lands indicates that many of the platted lots should not be built out as platted or not built out at all, however, then new responses will be needed.

### *2. Limiting or Restricting the Use of Existing Platted Lands in Specific Areas for Specific Reasons*

It may appear that certain areas of the platted lands should be developed only if specific conditions can be met, conditions that are not now considered under existing law. For example, a detailed study may show that if all lots in a specific area were built with septic systems, an adverse impact on underlying groundwater would occur. Thus, while homes with septic systems could be built on a few lots, full development of a specific area could overload the carrying capacity of the soil. In such a situation, either the number of units to be developed would have to be reduced to meet that carrying capacity, or development would have to be restricted unless a sewer or some alternative adequate on-site sewage disposal system could be installed. In another situation, it may prove important to temporarily delay the build-out process while the underlying planning is being completed. In other words, to avoid making irreparable mistakes, the area may need to be put on "hold" by use of a moratorium.

Finally, there may be specific areas that, upon examination, should not be built out at all, either because of the impact on critical environmental resources or because public facilities are not available to sustain a large population. Rather than have a smaller population scattered throughout the area, it may be best to have a large population concentrated in a specific area, leaving other areas completely undeveloped.

### 3. *Timing, Locating and Paying for the Development of Platted Lands*

It may prove that the plan for the platted lands will not necessarily require restricting the use of the lands or conditioning their use, but instead may require that development proceed in accordance with the orderly provision of public services such as sewer, water, roads, and schools. Numerous devices exist to phase development in this way, ranging from direct regulation to charging special fees for services to outlying areas.

### 4. *Reassembly of Platted Lands*

It may turn out that some platted lands will need to be recombined where existing lot lines themselves block alternative and more sensible uses of the land. It is therefore important to know the extent to which government can mandate or at least induce the recombination of some of the existing platted properties so that they can be redeveloped in an alternative configuration. If recombination can occur, the rights of the landowners who are subject to that recombination will become a critical legal issue.

### 5. *Restoring Some Areas in Whole or in Part to a Natural Condition*

In addition to precluding development, the restoration of certain portions of the platted lands may be required. Some of the legal implications of the restoration option are explored in Section III.

### 6. *Government/Developer Negotiation*

Some of the planning objectives may encounter legal obstacles which will either be insurmountable, or at least sufficiently serious to merit governmental consideration of the alternative of attempted negotiation with those land developers who still remain involved with their subdivisions. Financial inducements to lot-swap and concentrate land development in specific areas are among the possible actions.

## C. *The Legal Context for the Public Response Options*

Each of these options, and a range of intermediate ones, involves a variety of legal devices with a variety of legal implications. At the outset, however, it is important that the detailed discussion that follows does not obscure certain general principles.

First, as discussed earlier, the responses need to be appropriate to the problems. Not only does it make sense to avoid doing more than is necessary, but it is also more likely for a court reviewing a challenged local government initiative to sustain the initiative if the court is persuaded not only that the action taken lies within a range of reasonable responses, but that it is difficult to respond to a particular circumstance in virtually any other way. In short, this is an application of the principle that a governmental or public response is likely to succeed as a matter of law when it is based upon sound policy and is appropriate and responsive to the problems.

A second general consideration is a sense of fairness. What government undertakes must, for political reasons as well as those of legal sufficiency, be as fair as possible under the circumstances. That concept, however, is defined by the facts of each specific case, whether it involves a lot purchaser or platted land developer, and is classified under a variety of similar doctrines—estoppel, vested rights, and “taking” of private property without just compensation.

Finally, it is important to outline some threshold issues of governmental power in the platted lands context.

### *1. The Power of Government Over Land Use*

The power of government obviously includes the use of persuasion and inducement, but this power is grounded in the other powers of government to command, tax, and spend.

**THE POLICE POWER.** The power to command, otherwise known as the police power, is an inherent attribute of government. In the area of land use, an owner's right to use his land is not unlimited, but is subject to reasonable governmental regulation. He may not, for example, use his land to cause a nuisance to his neighbor or to the public at large. Governments have also limited otherwise lawful activity in order to confer collective benefits, such as basic residential zoning that not only restricts a lot in an area to residential use but also benefits it by preventing nonresidential development on adjacent lots. Private actions can be limited in order to protect key parts of the landscape, such as landmarks, and governments can also limit the use of land where there is an apparent need to protect the public from some harm.

In the platted lands the prevention of pollution, protection of fisheries, protection of water supplies, and prevention of loss of life in hurricanes are all valid public concerns, and the more serious they prove to be, the more regulatory responses will be justified. In that regard, recent developments in land use and environmental

law allow increasing restriction on private property in the face of information about the adverse impacts of a proposed use of the property on natural environmental systems and orderly growth. As Mr. Justice Sutherland said in the 1926 Supreme Court decision upholding zoning, "the meaning of constitutional guaranties never varies, [however,] the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation."<sup>7</sup> The scope of the police power has expanded to take account of new situations and conditions.<sup>8</sup> As the expansion progresses, the courts will still limit the application of otherwise lawful regulation when it is perceived to impose an unfair burden on the owners of specific properties—the fairness concept discussed previously.

In the platted lands context, factors such as the ultimate definition of problems, the size of the land area and number of lots affected, and the lack of a vigorous resale market for lot purchasers who are faced with competition from thousands of others similarly situated as well as from the original developer, may alter the legal rules that might otherwise apply in more conventional situations. In short, readers should be aware that the law adjusts to meet new situations, and traditional doctrines which have been established in contexts involving one or two parcels may prove to be inadequate when stretched to cover several hundred square miles and several hundred thousand owners.

**THE POWER TO TAX.** In general, governments raise revenue from exactions on consumption (user charges, sales taxes, benefit assessments), taxes on wealth (property and estate taxes) and taxes on income. The land-related revenue devices which are of most interest are the real property tax, the special assessment for certain capital and maintenance expenses, and the "impact fee" on new development.

**THE POWER TO SPEND.** In general, public funds may be expended only for public purposes. But government can often schedule and allocate its spending decisions, such as road building and sewer construction, to affect the process of land development. More than that, government has the power of eminent domain to compel a landowner to sell land he owns. This power may be exercised to

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

8. *See also Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). "The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where . . . the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Id.* at 9.

“take” land for “public use” upon payment of “just compensation” to the landowner.

## 2. *The Level of Government*

Under Florida law these governmental powers are not granted to all levels of government in the same degree. Consequently, the choice of the level of government to undertake a response will affect the range of potential alternatives.

In Florida, the platted lands are largely a matter of county jurisdiction, with one large subdivision (Cape Coral) constituting a separate municipality. Under Florida law, “charter” counties can exercise greater authority than non-charter authorities. Florida constitutional provisions relating to these questions are discussed later, but it is sufficient at this point to note that while local governments have broad powers, the state plays a direct role in many aspects of land use.

## 3. *Lots in Unitary Ownership versus Lots in Scattered Ownership*

In considering any action, an important point to remember is that the platted lands have many owners. Some areas may have many lots owned by one company or individual that are contiguous to each other—lots in unitary ownership. Other areas may have lots owned by many people—lots in scattered ownership. The choice of responses for a specific area of the platted lands will be affected by the ownership pattern involved.

A parcel in unitary ownership, even though platted, may still present a clean slate for many land use controls and incentives. For example, it may be feasible to deplat it or to rezone it, as discussed in more detail in Section III. But what may be possible for one owner becomes difficult for many:

If past experience is any guide, many of the lots now being created will never be used at all: in this case, it is, “lots first, buildings never.” The lot lines will remain on the record books, though, and land titles will become ever more clouded as decades pass. Tough for the land buyers? Yes. Tough also for the environment, as is shown by any number of “dead subdivisions” created forty or fifty years ago. If a few scattered lots are built upon, the subdivision may become a sparsely settled rural slum.

. . . .

Once the countryside has been given over to quarter-acre or 1-

acre lots . . . you can forget thoughts of clustering, variable densities, common open spaces, and the like. . . . [T]he lot lines will survive to block sensitive use of the land.<sup>9</sup>

In recognition of the different responses needed depending upon ownership patterns, this article focuses most heavily on what can be done when lots are in scattered ownership.

#### 4. *Lots Under Contract for Deed*

A substantial number of lots in the platted lands subdivisions have been sold under contracts for deed, that is, legal title to the land is in the developer or his successors in interest and will be conveyed to the purchaser upon payment of the final installment of the purchase price.

The SWFRPC staff has made a preliminary estimate that title to approximately fifteen percent of the platted lands now remains in the developer, including an uncertain percentage under contract for deed.<sup>10</sup> Some of these contracts for deed are likely to be outstanding when and if additional governmental responses are undertaken. A key issue, therefore, is whether such lots are to be treated as the developer's—in unitary ownership—or the purchaser's—in scattered ownership—in determining the appropriate governmental response. The conventional rule, adopted in Florida, treats the purchaser as the "equitable" owner even though title stays in the developer, meaning that the purchaser bears the risk of loss during the contract payment period. For a variety of reasons, this rule may require an exception when applied to a problem as large in scope as the platted lands. But for purposes of this discussion, the reader should assume that references below to lots in scattered ownership refer to lots under contract for deed as well as lots already owned outright by purchasers, with a strong caveat that the applicable law could ultimately coincide with the administrative simplicity of treating the developer as "owning" all lots to which he still holds legal title.<sup>11</sup>

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9. *THE USE OF LAND: A CITIZENS' POLICY GUIDE TO URBAN GROWTH* 275-76 (W. Reilly ed. 1973).

10. The SWFRPC has attempted to ascertain how many of the platted lots have not been marketed and are still owned by developers. Using plats of 100 lots or more which were registered with the Division of Lots Sales and Condominiums as a guide, it was estimated that 15.97% of the platted lots in the three county area are in company ownership. This figure includes lots which have been retained by the companies in contract for deed arrangements with lot purchasers.

11. If a governmental response to the platted lands affects a lot's availability for devel-

### III. A DETAILED ANALYSIS OF SELECTED PUBLIC RESPONSES

#### A. *Continuing to Do What is Already Being Done*

The existing platted lands could be left alone, relying on the

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opment, will that impact fall on the seller-developer or on the purchaser? More specifically, will the purchaser now be able to unwind his purchase or will he be compelled to continue payment on a lot that may have no value to him? This is one of those areas where the law as it has emerged over time may need to be rethought when applied to a situation as extensive as these platted lands.

A frequently debated question concerns the rights and liabilities of the parties to a contract for deed during the period between execution of the contract and conveyance of legal title when an event causes a loss of the property or otherwise diminishes its value. If the parties allocate the risk of loss between themselves in the contract, then such a provision will ordinarily be controlling. In the absence of such a contract provision, however, the court must determine the rights and liabilities of the parties, employing equitable principles. Although courts agree that the "owner" should bear the loss, there is disagreement as to which party is the "owner" for this purpose. Three differing views on the outcome of this problem have received varying degrees of acceptance in American courts. 3 AMERICAN LAW OF PROPERTY § 11.30, at 90 (A. Casner ed. 1952).

The most widely accepted resolution is that the purchaser becomes the "equitable owner" from the time the vendor-purchaser relationship arises (i.e., the execution of the contract), and thus the purchaser bears the risk of loss regardless of who is in actual possession of the property at the time of the loss. *Id.* This is the so-called "equitable conversion theory."

Two minority views have received some support in the courts. Several courts have held that the burden of loss should remain on the vendor until the conveyance of legal title, even though the vendee may be in possession. *Id.* at 91. This view disregards the doctrine of equitable conversion and is based on the common law theories of consideration and implied conditions. A second minority position, expressed in the Uniform Vendor and Purchaser Risk Act, is that the party in possession should bear the risk of any loss occurring between the time of execution of the contract and conveyance of legal title. UNIF. VENDOR AND PURCHASER RISK ACT § 1(b), 14 U.L.A. 554 (1980).

The doctrine of equitable conversion has been generally adopted in Florida. *Arko Enters., Inc. v. Wood*, 185 So. 2d 734, 736-37 (Fla. 1st DCA 1966). See generally 33 FLA. JUR. *Vendor and Purchaser* § 101, at 461 (1960 & Supp. 1982). The theory has been applied to an executory contract for the sale of land. *J.C. Penney Co. v. Koff*, 345 So. 2d 732, 736 (Fla. 4th DCA 1977). Therefore, the purchasers of lots in the platted subdivisions under contracts for deed are likely to be deemed the equitable owners of the land and would bear the burden of any loss or benefit to the land absent any contractual provision allocating such risks in a different manner. For example, if a loss due to flooding were to occur, the purchaser would still be obligated to pay the purchase price agreed upon in the contract, rather than have the seller bear any such burden.

The same general rule is true for eminent domain. In the situation where land subject to an executory contract for deed is taken by a governmental authority by way of eminent domain between the time of execution of the contract and conveyance of legal title, a majority of courts apply the doctrine of equitable conversion and hold that, in the absence of a controlling contractual provision, the purchaser must pay the purchase price and is entitled to the condemnation award. Annot., 27 A.L.R. 3d 572, 592, 612 (1969 & Supp. 1981). A minority of jurisdictions (11) have adopted the Uniform Vendor and Purchaser Risk Act, which allocates the entire risk of loss due to eminent domain proceedings to the party in possession, absent any contractual provision. UNIF. VENDOR AND PURCHASER RISK ACT § 1, 14 U.L.A. 554 (1980).



market to induce development in the more desirable areas. The

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The courts of Florida follow the majority view and place the burden of any loss due to an exercise of eminent domain on the purchaser. *See, e.g., Arko Enters., Inc.*, 185 So. 2d at 740 (court applied doctrine of equitable conversion and held that condemnation of real property after execution of contract and before conveyance of legal title is not a ground for rescission and buyer is entitled to condemnation award).

This doctrine could also be applied to a loss due to a zoning change in the period between execution of the contract and conveyance of title as well as to the usual case of casualty loss. This is apparently the general rule. 6 A. CORBIN, CONTRACTS § 1361 (1962). In a case of first impression in 1969, the Pennsylvania Supreme Court, after noting that the doctrine of equitable conversion was well established in Pennsylvania law, found that no reasonable argument could be made for not applying the doctrine to determine who should bear the risk of loss due to a zoning change. *DiDonato v. Reliance Standard Life Ins. Co.*, 249 A.2d 327, 329, 330 (Pa. 1969).

The courts of Florida ordinarily hold that the beneficial owner is the party who must bear the consequences of any governmental action, absent a contractual provision on the subject. *E.g., J.C. Penney Co.*, 345 So. 2d at 736. In *J.C. Penney Co.*, the court held that the beneficial owner (i.e., the purchaser, after applying equitable conversion upon execution of the contract) is the party directly affected by the change in zoning. *Id.* Thus, the purchaser would reap the benefit of any enhancement in the value of the land as a result of the rezoning as well as bear any loss that may attend a zoning change, even though title may still be in the developer. Florida courts would most likely adhere to this position in a case involving a platted lot purchased under a contract for deed.

However, any new governmental response is likely to involve not one but many lots. Moreover, the platted lot is not the same as the conventional single-family home. It is one of thousands of virtually identical parcels marketed in mass. These two facts could lead the courts to a different ruling for several reasons.

First, if the purchaser were to default on his agreement to buy, it would likely mean he might be practically judgment-proof except to the extent of the value of his lot because of his non-resident status or the cost of recovery. In lay terms, the developer may be stuck anyway.

Second, the platted lands may have little current resale value. The lots may be difficult for individual owners to sell since the market is largely "manufactured" by developer sales efforts, and any lot an individual purchaser may wish to sell must compete with lots being sold from developer inventory. Thus, the developer may be better able to sell a lot than the purchaser.

Third, as an extension of these relative hardship considerations, the developer may be better suited to absorb the loss involved. A single purchaser with an unbuildable lot has little. A developer with many individually unbuildable lots may in fact have one large buildable parcel.

Finally, the equitable conversion doctrine used to decide who bears the risk of loss treats the contract as complete even though title has yet to pass. But equitable conversion is grounded on the assumption that a court would order specific performance of a land sale agreement by the purchaser even though the property has been injured in some way between the time the contract for sale has been signed and the time the deed has been delivered. In some cases, such as the risk of fire loss, it is appropriate to put the burden upon the party in possession on the theory that the risk of loss should follow the occupancy of the property. In the case of the platted subdivisions, however, the court could view the purchaser of a subdivided lot as being similar to the purchaser of a specific product where the risk of loss does not pass to the purchaser until possession has been acquired. To the extent that the developer retains possession under a contract for deed, he is analogous to a seller of a commodity, which is an appropriate comparison in light of the character of the subdivided platted lands.

option of inaction, however, leaves government with the serious problem of deterioration of existing roads and canals. Furthermore, to the extent that the platted lands continue to be built out in scattered sites, operating costs for local government services will increase with the degree of development dispersion. This latter problem could be ameliorated, however, by the fact that some of the companies which sold the subdivided lots generally have tried to implement "lot swapping" arrangements whereby owners who wish to develop are encouraged to do so in areas where building has already occurred. The extent to which these arrangements could alleviate dispersed build-out is something which needs careful study, and could play an important role in negotiated responses to some of the identified problem areas discussed below.

### *B. Limiting or Restricting the Use of Existing Platted Lands in Specific Areas for Specific Reasons*

#### *1. Rezoning to Lower Density*

When land has not yet been platted into lots, rezoning to increase the minimum lot size needed to build a dwelling is possible, as long as the comprehensive land use plan affecting the subdivision at issue is first reviewed by the governing body<sup>12</sup> and the rationale for the change is clearly related to the public health, safety,

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Moreover, unlike the conventional purchase and sale agreement in which both parties are in relatively equal bargaining positions, the large subdivided lot sale developer is a mass merchandiser. The developing rules of warranty of fitness applicable to products is being extended to new construction, and even used homes, but the warranty has never been applied to physical conditions on the land. Thus, the rule which might otherwise apply may not be controlling where thousands of lots are at issue. In that case, a court might find the impact imposed on the platted lands by land use restrictions, as a matter of consumer protection, to be a burden absorbed by the developer. The argument that the developer facilitated the situation requiring the remedial action in the first place, as between the purchaser and the developer, could lead a court to find that the risk of loss should be appropriately allocated to the developer.

In summary, then, a court may choose to vary the conventional Florida rule and place the risk of any loss resulting from government responses to the platted lands on the land developer, absent special circumstances applicable to individual lots, on the basic belief that, as between the developer and the lot purchaser, the developer should more fairly bear the risk until title has passed. Such an outcome would also facilitate any rational governmental response because planners would only need inquire as to those lots to whom title has passed, and treat all others—both those unsold and those under contract for deed—as developer owned.

Thus, while past Florida decisions, as well as those of other jurisdictions, argue for treating purchasers of platted lots under contract for deed as the equitable owners, the platted lands situation may nonetheless require treating the developer as owner.

12. See generally FLA. STAT. §§ 163.3161-.3211 (1981) (amended 1983).

or welfare.<sup>13</sup>

Increasing lot size requirements for the platted lands, however, poses other difficulties. Owners of individual or contiguous home sites thereby rendered unbuildable may try to show that they have acquired a vested right which protects them from a change in the zoning or that their reliance on governmental action prevents enforcement of the new zoning as to their lot. They may also argue that they have been left with no constitutionally adequate use of the property, and are therefore entitled to either invalidation of the regulation or compensation for their property.<sup>14</sup> To understand these issues requires some background in zoning, the principle technique by which local governments control the use of land, the size of parcels needed, and the external aspects of structures such as bulk or parking.

**LIMITS OF REZONING POWER.** Since the United States Supreme Court decided *Village of Euclid v. Ambler Realty Company*<sup>15</sup> in 1926, it has been clear that local government can regulate the use of land through the exercise of police power. *Village of Euclid*, recognized as the leading case on the validity of a zoning ordinance,<sup>16</sup> held that the allocation and restriction of land uses through zoning were consistent with the United States Constitution<sup>17</sup> and laid to

13. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926). For example, the provision of public services to low density housing may prove more expensive per unit than services to higher density areas, making a service cost justification for lower density rezoning difficult to sustain.

14. The question also exists as to whether lot owners could seek relief from rezoning as to minimum lot size on the basis of an alleged non-conforming use. The platting of land, however, is not normally considered a "use" in zoning law for the purpose of establishing a non-conforming use. See *R.A. Vachon & Son, Inc. v. City of Concord*, 289 A.2d 646, 650 (N.H. 1972) (city zoning amendment governing non-conforming uses does not apply to landowner who took no action until after the zoning amendment). Of course, this rule does not apply in states which have enacted statutes which grant immunity from zoning changes to subdivisions which have received final approval. *E.g.*, CONN. GEN. STAT. § 8-26a (1981); MASS. GEN. LAWS ANN. ch. 40A, § 6 (West 1979). Apparently, Florida does not have such a statute. There is a clause in the Florida Statutes which provides for exemption of a project from the necessity of seeking Development of Regional Impact (DRI) approval if prior approval had already been secured from local authorities having jurisdiction. FLA. STAT. § 380.06(18) (1981). This statute provides immunity from subsequent DRI regulations only. Note that the protection afforded landowners from the designation of land as an Area of Critical State Concern under § 380.05(18), Florida Statutes (1981), is not as sweeping. That provision merely reaffirms that affected landowners have vested rights and that designation of land as an Area of Critical State Concern does not extinguish those rights. *Id.*

15. 272 U.S. 365 (1926).

16. *E.g.*, *City of Miami Beach v. Lachman*, 71 So. 2d 148, 150 (Fla. 1953), appeal dismissed, 348 U.S. 906 (1955).

17. *Village of Euclid*, 272 U.S. at 395, 397.

rest the concern that zoning controls were *per se* an unconstitutional infringement upon property rights.

In *Village of Euclid*, the Supreme Court set out the test for determining the validity of a zoning ordinance: "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."<sup>18</sup>

This test has been applied in Florida.<sup>19</sup> In applying the fairly debatable test to a particular zoning ordinance, "the evidence need not establish the wisdom, propriety or efficacy of the ordinance. Rather, it is only necessary to show that reasonable men might differ as to the reasonableness of the ordinance and, upon such a showing, it must be sustained."<sup>20</sup> It is not sufficient, however, to establish that a zoning ordinance is fairly debatable by demonstrating that expert witnesses disagree on the reasonableness of an ordinance. The fairly debatable rule must be applied to the basic physical facts that exist as to a particular parcel of land.<sup>21</sup>

Florida courts have at times seemed uncertain as to how the fairly debatable test should apply. They have attempted to treat the fairly debatable test as if it were analogous to the test for determining the validity of an action of an administrative agency—that its decision be rational in light of all the competent substantial evidence before it.<sup>22</sup> However, zoning has been deemed a legislative function, not a quasi-judicial function to which the competent substantial evidence test would apply. Thus, the two tests are not similar and should be used for different purposes.<sup>23</sup> In *Dade County v. Yumbo, S.A.*,<sup>24</sup> the court pointed out that it is clearly wrong to apply the competent substantial evidence test in cases challenging zoning actions, "which are universally considered administrative in nature" and that the trial court should instead apply the fairly debatable test.<sup>25</sup>

Since the fairly debatable test is heavily weighted in favor of the

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18. *Id.* at 388.

19. *Renard v. Dade County*, 261 So. 2d 832, 837, 838 (Fla. 1972); *Lachman*, 71 So. 2d at 150, 152.

20. Faust, *Zoning*, in *FLORIDA REAL PROPERTY PRACTICES III* § 13.8, at 13.25-26 (Fla. Bar CLE Manual, 2d ed. 1976).

21. *See Oklahoma City v. Barclay*, 359 P.2d 237, 242 (Okla. 1960).

22. *See, e.g., Rural New Town, Inc. v. Palm Beach County*, 315 So. 2d 478, 480 (Fla. 4th DCA 1975) (applicant for rezoning must prove by competent substantial evidence that existing ordinance or classification is not fairly debatable).

23. Faust, *supra* note 20, § 13.18, at 13.25.

24. 348 So. 2d 392 (Fla. 3d DCA 1977).

25. *Id.* at 394.

zoning authority, Florida appellate courts have been reluctant to invalidate zoning decisions of local governments.<sup>26</sup> Thus, an attack on a zoning ordinance may often fail due to this deference to the governmental authority provided that the ordinance also has the requisite relationship to a legitimate goal.<sup>27</sup>

[T]he right of an urban owner to the free use of his property may be regulated by a legitimate exercise of the police power, and when so asserted, fairly and impartially in the interest of the public health, safety, morals or general welfare, the courts will not substitute their judgment for that of the public officials . . . unless it clearly appears that their action has no just foundation in reason and necessity.<sup>28</sup>

Florida cities were given land use regulatory powers in 1939,<sup>29</sup>

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26. See *City of Miami Beach v. Wiesen*, 86 So. 2d 442, 444-45 (Fla. 1956) (upholding zoning ordinance; stating that courts should not substitute their judgment for that of local government in zoning decisions unless enforcement results in confiscation of property); *Lachman*, 71 So. 2d at 152 (upholding denial of rezoning application because existing ordinance fairly debatable). The fairly debatable test is really a question of procedural law: "If the application of a zoning classification to a specific parcel of property is reasonably subject to disagreement, that is, if its application is fairly debatable, then the application of the ordinance by the zoning authority should not be disturbed by the courts." *Davis v. Sails*, 318 So. 2d 214, 217 (Fla. 1st DCA 1975).

27. The United States Supreme Court, in describing the constitutional limits of the power to zone, held that before a zoning ordinance can be declared unconstitutional, it must be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Village of Euclid*, 272 U.S. at 395. This standard also has been adopted in Florida. *Blicht v. City of Ocala*, 195 So. 406, 410 (Fla. 1940); *S.A. Healy Co. v. Town of Highland Beach*, 355 So. 2d 813, 814 (Fla. 4th DCA 1978). The reasonable relationship test is a matter of substantive law: "The fairly debatable rule . . . 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." *Davis*, 318 So. 2d at 217 (emphasis in original).

In this view, it has been recognized that regulations which are enacted in order to prevent or avoid serious traffic congestion are substantially related to the general welfare of the community. See, e.g., *Trachsel v. City of Tamarac*, 311 So. 2d 137, 140 (Fla. 4th DCA 1975) (avoidance of traffic congestion is in interest of public welfare; evidence showing that enactment of zoning ordinance was conducive to that end indicates that propriety of zoning ordinance is fairly debatable and should therefore be upheld). Furthermore, the Florida Supreme Court has recognized that it is exclusively within the legislative competence to consider such factors as future growth and development, adequacy of drainage and storm sewers, public streets, and population density. See *City of Miami Beach v. Weiss*, 217 So. 2d 836, 837-38 (Fla. 1969) (final decree of trial court which directed municipality to rezone certain property reversed because ultimate classification of property involves exercise of legislative powers and consideration of factors peculiarly within legislative competence).

28. *Forde v. City of Miami Beach*, 1 So. 2d 642, 645 (Fla. 1941).

29. Ch. 19539, 1939 Fla. Laws 1248 (current version at FLA. STAT. §§ 166.011-021 (1981)).

making Florida the last of the existing forty-eight states to authorize, by general law, local governmental zoning.<sup>30</sup> However, it was not until 1969 that a similar general law authorizing counties to exercise land use regulatory powers was adopted.<sup>31</sup>

Following the 1939 and 1969 zoning enabling acts, which were permissive, the legislature adopted the Local Government Comprehensive Planning Act of 1975 (LGCPA),<sup>32</sup> which mandated planning (as distinct from zoning) by all local governments, including large counties such as Charlotte, Lee, and Sarasota. The LGCPA requires zoning to be in conformance with the comprehensive plan for a particular area.

The LGCPA requires these counties to include ten specific elements in their plans. Once these elements are addressed in the applicable plan, zoning changes in conformance with these elements can be enacted. Since under the LGCPA all development regulations must be in conformance with the plan, which includes building permits, special permits, etc., the entire framework for addressing platted lands issues could be met by the comprehensive plan.<sup>33</sup>

"GRANDFATHERED RIGHTS" OR VESTED RIGHTS AND ESTOPPEL. Under certain conditions, an owner of land can acquire a right to continue to develop his land even though the government changes the rules to prohibit the type of development undertaken. This concept is commonly called "grandfathering," but its technical name is either vested rights or estoppel. The issue here is whether the existing platted lots are protected by this doctrine from a change in minimum lot size.

Although the concepts of vested rights and equitable estoppel arise from distinct theories, the Florida courts are apparently comfortable with using the doctrines interchangeably.<sup>34</sup> It has been noted that courts may reach the same result in any given factual situation regardless of which concept is applied.<sup>35</sup>

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30. See O'Connell, *Whatever Happened to "Zoning" or What You Need to Know About "The Local Planning Act" But Don't Know What to Ask!*, 50 FLA. B.J. 46, 46 (1976).

31. Ch. 69-139, 1969 Fla. Laws 642 (current version at FLA. STAT. §§ 163.160-315 (1981)).

32. Ch. 75-257, 1975 Fla. Laws 794 (current version at FLA. STAT. §§ 163.3161-.3211 (1981) (amended 1983)).

33. As required by the LGCPA, Charlotte, Lee, and Sarasota counties have adopted comprehensive plans. These plans, however, may need further work to focus specifically on the future development issues of the platted lands.

34. Rhodes, *Vested Rights Update*, 54 FLA. B.J. 787, 787 (1980); see, e.g., *Compass Lake Hills Dev. Corp. v. State*, 379 So. 2d 376, 381 (Fla. 1st DCA 1979) (appellant did not acquire vested rights status under exemption from DRI review provision based on estoppel theory).

35. Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and*

The general rule in Florida is that equitable estoppel will preclude a municipality from exercising its zoning power where "[a] property owner (1) in good faith (2) upon some act or omission of the government (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right he acquired."<sup>36</sup> As one court explained the application of this rule:

[T]he theory of estoppel amounts to nothing more than an application of the rules of fair play. One party will not be permitted to invite another onto a welcome mat and then be permitted to snatch the mat away to the detriment of the party induced or permitted to stand thereon.<sup>37</sup>

Estoppel will come about only if the change in position is induced by an official act performed under circumstances which give rise to a reasonable conclusion that the government knew or should have known that its act would be relied upon in that very manner.<sup>38</sup>

Ordinarily, the issuance of a building permit is a sufficient governmental act to give rise to vested rights or estoppel.<sup>39</sup> Therefore, absent special circumstances,<sup>40</sup> owners of lots in the platted lands who have obtained building permits and have detrimentally relied thereon should have a vested right to build on their lots regardless of restrictions imposed by subsequent zoning ordinances.

As a general rule, the existence or absence of zoning restrictions alone does not constitute a governmental act which, without a building permit or some other authorization, establishes vested

*Vested Rights to Zoning Disputes*, 1971 URB. L. ANN. 63, 65. See also C. SIEMON & W. LARSEN, *VESTED RIGHTS: PROTECTING DEVELOPMENT EXPECTATIONS BY VESTING RIGHTS passim* (1982) (detailed discussion of concept of vested rights).

36. *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So. 2d 10, 15 (Fla. 1976) (quoting *City of Hollywood v. Hollywood Beach Hotel Co.*, 283 So. 2d 867, 869 (Fla. 4th DCA 1973)).

37. *Town of Largo v. Imperial Homes Corp.*, 309 So. 2d 571, 573 (Fla. 2d DCA 1975) (quoting *Driver, J., Cir. Ct., Pinellas County*).

38. See, e.g., *City of North Miami v. Margulies*, 289 So. 2d 424, 426 (Fla. 3d DCA 1974) (city estopped from denying building permit to landowner who incurred substantial expenditures in reliance upon prior rezoning and issuance of conditional use permit).

39. See, e.g., *City of Hialeah v. Allmand*, 207 So. 2d 9, 9-10 (Fla. 3d DCA 1968) (per curiam) (city estopped from prohibiting completion of industrial plant because it had previously issued building permit to owners thereof).

40. See *Hollywood Beach Hotel Co.*, 283 So. 2d at 870 (if city can show that "some new peril to the health, safety, morals, or general welfare of the municipality has arisen between the granting of the building permit and the subsequent change of zoning to the detriment of the landowner, the change of zoning may effectively revoke a building permit").

rights or estoppel.<sup>41</sup> Therefore, in the event that the platted lands subdivisions are rezoned, owners of lots in the platted lands are not likely to successfully argue that they have acquired vested rights to build on their lots on the basis of pre-existing or subsequent zoning.

What about plat approval itself? Courts and commentators in other jurisdictions have indicated that plat approval should be considered a governmental act sufficient to give rise to vested rights and estoppel,<sup>42</sup> and one recent Florida case held that preliminary plat approval, together with substantial developer reliance, constituted grounds for estoppel.<sup>43</sup> Also, the Florida Legislature has provided that subdivision approval is a governmental act which can give rise to vested rights when a landowner's property falls within an area statutorily designated to be an Area of Critical State Concern<sup>44</sup> or subject to Development of Regional Impact (DRI) approval.<sup>45</sup> It would be possible for the courts of Florida, in light of this recent case and this statutory policy, to adopt a rule for the platted lands establishing that subdivision approval is a governmental authorization to proceed with development which gives rise to vested rights or estoppel. In that event, owners of lots and developers of the subdivisions could establish vested rights to proceed with development upon a showing that they have detrimentally relied upon governmental approval of the subdivision lots.

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41. See, e.g., *City of Miami Beach v. 8701 Collins Ave.*, 77 So. 2d 428, 430 (Fla. 1954) (where landowner detrimentally altered his position upon chance that no change in zoning regulations would occur, city not estopped from enforcing new, more restrictive regulations); *Pasco County v. Tampa Dev. Corp.*, 364 So. 2d 850, 853 (Fla. 2d DCA 1978) (county is not estopped from enforcing new zoning ordinance prohibiting developer from constructing multi-family units in subdivision because "[t]he mere existence of a present right to a particular use of land, whether derived from a less restrictive zoning ordinance or no zoning ordinance at all, is not a sufficient 'act' of government upon which to base equitable estoppel").

42. See, e.g., *Gruber v. Mayor of Raritan Township*, 186 A.2d 489, 495, 498 (N.J. 1962) (city is estopped from rezoning property where city had approved subdivision plans and developer detrimentally relied thereon); 4 A. RATHKOFF, *THE LAW OF ZONING AND PLANNING* § 50.03(d), at 50-39 to -40 (4th ed. Supp. 1982) (subdivider may secure vested rights in plat when he changes his position by installing improvements in reliance on grant of final approval).

43. See *Florida Companies v. Orange County*, 411 So. 2d 1008, 1009, 1012 (Fla. 5th DCA 1982) (mortgage lender successfully challenged refusal to approve subdivision plat after preliminary plat approved and developer made good faith expenditures for sewage treatment plant and service lines).

44. FLA. STAT. § 380.05(18) (1981).

45. FLA. STAT. § 380.06(18) (1981).



However, a large scale development the size of the major platted subdivisions would, if undertaken today, be subject to the DRI process, which would address some of the potential problems now being experienced by the platted lands. Thus, the Florida courts might decide that, not having borne the burden of the DRI process, the platted subdivisions are not entitled to its vesting protection. A case involving a relatively small subdivision of several hundred lots may prove inapplicable to a situation on the scale of the platted lands. Moreover, the official government action that produced most of the platted lands was nominal—the acceptance of a map. Unlike conventional current subdivision regulation, which involves a review of the proposed land plan,<sup>46</sup> the review process for much of the original platted lands was pro forma and principally served as an aid to lot description for ultimate sale. Therefore, the past approval process may be less likely to create an estoppel situation than critical public review of a subdivision plan under modern regulations.

Showing the requisite governmental act is half the issue. The other half is the landowner's conduct. In establishing detrimental reliance which, in conjunction with a governmental authorization, is sufficient to create vested rights or estoppel, it is not necessary for the landowner in Florida to show that physical changes in the land have been made.<sup>47</sup> Apparently, however, the rule in most jurisdictions is that land acquisition costs alone are not a sufficient detriment to create vested rights,<sup>48</sup> and there is no direct case law

46. Ch. 71-339, § 3, 1971 Fla. Laws 1533, repealed the provisions in Florida concerning maps and plats and introduced a new statutory scheme. Among the new requirements is a provision that the submission of the plat for approval be accompanied by a title opinion from an attorney at law licensed in Florida or a certification by an abstractor or a title company indicating that the land described in the plat is owned by the developer. FLA. STAT. § 177.041 (1981). There is also a more exacting surveying requirement and a mandate that plats be approved by the appropriate local government before they are recorded. FLA. STAT. §§ 177.061-.071 (1981).

47. *Imperial Homes Corp.*, 309 So. 2d at 573 (existence of building permit or physical changes to land not condition precedent to invoking estoppel); Rhodes, *supra* note 34, at 790 (has been held that physical changes in property not prerequisite to application of estoppel).

48. See, e.g., *Sautto v. Edenboro Apts., Inc.*, 174 A.2d 497 (N.J. Super. Ct. App. Div. 1961).

Clearly, cost of land to a property owner should not, ordinarily or invariably, be regarded as a factor of reliance to prevent subsequent zoning upgrading beneficial to the community at large, since every owner has presumably made an expenditure for his property at some time or other. Cases too numerous to require citation hold that a property owner may not be exempted from an upgrading zoning ordinance merely because he may more profitably use the property as previously . . .

on this issue in Florida.<sup>49</sup> Assuming that the majority of the owners of individual lots in the platted lands have not incurred liabilities beyond the initial acquisition of the land, the adoption of such a rule in Florida would appear to prevent the creation of vested rights or estoppel for those lot owners.

Developers of the platted lands who have expended funds for roads, drainage canals, or made land dedications to the public may well have undertaken a sufficient detrimental reliance to give rise to vested rights or estoppel.<sup>50</sup> Courts in other jurisdictions have recognized such expenditures as creating vested rights to develop in a manner contrary to subsequent zoning restrictions.<sup>51</sup> In other jurisdictions, however, vested rights do not arise if the developer is capable of recouping his expenditures despite the increased zoning restrictions or if he has abandoned the expenditures.<sup>52</sup> One court has stated that "[t]he right to upgrade zoning requirements in the public interest may fairly be sustained against a development which will be subjected to no substantial loss by virtue of the upgrading."<sup>53</sup> Whether Florida courts would so rule is unclear. If so, then developers who have made expenditures in reliance upon governmental approval of subdivision plats<sup>54</sup> and who have not aban-

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zoned.

*Id.* at 504.

49. In *Imperial Homes Corp.*, the court acknowledged that "the mere purchase of land does not create a right to rely on existing zoning" but found that land acquisition costs plus other factors gave rise to an estoppel. 309 So. 2d at 573. In that case, the government rezoned the property at the owner's request and was aware that the purchase of the property was contingent upon the rezoning. *Id.* The same nexus between a governmental authorization and land acquisition costs is not present when the authorization is subdivision approval. But in *Florida Companies*, the court found a mortgage lender entitled to standing to challenge a denial of a plat approval when it had disbursed funds in reliance on preliminary plat approval. 411 So. 2d at 1009, 1012.

50. See *Florida Companies*, 411 So. 2d at 1009, 1012 (sewage treatment plant and service line expenditure).

51. See, e.g., *Telimar Homes, Inc. v. Miller*, 218 N.Y.S.2d 175, 176 (N.Y. App. Div. 1961) (mem.) (developer who installed water system, roads, drainage system, and model homes, acquired vested right against subsequent zoning ordinance which increased lot size requirements).

52. See *Putnam Armonk, Inc. v. Town of Southeast*, 382 N.Y.S.2d 538, 541-42 (N.Y. App. Div. 1976) (case remanded for determination of whether developer abandoned or recouped his expenditures and, in the event that there was partial abandonment or partial recoupment, whether considerations of public health, safety, and welfare override developer's remaining interests).

53. *Virginia Constr. Corp. v. Fairman*, 187 A.2d 1, 7 (N.J. 1962). See also *Gisler v. County of Madera*, 112 Cal. Rptr. 919, 920, 923 (Cal. Dist. Ct. App. 1974) (18 acre minimum lot size and agricultural zoning of subdivision recorded with two and one-half acre residential lots but still used for agricultural purposes upheld).

54. An unresolved issue is whether, in weighing the vesting or estoppel issues, the gov-

doned those expenditures may have vested rights in the existing lot sizes if they can prove that they cannot recoup their expenditures with increased lot sizes.

In summary, a rezoning of the platted lands would probably be effective against a vested rights or estoppel challenge by owners of individual lots who have not yet obtained building permits under the old zoning or made substantial expenditures, and against developers who have not made substantial expenditures and whose lots provide enough land to permit aggregation to the new minimum lot size without severe hardship.

**THE TAKING CHALLENGE TO REZONING.** The compensation clause of the fifth amendment of the United States Constitution, like similar state constitutional provisions, provides that private property may not be taken for public use without just compensation.<sup>55</sup> A rezoning to lower density involves no acquisition or taking by the government, as when it takes land for a highway, but this constitutional language has been used to invalidate governmental regulation that leaves the property owner in possession but goes "too far" in regulating its use.<sup>56</sup> The standard for finding a taking, in this regard, has never been established by a definitive test. In each case, the courts engage in factual ad hoc inquiries in order to determine whether a taking has occurred.<sup>57</sup>

The United States Supreme Court has discussed a number of factors which bear upon whether a taking has occurred in any given case. These include (1) the economic impact of the regulation on the property owner, particularly the extent of interference with reasonable investment-backed expectations, and (2) the character of the governmental action.<sup>58</sup> These factors have been cited by the courts of most states, including Florida.

The Florida Supreme Court, in *Graham v. Estuary Properties, Inc.*,<sup>59</sup> agreed that no definitive formula existed for determining when an exercise of the police power constituted a taking, but

ernmental act or the landowner reliance is more critical, and also whether any reliance is always subject to a proviso that government acts with the reservation that it may change its mind. For a discussion of this issue in relation to the contract clause of the United States Constitution, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 465-73 (1978).

55. U.S. CONST. amend. V.

56. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

57. *Loretto v. Teleprompter Manhattan CATV Corp.*, \_\_\_ U.S. \_\_\_, 102 S. Ct. 3164, 3171 (1982); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

58. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Penn Cent. Transp. Co.*, 438 U.S. at 124.

59. 399 So. 2d 1374 (Fla. 1981).

listed six factors which it deemed relevant: (1) whether there is a physical invasion of the land, (2) whether the regulation precludes all economically reasonable use, (3) whether the regulation confers a public benefit or prevents a public harm, (4) whether the regulation promotes the health, safety, welfare, or morals of the public, (5) whether the regulation is arbitrarily and capriciously applied, and (6) the extent to which the regulation interferes with investment-backed expectations.<sup>60</sup> The third, fourth, and fifth factors cited relate to the validity of the governmental action in the first place, and the remaining three factors relate to whether a taking has occurred, either because of the character of the governmental action or the impact on the property owner.

Thus, an important factor to be considered in evaluating whether a taking has occurred is whether the zoning regulation is a valid exercise of the police power.<sup>61</sup> In this regard, an increase in lot size must be shown to be reasonably related to the public health, safety, and welfare. Alleviation of traffic congestion,<sup>62</sup> preservation of the environment<sup>63</sup> and concern for the irreversible effect on an area's ecological balance as a result of urban development<sup>64</sup> have all been recognized as legitimate concerns within the ambit of the public welfare. Local governments may be able to justify increases in lot size requirements for the platted lands by showing that some or all of the above-mentioned ends are the goal of the rezoning action.<sup>65</sup>

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60. *Id.* at 1380-81.

61. *Id.*

62. See *Trachsel v. City of Tamarac*, 311 So. 2d 137, 140 (Fla. 4th DCA 1975) (avoidance of traffic congestion is in interests of public welfare and legitimate goal of zoning ordinance).

63. See *Town of Indialantic v. McNulty*, 400 So. 2d 1227, 1231 (Fla. 5th DCA 1981) (it is established that police power may be exercised to protect and preserve environment).

64. *Moviematic Indus. Corp. v. Board of County Comm'rs*, 349 So. 2d 667, 669 (Fla. 3d DCA 1977).

65. There is a rebuttable presumption that exercises of the police power are reasonably related to the public health, safety and welfare. *City of Boca Raton v. Boca Villas Corp.*, 371 So. 2d 154, 159 (Fla. 4th DCA 1979) (per curiam). That presumption can be overcome by substantial competent evidence. *Id.* In *Boca Villas Corp.*, for example, a zoning amendment which placed a "cap" on dwelling units was found not to be reasonably related to the public health, safety and welfare in light of certain findings of fact that (1) utility services would not be strained by increased growth, (2) water resources could withstand increased growth so long as proper management policies are maintained, and (3) the city's comprehensive plan would not be affected if the cap was removed. *Id.* at 156-57. The court concluded that the lack of a compelling need justifying the restrictive provision is sufficient to invalidate the legislative act without considering the question of confiscation. *Id.* at 157. To the extent that the local governments in the three county area are able to establish that increased growth will have deleterious effects on the public health, safety and welfare, and that the new zoning requirements address those problems, the reasonable relation test will be met.

But while rezoning may be a valid exercise of the police power, as applied to a specific parcel, it may nonetheless constitute an invalid taking. For example, the character of the governmental action is important. A taking is more readily found when a physical invasion occurs, though physical invasion is not a prerequisite.<sup>66</sup> The United States Supreme Court has recently stated that if the intrusion amounts to a permanent physical occupation by the government, its agents, or the general public, the character of the government action is determinative and there is a taking.<sup>67</sup> If the regulation does not result in a physical invasion, other factors must be considered in analyzing whether the regulation constitutes a taking.<sup>68</sup> Since the rezoning of the subdivisions under the police power authority would not result in any physical invasion of the property by government, its agents, or the public at large, it is the other factors which relate to the impact on the property owner that would be determinative.<sup>69</sup>

A valid police power regulation may still constitute a taking of private property for public use without just compensation if the effect of the regulation is to deny all reasonable use of the property,<sup>70</sup> and Florida decisions have held that a zoning ordinance

66. *Penn Cent. Transp. Co.*, 438 U.S. at 123 n.25, 124.

67. *Loretto*, 103 S. Ct. at 3171, 3176; see Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184 (1967) (physical occupation by government is always a compensable taking).

68. *Loretto*, 103 S. Ct. at 3177.

69. Decisions of the United States Supreme Court have uniformly held that a diminution in value alone cannot establish a taking. *Penn Cent. Transp. Co.*, 438 U.S. at 131; see *Village of Euclid*, 272 U.S. at 384, 395 (zoning resulting in 75% diminution in value not a taking); *Hadacheck v. Sebastian*, 239 U.S. 394, 405, 410-11 (1915) (ordinance upheld even though it caused 87% diminution in value). Furthermore, governmental regulation has been held permissible even though it prohibits the most beneficial use of the land. *Penn Cent. Transp. Co.*, 438 U.S. at 125; *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592-93 (1962).

70. Arguably, rezoning ordinarily does not deny all reasonable use of the land. "Property," as that word has been construed in the context of taking analysis, signifies the group of rights held by virtue of ownership of a physical thing. *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945). These are the rights to possess, use, and dispose of the physical thing. *Id.* at 378; see *Loretto*, 103 S. Ct. at 3176 (quoting *General Motors*). Because rezoning in many circumstances will not substantially interfere with any of these rights it will be arguable that the property still has value to the owner and that a compensable taking did not occur. In this regard, the case *Andrus v. Allard*, 444 U.S. 51 (1979), is of interest. The United States Supreme Court found that a regulatory prohibition on the sale of artifacts partly composed of feathers of statutorily protected birds was not a taking as to traders of bird artifacts because they retained the rights to possess, transport, devise and donate their personal property. *Id.* at 65-66. The mere loss of future profits was insufficient to establish a taking. *Id.* at 66.

Related to the economic impact factor is a consideration of whether the regulation interferes to a significant extent with the property owner's reasonable investment-backed expect-

constitutes a taking if the landowner demonstrates that the ordinance effectively deprives him of all reasonable uses of his prop-

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tations. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the leading case for that proposition, the Supreme Court reasoned that an otherwise valid exercise of the police power may interfere with distinct investment-backed expectations to such an extent that a taking will occur. 260 U.S. at 414-15. A standard defining such an expectation, however, has not emerged.

In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the Supreme Court considered a case in which the owners of a pond which was considered to be private property under state law dredged a channel which connected the pond to navigable waters. 444 U.S. at 166-67. The Court held that the consent of the Corps of Engineers in the dredging operations led to a reasonable expectation on the part of the owners that they could exclude people from their property. *Id.* at 179. The government could not declare the owners' property to be navigable waters, and thereby open the property to the general public, without furnishing just compensation. *Id.* at 179-80. In *Penn Cent. Transp. Co.*, the Court found that the plaintiff's primary expectation for the use of its property was as a railroad terminal with offices and shops. 438 U.S. at 136. Therefore, the plaintiff had not established a taking on the basis of the city's denial of permission to build a high rise office building in the air space above the terminal. The Court stated: "[T]he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable." *Id.* at 130. Rather, the focus must be on the interference with the rights in the parcel as a whole. *Id.* at 130-31.

In *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374 (Fla. 1981), the factfinder had concluded that the plaintiff's plans for development did not accomplish the goal of assuring that the development would not adversely affect the environment. 399 So. 2d at 1383. The Florida Supreme Court, therefore, concluded that the plaintiff had only "its own subjective expectation" that the land could be developed without adversely affecting the environment and that a reasonable investment-backed expectation had not been interfered with when the plaintiff's application for a DRI permit was denied. *Id.* The court in *Estuary Properties, Inc.* distinguished *Zabel v. Pinellas County Water and Navigation Control Auth.*, 171 So. 2d 376 (Fla. 1965) and *Askew v. Gables-By-The-Sea, Inc.*, 333 So. 2d 56 (Fla. 1st DCA 1976), *cert. denied*, 345 So. 2d 420 (Fla. 1977), by pointing out that in both cases the plaintiffs purchased submerged lands owned by the state with the expectation of filling the land and the lands were totally useless unless they were filled. *Estuary Properties, Inc.*, 399 So. 2d at 1381, 1383. Furthermore, in *Zabel*, a statutory right to fill the land existed when the property was purchased. *Id.* at 1383.

In *Deltona Corp. v. United States*, 657 F.2d 1184 (Ct. Cl. 1981), the Court of Claims considered a case in which the plaintiff was prevented from fully developing its land due to the expansion of the jurisdiction of the Army Corps of Engineers and a stiffening of the requirements for building permits. *Id.* at 1190-91. The plaintiff, Deltona, had plans to sequentially develop a five phase project on Marco Island. *Id.* at 1188. Two phases were developed before the regulatory changes by the Army Corps of Engineers. *Id.* Deltona had all of the necessary state and local permits for the remaining phases and had entered into contracts for the sale of 90% of the lots in two of the areas. *Id.* at 1189. Although the court found that Deltona had been deprived of a reasonable investment-backed expectation, it was held that a taking had *not* occurred. *Id.* at 1192-94. Citing language from *Penn Cent. Transp. Co.*, the court found that there was no taking because Deltona had never been given assurances that it would be allowed to develop according to its original plans. *Id.* at 1193. Furthermore, it was found that Deltona's residual economic enterprises on Marco Island were substantial and that the regulations to which Deltona was subjected were uniformly enforced nationwide. *Id.* at 1192.

erty.<sup>71</sup> The owner of a residential lot may challenge an ordinance which mandates increased lot sizes on the ground that it amounts to a taking because it prevents residential construction, assuming that is the only viable use of the parcel. Such challenges would ordinarily be successful, since the owner would seem to have met the burden of showing that there were no remaining reasonable uses for his lot,<sup>72</sup> unlike cases in which a landowner was only prevented from using his land for its highest and best use.<sup>73</sup>

In summary, current Florida case law indicates that, even assuming a substantial public interest, an increased lot size requirement for a single lot could constitute a taking if the landowner establishes that he will lack any other reasonable use for the lot he owns, and such a rule would ordinarily apply to a lot in an undeveloped subdivision. As discussed earlier, however, the major lot sale subdivisions in Charlotte Harbor may create problems calling for a different conclusion.

A court which might find it unfair to preclude a single lot owner from developing an otherwise ordinary residential lot might refrain from providing the same right to owners of several hundred thousand lots in an area as large as the platted lands and thereby deprive public authorities of any effective regulatory response to a problem which is by definition far larger in scope.<sup>74</sup> The judiciary

71. See *Ex parte Wise*, 192 So. 872, 875 (Fla. 1940) (well-established principle that when application of zoning ordinance completely deprives owner of beneficial use of property, ordinance should be altered to prevent confiscation without compensation).

72. See *Miami Shore Village v. Ellis*, 53 So. 2d 324, 325 (Fla. 1951) (Thomas, J. concurring) (per curiam) (where zoning law effectively prevents construction on owner's fifty-foot lot, no reasonable use remains and constitutional guarantees have been invaded); *Graves v. Bloomfield Planning Bd.*, 235 A.2d 51, 55-56 (N.J. Super. Ct. Law Div. 1967) (the settled rule in most jurisdictions is that "a municipality may not destroy the economic value of an isolated lot by retroactively prohibiting the erection thereon of a single-family dwelling through adoption of a zoning ordinance prescribing minimum lot size requirements unless relief is available to the owner of such undersized lot"); *Long Island Land Research Bureau v. Young*, 159 N.Y.S.2d 414, 417 (N.Y. App. Div. 1957) (when minimum lot size regulation bars property from any practical use for which suited, owner must be compensated). It may be significant that in *Miami Shore Village* it was not apparent from the opinion whether there was a showing of environmental considerations in support of the ordinance.

73. See, e.g., *S.A. Healy Co. v. Town of Highland Beach*, 355 So. 2d 813, 814 (Fla. 4th DCA 1978) (zoning ordinance which prohibited use of land that would double value of land did not constitute a taking).

74. This discussion again grows out of specific situations not involving parcels of land of the scope involved in the platted subdivisions. The cases indicate that where the impact of government regulation is widespread and does not appear to single out a specific owner of land, treating similarly situated landowners the same, the governmental action is more likely to be upheld. Thus a doctrine which might suggest a taking in the case of a few lots might not fit the situation where regulations affect many lots.

might be especially deferential to governmental action if offered significant justification for the action,<sup>75</sup> and if it was determined that the purchasers of these lots lacked significant and justifiable investment-backed expectations.

Many lot owners may appear to be primarily speculators rather than deferred users.<sup>76</sup> An individual lot has little value on the open market because it is competing with the lot sales force of the developer and the other lot owners desiring to sell their lots, meaning there may be no market for a lot unless the developer chooses to make one. Moreover, some of the expectations of land purchasers may be unjustified by the physical aspects of the affected parcels themselves.<sup>77</sup> In this regard, it is conceivable that, given a sufficient need, a court would sustain a rezoning of the platted lands to a lower density even though it would make single lots unsuitable for building because the platted lot owner is deemed to have a more limited entitlement from the outset. Such a course would, however, mark a significant departure from traditional rules and require a strong showing of an important reason necessitating the change.

If a number of contiguous lots are held by a single owner and a zoning ordinance increases the lot size requirements for construction on those lots such that none of them, alone, are of sufficient size, will the owner of the contiguous lots, like owners of individual lots, have a significant taking argument that the lots should be exempt from the ordinance? If the owner is able to comply with the

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75. See *Town of Indialantic v. McNulty*, 400 So. 2d 1227, 1232-33 (Fla. 5th DCA 1981) (where important public interest such as protection of coastal wetlands is at stake, owner has heavier burden of showing that intended use will not likely result in the harm that the ordinance seeks to prevent, and a balancing between public harm prevented and derogation of individual property rights is appropriate). In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the United States Supreme Court noted that the taking question "necessarily requires a weighing of private and public interests." *Id.* at 261.

76. Cf. *Andrews v. Lathrop*, 315 A.2d 860, 864 (Vt. 1974) (upholding a tax on gain derived from short term sales of Vermont land in part because of its rational relationship to the legitimate goal of deterrence of speculation). The court said:

We may take judicial notice of an increasing concern within the State over the use and development of land as a natural resource, a concern to which the legislature has responded in other instances with appropriate legislation. . . . Speculation falls within the ambit of such concern as a land use; indeed it has a bearing on many other uses to which the land might be put.

*Id.* at 863.

77. In short, the use of a test such as interference with reasonable investment-backed expectations is really an exercise in circular reasoning unless some initial content can be given to what expectations are in fact reasonable. The planning process may aid in disclosing the range of reasonable expectations. Or put another way, even if no regulation was to be undertaken, a lot purchaser might find that there are physical constraints on the property that would preclude using the land.



ordinance by consolidating his lots and then building at a density in accordance with the new standards, the taking argument is considerably weakened.<sup>78</sup> In that circumstance, the property value would merely be diminished and would not be destroyed.<sup>79</sup> As one Florida court has stated, "[a] zoning ordinance is not invalid merely because it prevents the owner from using the property in the manner which is economically most advantageous."<sup>80</sup> There is, then, a strong argument that an increase in lot size requirements would not constitute a taking against owners of contiguous lots which could be combined to meet the new requirements.

In summary, if police power validity was established, owners of multiple lots might find it difficult to show that a taking has occurred according to the criteria set forth in *Estuary Properties*.<sup>81</sup> There would not be a physical invasion of the land and the purpose of the ordinance would, arguably, not be an excessive interference with investment-backed expectations.<sup>82</sup> As stated above, however, single-lot owners may make a more substantial challenge.

## 2. Special Permits

Special permits have historically been used to provide local government with some degree of administrative discretion in regulating a particular form of new development. Schools and churches, for example, are commonly found in residential zones pursuant to

78. At least one court, however, has found this scenario to be objectionable. In *Wood v. North Salt Lake*, 390 P.2d 858 (Utah 1964), the municipality increased lot size requirements and denied a building permit to the plaintiff solely because his lot lacked the necessary square footage. The municipality argued that adjoining lots owned by the plaintiff could be used to conform to the new requirement. *Id.* at 858-59. The court declared that this argument "loses sight of the fact that one owning two adjoining lots would be subject to the zoning ordinance, while a neighbor owning but one lot presumably would be either inoculated against the ordinance . . . [or] would be owner of a useless lot. . . . Such a state of affairs would seem to be objectionable under simple principles touching discrimination." *Id.* at 859.

79. See *Moviematic Indus. Corp. v. Board of County Comm'rs*, 349 So. 2d 667, 668, 671 (Fla. 3d DCA 1977) (where zoning ordinance changed classification of owner's land from heavy industrial to single-family residential on a minimum of five acre lots, there was no taking because owner did not demonstrate that his property could not be put to a use compatible with the new zoning; evidence that the ordinance resulted in a reduction in the market value of the property was not sufficient to establish a taking).

80. *City of Miami v. Zorovich*, 195 So. 2d 31, 36 (Fla. 3d DCA), *cert. denied*, 201 So. 2d 554 (Fla. 1967).

81. See *supra* text accompanying note 60 for a list of the criteria.

82. See *Deltona Corp. v. United States*, 657 F.2d 1184, 1192 (Ct. Cl. 1981) (where the court held that the frustration of the landowner's investment-backed expectations was insufficient to establish a taking claim).

special use permits and subject to additional regulations with respect to setback, parking, minimum lot size, and perhaps location in relation to other uses. The special permit simply provides an opportunity for the reviewing agency to determine whether development in a particular location will create special problems which can be ameliorated by specifically devised conditions, or whether the situation requires denial of development permission.

The use of special permits has expanded in recent years beyond the control of use-type permits to require preconditions for particular uses, or to limit or time growth. If areas of the platted subdivisions create specific problems by their build-out, or if they have environmental constraints to building, the special permit process could provide the ability to look more closely at the proposed use, as well as a better opportunity to deal with possible adverse impacts on environmental issues such as water quality and supply. For example, it might prove feasible to condition the issuance of a building permit for a canal-front lot in the platted lands upon a showing that the site plan provides holding swales and sufficient canal bank vegetation to minimize pollutant runoff from newly installed impermeable surfaces, such as roofs or driveways.

It should be noted that the conditions for granting special permits are often listed in the ordinance itself and not left to the discretion of reviewing officials.<sup>83</sup> This places developers, landowners and builders on notice of the possible problems with the build-out of the special permit areas. In this way it subtly dissuades private investment in these areas unless the applicant is willing to go through the heightened review process. For developers, builders and speculators, it provides guidance as to where public policy desires investment to be made and not to be made.

The terms "special permit," "special exception" and "conditional use permit" are virtually synonymous. They all refer to administrative permission to use land for a specified purpose within a zoning district.<sup>84</sup> Special exceptions have been defined by statute in Florida as uses which "would not be appropriate generally or without restriction throughout the particular zoning district . . . but which, if controlled as to number, area, location, or relation to

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83. See *City of Naples v. Central Plaza of Naples, Inc.*, 303 So. 2d 423, 425 (Fla. 2d DCA 1974) (city council, in rejecting application for special exception, did not have right to consider whether proposed construction would increase amount of traffic and result in overpopulation which would strain utilities and other services because these factors were not delineated in ordinance).

84. 3 R. ANDERSON, *AMERICAN LAW OF ZONING* 2D § 19.01, at 357-58 (1977).

the neighborhood, would not adversely affect the public health, safety, comfort, good order, appearance, convenience, morals, and the general welfare."<sup>85</sup>

With this mechanism, legislative bodies of local governments authorize certain uses within a zoning district subject to specified conditions. An administrative body is appointed to ascertain whether the conditions have been met. If the conditions are met, it is the administrative body's duty to grant the special permit or special exception unless it also determines that such use would adversely affect the public interest.<sup>86</sup> Section 163.225(2)(b), Florida Statutes, provides: "In granting any special exception, the board shall find that such grant will not adversely affect the public interest."<sup>87</sup>

Like most other states, Florida has enacted enabling legislation which empowers municipalities to authorize a board of adjustment to grant special exceptions.<sup>88</sup> Municipal ordinances which create special exceptions must include the requisite conditions which are necessary to qualify for a special exception.<sup>89</sup>

Special exceptions are challenged most frequently as improper delegations of legislative authority. The aggrieved party claims that the ordinance in question contains standards which are not sufficiently restrictive for the guidance of the board of adjustment. The Florida courts have adhered to the "traditional approach" to this issue.<sup>90</sup> This approach holds that the constitutional principles of separation of powers and due process require meaningful legislative standards and, to a lesser extent, procedural safeguards. The most recent enunciation of this doctrine appeared in *Askew v.*

85. FLA. STAT. § 163.170(6) (1981).

86. See *Odham v. Petersen*, 398 So. 2d 875, 877 (Fla. 5th DCA 1981) (once ordinance criteria is established, board has duty to grant the special exception unless it finds the use to be adverse to the public interest).

87. FLA. STAT. § 163.225(2)(b) (1981); see *Rural New Town, Inc. v. Palm Beach County*, 315 So. 2d 478, 480 (Fla. 4th DCA 1975) ("where the applicant has otherwise complied with those conditions set forth in the zoning code, the burden is upon the zoning authority to demonstrate by competent substantial evidence that the special exception is adverse to the public interest"; applicant is permitted use unless zoning authority finds that pursuant to standards in ordinance it is adverse to public interest) (emphasis in original).

88. FLA. STAT. §§ 163.220(1), .225(2) (1981).

89. *Id.* at § 163.225(2)(a). In *City of St. Petersburg v. Schweitzer*, 297 So. 2d 74, 76 (Fla. 2d DCA 1974), an ordinance providing for special exceptions was held to be invalid because the commission's procedure for determining whether a special exception should be granted was created independently of the ordinance.

90. Martin, *Legislative Delegations of Power and Judicial Review — Preventing Judicial Impotence*, 8 FLA. ST. U.L. REV. 43, 43-44 (1980).

*Cross Key Waterways*,<sup>91</sup> where the Florida Supreme Court held that the relatively precise criteria contained in the Florida Environmental Land and Water Management Act of 1972<sup>92</sup> for determining whether a geographic area should be designated an Area of Critical State Concern was insufficient because it did not establish priorities which could be ascertained by a reviewing court.<sup>93</sup> The legislation was held to have effectively delegated policy decisions to an administrative agency in contravention of article II, section 3, of the Florida Constitution.<sup>94</sup>

With proper drafting, a special permit process may provide a means of better dealing with problems created by build-out of the platted lands by providing local government with the opportunity to place reasonable conditions on development approval.

What if the application of a special permit requirement made a lot incapable of improvement? In this regard, the issues discussed previously concerning rezoning again become relevant. Without recapitulating that discussion, a valid and important planning or environmental reason for the permit condition, especially one arising from new information, should make the permit condition sustaina-

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91. 372 So. 2d 913 (Fla. 1978).

92. Ch. 72-317, 1972 Fla. Laws 1162 (codified as amended at FLA. STAT. §§ 380.012-10 (1981)). The criteria for designating an area of critical state concern is found at FLA. STAT. § 380.05(2) (1981).

93. *Cross Key Waterways*, 372 So. 2d at 919, 925.

94. *Id.* at 925. The Florida Supreme Court emphasized that its decision was not based on the use of words such as "significant impact" and "significant effect" because such approximations are a necessity in legislation. *Id.* at 919. The seminal case for construing the delegation of powers issue in the context of special exceptions is *Drexel v. City of Miami Beach*, 64 So. 2d 317 (Fla. 1953). In *Drexel*, the Florida Supreme Court considered an ordinance which regulated the construction of multiple-level automobile parking garages. The ordinance provided that no such structures were to be built in a designated area except upon "approval and permit by the City Council . . . after a public hearing at which due consideration shall be given to the effect upon traffic of the proposed use." *Id.* at 318. The court found the statute void because the condition that "due consideration" be given was too lax and inexact. *Id.* at 319. Such language could "easily become . . . an instrument of discrimination" and "ripen into a power that would take away property" in violation of the Florida and United States Constitutions. *Id.*

For two examples of out-of-state cases in which special exception ordinances were held not to involve an improper delegation of power, see *Oursler v. Board of Zoning Appeals*, 104 A.2d 568, 570 (Md. 1954) (statutory authorization to empower zoning commissioner to issue special permits for restaurants and other commercial uses in residential areas when they are in accord with basic purposes and intent of zoning regulations is valid delegation of legislative power), and *State ex rel. Saveland Park Holding Corp. v. Wieland*, 69 N.W.2d 217, 219, 224 (Wis.) (ordinance authorizing issuance of building permit upon finding that architectural plan of building would not be so at variance with neighboring structures that substantial depreciation of neighborhood would occur held to be sufficiently definite and therefore valid), *cert. denied*, 350 U.S. 841 (1955).

ble even though it adversely affects some pre-existing lots. This is especially so if the permit condition does not deny the right to build outright but places upon the owner the burden of proof to show that a reasonable environmental safeguard will be met.<sup>95</sup> The most difficult situation, of course, is where it is practically impossible to satisfy a required permit condition. A court is then faced with the problem that a new development condition may mean a platted lot (or group of lots) may not be buildable at all. Again, where a large parcel of land consisting of contiguous lots is involved, some uses may still remain, such as agriculture, timber, livestock grazing or significant recreation (golf, tennis, etc.). What if one lot is involved, however, and the lot is realistically too small for the foregoing uses to have much meaning? In such a situation a court must decide whether to invalidate the condition as applied to that lot and defeat the public interest, or let it stand and adversely affect the lot owner's interest. Here, the conventional rule would protect the landowner, or at least force the government to decide whether it wants to limit his use, but only after payment of just compensation for the restriction imposed.<sup>96</sup> While the outcome is uncertain, the chance of the special permit requirement being upheld as a valid exercise of governmental authority improves significantly if the condition relates to the specific characteristics of the lot or to the prevention of a specific environmental or other type of harm.<sup>97</sup>

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95. The state of Vermont, for example, places upon an applicant for a permit for a major subdivision or development the burden of showing compliance with six criteria (out of ten), relating to pollution, water supply, soil erosion conformance to any state plans, and local or regional capital programs. VT. STAT. ANN. tit. 10, §§ 6086(a)(1)-(10), 6088 (1973). Pursuant to an administrative rule, Vermont has allowed issuance of a permit or a certification of compliance by a state agency to create a rebuttable presumption that specified criteria have been met. D. MANDELKER, ENVIRONMENTAL AND LAND CONTROLS LEGISLATION 378 (1976).

96. See FLA. STAT. chs. 73-74 (1981 and Supp. 1982) (outlining procedure for condemnation of private property by eminent domain and payment of just compensation) (amended 1983).

97. See *Just v. Marinette County*, 201 N.W.2d 761, 768, 772 (Wis. 1972) (shoreland wetland conservation law upheld); see also Berger, *The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis*, 76 COLUM. L. REV. 799, 823 (1976), arguing:

The most offensive uses will give way, regardless of the offender's economic loss. But uses vary in their degree of harm, as do opinions on the nature of harm; and as we move from more to less harmful uses, or as the consensus over harmfulness weakens, we become increasingly aware of what regulation costs the offender. At some point, his hardship may well outweigh the perceived benefit which the community gains from removal of a "harmful" use. At that point, further regulation may then be deemed a taking.

### 3. *Moratoria*

A moratorium is generally a total ban of all of a particular type of building for a temporary period of time. The reasons for use of moratoria on development or building are to provide government the opportunity to plan or rezone without the pressure of permit applications being filed while the action is being undertaken; to prevent building which may not be in conformance with new requirements; and to provide time for more orderly and professional consideration of planning or rezoning efforts. The use of a moratorium places everyone on notice that the "rules of the game" may change and creates, in the case of platted lands, a concern that if investment decisions are to be made then perhaps they should be made outside moratorium areas.

While a plan for the platted lands is being considered, it may be advisable to enact a moratorium in certain areas to temporarily prevent further development until the planning process has been completed and permanent controls have been prepared to implement the plan.<sup>98</sup> The moratorium would serve to encourage and protect the planning process and to preserve the status quo while the permanent plan is being developed. Temporary measures adopted during the preparation of a comprehensive zoning ordinance are generally held to be valid when they are based on a reasonable period of time to complete the study and implement the ordinance.<sup>99</sup>

### 4. *Eminent Domain*

Where restriction of land use is not permissible because of the limits on the exercise of the police power, an alternative method to accomplish the same result may be through a land use restriction acquired by purchase or by the exercise of the power of eminent domain. The purchase option is simply the offer to buy the restriction or the entire fee. If accepted at the price offered, there is no problem. Where voluntary purchase is not possible, eminent do-

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98. Freilich, *Development Timing, Moratoria, and Controlling Growth*, 1974 INST. ON PLAN. ZONING & EMINENT DOMAIN 147, 151-52.

99. See, e.g., *Jason v. Dade County*, 37 Fla. Supp. 190 (Cir. Ct. Dade Cty. 1972), *aff'd*, 278 So. 2d 311 (Fla. 3d DCA 1973).

The legislature may validly authorize the cities and counties to adopt "interim" or "stop-gap" ordinances to place a moratorium on the development of certain areas for a reasonable period of time. Property owners affected by such ordinances would not be entitled to compensation for the limitation on the use of their property. 1972 FLA. ATT'Y GEN. ANN. REP. 15.

main may be used, subject to certain restrictions.<sup>100</sup>

In addition, it might prove useful to consider not a partial or full fee acquisition, but a purchase or taking of a partial interest for a specific period so that integrated land management of scattered parcels could occur.<sup>101</sup>

##### 5. *Selected Statutory Authority for State and Local Government Action*

An area in which jurisdiction of the State of Florida would specifically impact the platted lands is the statutory requirement that any sanitary wastes discharged into Charlotte Harbor or any tributary thereof must be treated by advanced sewage treatment methods if deemed necessary by the Department of Environmental Regulation (DER).<sup>102</sup> Presently, septic tank systems or domestic sewage treatment plants with a daily flow of 2,000 gallons or less (typical single-family homes) are exempted from compliance with the statute.<sup>103</sup> The platted lands in the three county area could be specifically designated as an area not exempted by statute, with encouragement by the state, either through funding or regulation, for the construction of municipal treatment facilities for some areas and a special permit approach for individual septic tanks.

The state also has the authority to regulate water use.<sup>104</sup> All consumptive users of water may be required to obtain a permit from the DER.<sup>105</sup> To obtain this permit, an applicant must show that the proposed use is a reasonable and beneficial use of the water, will not interfere with any presently existing legal uses of water, and is consistent with the public interests.<sup>106</sup> In relation to the platted lands, drilling of wells of less than two inches in diameter and domestic usage of water are not regulated by the state. How-

100. The limits of the eminent domain power are explored in Section III(D)(3), *Reassembly by Eminent Domain*.

101. An example here is a taking of an easement for a ten year period to provide time for planning. During this period crops could be grown on the land.

102. FLA. STAT. § 403.086(1)(a) (1981).

103. CHARLOTTE HARBOR: A FLORIDA RESOURCE, *supra* note 2, states that the present package treatment plants are not adequately maintained by owners in the three county platted lands area. This problem should be examined to determine if it is a significant hazard to public health and welfare, or if it is adversely affecting the natural environment. *See also* FLA. ADMIN. CODE R. 17.4.04(1)-(2) (1982) (exempting septic tanks and domestic sewage treatment plants from requirements of state permitting).

104. FLA. STAT. § 373.016 (1981).

105. FLA. STAT. § 373.219(1) (1981).

106. FLA. STAT. § 373.223(1) (1981).

ever, the DER or a local water management district may require that prior permission for *any* water well be obtained to "protect the groundwater resources."<sup>107</sup> There is a subsection that allows a well if failure to issue this prior permission would place an undue hardship on the applicant.<sup>108</sup> As with the septic system issue, certain areas of the three counties could be regulated by the enforcement of this statute.

The dredging and filling statutes of the state may also be relevant to the continued development and build-out of the platted lands, particularly for maintenance of existing canals or installation of new canals. The DER has the authority to review and approve any permits for the dredging and filling of navigable waters.<sup>109</sup>

Charlotte, Lee and Sarasota counties have the authority to regulate land uses.<sup>110</sup> They also have the power to establish and administer programs related to housing, slum clearance, redevelopment, and flood and beach erosion,<sup>111</sup> and are authorized to "[p]rovide and regulate waste and sewage collection and disposal, water supply, and conservation programs."<sup>112</sup>

Additionally, the counties have the authority to establish municipal service taxing or benefit units for any or all parts of unincorporated areas of the counties.<sup>113</sup> The units may be used to provide fire protection, recreation facilities, water, waste and sewage disposal, drainage and other essential services and facilities, by levying service charges, special assessments or taxes within such units.<sup>114</sup> Counties are also empowered to create special districts in incorpo-

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107. FLA. STAT. § 373.313(1) (1981).

108. *Id.*

109. FLA. STAT. chs. 253, 403 (1981) (amended 1983). Navigable waters are defined under the statutes as the mean water line for tidal waters and the ordinary high water line for non-tidal waters. The DER also has the authority to review and approve permits for dredging and filling other waters of the state, particularly rivers, streams, bays, bayous, estuaries, and natural lakes. Permitting for both of these activities is done in conjunction with the United States Army Corps of Engineers. The DER may look at the total effect of any proposed dredging or filling project on the water body. The applicant must show the DER that the proposal will not violate the applicable water standards for the respective body of water. Existing man-made canals and similar structures and intermittent water sources caused by heavy rainfall are specifically exempted from the provisions of the statute. *See also* FLA. ADMIN. CODE R. 17.4.04(10) (1982) (full description of exemptions); FLA. ADMIN. CODE R. 17.4.04(2) (1982) (description of waterways covered by statute).

110. FLA. STAT. §§ 125.01(1)(h), 163.175(2), .205(1), .260(1) (1981).

111. FLA. STAT. § 125.01(1)(j) (1981).

112. FLA. STAT. § 125.01(1)(k) (1981).

113. FLA. STAT. § 125.01(1)(q) (1981).

114. *Id.*



rated and unincorporated areas within which municipal services and facilities may be provided from funds derived from service charges, special assessments, and taxes levied within such districts.<sup>115</sup>

The counties, therefore, either separately, jointly or with local municipalities, could establish sewage treatment districts.<sup>116</sup> These districts could regulate the number of septic tank permits, sewer tie-ins and treatment plants throughout the subdivisions under their jurisdiction. In conjunction with water management districts, the counties could more closely regulate both the supply and the conservation of water throughout the platted subdivisions.

Counties, through the power of eminent domain, may also acquire any land necessary to fulfill their duties.<sup>117</sup> As related to the platted lands in the three county area, any of the counties may acquire land necessary for county facilities. The major limitation is that in any judicial review of the county's action, the county must show the necessity of the condemnation.<sup>118</sup>

At the municipal level, article VIII, section 2(b) of the Florida Constitution allows municipalities to exercise all the governmental, corporate and proprietary powers necessary to conduct municipal functions and to exercise those powers for municipal purposes.<sup>119</sup>

Also, under the authorization of the Community Redevelopment Act of 1969,<sup>120</sup> counties and municipalities may set up a community redevelopment agency to deal with the problems of "blighted areas."<sup>121</sup>

115. FLA. STAT. § 125.01(5)(a) (1981).

116. FLA. STAT. § 125.01(1)(p) (1981).

117. FLA. STAT. § 127.01 (1981).

118. FLA. STAT. § 127.01(2) (1981). In *Dade County v. Paxson*, 270 So. 2d 455 (Fla. 3d DCA 1972), the court stated that the county's burden under this statute is to show there is a "reasonable necessity" for the taking. *Id.* at 458. The court held that the condemnation of 180 acres for park purposes in an area in close proximity to 250,000 residents was reasonably necessary in light of testimony that there was a shortage of park facilities. *Id.*

119. Municipal purpose is defined as "any activity or power which may be exercised by the state or its political subdivisions." FLA. STAT. § 166.021(2) (1981). A further provision of the statute allows municipalities "the broad exercise of home rule powers granted by the constitution." FLA. STAT. § 166.021(4) (1981). Therefore, unless specifically prohibited or preempted by the Florida Constitution, statute, or case law, local municipalities have a great deal of power.

120. Ch. 69-305, 1969 Fla. Laws 1075 (codified as amended at FLA. STAT. §§ 163.330-450 (1981) (amended 1983)).

121. FLA. STAT. § 163.356 (1981). "Blighted areas" are defined as either:

a) An area in which there are a substantial number of slum, deteriorated or deteriorating structures . . . or one or more of the following factors which substantially impairs . . . the sound growth of a county or municipality and is a menace

In establishing the redevelopment agency, the county or municipality may grant the agency the power of eminent domain.<sup>122</sup> Any land acquired may be used by the agency or sold, leased, or otherwise transferred by the agency subject to covenants and restrictions on the land as to its use. All such transactions are subject to review by the governing board of the respective municipality or county.<sup>123</sup>

This statute is geared primarily toward redevelopment of urban areas in Florida. While there is language relating to faulty street and lot layout, there is an unresolved question of whether the statute is inapplicable to the platted lands areas except in partially developed portions of the subdivisions.

Coordinating the tools available to local government to address platted lands issues can be done through the local comprehensive plan. The policy guidance included in the plan could serve as a framework for governmental action.

### *C. Timing, Locating and Paying for Development of Platted Lands*

#### *1. Capital Facilities and Development Phasing*

Control of the amount, rate, or location of building, or of all three, may be desirable in the platted subdivisions. Use of timing

to the public health, safety, morals or welfare in its present condition and use:

1. Predominance of defective or inadequate street layout;
2. Faulty lot layout in relation to size, adequacy, accessibility, or usefulness;
3. Unsanitary or unsafe conditions;
4. Deterioration of site or other improvements;
5. Tax or special assessment delinquency exceeding the fair value of the land; and
6. Diversity of ownership or defective or unusual conditions of title which prevent the free alienability of land within the deteriorated or hazardous area;

or

- b) An area in which there exists faulty or inadequate street layout; . . . or roadways, bridges, or public transportation facilities incapable of handling the volume of traffic flow into or through the area, either at present or following proposed construction.

FLA. STAT. § 163.340(8) (1981).

122. FLA. STAT. § 163.375 (1981).

123. A restriction in the program is that real property belonging to the United States, the state, or any political subdivision of the state may not be acquired by eminent domain without its consent. *id.* The agency is also under constraints to show that, in any judicial review, the taking is reasonably necessary.

and location mechanisms requires a high degree of sophisticated front-end planning, and requires a municipal commitment to a phased capital facilities program to serve the growth that will be allowed in conformance to the phasing plan.

This type of action restricts building in areas not provided with specific services and facilities, and establishes a program and a timetable for provision of facilities and services so that the time of allowed development will be reasonably ascertainable. Again, this would foster investment decisions in desired areas not yet appropriate for build-out.<sup>124</sup>

**THE EFFECTS OF EXISTING OR COMMITTED CAPITAL FACILITIES.** Time controls on land development have been referred to as a "bridge over troubled waters."<sup>125</sup> The present build-out of Charlotte Harbor's platted lands constitutes potential troubled waters for the three counties, over which phased development linked to a capital improvement program may offer a bridge.

The town of Ramapo, New York, pioneered in the field of growth management linked to a phased capital improvement program. Located in an area experiencing rapid growth, the town's concern about providing services for new development led it to amend its zoning ordinance to require a special permit for residential development. The permit could be granted if certain public facilities, provided either by the town or by the developer, were in place. The ordinance's purpose was to coordinate land development with the town's ability to provide designated facilities and services. It should be noted, however, that the definition of "development" regulated by the ordinance did not include single homes built for occupancy.

Ramapo's scheme for timing development used a three-phase plan for development, covering eighteen years in three six-year phases. Corresponding with this plan was an eighteen-year program for the town's installation of capital improvements (sewage, drainage, fire protection, etc.). The capital improvement program specified the location and sequence of installation of the necessary facilities. The town conditioned the issuance of a special permit on the availability of the necessary capital improvements. A person wishing to develop property not yet provided with the necessary

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124. Cape Coral, for example, apparently has a capital facilities extension program designed to foster development of close-in areas, but is without a complementary limit on development in non-service areas.

125. Comment, *Time Controls on Land Use: Prophylactic Law for Planners*, 57 *CORNELL L. REV.* 827, 847 (1972).

services would have to provide those services at his own expense in order to develop the property sooner than called for in the capital improvement program.

Persons wishing to develop their property sooner than allowed under the ordinance sued the town alleging that the ordinance destroyed the value and marketability of their property.<sup>126</sup> The New York Court of Appeals, in a 5-4 decision, held that the ordinance was constitutional, stating that:

[W]here it is clear that the existing physical and financial resources of the community are inadequate to furnish the essential services and facilities which a substantial increase in population requires, there is a rational basis for "phased growth" and hence, the challenged ordinance is not violative of the Federal and State Constitutions.<sup>127</sup>

Ramapo's plan for phased development, though rather simple, has been considered as opening up a new era in American planning law. Since *Ramapo*, other local governments, using different methods, have attempted to phase or limit growth.<sup>128</sup>

*Ramapo* held that phasing growth, where the government was unable to provide necessary services, was permissible since the lack of services jeopardized the health, safety, and general welfare of future residents. The decision provides strong support for the idea that phased zoning is consistent with the traditional goals of zoning ordinances.<sup>129</sup> Therefore, even without using its zoning authority, a local government's control over the development or improvement of services within its jurisdiction may be a significant tool for

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126. *Golden v. Planning Bd. of Ramapo*, 285 N.E.2d 291 (N.Y. 1972).

127. *Id.* at 304-05.

128. For example, Boca Raton, Florida (population cap); Petaluma, California and Boulder, Colorado (limitation on number of building permits with issuance based on merit system). For a discussion of these growth management programs, see Harwell, *Growth Management Workshop*, ENVTL. COMMENT, June 1979, at 3.

129. *Ramapo*, 285 N.E.2d at 300, 303; Note, *Phased Zoning: Regulation of the Tempo and Sequence of Land Development*, 26 STAN. L. REV. 585, 591, 595 (1974). Courts, as a general rule, have been reluctant to abridge the power of local government to make policy concerning the extension of services, holding that decisions relating to the allocation of public funds are better made by the local officials than by judges. *E.g.*, *Browne v. City of Bentonville*, 126 S.W. 93, 94 (Ark. 1910); *Marr v. City of Glendale*, 181 P. 671, 673 (Cal. Dist. Ct. App. 1919); *Moore v. City Council*, 105 S.W. 926, 926 (Ky. 1907); *Rose v. Plymouth Town*, 173 P.2d 285, 287 (Utah 1946). *But see Reid Dev. Corp. v. Parsippany-Troy Hills Township*, 89 A.2d 667, 671 (N.J. 1952) (was abuse of discretion for governing body to use grant of extension of public facilities in order to coerce landowner to accept minimum lot-size restrictions).

effective long-range land use planning that does not have the limitations of many other methods.<sup>130</sup>

**THE IMPORTANCE OF A CAPITAL FACILITIES PLAN.** If the three counties plan and zone for the platted lands so as to phase development in certain areas, the standard that would be applied on judicial review is the fairly debatable test. So long as it can be argued that the purpose of the ordinance is reasonably related to the protection of the public health, safety, and welfare, the action should be upheld.<sup>131</sup>

Meeting the challenge of managing growth requires careful planning.<sup>132</sup> By (1) projecting future demand for development in the platted lands, (2) establishing a capital improvement plan to meet that demand within the fiscal restraints of the counties, and (3) incorporating those plans into the counties' comprehensive plans and zoning ordinances, and requiring the necessary capital improvements to be made prior to the issuance of a building permit, the counties could have a plan for phased development in *selected* portions of the platted lands similar to the Town of Ramapo's phased development plan.

So long as the landowners are not precluded from using their property within a reasonable time, the ordinance should be able to withstand the ordinary zoning challenge. In *Moviematic Industries Corp. v. Board of County Commissioners*,<sup>133</sup> the Third District Court of Appeals stated that "[z]oning regulations which are reasonably related to the adequacy of governmental services fall within the established purpose of the public health, safety and welfare. . . . Therefore, zoning ordinances have been sustained because of their tendency to insure that such essential governmental services . . . will be provided."<sup>134</sup>

To prevent further development from taking place in the designated platted lands areas, thereby frustrating any plan to phase

130. *THE USE OF LAND*, *supra* note 9, at 125-26. It has been suggested that the town of Ramapo reduced development at the expense of neighboring communities, which absorbed the development which would have occurred there and thereby developed at an increased rate. Busselman, *Can the Town of Ramapo Pass a Law to Bind the Rights of the Whole World?*, 1 FLA. ST. U.L. REV. 234, 234-35 (1973). If that assessment is valid, then truly sophisticated growth management through development timing requires enforceable regional planning policies. *Id.* at 244.

131. See discussion in text at Section III(B)(1), *Rezoning to Lower Density*.

132. See generally Comment, *One Tier Beyond Ramapo: Open Space Zoning and the Urban Reserve*, 15 SAN DIEGO L. REV. 1211 (1978) (discussion of the validity of police power implementation of phased growth regulations).

133. 349 So. 2d 667 (Fla. 3d DCA 1977).

134. *Id.* at 669.

development of the area or to redevelop the area, the local governments involved could declare a moratorium on development pending the preparation and implementation of a plan for phasing development.<sup>135</sup> That plan should be part of the comprehensive plan and be tied into a capital improvement program for maintenance and improvement of public facilities and services. Barring a successful suit based upon vested rights or equitable estoppel,<sup>136</sup> the withholding of building permits or zoning changes because of temporary inadequacy of public facilities should be approved by the courts because such a regulation would be reasonably related to the public health, safety, or welfare.<sup>137</sup>

## 2. *Impact Fees*

Impact fees or similar types of assessments can often require new development to help pay the costs of development. To the extent that the charges reflect the true cost of new services or facilities extended to an outlying development site, they may in fact have a regulatory effect resulting in some development not being considered where service and facility costs make building financially unfeasible. Some consideration therefore could be given to impact fees based on distance (or some related criterion) from existing facilities such as roads, sewers and so forth.

Impact fees are charges levied by local governments in order to raise funds for capital improvements which are necessitated by new development.<sup>138</sup> Unlike exactions or "in lieu fees," which often are levied at the time the land is platted, impact fees are usually collected when building permits are issued.<sup>139</sup> Impact fees, therefore, are arguably appropriate where land was platted before local governments imposed exactions or in lieu fees as preconditions to

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135. See discussion in text at Section III(B)(3), *Moratoria*.

136. See Rhodes, *These Rights Are Mine*, 50 FLA. B.J. 586 (1976) and discussion in text at Section III(B)(1), under the subheading "GRANDFATHERED RIGHTS" OR VESTED RIGHTS AND ESTOPPEL.

137. The local governments, however, should also reassess the taxable status of these platted lands not presently allowed to be developed under the plan. Where the action of local government prevents the development of one's property, and at the same time the government continues to collect taxes, thereby consuming what value the property may have, the local government's refusal to allow development may amount to a taking of property without compensation. *Forde v. City of Miami Beach*, 1 So. 2d 642, 647 (Fla. 1941).

138. Juergensmeyer, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 9 FLA. ST. U.L. REV. 415, 417 (1981).

139. *Id.* at 418, 419.

plat approval.<sup>140</sup> With this mechanism, local governments in the three county area can assess newcomers in order to finance the increased services which they require. Furthermore, impact fees can help to alleviate the "time lag" problem which exists when incoming residents create the need for expanded services, and the new tax base which they are creating is not yet generating adequate revenue to pay for those services.<sup>141</sup> Again, because the charges will defray the costs of new services and facilities extended to an outlying development site, impact fees may have the effect of discouraging build-out where service and facility costs are prohibitively expensive.

In assessing the legal problems associated with enacting impact fee ordinances in Florida, two issues arise. First, there must be valid statutory authority. In this regard, it is important that the impact fee be framed so that it is construed to be a regulation and not a tax. Local taxes in Florida must be specifically authorized by general statute and cannot be inferred from broad delegations of authority.<sup>142</sup> The second legal concern is that the impact fee be drafted such that it meets the requirements for a valid exercise of the police power.<sup>143</sup>

There is limited statutory authority in Florida for local governments to impose impact fees in order to raise money to expand water and sewerage systems. In *Contractors & Builders Association v. City of Dunedin*,<sup>144</sup> the plaintiffs challenged a municipal ordinance which authorized the municipality to charge an impact fee, payable upon issuance of the building permit, in order to defray the costs of increased water and sewerage facilities.<sup>145</sup> The Florida Supreme Court found that this was authorized by section 180.13(2), Florida Statutes, which provides that "the 'legislative body of the municipality . . . may establish just and equitable

140. *Id.* at 420.

141. J. JUERGENSMEYER & J. WADLEY, *FLORIDA LAND USE RESTRICTIONS* § 1701 (rev. ed. 1979); Note, *Impact Fees: National Perspectives to Florida Practice; A Review of Mandatory Land Dedications and Impact Fees that Affect Land Developments*, 4 *NOVA L.J.* 137, 140 (1980).

142. FLA. CONST. art. VII, § 1(a). Ad valorem taxes do not require statutory authority, but are subject to a ten mill cap. See generally Note, *supra* note 141, at 176-77.

143. See discussion in text at Section II(C)(1), under the subheading THE POLICE POWER.

144. 329 So. 2d 314 (Fla. 1976).

145. The challenged portion of the ordinance required connection charges for the installation of meters and mandated that there "shall be paid an assessment to defray the cost of production, distribution, transmission and treatment facilities for water and sewer provided at the expense of the City of Dunedin." *Id.* at 316 n.1.

rates or charges' for water and sewerage."<sup>146</sup>

Whether there is sufficient statutory authority to enable the imposition of impact fees for educational, recreational, or transportation purposes is more problematic, for Florida does not have a specific statute authorizing capital cost shifting for those purposes. Commentators have suggested, however, that general constitutional and statutory grants of authority to counties, municipalities, and towns may constitute a sufficient statutory basis.<sup>147</sup> For example, municipalities have home rule powers derived from the Florida Constitution<sup>148</sup> and the Municipal Home Rule Powers Act.<sup>149</sup> Under these provisions, municipal corporations have "governmental, corporate and proprietary powers" and "may exercise any power for municipal purposes except as otherwise provided by law."<sup>150</sup>

However, in *Broward County v. Janis Development Corp.*,<sup>151</sup> the court held that an impact fee which was imposed in order to pay for roads was a tax and therefore was invalid because there was no statutory authorization. The court found the fee to be a tax because (1) it was imposed solely for revenue purposes and (2) there were no specifics in the ordinance as to where and when the money was to be expended.<sup>152</sup>

In *Dunedin*, however, the Florida Supreme Court held that sewer connection fees were not a tax. The court indicated that the

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146. *Id.* at 319.

147. Juergensmeyer, *supra* note 138, at 434-38.

148. FLA. CONST. art. VIII, § 2(b).

149. Ch. 73-129, 1973 Fla. Laws 238 (codified as amended at FLA. STAT. §§ 166.011-.043 (1981)). Specifically, the powers stem from § 166.021.

150. FLA. CONST. art. VIII, § 2(b).

Chartered counties have "all powers of local self-government not inconsistent with general law." FLA. CONST. art. VIII, § 2(b). Non-chartered counties, like chartered counties, have been granted statutory home rule powers. FLA. STAT. § 125.01 (1981). In *Speer v. Olson*, 367 So. 2d 207 (Fla. 1978), the Florida Supreme Court held that Florida Statutes, § 125.01, empowered a county to issue general obligation bonds to acquire sewer and water systems and to pledge for their payment ad valorem taxes. The court stated that "[u]nless the Legislature has pre-empted a particular subject relating to county government by either general or special law, the county governing body, by reason of this [statute], has full authority to act through the exercise of home rule power." *Id.* at 211.

Ch. 69-139, 1969 Fla. Laws 642 (codified as amended at FLA. STAT. §§ 163.160-315 (1981)) (relating to county and municipal planning for future development) and the Local Government Comprehensive Planning Act of 1975 have also been suggested as possible sources of statutory authority for local governments. Juergensmeyer, *supra* note 138, at 437.

151. 311 So. 2d 371 (Fla. 4th DCA 1975).

152. *Id.* at 375. The court noted that the city anticipated six million dollars in revenue from the fees and concluded that "it is impossible that such revenue could approximate any cost of regulation." *Id.*



impact fees in that case were distinguishable from those in *Janis* because the use of the proceeds was clearly limited to meeting the costs of expansion.<sup>153</sup> The court concluded that when revenues raised in this manner are sufficiently earmarked for their intended use, the impact fees do not constitute a tax.<sup>154</sup> Thus, there is a basis for arguing that impact fees, like subdivision exactions and in lieu fees, should be upheld.

Although the standard used for assessing the validity of impact fees in Florida has not been definitively expressed, the courts seem inclined to favor the "rational nexus" requirement, as expressed by the Supreme Court of Wisconsin in *Jordan v. Village of Menomonee Falls*.<sup>155</sup> In that case, the court upheld in lieu fees imposed upon a developer for educational and recreational purposes because of the "rational connection" between the need for new facilities and the new growth caused by the new subdivision, and because the funds acquired were restricted to benefitting the new subdivision.<sup>156</sup> The test was met if (1) the approval of subdivision plats had required the local government to expend significant sums for park and school lands and the expansion of public facilities, (2) the expenditures were made necessary by the influx of people into these subdivisions, and (3) the expenditures were greater than the amount exacted from the subdividers.<sup>157</sup>

The *Jordan* court stated that the rationale for upholding the imposition of in lieu fees is that the municipality, by approval of a proposed subdivision plat, benefits the developer and enables him to profit financially. In return for this benefit the municipality may require him to make expenditures in order to meet a demand to which the municipality would not have been put but for the influx of people into the community to occupy the lots.<sup>158</sup>

In *Wald Corp. v. Metropolitan Dade County*,<sup>159</sup> a Florida appeals court considered whether subdivision exactions were a valid exercise of the police power. The court dismissed the "reasonable relation test" as allowing too much governmental latitude "in dero-

153. *Dunedin*, 329 So. 2d at 318. The Supreme Court of Florida stated: "In contrast [to *Janis*], evidence was adduced here that the connection fees were less than costs [the city] was destined to incur in accommodating new users of its water and sewer systems. We join many other courts in rejecting the contention that such connection fees are taxes." *Id.*

154. *Id.*

155. 137 N.W.2d 442 (Wis. 1965).

156. *Id.* at 448-49.

157. *Id.* at 449.

158. *Id.* at 448.

159. 338 So. 2d 863 (Fla. 3d DCA 1976).

gation of constitutionally protected property rights.”<sup>160</sup> The court also rejected the “specifically and uniquely attributable test” because it is unduly restrictive of the government’s ability to impose land use restrictions.<sup>161</sup> The court adopted as an intermediate standard the “rational nexus test” of *Jordan*, which requires a “reasonable connection between the required dedication and the anticipated needs of the community.”<sup>162</sup> Under this analysis, there is a balancing of the prospective needs of the community and the property rights of the landowners.<sup>163</sup> The court concluded that an ordinance which required a developer to dedicate canal rights of way and maintain easements as a condition of plat approval was a valid exercise of the police power.<sup>164</sup>

The *Dunedin* decision suggests that the Florida Supreme Court may be prepared to apply the “rational nexus test” to a consideration of impact fees. In assessing whether an impact fee was a proper exercise of governmental power, the court used language of that test: “Raising expansion capital by setting connection charges, which do not exceed a *pro rata* share of reasonably anticipated costs of expansion, is permissible where expansion is reasonably required, *if use of the money collected is limited to meeting the costs of expansion.*”<sup>165</sup> In a footnote, the court stated that “perfection is not the standard of municipal duty” in estimating the projected costs of expansion.<sup>166</sup>

Whether the Florida courts will apply the “rational nexus test” in determining the validity of impact fees for purposes other than water and sewerage is yet to be decided. At least one commentator has suggested that judicial approval of impact fees for a wide variety of purposes is likely because the courts, cognizant of the platted lands problems, will be persuaded that there are few viable alternatives for alleviating those problems.<sup>167</sup> It is significant that in both *Jordan* and *Wald*, where the rational nexus test was unequivocally adopted, the landowners were developers. In *Wald*, the court found this fact to be very important and indicated that a different

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160. *Id.* at 866.

161. *Id.* at 866-67.

162. *Id.* at 868. For a general discussion of these three tests, see Juergensmeyer, *supra* note 138, at 441-43, and Note, *supra* note 141, at 151-58.

163. *Wald*, 338 So. 2d at 868.

164. *Id.* at 868-69.

165. *Dunedin*, 329 So. 2d at 320 (emphasis in original).

166. *Id.* at 320 n.10 (quoting *Rutherford v. City of Omaha*, 160 N.W.2d 223, 228 (Neb. 1968)).

167. Juergensmeyer, *supra* note 138, at 445.

standard of review might be appropriate if the affected landowner was an individual property owner.<sup>168</sup> In *Dunedin*, the court was silent on this matter.

### 3. Taxation

Various forms of taxation are useful to consider as revenue raising devices. Many of the tax incentives and disincentives that are most often considered for land preservation purposes, however, such as preferential tax assessments or land speculation taxes, appear more appropriate to natural areas which are at risk to new development and not areas already platted for building lots. Therefore, these forms of taxation are not discussed here in depth.<sup>169</sup>

Also, taxation of land in its current use is often proposed as an incentive to retain land in its current state. For example, proponents of agricultural preservation often argue that it is an important component of tax relief for a farmer to be taxed on the agricultural land value rather than its potential value as developed property, a component which mitigates the pressure for a distress sale. The platted lands are apparently taxed as developable sites. This produces an expectation on the part of the lot owner that the property is buildable at the present time. If any regulatory program is established to delay the ability to build, changes in the taxable status of the lots probably should be made. This change also serves as notice to the lot owner of the changed status of the property.

To the extent that land use restrictions are imposed on subdivided lots by the exercise of the police power or by condemnation of an interest in the land, it may prove an important mitigating element of such restrictions for the lots to be revalued to reflect their restricted use.<sup>170</sup>

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168. *Wald*, 338 So. 2d at 868.

169. One aspect of the platted lands problem that offers intriguing possibilities lies in the fact that many unbuild lots produce more taxes than they currently consume in services. It might be feasible to earmark a portion of this increment for a special sinking fund which could constitute a trust fund for the future use of the platted lands, and earmark the income from this fund to help absorb the extra service costs associated with providing for future build-out, a situation analogous to the technique of tax increment financing.

Paying for necessary improvements, however, can also be accomplished by the formation of special taxing districts. See, e.g., Hudson, *Special Taxing Districts in Florida*, 10 FLA. ST. U.L. REV. 49 (1982).

170. Instances where the tax system has been used as a disincentive rather than an incentive are probably also not applicable here. For example, Vermont imposes a short term

#### 4. *Selected Statutory Authority for State or Local Government Action*

Siting and construction of capital facilities in Florida are primarily done at the county and municipal level. The state may provide funds to any political subdivision of the state for any reasons as may be provided by the general laws.<sup>171</sup>

At the county level, the county commissioners have the power to construct, acquire or establish facilities to provide and maintain county buildings, support fire protection, provide hospitals and create parks, as well as the power to regulate water supply and sewage collection.<sup>172</sup>

There is an overlap between the powers of municipalities and counties, though both are encouraged to develop projects jointly. The overlap and potential conflict becomes real when both a county and a municipality attempt to construct similar facilities. Under the statutes, the municipality proposing the facility must

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tax on gain from the sale of land held for less than six years. This had an apparent tendency to reduce the amount of demand for large parcels of Vermont land, especially from out-of-state speculators. See Baker & Andersen, *Taxing Speculative Land Gains: The Vermont Experience*, 22 URB. L. ANN. 3 (1981). But here, the otherwise large parcels have already been broken up into subdivided lots, and any disincentive is likely to be more usefully linked to the actual build-out of the lots.

171. FLA. CONST. art. VII, § 8. School districts, as such, are separate jurisdictions from local municipalities and have the right of eminent domain in acquiring land. FLA. STAT. § 235.05 (1981). The state provides funds to schools (separate from the district's taxing power) under the Public Education Capital Outlay and Debt Service Trust Fund for construction and maintenance of school buildings. FLA. STAT. § 235.42 (1981 & Supp. 1982). School districts are encouraged, though, to work closely with local municipalities as to the siting of new schools. FLA. STAT. § 235.19 (1981).

The federal government has recently shifted the burden of local sewer funding to the states, and the Florida Legislature responded by passing Part IX of the Water Quality Assurance Act of 1983, ch. 83-310, §§ 47-60, 1983 Fla. Laws \_\_\_\_ . This part of the Act, which amended FLA. STAT. §§ 403.1821-1835 (1981), resulted in the generation of an estimated \$100 million in funds for sewer grants to local governments, at least 45% of which are to be reserved for the Small Communities Sewer Construction Assistance Trust Fund for eventual grants to local governments with a population of 35,000 or less.

172. FLA. STAT. § 125.01 (1981). The limitation on these items is that county revenues must be used to provide real and substantial benefits to property or persons within their jurisdiction. FLA. STAT. § 125.01(7) (1981).

The counties are also authorized to purchase and construct water and sewer systems. FLA. STAT. § 153.03 (1981). These systems are defined as including all wells, pipes, reservoirs, and related facilities for present and future uses. FLA. STAT. § 153.02(3) (1981). Financing may be by water and sewer revenue bond or by special assessment districts, both subject to procedural safeguards. FLA. STAT. §§ 153.05-.06 (1981). County commissioners may establish water and sewer districts outside of incorporated areas by petition of persons owning not less than ten percent of the property within the boundary of the proposed area. FLA. STAT. § 153.53(2) (1981).

obtain the abutting municipality's or operating entity's consent prior to facility construction.<sup>173</sup>

The state, under chapter 190, Florida Statutes, has endeavored to deal with the problem posed by these overlapping responsibilities between counties and municipalities in the construction of the necessary infrastructure. Enacted as the "Uniform Community Development District Act of 1980," the purpose of the law was to establish a process by which a local government, developer, or landowner could establish a district that would construct, manage, and finance the necessary facilities to serve the particular area designated.<sup>174</sup> Management and financing of vacant land development are specifically noted by the legislature as a need requiring a closer interrelationship between developers and the state, counties, and local municipalities.<sup>175</sup> This management and financing process is entirely separated from the necessary permitting process in the respective jurisdictions.<sup>176</sup> The Act is now the sole authority for local municipality or county government attempts to set up any special district for the provision of infrastructure.<sup>177</sup>

As related to the platted lands, the Act provides for an alternative method of financing the major infrastructure for community developments.<sup>178</sup> Upon approval of a community development dis-

173. FLA. STAT. § 180.06 (1981).

174. Uniform Community Development District Act of 1980, ch. 80-407, 1980 Fla. Laws 1628 (codified as amended at FLA. STAT. §§ 190.001-.049 (1981 & Supp. 1982)). The statement of purpose is found at FLA. STAT. § 190.002 (1981).

175. FLA. STAT. § 190.002(1)(b) (1981).

176. FLA. STAT. § 190.002(2)(c) (1981).

177. FLA. STAT. § 190.004 (1981).

178. A part of the applicable statute's provisions deal with developments over 1,000 acres which, while they may be entirely encompassed within one county or municipality, still have significant impact across municipal or county lines. FLA. STAT. § 190.002(2) (1981). A prospective developer or landowner is required to submit a petition to the Florida Land and Water Adjudicatory Commission. FLA. STAT. § 190.005(1)(a) (1981). The petition must contain, among other things, a description of the boundaries of the district, a map of the proposed district showing the current water and sewer system, a description of the timetable of future construction of infrastructure and a designation of future land uses in compliance with the comprehensive land use plan of the relevant local governmental body. FLA. STAT. § 190.005(1)(a) (1981). There is a requirement that 100% of the landowners in the proposed district consent to the formation of the district though specific properties within the boundaries of the district may be excluded. *Id.* Owners of such excluded properties must be listed in the petition. *Id.* Finally, a designation of a temporary board of supervisors to serve until members are elected must be included in the petition. *Id.*

There are notice requirements relating to the holding of a public hearing by a hearing officer. FLA. STAT. § 190.005(1)(b) (1981). Testimony, both oral and written, is given at the hearing and the record of the hearing is then considered by the Florida Land and Water Adjudicatory Commission, which consists of the Governor and Cabinet. FLA. STAT. § 190.005(1)(b)-(c) (1981). The Commission then renders a decision, based upon the informa-

trict, a board of supervisors, composed of five members, is elected for a term of four years by the landowners of the district.<sup>179</sup> This board is empowered to exercise the powers granted to the district.<sup>180</sup> These powers are, among others, (1) to purchase and acquire land and personal property, (2) to contract for services, and (3) to acquire land by the exercise of the power of eminent domain.<sup>181</sup> The board also has special powers, singly or in combination with other governing bodies, to manage water, sewage and waste water, including the power of water diversion; to construct bridges, streets, parks, fire prevention facilities, schools, jails and street lights; and the specific task to regulate the use and maintenance of private septic and sanitary systems.<sup>182</sup> The development district may issue bonds to finance these items.<sup>183</sup>

In addition to these powers, the district may also levy ad valorem taxes upon property in the district to pay for the bonds, in addition to any existing county and other ad valorem taxes.<sup>184</sup> Benefit taxes may be placed on the properties specifically for payment of the construction of water management and control facilities.<sup>185</sup> A maintenance tax may also be enacted to pay for the continued upkeep of the water management and control facilities.<sup>186</sup>

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tion in the record and a consideration of six factors, to grant or deny the petition to create the district. FLA. STAT. § 190.005(1)(c) (1981). Approval for a development district of less than 1,000 acres is done on a county or municipal basis. FLA. STAT. § 190.005(2) (1981). A petition containing the same information listed above for developments of over 1,000 acres is submitted to the appropriate governmental authority. *Id.* The same procedures for a public hearing must also be complied with by the local government entity. FLA. STAT. § 190.005(2)(b) (1981). The county or municipality may render a decision on the petition, or within 90 days of submission of the petition, the county or municipality may transfer it (with all approval and denial rights) to the Florida Land and Water Adjudicatory Commission which may then grant or deny the petition. FLA. STAT. § 190.005(2) (1981). Under the provisions of the Act, any existing special district formulated for the purposes of infrastructure construction or recreation may petition to be restructured as a community development district. FLA. STAT. § 190.005(3) (1981).

179. FLA. STAT. § 190.006(1) (1981).

180. *Id.*

181. FLA. STAT. § 190.011 (1981).

182. FLA. STAT. § 190.012 (1981).

183. FLA. STAT. § 190.016 (1981).

184. FLA. STAT. § 190.021(1) (1981).

185. FLA. STAT. § 190.021(2) (1981).

186. FLA. STAT. § 190.021(3) (1981). There are procedural guidelines that the district must follow for the issuance of the revenue bonds, the levying and collecting of taxes, and the attachment of liens to properties that do not pay the taxes. FLA. STAT. §§ 190.016, .021 & .024 (1981 & Supp. 1982).

The Community Development Act also allows liberal expansion, contraction, and termination of a district. FLA. STAT. § 190.046 (1981). Under this provision a district may petition to contract or expand the boundaries of the district in a procedure similar to the district estab-

This district approach appears to provide a possible financing mechanism to deal with the provision of infrastructure, and its use around the state should be carefully monitored.

#### D. Reassembly of Platted Lands

##### 1. Reassembly of Lots in Unitary Ownership by Deplatting

Florida statutes provide for the vacation of approved plats upon the application of the land developer or, subsequent to the sale of the subdivision, upon the application of the owners of the subdivided lots.<sup>187</sup> The statutes also provide that the governing body

lishment procedure. FLA. STAT. § 190.046(1) (1981). The district may be wholly merged with another community development district or transferred to a general purpose local government. FLA. STAT. § 190.046(3)-(6) (1981). Specific services of the district may also be transferred to a local government. FLA. STAT. § 190.046(4) (1981). The charges of the community development district and the quality and efficiency of the services must be maintained in any transfer. *Id.* Review of the transfer ordinance adopted by the local government may be sought by the district's board of supervisors in the circuit court of the county in which the local government is located. FLA. STAT. § 190.046(5) (1981).

An additional termination method is provided under § 190.046(7) if within five years from the effective date of the rule or ordinance creating the district, a landowner has not received a development permit for some portion or all of the property in the district. FLA. STAT. § 190.046(7) (1981). In this situation, the district is automatically terminated and a circuit court judge is responsible for the filing of a statement to that effect in the public record. *Id.*

Presently, seven petitions have been filed for the establishment of a community development district. These petitions are for areas in southeast, southwest and central Florida. The petition for central Florida is a cross-jurisdictional district between Orange County and the City of Orlando. In the jurisdiction including the platted lands area, the SWFRPC initially passed and then rescinded a resolution for repeal of the Community Development Act. Other areas of Florida have not made any resolution regarding the Act, with the exception of Martin County. In Martin County, a disagreement between a developer and the local county/municipality which must approve the proposed community development district has arisen. The governmental body has resolved that the Act should be repealed. There is presently no litigation or case law involving the statute. Interview with Ken van Assenderp, author of FLA. STAT. ch. 190 (The Community Development Act), on Aug. 6, 1982.

187. FLA. STAT. § 177.101 (1981).

Many states have statutes which provide for the deplatting of land. The statutes appear to fall primarily into one of two types: those that provide for owner initiated deplatting, e.g., ARK. STAT. ANN. § 19-407 (1980); IDAHO CODE §§ 50-1306(A), -1317, -1321 (1980); ILL. ANN. STAT. ch. 109, §§ 6-7 (Smith-Hurd 1952 & Supp. 1981-82); IND. CODE §§ 36-7-3-10, -7-3-11, -7-4-712 (1981); IOWA CODE ANN. §§ 409.18-.22 (West 1976); KAN. STAT. ANN. § 58-2613 (1976); MINN. STAT. ANN. § 505.14 (West 1982); MISS. CODE ANN. § 19-27-31 (1972); NEB. REV. STAT. §§ 19-917, 23-110 (1977); NEV. REV. STAT. § 270.160 (1979); N.M. STAT. ANN. § 14-19-11 (1976); N.D. CENT. CODE § 40-50-20 (1968); OHIO REV. CODE ANN. § 711.17 (Page 1976); OKLA. STAT. ANN. tit. 11, §§ 42-102, -106 (West 1978 & Supp. 1981-82); S.D. CODIFIED LAWS ANN. § 11-3-16 (1982); TEX. REV. CIV. STAT. ANN. art. 974(a) (Vernon 1982); UTAH CODE ANN. § 57-5-7 (1974); WASH. REV. CODE ANN. §§ 58.11.010-.11.050, .12.010 (West 1983); WYO. STAT. § 34-117 (1959); and those that provide for government initiated deplatting, e.g., CAL. GOV. CODE §§ 66499.11-.20 ½ (West 1983); MICH. COMP. LAWS ANN. §§ 560.221-.229

may order the vacation of land upon its own motion where the plat of the subdivision has been recorded for five years and not more than ten percent of the total area has been sold by lot.<sup>188</sup> The vacation must be based on a finding that it will promote the public welfare and conform to the comprehensive plan of the area.<sup>189</sup>

Telephone conversations with a number of government officials around Florida disclosed few examples of the use of such deplatting statutes. A common factual circumstance which appears to exist when deplatting situations occur is that only a small minority of lots have been sold out of original ownership. Consequently, when deplatting occurs, it may produce a few isolated lots surrounded by larger acreage owned by the original developer.

It may be possible for such deplatting to occur in some portions of the Charlotte Harbor subdivisions, but significant portions of these subdivisions have passed out of common ownership into the hands of scattered individual purchasers. To the extent, however, that significant acreage remains in the original or a subsequent landowner's hands, deplatting of those portions can be considered under existing Florida law absent some limitation arising because of equitable estoppel or vested rights. Another limitation, of course, is the physical constraint on deplatting because of the roads and canals which have been constructed.

Looking to the Florida case law on deplatting provides little guidance, for deplatting has rarely been litigated.<sup>190</sup>

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(Supp. 1982-83); OR. REV. STAT. §§ 92.205-.245 (1981); VA. CODE § 15.1-482(b) (1981).

There has not been much activity around the United States dealing with consolidation of land parcels, and what has been done does not approach the needs in the Charlotte Harbor area. One example is the California Coastal Conservancy, a state agency created in 1976. The Conservancy is undertaking three lot consolidation projects—one in southern California and two in the northern part of the state. In the Santa Monica Mountains, outside Los Angeles, the Conservancy proposed to acquire and consolidate some 200 small lots for resale as 16 larger parcels covering a total of about 40 acres. In northern California, one of two smaller projects provided for consolidation of 72 lots into 50 units under a redesigned building plan; the other called for the purchase of 35 subdivision lots on 22 acres and subsequent transfer of their development potential to some other approved area. See R. HEALY & J. SHORT, *THE MARKET FOR RURAL LAND: TRENDS, ISSUES, POLICIES* 255-58 (1981).

The Oregon statute, in particular, provides a mechanism for the deplatting of undeveloped subdivisions in unitary ownership if it is determined that the original platting of the subdivisions does not conform to contemporary standards. OR. REV. STAT. § 92.205 (1981). This statute has seen little use to date because of the specific statutory definition of "undeveloped." If so much as one road has been built, the land is "developed."

There has been some relevant activity in other nations, and that experience is discussed *infra*, at note 226 and accompanying text.

188. FLA. STAT. § 163.280(2) (1981).

189. *Id.*

190. In Florida *E. Coast Ry. v. Worley*, 38 So. 618 (Fla. 1905), the Florida Supreme



Voluntary deplatting appears to be the most feasible approach, absent amendment to the statutes allowing mandatory deplatting. Inducements to deplat, however, would be necessary because voluntary deplatting and reassembly could trigger the DRI review process, depending upon the size of the parcel. This would cause the landowner to incur new and expensive development review costs.<sup>191</sup>

It may also be possible to induce unitary ownership of certain tracts of land so that voluntary deplatting would be more feasible. One idea, for example, is to encourage the land sales companies to repurchase the land from the lot owners or to swap lots. A major problem, however, is that many lot owners have been found to be reluctant to relinquish their property, even when it is economically advantageous to do so. They perceive a swap not as an escape from a hopeless situation, but as a device for pirating away their valuable property. Developer contact with the lot owners in itself raises expectations as to value.<sup>192</sup>

#### REASSEMBLY BY GOVERNMENT MANDATED DEPLATTING. As dis-

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Court held that where the owners of a tract of land lay out lots and blocks with intervening streets and parcels of land marked "Park," the owners have manifested an intention to dedicate such streets and parks to public use and the grantees of such lots and blocks therefore acquire the right to have such streets and parks kept open. *Id.* at 621. This is particularly true with respect to persons owning land which adjoins the particular street or park in question. *Id.* at 623. The rationale for this rule is that "[t]hese deeds were so drawn as to induce a large proportion of the purchasers to believe that the premises in controversy were dedicated, and thus they have received a consideration from the public for this very land." *Id.* at 622.

*Florida E. Coast Ry.* was cited with approval in *Weber v. City of Hollywood*, 120 So. 2d 826 (Fla. 2d DCA 1960). In that case, the court held that the filing of a plat is an offer to dedicate land which may be revoked prior to acceptance by the local government. *Id.* at 828. Such a revocation may not take place, however, without the consent of owners of other lots or blocks in the subdivision if the revocation would reduce the value or beneficial use of their lots. *Id.* at 828-29. This rule excludes the closing of public streets as authorized by statute. *Id.* at 829.

In *Ocean Nav. Co. v. Town of Palm Beach*, 152 So. 853 (Fla. 1934), the Florida Supreme Court considered a case in which the recorded plat did not account for a certain parcel of the subdivided land. The town argued that it was the intention of the owners to dedicate the land to public use and that this intention was manifested by their subsequent acquiescence to the public use and town regulation of the land for 17 years. *Id.* at 856. The court held that the town had presented sufficient information to overcome the allegations of insufficient pleadings. *Id.* at 857.

191. A DRI exemption could be appropriate as an incentive, on the assumption that future development would be better than the current scheme. This, however, would require amendment of the statute.

192. One suggested solution is to have a government agency handle all correspondence, explaining carefully the purchase or swap arrangement. The power of eminent domain, discussed in text at Section III(D)(3), could also be used by government to induce lot owners to swap.

cussed previously, the local governing body may order the vacation of plats upon its own motion where they have been recorded for five years and not more than ten percent of the total area has been sold by lot. The vacation must be based on a finding that it will promote the public welfare and conform to the comprehensive plan of the area.<sup>193</sup> Under present law, this appears to be the only situation where mandatory deplatting is allowed.

If the owners of platted lots purchased those lots for building or investment and, in so doing, relied upon governmental plat approval, zoning, and canal and road dedication, the issue of vested rights or estoppel arises when there is consideration of mandatory deplatting. This issue has been discussed above and, as applied here, is a question of fairness.

Under this "fair play" standard, it is still the developer or lot owner who runs the risk of change. The question faced is when is it warranted for the property owner to rely on government representations. A reading of the cases which exist leads toward the conclusion that a developer is warranted in relying upon any affirmative discretionary act which endorses or approves a particular character, location and magnitude of development, but only to the extent to which there has been disclosure to the decision-making body of the plans for the use of the land. Therefore, plat approval with significant site improvements in reliance on the approval could be used by a developer to challenge a mandatory deplatting.<sup>194</sup>

If there is mandatory deplatting where the lots are still in unitary ownership, then the expectation of a specific pattern of lots for sale would be frustrated, but there would still be no denial of all use—just one use—and it is probable that reasonable investment-backed expectations could still be realized. The taking challenge discussed earlier in the rezoning context is relevant here.<sup>195</sup>

**DEPLATTING INDUCED BY TAX ABATEMENT.** A clearly stated pro-

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193. FLA. STAT. § 163.280(2) (1981).

194. Road and canal improvements, for example, would probably be considered as reliance sufficiently detrimental to give rise to vested rights. In *Town of Largo v. Imperial Homes Corp.*, 309 So. 2d 571 (Fla. 3d DCA 1974), the developer spent \$379,000 on land acquisition and project design *after* the property was rezoned and *after* extensive negotiation with city officials. The detrimental reliance was composed of land acquisition costs, architectural fees, interest, taxes, sewer permits and other costs. *Id.*

If lands have been simply platted by a developer and no substantial expenditures have been made in good faith reliance on the plats, then the ability of the local government to mandatorily deplat is enhanced. Thus, if there were an amendment to FLA. STAT. ch. 177 to allow additional instances for mandatory deplatting, the estoppel argument probably could not be raised in that situation.

195. See discussion in text at Section III(B)(1), *Rezoning to Lower Density*.

gram of tax abatement is one method to induce deplatting. If a landowner is willing to deplat to a single parcel, the property tax assessment might abate to reflect the land as deplatted.<sup>196</sup> However, in communities containing platted subdivisions the subdivided lots provide a source of property tax revenue with little immediate burden. To the extent that the parcels in combined form would be entitled to lower levels of taxation, these communities will face a revenue loss.

**DEPLATTING INDUCED BY CLUSTER ZONING.** A cluster development ordinance allows a landowner to seek permission to shift the location of units allowed on the site to best meet site planning considerations and market demand for a type of unit other than large-lot, single-family housing. If a cluster option existed for areas of the platted subdivisions, it would allow one holding title to a large tract to replat and to then design a subdivision placing the allowed density on the most suitable areas of the parcel. Also, the ability to cluster may attract private assembly actions to take advantage of the option.

For example, the owner of a one-hundred acre parcel, platted in two acre parcels, could replat and be offered the option to cluster the allowed fifty units on perhaps thirty acres, leaving seventy acres of open space. The permission to cluster could also be tied to provisions allowing a change from detached single-family use to multi-family attached dwellings, adding a density bonus to further lower infrastructure costs per unit.

**DEPLATTING INDUCED BY PLANNED UNIT DEVELOPMENT.** The Planned Unit Development (PUD) concept is one step beyond clustering. It provides flexibility in site design which allows not only clustering but also mixtures of housing types and ancillary commercial development. PUD requirements are usually included in the zoning ordinance and are administered by either a districting approach or through a special permit process.

The districting approach to PUD would be the method most applicable to platted subdivisions. This approach has two variants. First is the floating zone method where the zoning ordinance enumerates the PUD requirements, but the PUD zones are not mapped until after application and approval. The second method

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196. That in turn raises interesting and difficult questions of tax assessment and valuation. Is a site which has been voluntarily deplatted taxable to the same degree as before? One can argue that having been deplatted, the site is no longer available for multiple lot development. On the other hand, one can argue that the site is now available for new development, and the tax on it should reflect its new capability.

of PUD districting is by use of overlay zones—districts which are both mapped and included in the ordinance text. Overlay PUD zones result in a mandatory set of requirements, and have been used in instances where site characteristics demand clustering of structures on only part of the site.

If areas of the platted lands were designated as possible PUD districts for floating zone use, and if the sites were in single ownership, application could be made for PUD approval. If ownership is split, a joint venture or private assembly effort would be necessary and this concept is discussed below.

If areas of platted lands were designated as overlay PUD zones, this designation is in effect a rezoning of the land, and the relevant issues are discussed in Section III(B)(1), under "Rezoning to Lower Density." The designation of an overlay zone places the property simultaneously in two zones—the underlying zoning district and the overlay zone. Requirements of both zones have to be met for project approval.<sup>197</sup>

**DEPLATTING INDUCED BY TRANSFERABLE DEVELOPMENT RIGHTS.** The use of Transferable Development Rights (TDR) differs from clustering or PUD in that it is based upon the concept that density can be transferred even if the property of another is between the sending and receiving areas. Collier County and Palm Beach County have TDR provisions in their zoning ordinances, but neither was specifically designed to address the platted lands problem.<sup>198</sup> Sarasota County recently enacted a TDR ordinance, allowing density in platted, but undeveloped, subdivisions to be transferred to the urban core.<sup>199</sup> TDR is "clustering" on a larger scale, and it has been referred to in the professional literature as a tool to assist in resolving a portion of the platted lands problem.<sup>200</sup>

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197. Several Florida cases have reviewed PUDs. *E.g.*, Harbor Ventures, Inc. v. Hutches, 366 So. 2d 1173 (Fla. 1979); Fogg v. Broward County, 397 So. 2d 944 (Fla. 4th DCA 1981); Dade County v. Beauchamp, 348 So. 2d 53 (Fla. 3d DCA 1977); Andover Dev. Corp. v. City of New Smyrna Beach, 328 So. 2d 231 (Fla. 1st DCA 1976); Board of County Comm'rs v. Ralston, 284 So. 2d 456 (Fla. 2d DCA 1973). No Florida courts, however, have discussed the seminal question of whether PUDs are valid in Florida absent specific enabling legislation. In one case, however, the court noted in dicta that a landowner challenging zoning as too restrictive failed to exhaust his administrative remedies because he had not applied for a PUD, which "would allow a proper degree of negotiation for the protection of interests of the general public consistent with the recognition of the constitutional rights of the landowners." *Ralston*, 284 So. 2d at 459.

198. See Palm Beach County, Fla., Ordinance R-81-28 (1981); Collier County, Fla., Ordinance 78-71 (1978).

199. Sarasota County, Fla., Ordinance 82-61 (1982).

200. Additional discussion of the TDR concept appears in text at Section III(D)(2),

## 2. *Reassembly of Lots in Scattered Ownership by Deplatting*

**REASSEMBLY BY GOVERNMENT MANDATED DEPLATTING.** Deplatting land with multiple owners would probably require revision in the enabling authority. If a large subdivision with separately owned lots was deplatted, the question is what would the lot purchasers own. It is important to recognize that bulk acreage is conveyed by a metes and bounds legal description, whereas subdivided lots are sold by lot and block number in relation to the recorded plat. If the plat is vacated, the lot owner's deed describes a parcel which may be difficult to trace, unless it can be located with a physical survey from monuments on the subdivision boundary. If impossible to trace, deplatting might produce property owners who were, in effect, tenants in common of one large parcel. Each would own a partial undivided interest in the whole parcel with joint access, but each would also have all the management problems that such a situation implies.<sup>201</sup> Either way, the individual lot owner's ability to make some reasonable use of the property is uncertain. A serious consideration, therefore, is whether deplatting alone would accomplish anything beneficial. The uncertainty of the resulting property interests and the potential for confusion are arguments against using deplatting in isolation, at least without new clarifying legislation.<sup>202</sup>

**THE FACTUAL PREDICATE FOR MANDATORY DEPLATTING.** A governing body may adopt a resolution vacating plats only upon application of the owners in fee simple of the land covered by the plat, and then only after it has been determined that such vacation will not affect the right of convenient access of persons who own land nearby.<sup>203</sup> Local governments have no present authority under this statute to vacate plats upon their own motion without an application from owners of lots within the subdivision.<sup>204</sup>

As discussed earlier, local governments may vacate plats on their own when plats have been recorded for at least five years and

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under the subheading **REASSEMBLY INDUCED BY TRANSFERABLE DEVELOPMENT RIGHTS.** Sarasota County's TDR ordinance, having been recently enacted, has not yet been applied.

201. This possibility poses a significant administrative challenge, unless some equivalent of a homeowners association could be created simultaneously to serve as nominal owner of the land, much as homeowners associations now serve as a vehicle to "own" and maintain common areas in subdivided developments throughout the country.

202. For a deplatting variation with a potential resolution of these issues, however, see the discussion in text at Section III(D)(2), under the subheading **REASSEMBLY BY LOT POOLING.**

203. FLA. STAT. § 177.101(3) (1981).

204. 1972 FLA ATT'Y GEN. ANN. REP. 169.

where not more than ten percent of the total subdivision area in which the plats are located has been sold as lots by the subdivider.<sup>205</sup> As a prerequisite to such mandatory deplatting and reversion to acreage, local government must find that the vacation of the subdivided land will promote the public health, safety, order, economy, and welfare; that the vacation conforms to the comprehensive plan of the area; and that there is due notice and a public hearing concerning the vacation.<sup>206</sup>

There is a substantial estoppel argument against mandatory deplatting. Unlike a zoning change, a deplatting may deprive the lot owner of the essence of his purchase—a distinct lot whose existence is in part traceable to a governmental act and whose acquisition, rather than use, was accompanied by a financial detriment. Thus, even if the enabling legislation was amended to allow such deplatting, courts are likely to protect innocent lot purchasers from such action unless demonstrably necessary. As one Florida court has said in another context, but with implications here:

Lest our decision be misconstrued, we recognize an increasing awareness on the part of local governments of the growth problems which vitally affect many of the communities in Florida. Therefore, nothing in this opinion should be construed as any impediment to the efforts of municipalities and other local governmental entities which exercise zoning authority from reducing the density provisions in their zoning regulations in an orderly and comprehensive manner, provided this is accomplished in the interest of the public health, safety and welfare and in a way as not to mislead innocent parties who in good faith rely to their detriment upon the acts of their governing bodies.<sup>207</sup>

Unlike the vested rights or estoppel challenge to rezoning, a challenge by a lot owner to deplatting is much more likely to prevail, though direct authority for this proposition is slim. The same substantial public purpose considerations that might lead a court to permit a rezoning of individual lots might, however, lead a court to permit a deplatting despite the vested right or estoppel argu-

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205. FLA. STAT. § 163.280(2) (1981).

206. *Id.* The factual predicate for vacation of plats under existing legislation is such that deplatting does not appear to be a viable mechanism to alleviate possible platted lands problems. It would be very expensive and difficult to contact all of the owners of the subdivided lots and ask them to apply for vacations of their respective lots. Also, the large subdivisions do not meet the requirements for vacation upon motion of the governmental body.

207. *Town of Largo v. Imperial Homes Corp.*, 309 So. 2d 571, 574 (Fla. 2d DCA 1975).

ment. The question then arises as to whether the property has been "taken" by deplatting.

It has already been noted that courts have suggested a variety of tests or factors to be used in determining whether a governmental act constitutes a taking.<sup>208</sup> To date, the United States Supreme Court has not adopted a definitive test, but makes "essentially ad hoc, factual inquiries."<sup>209</sup> Nonetheless, the Court has identified certain factors of particular significance in determining whether a taking has occurred, including those relating to the character of the governmental action and its impact on property owners. As discussed earlier, Florida courts have adopted this approach.<sup>210</sup>

The case law is not definitive as to whether the property owners in the platted subdivisions have any reasonable investment-backed expectation which would be frustrated by deplatting. Different owners may have different expectations regarding their parcels and not all may be reasonable. The effect of the approval of the plats by the county commission is important, but the mere fact that the landowner had assumed the land was available for development in a certain manner is not conclusive as to whether a taking has occurred.<sup>211</sup>

The taking question in deplatting is therefore difficult to resolve. If it were to be statutorily permitted, however, the case law which exists suggests that if deplatting is based upon substantial public health and welfare concerns, and the existence of the plat itself creates a public harm, then there could be a determination that the deplatting action is a reasonable governmental action and not a taking. In the alternative, if it were found that after deplatting there remained a reasonable use of a lot owner's land, then the deplatting might also be upheld against a taking challenge.

**REASSEMBLY INDUCED BY TRANSFERABLE DEVELOPMENT RIGHTS.** A TDR program would allow a landowner to increase site density by purchasing density units from other lot owners and transferring the density to his site. The sending parcel would then be deed-restricted against future development.

The application is obvious and could work well with lots in scattered ownership. Areas of the subdivision which could be allowed

208. See *supra* text accompanying notes 59-60.

209. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

210. See *supra* text accompanying notes 59-60.

211. See *Penn Cent. Transp. Co.*, 438 U.S. at 130 (argument that taking may be established by demonstrating an inability to exploit a property interest which one assumed was available for development is untenable).

to develop at a higher density, and to which local government is willing to make the public service and facilities commitment necessary to mitigate any adverse impact of increased density, would be areas where density could be increased by purchase of development rights from areas designated as sending areas (areas not desirable for build-out). As long as the planning studies designating the sending and receiving zones showed a rational nexus between the two sites, this would be viewed as similar to a community-wide cluster program, with overall density remaining relatively constant.

The TDR approach may be especially helpful as a vehicle to match new developers of specific sites with unhappy lot owners from other areas.<sup>212</sup>

The use of TDR is a judicially-recognized land management tool. The United States Supreme Court examined the use of TDR in *Penn Central Transportation Co. v. New York City*,<sup>213</sup> and, agreeing with New York's highest court,<sup>214</sup> found that "[w]hile 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."<sup>215</sup>

The New York Court of Appeals has also addressed the use of TDR in the decision *Fred F. French Investing Co. v. City of New York*.<sup>216</sup> As opposed to its later *Penn Central* decision, the court

212. The problem which arises, however, is how to treat the deed restricted parcels. They are privately owned, yet no development use can be made of them.

213. 438 U.S. 104 (1978).

214. *Penn. Cent. Transp. Co. v. New York City*, 366 N.E.2d 1271 (N.Y. 1977).

215. *Penn. Cent. Transp. Co.*, 438 U.S. at 137. The Court examined New York City's Landmarks Preservation Law, and the allegations by Penn Central that their property had been "taken" without just compensation in violation of the fifth and fourteenth amendments and that they were arbitrarily deprived of their property without due process of law in violation of the fourteenth amendment. *Id.* at 119. Penn Central had sought to construct a fifty-five story office tower on top of the terminal and was denied approval because of the terminal's landmark status. *Id.* at 116-18.

The Landmarks Preservation Law, as applied to the terminal, allowed transference of the development rights to at least eight parcels in the vicinity of the terminal. *Id.* at 113-15. Additionally, and an important factor in the Court's ultimate decision, the law permitted the remainder of the parcel to be used in a gainful fashion. "The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the [t]erminal site proper but also other properties." *Id.* at 138. Simply, the terminal remained in the ownership of Penn Central, and its presently beneficial use as such was allowed.

216. 350 N.E.2d 381 (N.Y. 1976).



held that an attempt by the city to designate two privately-owned parks as passive recreation areas was invalid, prohibiting their development but allowing transfer of the development rights.<sup>217</sup> The court stated that "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."<sup>218</sup> The court found no right to compensation as it would for a taking by eminent domain, and went on to examine whether such a restriction was a valid exercise of the police power.<sup>219</sup> In holding that the regulation was unreasonable and therefore unconstitutional, the court found that it deprived the owner of practically all of his property rights and, though this may have been offset by the transferable development rights, the market considerations and governmental discretionary decisions which were a pre-condition to the use of these rights resulted in too great an uncertainty as to their possible use.<sup>220</sup> There was no right to implement these development rights, but only a series of discretionary reviews to determine where they could be used.

It is enough to say that the loose-ended transferable development rights in this case fall short of achieving a fair allocation of economic burden. Even though the development rights have not been nullified, their severance has rendered their value so uncertain and contingent, as to deprive the property owner of their practical usefulness, except under rare and perhaps coincidental circumstances.<sup>221</sup>

In *Penn Central*, the income-productive terminal remained and there were specific sites owned by Penn Central to which the development rights could be transferred. In *Fred F. French*, there were private parks which remained private parks—but were required to be maintained at the owner's expense as parks open to the public. Additionally, the transfer procedure in *Fred F. French* involved a great deal of government discretion.

In *Penn Central*, the New York court, affirmed by the United States Supreme Court, found permissible the preservation of the terminal, after having found the prohibition of development on the private parks impermissible in *Fred F. French*.

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217. *Id.* at 383.

218. *Id.* at 386.

219. *Id.*

220. *Id.* at 387-88.

221. *Id.* at 389.

The ultimate evil of a deprivation of property, or better, a frustration of property rights, under the guise of an exercise of the police power is that it forces the owner to assume the cost of providing a benefit to the public without recoupment. There is no attempt to share the cost of the benefit among those benefited, that is, society at large.<sup>222</sup>

In *Fred F. French*, the city was attempting to use TDR to provide parkland open to the public, yet was both unwilling to pay for it or to designate transfer sites for the development rights that could be used as a matter of right. This was too great a private burden for a public benefit.<sup>223</sup>

TDR is an equitable means of providing an anticipated return on land investment to property owners whose return otherwise might be lessened by regulatory activity. Professor John J. Costonis, considered by many to be the innovator in the TDR area, has stated that "TDR compensates owners for restrictions on the development of their land, not with dollars, but with the entitlement to transfer their unused development rights to parcels elsewhere."<sup>224</sup> However, as illustrated above, the opportunity for an equitable return must be provided. TDR is a means to meet both the needs of the public in the protection of a recognized resource and the needs of the property owner to make an equitable return on investment.<sup>225</sup>

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222. *Id.* at 387.

223. In reflecting upon these two decisions, their author, Chief Judge Charles D. Breitel of the New York State Court of Appeals, in response to commentators' attempts to place the decisions in the "eminent domain box" or the "police power box," has stated:

So with TDRs, for the time being at least, I think the fruitful approach is to try not to worry about which box it falls into. The problem is to analyze the situation economically to see what the impact is, what it is we are doing, why we are doing it, and whether it fits in with the basic trend of government and law and social policy in permitting our society to survive, both with its amenities and its economic necessities. Then, later, we will see whether it fits in one place or the other.

Breitel, *A Judicial View of Transferable Development Rights*, LAND USE L. & ZONING DIG. No. 2, 1978, at 5, 7.

224. Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021, 1055-56 (1975).

225. It is not a means to provide the public a benefit with an unreasonable burden upon the landowner, who, in the words of Chief Judge Breitel, should not find that "the accident of ownership determines who shall bear the cost initially." *Fred F. French*, 350 N.E.2d at 387. Judge Breitel went on to state:

Of course, as a further consequence, the ultimate economic cost of providing the benefit is hidden from those who in a democratic society are given the power of deciding whether or not they wish to obtain the benefit despite the ultimate economic cost, however initially distributed. . . . In other words, the removal from

**REASSEMBLY BY LOT POOLING.** Between individual ownership and public ownership is the concept of pooled ownership. This concept can be illustrated by the enclosure movement in 18th century Britain. In an attempt to strengthen the institution of private property and to enclose common lands, various Acts of Parliament were passed. The landholders involved pooled their lands and the common rights attaching to them. This was done in order to be able to redistribute and reallocate the land, and was an important part of the process of changing over from the feudal system to freehold ownership of land. What resulted was a change from ownership of a small parcel, with use rights to a large area of common land, to ownership of a larger parcel which included a portion of the previous common land.

A more recent example of the use of this concept is the standard method used in the reconstruction of war-damaged towns in France after World War II. In LeHavre, for example, land ownership patterns would not allow any sensible scheme of redevelopment. Also, a limited rearrangement based on existing ownership would have been inadequate. A completely different layout was proposed, and a form of co-ownership was established. This was not a simple redistribution of lots, for property owners surrendered their former holding of land in return for shares in an "ilot," or block.<sup>226</sup>

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productive use of private property has an ultimate social cost more easily concealed by imposing the cost on the owner alone. When successfully concealed, the public is not likely to have any objection to the "cost-free" benefit.

*Id.* at 387 (citations omitted).

226. In LeHavre, all landowners in the block became members of the group co-owning the land, the building or buildings, and the common-use facilities. The public authorities paid for the new buildings for former owners as compensation for their war losses. Each owner, however, would own outright the space actually used by him. This type of reassembly did away with any need for government purchase and redistribution of the land. It was simply redistributed to the co-owners as shares in the block.

A similar procedure is used in present day France for urban renewal. The Ministry of Construction, which has jurisdiction over planning, works with the municipality in the planning process, and the municipality is responsible for implementation. The municipality may either undertake the task itself, or more likely, it will delegate it to a "mixed" company, one combining both public and private investment, but weighted on the public side. The company which is established for a given area proposes to the individual landowners that they take part in the renewal operation. If the owners accept, they will receive no compensation for turning over their property to the company, but they will have a right to possession of space in the new or reconstructed buildings. The owners who do not agree to participate on this cooperative basis are bought out either by compulsion or by agreement.

In tracing the beginnings of the pooling concept, N. Lichfield and H. Darin-Drabkin state that:

This system of private landowner/public authority co-operation is widely used

## A pooling arrangement is not foreign to the United States. It is

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in West Germany under its Federal Building Law, dating back to the *Lex Adiches* of 1909, which established the legal right for the authorities to enforce a compulsory exchange of property.

The planning authority is responsible for the detailed site plan which contains the new street pattern, additional open spaces, and so on (the *Bebauungsplan*). Usually this lowers the total amount of land left in private ownership; for example, in Dortmund the redirection was of the order of 28 per cent. However, before this binding site plan is published, the authority attempts to reach agreement with the holders of proprietary interests voluntarily as the rearrangement of plots that is necessitated by the new plan and exemptions from rates and costs are made in the event of a voluntary agreement. The revised landownership plan (*Umlegungskarte*) thus fairly apportions the remaining plots among the landowners.

It should be noted that if the new plot is decreased in value, the owner receives compensation (either cash or other land); however, if there is a gain in value, betterment is charged, since this is the result purely of public activity with no action on the part of the landowners.

The German system has been copied in other countries, particularly in Japan. Since 1919 land-readjustment schemes have been widely used, particularly after natural disasters or war destruction. Approximately 27 per cent of the total urban land surface, or over 1,500 square kilometres, has been affected. Again, both public and private bodies are involved. In the latter case these are known as Land Readjustment Associations and they must hold a yearly public meeting (*sokai*) of all landowners to approve the scheme for rearrangement. The basic procedure is the same in the area as a whole; some land is designated for public uses (called *genbu*), while the remainder is pooled as the reserve to be apportioned between all the landowners (*horyuchi*). This procedure was used, for example, when the high-speed train line was built from Tokyo.

N. LICHFIELD & H. DARIN-DRABKIN, *LAND POLICY IN PLANNING 197-98* (1980).

Britain has also considered the concept of co-ownership. The Uthwatt Committee in 1942 considered it as a means of evening out the problem of compensation and betterment over entire urban areas—a problem referred to as “windfalls and wipeouts” in the United States. Ultimately the Committee rejected the idea because the focus of their work was to secure for the community the increments of value in land due the community, and pooling of ownership would still result in the increased value remaining in private hands.

British author D. Guthrie has addressed the concept of pooled ownership. He suggests that “[t]o nationalize land would provoke anger, to municipalize land would produce suspicion, but the voluntary amalgamation of ownerships, with an appropriate return as interest, might well make the position more acceptable.” Guthrie, *Land Rationalization*, 46 *J. TOWN PLAN. INST.* 301, 302 (1960).

Guthrie suggested that an entire community form a company through which all land transactions would pass. The company would hold all land, leasing it to the former owners and others, and distributing to the shareholders (the former owners) interest in proportion to their previous land holdings. Such companies would be non-governmental, but government would participate as a shareholder to represent citizens without shares, even though government may not have owned land. *Id.* at 302-03.

In the Charlotte Harbor area, portions of the platted lands could be designated for redevelopment by a “mixed” company. Share certificates in the company would replace the titles held by existing landowners and the number of shares would be based upon a careful, realistic valuation of the land.

The lot pooling concept is examined in greater detail in W. DOEBELE, *LAND READJUSTMENT* (1982). The volume examines programs in Germany, Japan, Korea, Taiwan and Australia,

presently used for the controlled development of oil and gas, with an element of compulsion from states using their police power. In Texas, Oklahoma, Indiana, and Florida, for example, landowners over a particular oil or gas reserve may be required by the state to join a pool, and their share in the risks and profits will be in relation to the surveyed estimate of reserves beneath their property.<sup>227</sup>

In Florida this procedure is outlined in chapter 377, Florida Statutes.<sup>228</sup> The Florida policy of pooling different owners' interests is "to provide for the protection and adjustment of the correlative rights of the owners of the land wherein said natural resources lie and the owners and producers of oil and gas resources and the products made therefrom."<sup>229</sup>

There is presently no Florida case law that has reviewed chapter 377. This is probably due to both the small amount of oil and gas reserves in Florida as compared to the fields of Texas and Oklahoma, and the authority given to the Department of Natural Resources to encourage unitization and conservation of oil and gas drilling in Florida.<sup>230</sup>

State enabling legislation would probably be required to use the pooling concept for the platted lands. Such legislation, even if not

and should be a basic reader for those interested in a detailed discussion of how lot pooling has actually worked. This is the first book-length publication on land readjustment printed in the English language.

227. See generally R. HEMINGWAY & B. KRAMER, OIL AND GAS REPORTER (1982) (multi-volume treatise including detailed discussion of oil and gas pooling).

228. FLA. STAT. §§ 377.01-712 (1981 & Supp. 1982) (amended 1983). For the purposes of this article, unitization and pooling relating to oil development are treated similarly.

229. FLA. STAT. § 377.06 (1981).

The Department of Natural Resources is the regulating agency of this pooling process. As such, the Department is directed to determine, after a hearing(s), the proper number and location of wells so as to prevent "waste and to avoid the augmenting and accumulation of risks arising from the drilling of an excessive number of wells." FLA. STAT. § 377.25(2) (1981) (emphasis added). The Department may require the different landowners to develop the site jointly, and owners are also encouraged to merge their interests voluntarily for oil and gas development by the Department granting to them an exemption from any state statutes relating to trusts, monopolies or contracts in restraint of trade. FLA. STAT. §§ 377.27, .29 (1981).

Hearings are required in front of the Department when any pool or reserve area is established. The Department is authorized to establish the pool and to determine the method of allocation of respective royalties and costs to owners of the separate parcels on a fair and equitable basis. FLA. STAT. § 377.28 (1981). However, the order requiring operation of the pool is not effective until at least 75% of the parties involved (landowners and operators) have executed an agreement. *Id.* § 377.28(4).

230. For a more thorough discussion of unitization and pooling in Florida, see Carmichael, *Transferable Development Rights as a Basis for Land Use Control*, 2 FLA. ST. U.L. REV. 35, 77-99 (1974); and Note, *Compulsory Unitization in Florida: A New Emphasis in the Energy Crisis?*, 27 U. FLA. L. REV. 196 (1974).

required, would be desirable to standardize the terms of reference and articles of association.<sup>231</sup> Pooling could in effect be used like a limited partnership, where the lot owners contribute their land and the general partners (the developers) arrange financing and manage the development activity. Return to the limited partners could be based upon a percentage of property provided. This is quite an

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231. These "land corporations" could simply administer the land, as opposed to developing it or planning for its development. Planning and zoning powers could remain with local government.

Under one possible version, a corporation could be established under a state "landowners compulsory pooling act." The legislation would require registration of the corporation within a specified time period. The next step would be the preparation of an estimate of the value of all land under the corporation's jurisdiction for its full permissible development. Shares in the corporation to the amount of the total value would then be issued to individual owners on a pro rata basis. The initial asset, then, would be the total combined value of the land.

Development approval could be handled in two ways. First, all review and approval could be carried out in the traditional manner once the corporation agreed to sell a parcel for development. As an alternative, a condition precedent to municipal submission could be the corporation's approval of the development plans either before or after the agreement to sell. In the latter instance, any owner, developer or builder would have to submit proposals to the board of directors before seeking government approval. The board and its consultants would then review the proposed project to determine whether it would add to or detract from the total asset. The determining factors for approval would include the fact that the proposed project would create maximum benefit to the total asset rather than to any particular parcel. If approved, submission to governmental agencies is made. If denied, the proposal could not be so reviewed, and since the corporation "owns" the land, there is no question of a taking.

Yet, the concept is not without its problems. The first question to be asked is whether in a democratic society this is the type of solution to use. These "company towns" would be run by a class of ex-landowners, and it is only they who will have the vote. Would this be a throwback to the concept of ownership of land being an essential element of full citizenship? This immediately cautions one to be concerned about the size of the land controlled by each corporation and concerned about the implications of the possible merger of such corporations.

One of the immediate benefits of lot pooling would be in the administration of property tax. It is the corporation which will be billed, not the individual owners, and it is also the corporation that will pay the capital gains tax.

Safeguards could be put into the system to assure that the corporation either sells the deplatted acreage or sells land when development approval is received. For example, it could be stipulated that if title to a parcel was not transferred when a purchaser wanted it, title must be transferred when all approvals from the governmental authority were received and financing committed. Over time, as the asset redeveloped, it would be sold. Once this piecemeal sale was complete, the corporation could be liquidated, and the net result would be deplattling, replatting, and development of the selected portions of the subdivision.

The pooled land situation is most likely to succeed when the land pooled has development value in a combined form. First, the corporation needs sales to generate cash. Second, the rights received will need to have some value to be attractive.

Given this discussion, land pooling may prove to be a possible tool in certain areas of the subdivisions to overcome the obstacle to better development posed by the pattern of existing platted lands.

innovative concept and is one that deserves further examination as a possible solution to identified platted lands problems.<sup>232</sup>

### 3. *Reassembly by Eminent Domain*

At the other end of the spectrum from regulatory reassembly lies the process of land reassembly through eminent domain. As discussed earlier, the regulatory power of government is not unlimited, and there may not be, in some cases, "a shorter cut than the constitutional way of paying for the change."<sup>233</sup> But paying for the

232. The adoption of land pooling will require the state government to undertake a number of steps to authorize, guide and assist local government (and other designated authorities) to undertake pooling projects. These steps include:

#### 1. *Legislation:*

Amendment to existing land use planning legislation to authorize and regulate the preparation and implementation of a pooling program by local governments and other designated authorities. The legislation would stipulate that a pooling program be prepared to define and regulate each pooling project. The legislation would provide for the use of the resumption technique of acquiring and consolidating separate landholdings along with public and government lands in the areas designated for pooling.

#### 2. *Regulations:*

Preparation of regulations to guide local government and other designated authorities in the preparation and implementation of pooling programs and projects.

#### 3. *Standard Procedure:*

Formulation of a standard procedure for the commencement, preparation, exhibition, review, adoption, approval, financing, implementation, finalization and reporting of pooling programs and projects, with provision for consultation with landowners at project commencement and during project preparation.

#### 4. *Principles, Criteria and Formulas:*

Formulation of the principles, criteria and formulas to be followed in determining project boundaries, assessing project costs, assessing project profits, allocating the new sites, sharing project profits, etc.

#### 5. *Model Program Text:*

Preparation of a standard draft text for pooling programs to define, authorize and regulate each pooling project and as a *de facto* partnership agreement between the local government and the landowners.

#### 6. *Eminent Domain:*

Willingness of the relevant government agency to issue condemnation notices for the consolidation of all lands under an approved and published pooling scheme.

#### 7. *State Government Administration:*

Formation of a group in the state government planning agency to assist the local government in reviewing and approving draft pooling programs, and to then oversee, monitor and report the implementation of pooling projects.

#### 8. *Project Advice and Assistance:*

Provision of advice and assistance to local governments in preparing and implementing pooling programs by a state agency.

Possible establishment of a fund to provide short term loans to local government for working capital for pooling projects.

This material is abstracted from Archer, *Land Pooling by Local Government for Planned Urban Development in Perth*, 1980 AUSTL. INST. URB. STUD., MONOGRAPH 4, at 65-66.

233. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

change, however, may involve the exercise of the power of eminent domain, and it too is not unlimited. The language of the fifth amendment is instructive: "[N]or shall private property be taken for public use, without just compensation."<sup>234</sup>

Thus private property may not be taken unless for a "public use" and only upon payment of "just compensation." The following discussion examines what these concepts may mean in the platted lands context, but a few introductory comments are first in order.

The exercise of the power of eminent domain is different from purchasing land in the private market. Land is customarily acquired on the open market by making the current owner a desirable offer; government often acquires land in this manner. The power of eminent domain exists to compel a sale at a "fair" price, and is used where the landowner refuses to sell or is in a monopoly position and asking an "unjust" price. An example of the use of eminent domain occurs in land assembly for urban renewal. One key landowner could refuse to sell and bar assembly of sufficient land to complete a planned project unless government exercises its eminent domain authority. In the urban renewal situation, the taking of some parcels whose current use is not "blighted" has been allowed if the parcel is necessary to complete a large project.<sup>235</sup>

The use of the condemned property must be "public." Courts have been willing to uphold eminent domain where the end use was not itself public (like a school or courthouse) but the taking served an ostensibly public purpose even though the land ended up in private hands. There is no power, however, to compel one pri-

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234. U.S. CONST. amend. V. The Florida Constitution contains a similar provision: "No private property shall be taken except for a public purpose and with full compensation therefore paid to each owner or secured by deposit in the registry of the court and available to the owner." FLA. CONST. art. X, § 6(a).

235. See, e.g., *Berman v. Parker*, 348 U.S. 26, 34 (1954) (District of Columbia Redevelopment Act, which attacked the problem of urban blight on an area-wide rather than a structure-by-structure basis, was not an unconstitutional exercise of authority against a landowner whose building did not currently contribute to blight).

The literature in the planning and law fields does not deal with the platted lands issues as they are being addressed here. Some do, however, comment on the problems of reassembly of small parcels by government action.

Once rural parcels are divided, sold to diverse owners, and peppered with interspersed residential uses, they can be very difficult and expensive to recombine. Some indications of the cost and complexities of parcel recombination were evident in the experience of urban-renewal agencies during the 1950s and 1960s. The agencies incurred massive expenses as they purchased small, central-city properties and tried to recombine them into the large parcels needed for various projects.

R. HEALY & J. SHORT, *supra* note 187, at 212.



vate property owner to sell land for the benefit of another private party. Whether that power should be available by asking government to act as middleman is the issue. In short, when a taking appears to be for a *private* use, it may be turned aside. Under current law, nonetheless, governing bodies in many jurisdictions are permitted to use the power of eminent domain to accomplish a wide range of objectives deemed to constitute public purposes.<sup>236</sup>

The use of eminent domain in the platted subdivisions would clear the current confusion of separate ownership by creating a single ownership—the government purchasing body—which could in turn convey some or all of the bulk acreage to private enterprises for redevelopment in conformance with comprehensive plan and zoning amendments. The eminent domain alternative has a degree of simplicity to it that is attractive, but the authority to exercise the power is limited to specific situations and levels of government, and the exercise of the power must serve a public purpose. A consideration which effects the practicality of the use of eminent domain is the existence of sufficient public funds to pay the “just compensation” required for acquisition of private property.<sup>237</sup>

236. For example, in *City of Oakland v. Oakland Raiders*, 646 P.2d 835 (Cal. 1982), the California Supreme Court held that the City of Oakland’s attempt to take and operate the Oakland Raiders football franchise may constitute a proper public use and remanded the case for a trial on the merits. The court found that the operation of a sports franchise might be a proper municipal function, and that a prompt retransfer of the franchise would necessarily vitiate the “public use” which is a prerequisite to condemnation. *Id.* at 843.

In *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), the Supreme Court of Michigan considered whether the city’s condemnation of property in order to convey it to a private corporation encompassed a sufficient public purpose as to constitute a constitutionally permissible eminent domain action. The condemnation occurred pursuant to a statute which authorized actions in order to revitalize the economy. The court held that because the public benefit to be derived from the condemnation was “clear and significant,” essential public purposes were served, and the action was constitutional. *Id.* at 459. See also Warner, Ehrmann, Jackson & Lax, *Detroit’s Renaissance Includes Factories*, 41 URB. LAND 3 (1982) (detailed discussion of urban renewal plan and other aspects involved in *Poletown* case).

237. If eminent domain were undertaken, several ways of financing it might be considered. The first is through resale of the bulk acreage. It may turn out that some bulk acreage, subject to comprehensive plan and zoning changes, is quite valuable, allowing the government to recoup a significant portion of its eminent domain cost. This financing method is, of course, appropriate only for acreage which is to be committed to development, and not for open space preservation or restoration. Furthermore, for this financing device to be feasible, the land must have value in a reassembled configuration and there must be a market for resale. The parameters of these two variables would have to be fully explored.

A second major financing vehicle is through government funding of acquisition of ecologically important areas, an appropriate method of financing for lands which should not be developed. There may be a problem, however, in acquiring any state funding for what may well be regarded as a “local” problem.

WHAT CONSTITUTES A PROPER PUBLIC PURPOSE. While private property cannot constitutionally be taken except for a "public use," this term is incapable of precise definition.<sup>238</sup> However, the two views generally recognized are: (1) that "public use" means actual use by the general population (the "narrow view")<sup>239</sup> and (2) that "public use" means public advantage or benefit (the "broad view").<sup>240</sup> The first view has generally been held to be too restrictive, and therefore the trend is away from the narrow "public use" view and towards the broader "public purpose" view.<sup>241</sup>

The power of eminent domain is inherent to the State of Florida, as it is to all states, and the state may delegate that power by statute to its political subdivisions. The state has delegated the power of eminent domain to the counties,<sup>242</sup> and to municipalities,<sup>243</sup> as well as to certain specialized districts and agencies for specific purposes.<sup>244</sup> Florida also has general statutes detailing the proper procedure for the exercise of the power by the state, its municipalities

A third method is some special financing mechanism linked to the lot sale process itself, such as a transfer tax. Also, perhaps the owners of lots currently developed could be treated as beneficiaries of a restriction on new developments nearby, and specially assessed for the cost of eminent domain acquisitions. One problem with special assessments, however, may be that some of the benefit is likely to be "general," meaning that the full cost could not be recaptured by a betterment assessment, requiring some subsidy from general tax revenues.

238. 2A C. NICHOLS, EMINENT DOMAIN § 7.2 (J. Sackman & P. Rohan rev. 3d ed. 1981).

239. *Id.* at § 7.2[1].

240. *Id.* at § 7.2[2].

241. Courts and commentators alike generally refer to this requirement as the necessity for a "public purpose" to justify the taking. Due to the imprecise definition of the requirement, the issue of whether a public purpose exists is essentially a case-by-case determination, influenced more by settled practices and social necessities of the people of the state in which the question arises than philological considerations. 1 C. NICHOLS, *supra* note 238, § 40. One general proposition is that the public use may be negative in nature, such as prevention of an evil. 2A C. NICHOLS, *supra* note 238, § 7.2[2]. This is part of the reasoning behind the constitutionality of the use of eminent domain for urban redevelopment purposes. Also, there is a general judicial recognition that a strong presumption of validity exists for the legislative determination that a certain taking is for a public purpose. *Berman v. Parker*, 348 U.S. 26, 32 (1954); Note, *Public Land Banking: A New Praxis for Urban Growth*, 23 CASE W. RES. L. REV. 897, 956, 957 (1972). Several commentators have suggested that the public use requirement in reality does not impose a consistent substantive limitation on the power of eminent domain. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1, 41-42 (1980); Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 614 (1949). However, courts continue to discuss it and occasionally cite it as grounds for declaring the exercise of eminent domain unconstitutional. Thus, justifying the taking as a proper public purpose still deserves attention.

242. FLA. STAT. § 127.01 (1981).

243. FLA. STAT. § 180.22 (1981).

244. *E.g.*, FLA. STAT. § 375.031(6) (1981) (Department of Natural Resources); FLA. STAT. § 421.08(4) (1981) (housing authorities); FLA. STAT. §§ 373.086, .139 (1981 & Supp. 1982) (water management districts).

and any other public authorities.<sup>245</sup>

Florida cases have established some broad guidelines regarding the public purpose requirement. Cases determining whether a project serves a public purpose so as to allow the expenditure of public funds and the sale of bonds are instructive because the standard is the same as that for eminent domain cases.<sup>246</sup> A legislative determination that a particular use of the power of eminent domain serves a public purpose is presumed valid and should be upheld absent a finding that it is arbitrary or clearly erroneous.<sup>247</sup> It is also well established that a public authority may not acquire land by purchase or eminent domain where the sole purpose is to make it available for private uses.<sup>248</sup> However, the fact that a project, which serves a predominantly public purpose, may also result in some incidental use or benefit to private interests does not strip the proposed project of its public nature or necessitate a finding that the public purpose requirement has been violated.<sup>249</sup>

In addition to establishing that the taking is for a public purpose, Florida also requires that the condemning authority show a reasonable necessity that the particular property be taken for the proposed use.<sup>250</sup> Only that amount of property that is necessary for

245. FLA. STAT. §§ 73.012-161 (1981 & Supp. 1982).

246. *State v. Miami Beach Redevelopment Agency*, 392 So. 2d 875, 885 (Fla. 1980).

247. *E.g., id.* at 886; *State v. Housing Fin. Auth.*, 376 So. 2d 1158, 1160 (Fla. 1979).

248. *E.g., Miami Beach Redevelopment Agency*, 392 So. 2d at 886; *Baycol, Inc. v. Downtown Dev. Auth.*, 315 So. 2d 451, 455 (Fla. 1975).

249. *E.g., Miami Beach Redevelopment Agency*, 392 So. 2d at 886; *State v. Board of Control*, 66 So. 2d 209, 210-11 (Fla. 1953); *City of Miami v. Coconut Grove Marine Properties, Inc.*, 358 So. 2d 1151, 1155 (Fla. 3d DCA 1978), *cert. denied*, 372 So. 2d 932 (1979). For examples of the application of the public purpose requirement to specific projects, see, e.g., *Baycol, Inc.*, 315 So. 2d at 457 (plan for parking garage and shopping mall dominated by private uses because alleged public purpose of supplying parking was dependent on demand created by privately owned and operated shops in mall); *City of West Palm Beach v. State*, 113 So. 2d 374, 377 (Fla. 1959) (a project consisting of a civic center and marina in which proposed private shops were to serve the facility and the civic center was leased for operation by private enterprise was found to be predominantly for private use and benefit); *Panama City v. State*, 93 So. 2d 608, 610, 614 (Fla. 1957) (fact that plan allowed some private shops in proposed project consisting of several public buildings, two marinas and some concession buildings did not deprive project of its public nature); *State v. Daytona Beach Racing & Recreational Facilities Dist.*, 89 So. 2d 34, 36-37 (Fla. 1956) (public purpose found dominant in proposal for construction of racetrack and stadium to be operated by private interests substantial portion of year because of entertainment value, promotion of tourism, and provision for substantial public use).

250. FLA. STAT. § 73.021(1) (1981); *Dade County v. General Waterworks Corp.*, 267 So. 2d 633, 636 (Fla. 1972); *City of Miami v. Cox*, 313 So. 2d 443, 444 (Fla. 3d DCA 1975), *cert. denied*, 330 So. 2d 15 (Fla. 1976). The governmental authority does not have to prove an absolute necessity for the taking of the particular property. *Canal Auth. v. Litzel*, 243 So. 2d 135, 137 (Fla. 1970); *Dade County v. Paxson*, 270 So. 2d 455, 458 (Fla. 3d DCA 1972).

the proposed use may be acquired.<sup>251</sup> Florida also imposes a requirement that the condemning authority have a good faith intent to use the property, once acquired, for the proposed public purpose.<sup>252</sup>

The most viable authority for the exercise of the power of eminent domain in the platted subdivisions appears to be in the Community Redevelopment Act, which confers powers on counties and municipalities to be used to eliminate slum and blighted areas and to take actions to prevent their recurrence.<sup>253</sup>

The vast majority of courts, including the United States Supreme Court, have upheld the constitutionality of urban redevelopment statutes authorizing the exercise of the power of eminent domain to acquire property deemed a slum or suffering from blighting conditions, as defined by statute, even though part or all of the land acquired is ultimately to be turned over to private enterprise for development. In such cases, courts reason that the elimination of such conditions constitutes a public purpose which dominates any private benefit derived from redevelopment by private interests. Condemning authorities may constitutionally take property on an "area basis," including non-slum and non-blighted structures and lots. Blighting conditions, which justify a taking by eminent domain, may exist in primarily vacant and undeveloped areas such as the platted lands.<sup>254</sup> However, the use of eminent do-

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251. *Canal Auth. v. Miller*, 243 So. 2d 131, 133 (Fla. 1970).

An administrative determination that acquisition of certain land is reasonably necessary is presumptively valid and will be upheld absent proof of bad faith, fraud, or gross abuse of discretion. *City of Jacksonville v. Griffin*, 346 So. 2d 988, 990 (Fla. 1977); *Miller*, 243 So. 2d at 133. One lower court was very deferential, stating that it was "sufficient for a condemning authority merely to establish that it properly exercised, in the procedural sense, its discretionary powers under law. The burden then shifts to the landowner . . . to show either bad faith or an abuse of that discretion." *City of St. Petersburg v. Vinoy Park Hotel Co.*, 352 So. 2d 149, 152 (Fla. 2d DCA 1977). The condemning authority is not required to demonstrate an immediate need for the property or the proposed project. *Paxson*, 270 So. 2d at 458. Nor is it necessary to have the funds, plans, specifications, and all other necessary preparations ready as a condition to a proper determination of the necessity of the acquisition. *Griffin*, 346 So. 2d at 991 (quoting *Central & S. Fla. Flood Control Dist. v. Wye River Farms, Inc.*, 297 So. 2d 323, 326 (Fla. 4th DCA 1974)); *City of Miami Beach v. Broida*, 362 So. 2d 19, 20 (Fla. 3d DCA 1978), *cert. denied*, 372 So. 2d 466 (Fla. 1979).

252. *Dade County v. General Waterworks Corp.*, 267 So. 2d 633, 636 (Fla. 1972). "However, a reservation of the right to abandon condemnation proceedings if the judgment is beyond the financial capabilities of the condemning authority will not discredit an assertion of good faith and necessity." *Id.*

253. FLA. STAT. §§ 163.330-450 (1981) (amended 1983).

254. *See, e.g., Cannata v. City of New York*, 182 N.E.2d 395, 397 (N.Y.) (court approved taking of primarily vacant land for industrial redevelopment under urban renewal statute), *appeal dismissed*, 371 U.S. 4 (1962); H. FRANKLIN, D. FALK & A. LEVIN, *IN-ZONING: A GUIDE*

main to eliminate such conditions and reassemble land for redevelopment has primarily been restricted to urban areas.<sup>255</sup>

If the conditions existing in the platted subdivisions fall within the definition of "blighted area,"<sup>256</sup> then the area, or some portion thereof, may be acquired by eminent domain. Under Florida case law, the acquisition could be for a public purpose even if the land after replatting and development was made available for predominantly private uses, commercial as well as residential.<sup>257</sup>

WHAT IS JUST COMPENSATION? Lot owners must be paid just compensation for their land if taken by eminent domain. The general rule in Florida is that landowners must be paid a sum which is commensurate with the fair market value of the land.<sup>258</sup>

FOR POLICY-MAKERS ON INCLUSIONARY LAND USE PROGRAMS 188 (1974) (in cases involving primarily undeveloped areas, elimination of blighting conditions that inhibit development, such as unsound platting and clouded titles, found to be public purpose).

255. Florida was one of the last states to acknowledge that the elimination of slums and blighted areas is a valid public purpose even when the acquired land is conveyed out to private interests to redevelop. In 1938, the Florida Supreme Court upheld a legislative determination that slum clearance and public construction of housing for persons of low income served a public purpose. *Marvin v. Housing Auth.*, 183 So. 145, 150 (Fla. 1938). However, in a subsequent case, the court held unconstitutional a statute authorizing housing authorities to acquire property in blighted areas, by purchase or eminent domain, for the purpose of redevelopment and then make it available to private commercial and industrial interests. *Adams v. Housing Auth.*, 60 So. 2d 663, 670 (Fla. 1952). In a later case, after acknowledging that the public purpose underlying slum clearance and public housing was well-established, the court began chipping away at the *Adams* decision by upholding a proposal for clearance and redevelopment of a slum area resulting in primarily residential uses and a few incidental private commercial uses. *Grubstein v. Urban Renewal Agency*, 115 So. 2d 745, 751 (Fla. 1959).

In a recent opinion, the Florida Supreme Court held that the Community Redevelopment Act, FLA. STAT. ch. 163, "authorizing redevelopment projects involving expenditure of public funds, sale of public bonds, the use of eminent domain for acquisition and clearance, and substantial private and commercial uses after redevelopment, is in furtherance of a public purpose and is constitutional." *State v. Miami Beach Redevelopment Agency*, 392 So. 2d at 875, 891 (Fla. 1980). The court quoted portions of the United States Supreme Court decision in *Berman*, as persuasive on the issue of whether redevelopment of merely "blighted" areas serves a public purpose and the issue whether the existence of private commercial uses in the redeveloped area deprived the proposal of its public purpose. *Id.* at 889-91. The court also noted that in a previous case dealing with ch. 163, *Griffin*, it had "implicitly held that the use of eminent domain for slum clearance is constitutional even where the predominant land use of the area will ultimately be private." *Id.* at 891.

256. See *supra* note 121.

257. *Miami Beach Redevelopment Agency*, 392 So. 2d at 891.

258. See *Sunday v. Louisville & N.R.R. Co.*, 57 So. 351 (Fla. 1912) (measure of compensation is the actual market value at the time of appropriation); but see *Jacksonville Expressway Auth. v. Henry G. Dupree Co.*, 108 So. 2d 289 (Fla. 1959) (fair market value is not exclusive standard to be used to determine amount of compensation). See generally 21 FLA. JUR. 2D *Eminent Domain* §§ 84-97 (1980).

It may be possible, however, to consider the option of just compensation in other than

There is no requirement in the Florida Constitution<sup>259</sup> or the general statutes dealing with eminent domain<sup>260</sup> specifying that compensation must be paid in money. The majority of courts that have considered the question have concluded that compensation must be monetary,<sup>261</sup> although at least one court has held that because the fifth amendment of the United States Constitution makes no reference to the medium of payment, it does not therefore require monetary compensation.<sup>262</sup> It appears that in Florida the condemning authority may not compel the landowner to accept compensation in a form other than money, although it may be possible to offer the landowner a choice among nonmonetary and monetary options.<sup>263</sup>

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money. For example, if a government agency could acquire platted land and resell it for alternative purposes while giving the initial condemnees a participation in the new use, it may be a financially attractive eminent domain financing vehicle. Furthermore, if one assumes that lot purchasers acquire their land for use or for investment, would it be feasible to offer as just compensation some use option (such as an alternative site) or some investment option (such as a security interest plus right to a portion of appreciation in a new development—much like a shared appreciation mortgage)? Or must there be a choice for the condemnee, with at least a defensible monetary award provided as one of the options? But even if that were feasible, litigation over value of proposed awards (cash or otherwise) could create substantial legal costs. The actual value of many lots may prove to be substantially less than the original purchase price, producing lot owner dissatisfaction with proposed awards.

259. FLA. CONST. art. X, § 6(a). See *supra* note 234.

260. See FLA. STAT. §§ 73.012-74.121 (1981 & Supp. 1982) (amended 1983).

261. 3 C. NICHOLS, *supra* note 238, § 8.2, at 8-79. One basis for this conclusion is that just compensation within the meaning of the fifth amendment and similar state constitutional provisions has been judicially defined as the fair value of the property at the time of the taking contemporaneously paid in money. 29A C.J.S. *Eminent Domain* § 191(c) (1965). Under this view, the condemnor may not compel the condemnee to accept other land (even though equal or greater in value), stocks, bonds, municipal warrants, or the use of the improvement for which the land was taken. 3 C. NICHOLS, *supra* note 238, § 8.2, at 8-82 to -83.

262. United States *ex rel.* TVA v. Indian Creek Marble Co., 40 F. Supp. 811, 819 (E.D. Tenn. 1941).

263. Nonmonetary options may include TDRs, as discussed in text at Section III(D)(2), under the subheading REASSEMBLY INDUCED BY TRANSFERABLE DEVELOPMENT RIGHTS, or some participation in the new use, see *supra* note 258.

Nonmonetary benefits may be used to diminish the amount of damages or compensation due to the condemnee in a taking situation under either eminent domain or a regulation deemed to be a taking, such as deplating or rezoning. In other words, the condemnor may take less than the entire interest in the land by allowing the condemnee to retain certain rights in the land or promising to perform some service for the condemnee and this will serve to diminish the amount of money due to the condemnee. 3 C. NICHOLS, *supra* note 238, § 8.2, at 8-83. However, this is viewed only as mitigation, not a form of nonmonetary compensation. The yielding of rights to the condemnee must take place before the adjudication of the right to condemn the land and the parties' relations become fixed. *Id.* at 8-83 to -84. For instance, if the taking occurs and the proceeding is completed, the condemnor cannot then mitigate by offering to stipulate to use the property to some lesser extent than the

REDEVELOPMENT AFTER REASSEMBLY. Once funds are available and land is acquired, redevelopment is the next step. Depleted land must be used for an alternative public purpose, similar to conventional urban renewal. An express alternative use could include a redevelopment of the platted lands which meets modern planning and design standards for residential, commercial or industrial development, or which produces a more "natural" use of the land, such as agriculture, silvaculture, or cattlegrazing.

### *E. Restoring Some Areas in Whole or in Part to a Natural Condition*

#### *1. Partial Restoration*

Partial restoration of the platted lands may be achieved by placing weirs in or damming up selected canals, or by prohibiting seawall construction. This would allow the land to "naturally" restore itself. For areas of the subdivisions which come into public ownership, this would be a low cost means to initiate partial restoration, and there may be ways in which private landowners may also be required to undertake certain remedial action.<sup>264</sup>

interest taken would allow or to give back rights or easements in the property as partial payment of the compensation award.

If a less-than-fee interest is condemned, nonmonetary compensation in the form of special benefits may be used to offset the amount due to the condemnee for the value of the interest taken and any damages to the remainder. Potentially, this could reduce the amount to zero. Apparently, there is a split of authority on the question of whether benefits to the remainder may be set off against the condemnation award. Federal courts generally allow special benefits to be offset, and still others allow both general and special benefits to be offset. The Florida view on offset of benefits is found at FLA. STAT. § 73.071(4) (1981). This section provides that the enhancement in value of the remainder may only be offset when land is taken for a road, canal, levee, or water control facility right-of-way. *Id.* The Florida courts have construed this provision to also require that the enhancement be direct and peculiar to the condemnee's land, over and above that enjoyed by the neighboring property. *Daniels v. State Rd. Dep't*, 170 So. 2d 846, 854 (Fla. 1964); *City of Jacksonville v. Yerkes*, 282 So. 2d 645, 646 (Fla. 1st DCA 1973), *cert. denied*, 291 So. 2d 9 (Fla. 1974).

264. Regulation can also play a role in restoration. If a restoration plan for an area would also necessitate some remedial action by lot owners in the area, such as the construction of swales to minimize stormwater runoff, it may be feasible to require these actions of each owner in the platted land area affected, either as an element of property transfer or construction approval, or perhaps even as an affirmative duty without either transfer or construction. An example of an affirmative duty is already provided by the grass cutting requirement of the City of Cape Coral. The city requires the grass to be cut on vacant lots and if it is not done (as it is impractical for distant lot owners to accomplish) the city undertakes the work a block at a time with gang mowers and assesses the cost to the owners. Thus, if the success of a restoration plan depended upon private lot owner action, it might prove feasible for the local government to do the work if the owner failed to do it after notice and within a reasonable time, and assess costs against the property owner. *See gener-*

## 2. Full Restoration

The benefits to be gained by full restoration include enhanced aquifer recharge and surface water supply, increased wildlife habitat, and reduced desalination and contamination of water. Full restoration would likely be the most expensive way to achieve these benefits, and assumes that it is physically possible to return certain portions of the platted lands to their original state. This option would involve eminent domain as well as a significant management effort.

## 3. Financing Restoration

There is a possibility that some of the platted lands may be acquired through state or federal programs. The principal programs conducted by the State of Florida are the Conservation and Recreation Lands Trust Fund<sup>265</sup> or Land Acquisition Trust Fund.<sup>266</sup> The relevant federal programs<sup>267</sup> that may be applicable are through either the Coastal Zone Management Act<sup>268</sup> or the Watershed Protection and Flood Prevention Act.<sup>269</sup>

The State of Florida could possibly acquire certain environmentally sensitive or recreationally related areas in the Charlotte Har-

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ally 7 E. McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 24.561, at 546 (3d ed. 1981) (in referring to nuisance abatement by the municipality on private property, "[a] right to reimbursement and a lien on the real estate generally accrues to a municipality for its expense in rightfully demolishing a condemned building"); see also *id.* § 24.261 (the procedures for abatement of nuisances relating to sewage and drainage are followed as with general nuisances).

For such a requirement to be upheld, however, it would not only have to be based on the overall restoration plan, but also be necessary to protect public health, safety or welfare. For a discussion of the arguments which could be raised by lot owners, see the earlier discussion of the taking issue. For a discussion of constitutional issues involving a requirement that owners of property take specific action to protect the public health, safety and welfare, see Baker, *Enhancing the Visual Environment of the Twilight Commercial Zone: The Great Neck Plaza Experiment*, 2 *HARV. ENVTL. L. REV.* 389, 410-12 (1978).

265. FLA. STAT. § 253.023 (1981) (amended 1983).

266. FLA. STAT. §§ 253.02, 375.041 (1981) (amended 1983).

267. The primary research tool for determining state or local eligibility for funds to be used for acquisition or development of lands is the CATALOG OF DOMESTIC ASSISTANCE, updated through the use of the Federal Assistance Program Retrieval System (FAPRS). By using the CATALOG, which describes the various federal assistance programs, a municipal or county government may, through the use of a computer terminal or state access point, determine a local, county, or state government's eligibility for the program under federal guidelines.

268. Coastal Zone Management Act of 1972, Pub. L. No. 92-538, 86 Stat. 1280 (1972) (codified as amended at 16 U.S.C. §§ 145-1464 (Supp. V 1981)).

269. Watershed Protection and Flood Prevention Act of 1954, ch. 656, 68 Stat. 666 (1954) (codified as amended at 16 U.S.C. §§ 1001-1009 (Supp. V 1981)).



bor area through either a Conservation and Recreation Trust Fund grant (environmentally sensitive land) or through regular acquisition by the Division of Recreation and Parks (state parks, state forests, etc.).<sup>270</sup>

One federal program that may apply to the platted lands is the Watershed Protection and Flood Prevention Act,<sup>271</sup> a guaranteed loan program administered through the Farmers Home Administration. Under this program an applicant, such as a water management district, would apply for improvement funds guaranteed by the federal government for watershed flood prevention, drainage, fish and wildlife development and water storage costs. The program may be peripheral to direct acquisition of land for watershed protection or flood control, but would be relevant for construction

270. FLA. STAT. §§ 253.023(3)(b), 259.035 (1981 & Supp. 1982) (amended 1983).

Fla. SB 632, passed in 1981, amended FLA. STAT. § 253.023 and provided a minimum of \$20,000,000 annually for a Conservation and Recreation Lands Trust Fund to acquire land primarily in environmentally sensitive and unique areas. Ch. 81-210, 1981 Fla. Laws 835, 836 (current version at FLA. STAT. § 253.023 (1981 & Supp. 1982)) (amended 1983). Municipal governments, private groups, and individuals may apply, by a project proposal form, for incorporation of a parcel of land into the annual acquisition priority selection process. FLA. STAT. § 259.035 (1981 & Supp. 1982) (amended 1983).

A second statutory process through which the state could acquire the land for normal park and recreation usage is through the \$200,000,000 bond issue under the "Save Our Coasts" program of which \$50,000,000 is presently scheduled for sale. This will be over and above the normal Division of Recreation & Parks budget, and the focus of acquisition in the immediate future for these funds will be along the coast rather than interior park acquisition and development.

The issuance of any additional series of "Save Our Coasts" bonds, beyond the present \$50,000,000 authorized, may be a problem. The passage of Fla. HB 986 by the 1983 Legislature, which took effect June 1, 1983, requires the legislature to appropriate the first year's debt service before any additional "Save Our Coasts" bonds may be issued. Ch. 83-57, 1983 Fla. Laws \_\_\_\_.

Three recent amendments to ch. 253 improved the funding and the procedures for state land acquisition. The first amendment, amending FLA. STAT. § 253.023 (1981), enlarged the nature of items that could be included in state land acquisition grants. Funds from the Conservation and Recreation Lands Trust Fund can now also be used for title work, approval fees and survey costs related to lands to be acquired, donated or exchanged. Time periods were also established for the initial acquisition negotiations (6 months) and final closing of title (1 year from initiation of purchase negotiations). Ch. 82-152, 1982 Fla. Laws 441 (amended 1983). The second amendment, amending FLA. STAT. § 253.01 (1981), authorized the retention of proceeds from the sale of state-owned vacant land in the Internal Improvement Trust Fund, primarily for the acquisition, management, administration, protection and conservation of state-owned lands. Ch. 82-185, § 1, 1982 Fla. Laws 667. The third amendment, Fla. HB 1209, substantially modified the procedures used to designate lands and acquire such lands under the Conservation and Recreation Lands Trust Fund, the Land Acquisition Trust Fund, and the "Save Our Coasts" program. Ch. 83-114, 1983 Fla. Laws \_\_\_\_ (amending FLA. STAT. § 253.023 (1981 & Supp. 1982)).

271. 16 U.S.C. §§ 1001-1009 (Supp. V 1981).

of certain water facilities.<sup>272</sup> A second potential program is the Estuarine Sanctuaries program of the Coastal Zone Management Act.<sup>273</sup> This program is designed to assist coastal states in the acquisition, development and operation of estuarine sanctuaries, primarily to study the interaction between natural and human activities in the coastal zone.<sup>274</sup>

The federal government presently is retreating from large direct assistance to state governments for acquisition of land.<sup>275</sup> For the most part, funding for land acquisition by the federal government is for the growth of existing federal parks and similar institutions.

The State of Florida recognizes the need for conserving environmentally sensitive land, and the legislature has developed programs to meet that need. In determining the possibility of incorporation of any of the platted lands into the state public land acquisition programs, it will be necessary for each respective local government to show that it is either environmentally, historically, or for other reasons, important to maintain or return the land to its natural state.

#### *F. Government/Developer Negotiation*

Many of the platted lands developers have a continuing interest in the subdivisions because of lots in inventory, lots under contract for deed, lots subject to continued developer commitments to provide purchasers certain services, or areas owned by and to be built by the developers. These developers have a sufficient enough stake in the outcome of any plan for the platted lands that they may be willing to undertake voluntary action either to forestall more restrictive public action or to take advantage of new development opportunities.

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272. The Fiscal Year 1982 federal budget for the program is \$26,000,000 for the entire United States.

273. 16 U.S.C. §§ 1451-1464 (Supp. V 1981).

274. Nationwide, the program will develop twenty to thirty sites. In Florida, Rookery Bay is presently such a sanctuary. The program supplies up to \$50,000 for pre-acquisition work (research and related) prior to formal acquisition by the state or local organization. The agency works very closely with state conservation agencies prior to formal application for a sanctuary. However, only a total of \$1,280,000 is budgeted for the entire United States for Fiscal Year 1983.

275. Reviewed for this report was the possibility of obtaining funds through the Land and Water Conservation Fund. This program provides direct grants to state agencies involved in developing statewide planning and conservation programs and also for land acquisition. However, as of Fiscal Year 1982, the program was amended to provide for federal land acquisition only, with no funds budgeted for assistance to the states for land acquisition.

For example, a voluntary assembly program might be designed to foster the deed restriction or dedication to the public of contiguous lots in return for the ability to cluster the density allowed on only a portion of the assembled parcel. It may also be feasible to make attractive the purchase of selected scattered lots and their deed restriction or dedication to the public in return for the ability to transfer the allowed density to a non-contiguous parcel. It may even be possible to encourage the purchase of residential lots to mitigate the impact of more intensive development elsewhere within the subdivision.

Once the planning effort is complete, the local governments of the Charlotte Harbor area may find it useful to talk with some or all of these developers about ways they can jointly work toward accomplishing the defined public goals.

The lot purchasers should not be neglected either. While much more numerous and therefore more difficult to negotiate with, they may be very willing to consider new options for the use of their lots if properly approached.

Many lot purchasers have found themselves the owners of real estate beyond the area of foreseeable significant development and the area for public facilities and services. Many have paid for property which effectively cannot be used for years, and because of the large number of similar lots available, there is no realistic resale market. Or, they have in fact bought lots which because of environmental restrictions are unbuildable or capable of being built out only after expenditures beyond the value of the land. Finally, many lot purchasers bought their property for investment, only to find no purchasers from whom they can recoup even their initial investment. These individuals may be willing to consider suitable offers from developers responding to an incentive program.

In any event, the purpose of this discussion about negotiation is to serve as a reminder that negotiation as well as direct action can result in desired changes to platted lands build-out patterns.

#### IV. A CLOSING COMMENT

As the reader will no doubt have perceived from the foregoing discussion, the choice of appropriate legal responses to the platted lands problems cannot be made without good information about the scope and depth of the problems themselves. It may be helpful to offer a few general guidelines, however, assuming some level of response.

First, the county governments need to initially decide whether

the platted lands, especially the five large subdivisions, are going to become areas in which they want new building to occur or whether the governments desire new building to take place outside the platted lands. For example, other jurisdictions have decided to encourage building in areas already developed because many of the road and utility systems were in place, and more building there meant more open land saved at the fringe. In short, the platted lands may provide the three county area with an opportunity as well as a challenge.

Second, if there is a need to have much of the platted lands remain unbuilt, the counties need to decide whether those portions can be committed to a desirable alternative use.<sup>276</sup>

Third, assuming some development is desired in part, some non-development in part, and some timed development in part, how do the counties achieve these goals? A rezoning to lower density involves enough obstacles that it may prove feasible for lots in unitary ownership, but given the relatively small percentage of lots still in that category, especially if deductions are made for lots under contract for deed, a large-scale rezoning may not produce enough "return" to be worth the trouble, though even a "small" return in an area as large as the platted lands may involve sizeable parcels of land.

On the other hand, a special permit process, tied either to environmental constraints or availability of public services, and linked to appropriate impact fees, may help guide the growth that does take place to more appropriate locations.

That would still leave, however, some areas that are undesirable for single-family development. At the moment they may individually have scant value. But if certain areas were targeted for more intensive development or more feasible single-family development, the lots in those areas might be recombined, either through eminent domain, deplattling, or lot pooling, where feasible, in part because the resulting parcel would have development value to reimburse the acquisition and recombination costs. Rezoned, they might even be attractive enough to provide a receiving district for transferable development rights from owners of parcels which should not be built on at all.

Next, there may still be some lots that will either require resto-

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276. Land and water rich Floridians, by relative standards, may not notice it, but visitors from more crowded regions of the country marvel at the amount of parkland the platted lands could provide.

ration or preservation. Here, the counties may need to resort to purchase or eminent domain as a sure vehicle to accomplish the job, though regulatory options may need consideration.

Finally, the police power can prove broad and elastic, especially in the face of a strong need and a situation as unusual as the platted lands. But there may be situations to which the long arm of the law, at least as far as the counties may be willing to extend it, may not reach. In those cases, negotiation with developers and owners of individual lots may prove fruitful.<sup>277</sup>

The foregoing discussion has outlined the options and some of the legal issues they raise. But the massive lot sale subdivision is a twentieth century interstate land marketing innovation that the law and legal institutions have only begun to address. For example, developers must now under state and federal law make full disclosure to buyers of the characteristics of the property and the commitments for improvements.<sup>278</sup> Also, Florida itself has undertaken to prevent new lot sale subdivisions from creating some of the same problems with its development of a regional impact review

277. During the research on this article, the authors discussed possible management approaches which could be used to handle platted lands issues in the Charlotte Harbor area. These discussions were free-flowing examinations of how existing regional approaches could be modified to address the situations in Charlotte Harbor.

The authors reviewed the purposes and structure of such regional agencies as the San Francisco Bay Conservation and Development Commission; the Tahoe Regional Planning Agency; the Minneapolis-St. Paul Twin Cities Metropolitan Council; the New York Adirondack Park Agency; the Massachusetts Martha's Vineyard Commission; the New Jersey Hackensack Meadowlands Development Commission; and the New Jersey Pinelands Commission. When these approaches were distilled, and when Florida law was examined, what emerged was the suggestion of a three county community redevelopment agency, FLA. STAT. §§ 163.330-450 (1981 & Supp. 1982) (amended 1983), with financial capacity of a community development district, FLA. STAT. ch. 190 (1981 & Supp. 1982), which would work with the state and the SWFRPC in the study and examination of the specific problems of the area and in the establishment of goals for the area. Once this was done, this new agency would prepare a plan to address the problems identified and to meet desired goals, and would have the authority to implement the plan subject to home-rule limitations.

This new agency could have a commission made up of the Governor and county commission appointees, and an advisory municipal committee made up of representatives of the municipalities within the agency's jurisdiction. To deal with the concern of tax revenue from new development, a tax-base sharing program could be established.

Since it was beyond the scope of this article, no attempt has been made to flesh out these ideas. For those who are interested in looking at this concept in greater detail, review of the Florida statutes cited above and the enabling legislation of the regional agencies mentioned will provide the sufficient "food for thought." The legislation for the Hackensack Meadowlands Development Commission, N.J. STAT. ANN. § 13:17-1 to -86 (West 1979 & Supp. 1982), would be a good place to begin research. See also Grant, *Turning it Around in the Hackensack Meadowlands*, 35 URB. LAND 15 (1976).

278. FLA. STAT. ch. 498 (1981 & Supp. 1982); 15 U.S.C. § 1701 (Supp. V 1981).

requirement.<sup>279</sup> Consequently, the legal rules that arose in other contexts will provide guidance to action but not necessarily controlling authority. As stated earlier, the size of the platted lands, the problems they may prove to present, and the unusual nature of massive lot sale development may reshape the legal doctrine that might otherwise apply.

Therefore, while the Charlotte Harbor platted lands may not constitute an area of national significance, such as the Everglades or the Big Cypress Swamp, nor even an area of state significance such as the Green Swamp or the Florida Keys, the future of these platted lands matters a great deal. Not only does the future matter to the people who live there, and to those in the wider Charlotte Harbor region, but it also matters to outsiders. What happens to the platted lands is likely to have an impact far beyond Charlotte Harbor as many jurisdictions throughout Florida and the country wrestle with what to do about the large lot sale subdivisions in their own backyards.

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279. FLA. STAT. § 380.06 (1981).

