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Florida's Private Property Rights Act - What Will It Mean for Florida's Future?

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Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.¹

We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.²

Although seemingly contradictory, these two quotations from Justice Oliver Wendall Holmes in the classic taking case of *Pennsylvania Coal Co. v. Mahon*³ demonstrate the dynamic tension that exists between the need for government regulation of the use of land to protect the rights of the general public and the need to protect the rights of individual property owners from government regulations.

I. INTRODUCTION

The Bert J. Harris Jr. Private Property Rights Protection Act ("Act")⁴ was enacted by the Florida Legislature during its 1995 legislative session and signed into law by the governor. The Act reflects a strong national trend in many states, as well as in Congress, towards a search for statutory and constitutional definitions to create a bright line between valid government regulations and takings that neither Justice Holmes nor any court has yet been able to definitively articulate.⁵

The Act creates a new statutory cause of action and remedy that allows for private property owners to be compensated by a governmental agency that inordinately burdens, restricts, or limits an existing or vested use of real property. If the court determines that such an inordinate burden has occurred, the remedy is compensation for the fair market value of the property due to the loss created by the government action. The jury determines the fair market value of the property. The express intent of the

1. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

2. *Id.* at 416.

3. 260 U.S. 393 (1922).

4. 1995 Fla. Laws ch. 95-181 (codified at FLA. STAT. § 70.001 (1995)). House Bill 863 was passed by a vote of 111 to 0 in the House and 38 to 1 in the Senate. This enactment also contains the "Florida Land Use and Environmental Dispute Resolution Act," which is apparently an attempt to avoid the very litigation which the authors believe the Private Property Rights Act will foster. See Ch. 95-181, §2, 1995 Fla. Laws 1651, 1657 (codified at FLA. STAT. § 70.51 (1995)).

5. See generally John Martinez, *Statutes and Enacting Takings Law: Flying in the Face of Uncertainty*, in 1995 ZONING AND PLANNING HANDBOOK 129 (Alan M. Forrest ed. 1995).

legislature was to create "a separate and distinct cause of action from the law of takings"⁶ and to provide "for relief, or payment of compensation, when a new law, rule, regulation, or ordinance . . . as applied, unfairly affects real property."⁷

There have been numerous articles, seminars, conferences, and presentations regarding the true meaning and legislative intent of the Act. There were many participants in its drafting. Legislators themselves rarely "write" legislation, but rather, they rely on their staff and other experts (often lobbyists) to reflect their intent. The analogy between sausage making and law making is not inappropriate.⁸

The purpose of this article is not to look back at how the Act was written, but rather to look ahead to the consequences of its implementation. The authors of this article were close observers of, but not participants in, the legislative process that brought forth the Act. They cannot claim special knowledge of the actual intent of those involved in creating the Act. Moreover, the most fundamental maxim of statutory interpretation is that one must first read the words of a law as enacted by the legislature to find their meaning before resorting to explanations of the drafters or other collateral sources.⁹ Thus, this article will analyze how the words of the new legislation might be interpreted and applied to the delicate balance between private rights and legitimate public purposes.

Although the Act has been described by some of its authors as not being a radical departure from prior law and "an attempt to provide new and measured relief for landowners without undermining Florida's landmark environmental and growth management laws,"¹⁰ its impact on local government is likely to be quite severe. The severity of the impact, however, will not be measured by case law as much as by the unmeasurable, but real chilling effect the Act will have on governmental regulation of land

6. Ch. 95-181, § 1(1), 1995 Fla. Laws at 1652.

7. *Id.*

8. This oft quoted, and unflattering, comparison has been attributed to Otto von Bismarck. Thomas F. Gustafson, former Speaker of the Florida House of Representatives, described the Act as "the king sausage of all time" at a Florida Institute of Government Conference on Florida's New Property Rights Law, December 1, 1995.

9. *See, e.g.*, *St. Petersburg Bank & Trust Co. v. Hamm*, 414 So. 2d 1071 (Fla. 1982); *S.R.G. Corp. v. Department of Revenue*, 365 So. 2d 687 (Fla. 1978); *Tropical Coach Line, Inc. v. Carter*, 121 So. 2d 779 (Fla. 1960).

10. David L. Powell, et al., *Florida's New Law to Protect Private Property Rights*, 69 FLA. B.J. 12, 17 (Oct. 1995)

use.¹¹ In addition, the broad scope of the Act, the discretion left to the courts under vaguely defined concepts, and the prospect of significant monetary consequences, create a strong incentive for government to compromise its regulatory authority for case by case settlements with complaining property owners.

There is little doubt that complaining property owners, through this Act, have greater potential to achieve monetary and nonmonetary benefits related to the use of their property not heretofore available. The public-at-large also will pay for those benefits in many forms, including perhaps less environmental protection, fewer restrictions on land use and in some instances, the payment of increased taxes to pay for compensation to the private property owners.

II. CRITICAL ISSUES IN THE ACT

A. *Property Rights Protected: The Future is Now*

Many of the statutory definitions in this legislation are unique to this Act. The definitions are a mix of common law principles and new, broadly described concepts which promise to be the subject of litigation before their meanings can be more accurately determined.¹² However, a careful reading and analysis of these critical definitions lead to the conclusion that, contrary to Florida common law, "existing uses" equal future uses and "vested rights" equal new rights.

The unique definitions are the key to opening the door to an understanding of how the Act will be implemented. Although it is up to the courts to decide, interpret, and expand upon the Act's meaning,¹³ attorneys, planners, elected officials, and landowners will be making decisions without

11. Christopher Wren, City of Fort Lauderdale Planning and Zoning Manager, has expressed his reluctance in endorsing certain neighborhood association requests to restrict commercial development. His concern is that the city will be vulnerable to increasing litigation as a result of landowners' claims for compensation that will result from regulations that restrict the use of their property. As Mr. Wren has stated: the Act has "handcuffed me from doing what I consider proper planning." Peter Mitchell, *New Property-Rights Law Sends City Planners Scrambling for Cover*, WALL ST. J., Oct. 25, 1995, at F1.

12. One commentator describes these definitions as "a grab bag of takings jargon." Charles Siemon, Remarks at the Meeting of Government Attorneys of Broward County (Oct. 23, 1995).

13. Robert M. Rhodes, Balancing Private Property Rights with Local Government Regulations, Teleconference Remarks at Florida Institute of Government Conference (Oct. 6, 1995) [hereinafter Teleconference Remarks].

the luxury of court interpretations of what will surely be fact-based decisions. As in takings cases, it will be difficult to draw broad generalizations from these decisions.¹⁴

B. Critical Definitions

1. Existing Use

The Act defines "existing use" as comprising of two types. The first type is that of "an actual, present use or activity on the real property."¹⁵ This includes "periods of inactivity which are normally associated with, or are incidental to, the nature or type of use or activity."¹⁶ The second type includes land uses which are: 1) reasonably foreseeable; 2) nonspeculative; 3) suitable for the subject real property; 4) compatible with adjacent land uses; and 5) which have created an existing fair market value in the property greater than the fair market value of the actual present use or activity.¹⁷

For decades, it has been apparent in Florida that the local government comprehensive plan would become the dominant force in land development permitting decisions. The Local Government Comprehensive Planning Act of 1975¹⁸ mandated the adoption of plans that would be financially feasible, internally consistent, and implemented by land development regulations, and ensured that the comprehensive plan would set policy to be followed by specific development permitting activities.

Because the second type of "existing use" specifically omits "actual, present use or activity on the real property" and instead focuses on "foreseeable" or potential future use, the Act raises the possibility that the comprehensive plan's future land use plan element will define the second type of existing use. The one purpose of the future land use plan element is to reflect the nature or type of use or activity that is, in the future, suitable for the land and compatible with adjacent land uses. It certainly will be argued that investment decisions can and should be made based upon

14. *See* *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987). The Court held that takings cases are decided by "engaging in essentially ad hoc, factual inquiries." *Id.*

15. FLA. STAT. § 70.001(3)(b). For a discussion of the drafting history of the term "existing use," see Thomas G. Pelham, *Florida Legislature Enacts Private Property Rights Protection Act*, FLA. PLANNING (Fla. Chapter Am. Planning Ass'n), May-June 1995, at 1.

16. FLA. STAT. § 70.001(3)(b).

17. *Id.*

18. 1975 Fla. Laws ch. 75-257 (current version at FLA. STAT. §§ 163.3161-.3243 (1995)).

a reasonable expectation that the comprehensive plan will be implemented and that this expectation directly affects the present day valuation of land through consideration of its future use.¹⁹

Therefore, what may be permitted in the *future* land use plan element of an adopted comprehensive plan may be transformed to an *existing* use in terms of the Property Rights Act. One consequence of the Act is to accelerate the applicability of the Future Land Use Plan Element, which could undermine its effectiveness as a timing tool and thus as a planning tool.

A participant in the Act's drafting has referred to the definition of "existing use"²⁰ as the "When Harry Met Sally" or the "I'll have what he's having" provision, in that it is intended to give a property owner the rights to the same use of property as that of his neighbor, despite what the plans or regulations may provide. The impact of this definition goes far beyond the common law in Florida. For example, Florida common law does not recognize property rights to existing zoning uses unless those uses have been determined to be vested under principles of equitable estoppel.²¹ In so ruling, the courts have indicated a reluctance to interfere with the local government power to change zoning to either enlarge or reduce development potential to meet the needs of the community.²² Furthermore, the well-accepted zoning concept of nonconforming uses assumes that government may change regulations so as to make existing uses unauthorized except to continue in their existing state, with the expectation that such uses will gradually be eliminated over time for a more suitable pattern of uses in the community.²³ The courts have balanced this principle by holding that government must have a sufficient reason to justify the zoning change or it will be found to be either "arbitrary and capricious," or a denial of substantive due process and equal protection under the Constitution.²⁴

19. See William G. Earle, et al., *Compensation, in FLORIDA EMINENT DOMAIN PRACTICE AND PROCEDURE* 175 (4th ed. 1988) (discussing effect of zoning restrictions on analysis of highest and best use under eminent domain practice).

20. Rhodes, Teleconference Remarks, *supra* note 13.

21. See generally *City of Miami Beach v. 8701 Collins Ave., Inc.*, 77 So. 2d 428 (Fla. 1954).

22. See, e.g., *Edelstein v. Dade County*, 171 So. 2d 611 (Fla. 3d Dist. Ct. App. 1965); *Sarasota County v. Walker*, 144 So. 2d 345 (Fla. 2d Dist. Ct. App. 1962).

23. See, e.g., *3M Nat'l Advertising Co. v. City of Tampa Code Enforcement Bd.*, 587 So. 2d 640 (Fla. 2d Dist. Ct. App. 1991); *Lewis v. City of Atlantic Beach*, 467 So. 2d 751, 755 (Fla. 1st Dist. Ct. App. 1985).

24. See *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1212 (11th Cir. 1995); *Lee County v. Sunbelt Equities*, 619 So. 2d 996, 1006 (Fla. 2d Dist. Ct. App. 1993).

The Act, in contrast, requires compensation for not only actual existing uses that may be changed, but also for those future uses that are foreseeable, nonspeculative, suitable and compatible under the Act's unique definition. Additionally, the weighing of the public good against the burden to the individual property owners is left to the court, with no statutory presumption that the government action is valid.²⁵

Local governments, through their planning and zoning efforts, are familiar with such terms as "suitability" and "compatibility" and have developed their own land use definitions for such terms, as incorporated into comprehensive plans and land development codes.²⁶ These existing definitions may become even more important in assisting a court in reviewing a claim under the Act. However, the definitions of "reasonably foreseeable" and "nonspeculative" uses are more problematic. The intent of the Act's drafters in this regard was apparently to incorporate concepts from eminent domain valuation law.²⁷ In eminent domain law, courts have accepted appraisal testimony regarding highest and best use based in part on the testifying appraiser's evaluation of whether zoning changes or other land use changes were reasonably foreseeable.²⁸ Inclusion of a land use in the future land use plan element of the adopted comprehensive plan may be sufficient now to demonstrate that the planned use is reasonably foreseeable and not speculative. The landowner will argue that zoning and other development permits for that use, although procedurally necessary, would be expected to be obtained to remain consistent with the comprehensive plan and to comply with the Act. Therefore, the planned future use would be worthy of consideration by the appraiser. The Act may thus effectively allow uses that under a zoning regulation are either prohibited or permitted

25. The presumption of validity for governmental actions under the state arbitrary and capricious standard has already been significantly narrowed by the decision of Board of County Comm'rs v. Snyder, 627 So. 2d 469, 474 (Fla. 1993). The "specific" actions that form claims under the Act apply the law to specific real property and can be expected to be considered quasi-judicial actions under *Snyder*. *Id.* at 474-75.

26. Pelham, *supra* note 15.

27. Powell, *supra* note 10, at 14 n.13.

28. See Broward County v. Patel, 641 So. 2d 40, 42-43 (Fla. 1994) (citing 4 JULIUS L. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 12C-03(2), 12C-88-90 (rev. 3d ed. 1994)); Board of Comm'rs of State Insts. v. Tallahassee Bank & Trust Co., 108 So. 2d 74 (Fla. 1st Dist. Ct. App. 1958), *cert. quashed*, 116 So. 2d 762 (Fla. 1959). The testimony as to "reasonable probability" that rezoning may be changed in the future cannot be based merely on speculation, but may include an evaluation of the degree of probability that reasonably exists. *Tallahassee Bank & Trust Co.*, 108 So. 2d at 82-83.

only under conditional use approval to obtain the status of a compensable property right, simply by their inclusion in the comprehensive plan.

This change in the law can be expected to create particular development pressure on the urban fringe of communities where development is in transition and undeveloped property is located next to developed or developing property.²⁹ Generally, the Act now makes the creation of zoning districts, or regulatory boundaries and districts, more difficult than in the past, when the courts gave considerable deference to local government line-drawing.³⁰ As early as the first zoning cases, such as *Euclid v. Ambler*,³¹ reasonable classifications which are essential to the creation of zoning districts were upheld as not violative of the rights of substantive due process or equal protection. More than ever, attention must be given to the comprehensive plan to provide a defensible foundation for drawing district boundaries.

The definition also must give pause to local governments seeking to provide for higher densities or intensities of development for the future such as in redevelopment areas. This is because the granting of these future development rights will have taken on the status of an "existing use," should the future not unfold as planned or hoped, and the government wishes to redesign the uses. Finally, because a claim under the Act must be supported by an appraisal demonstrating that the reasonably foreseeable use has a greater market value than the present use, there will be a reasonably foreseeable increase in the market for appraisals and appraisal testimony.

2. Vested Rights

Property rights that are considered "vested" are also expansively defined under the Act. Vested rights are to be determined not only by applying the common law principles of equitable estoppel³² and by

29. Pelham, *supra* note 15.

30. See, e.g., *Orange County v. Butler Estates Corp.*, 328 So. 2d 864, 866 (Fla. 4th Dist. Ct. App. 1976) (holding that court is not permitted to substitute its judgment for that of legislative body if issue meets "fairly debatable" standard); *Town of Surfside v. Skyline Terrace Corp.*, 120 So. 2d 20, 22 (Fla. 3d Dist. Ct. App.) (holding that town's ordinance did not require commercial uses if ordinance can be sustained under "fairly debatable" rule where adjacent municipality permits commercial operations across street from owner's property), *cert. denied*, 123 So. 2d 675 (Fla. 1960).

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

32. FLA. STAT. § 70.001(3)(a); *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So. 2d 10, 15-16 (Fla. 1976). For a general discussion of Florida vested rights law, see Robert M. Rhodes & Cathy M. Sellers, *Equitable Estoppel and Vested Rights in Land Use*,

applying statutory law which explicitly creates vested rights,³³ but may also be determined by applying “substantive due process under the common law.”³⁴ To the extent that a substantive due process right relies on the proscription against “deprivation of due process” under the Fifth and Fourteenth Amendments of the Constitution, a “specific action” found to be constitutionally invalid is now by statutory definition a deprivation of a “vested right.” Thus, a private property owner who has experienced a substantive due process violation under the state or federal constitutions appears to also have a claim under the Act and may be awarded compensation under its provisions.

Some of the participants in the drafting of the law go further to suggest that the Act “enables the judiciary to craft a constitutionally based vesting test separate from takings theories or remedies, and distinct from equitable estoppel. This standard could focus on whether an owner has acquired a constitutionally protected property interest that should not be diminished or frustrated by governmental action.”³⁵ Although this suggestion seems to be an invitation for the courts to expand both the common law concepts of substantive due process and vested rights, it should be noted that the treatment of substantive due process under the Act can be distinguished from its treatment of inverse condemnation. In the case of inverse condemnation or “takings,” the Act states specifically that the intent of the legislature was to create a separate and distinct cause of action from the law of takings and that a claim under the Act need not rise to the level of a constitutional taking.³⁶ No such separate or distinct cause of action from the law of substantive due process is created by the Act.

Nevertheless, the application of substantive due process under the common law is a dynamic, not a static, concept. Some might argue that

in 2 FLORIDA ENVTL. & LAND USE LAW 8-1 (2d ed. 1994).

33. See, e.g., FLA. STAT. § 163.3167(8) (providing vesting under Comprehensive Plans); FLA. STAT. § 373.414(11)-(16) (1995) (providing vesting for Surface Water Management Permits); FLA. STAT. § 380.05(18) (1995) (providing vesting under Areas of Critical State Concern); FLA. STAT. § 380.06(20) (1995) (providing vesting under Developments of Regional Impact). Local government ordinances that implement state statutory vesting provisions may also grant property rights under the statute. See Powell, *supra* note 10, at 14.

34. FLA. STAT. § 70.001(3)(a); see generally *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208 (11th Cir. 1995).

35. Powell, *supra* note 10, at 14.

36. FLA. STAT. § 70.001(1)(a).

Florida courts have been inclined not to find such deprivations.³⁷ Certainly the federal courts have indicated a reluctance to find constitutional violations based on vested rights.³⁸ The Act's new provision adds one more dynamic factor to the mix.³⁹

The Act's compensable remedy for vested rights expands beyond the injunctive relief traditionally available to successful litigants. While owners whose rights have been violated under the state constitutional substantive due process guarantee are theoretically eligible for compensation as a remedy, the Florida courts, in practice, look further for a constitutional taking violation before awarding such compensation.⁴⁰ Thus, compensation becomes a more realistic remedy under the Act for substantive due process violations.

Local governments have increasingly made use of administrative vested rights proceedings as a method of resolving vested rights issues short of trial. Claims asserted under the Act, however, may circumvent these local vested rights remedies by the Act's provision that administrative remedies are not required to be exhausted after the 180-day statutory period has lapsed.⁴¹ To the extent that local government may require an applicant to proceed under a vested rights determination before any specific action is taken by the government, the administrative vested rights remedy may continue to be applicable and require exhaustion. However, a local government vesting determination itself may be the specific action under which a property owner brings a claim.

37. *See, e.g., City of Key West v. R.L.J.S. Corp.*, 537 So. 2d 641 (Fla. 3d Dist. Ct. App.), *review denied sub nom.* 1800 Atlantic Developers, Inc. v. City of Key West, 545 So. 2d 1367 (Fla. 1989).

38. *See, e.g., Restigouche*, 59 F.3d at 1208; *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1374 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 1400 (1994). *Contra* *A.A. Profiles v. City of Ft. Lauderdale*, 850 F.2d 1483 (11th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989). The federal court's state of flux on this matter is illustrated by the vacation of the case of *Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536 (11th Cir.), *vacated*, 42 F.3d 626 (11th Cir. 1994).

39. To what extent does the inclusion of the right to substantive due process also include the right to equal protection of the laws under the Fourteenth Amendment? Unless a fundamental right or suspect classification is involved, generally the courts will review equal protection claims under the same standards as substantive due process claims. *See* *Executive 100, Inc. v. Martin County*, 922 F.2d 1536 (11th Cir.), *cert. denied*, 502 U.S. 810 (1991). However, for that more narrow class of persons protected by equal protection guarantees, the Act apparently provides no additional protection.

40. *See, e.g., Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54 (Fla. 1994).

41. FLA. STAT. § 70.001(5)(a).

3. Inordinate Burden

The definition of “inordinate burden” requires the court, without statutory standards or guidance, to make the equitable decision on the proper balance of public and private interests. As explained by some of the Act’s drafters, the legislature expected and intended that the court would be left to interpret the meaning of such terms.⁴² The extent to which the Act leaves this matter to court interpretation has been suggested to be a violation of the separation of powers doctrine.⁴³

There are two classifications of “inordinate burdens” defined in the Act. The first is an action which: 1) directly restricts or limits the use of real property; 2) such that the owner is permanently restricted; 3) from attaining the reasonable investment-backed expectation for; and 4) his existing use or vested right to a specific use of the property as a whole. The second inordinate burden occurs if the owner is left with unreasonable uses such that he bears permanently a disproportionate share of the burden imposed for the good of the public, “which, in all fairness and justice should be borne by the public as a whole.”⁴⁴

The definition of “inordinate burden” invites the court to review the property owner’s reasonable investment-backed expectations for the use of the property. This investigation into investment-backed expectations is a well-recognized, but ill-defined, part of the takings law equation.⁴⁵ Under takings law, courts have looked to the regulation at the time of the land purchase, the owner’s ability to obtain financing, and other such criteria. However, the Act specifically indicates that its claims need not be construed under the takings law.⁴⁶

42. Robert M. Rhodes & Dean Saunders, Teleconference Remarks, *supra* note 13.

43. Hamilton Rice, Teleconference Remarks, *supra* note 13. *See, e.g.*, *City of Auburndale v. Adams Packing Ass’n*, 171 So. 2d 161 (Fla. 1965). *See generally* *B.H. v. State*, 645 So. 2d 987 (Fla. 1994), *cert. denied*, 115 S. Ct. 2559 (1995) (discussing strict separation of powers rule in *Florida Constitution*).

44. This language comes directly from *Armstrong v. United States*, 364 U.S. 40, 49 (1960), and is cited in *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994). *See also* *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 835 n.4 (1987).

45. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Reahard v. Lee County*, 968 F.2d 1131, 1136 (11th Cir. 1992) (setting forth factors to be analyzed in resolving federal “takings” disputes), *cert. denied*, 115 S. Ct. 1693 (1995); *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1382 (Fla.), *cert. denied sub nom.* *Taylor v. Graham*, 454 U.S. 1083 (1981) (discussing “reasonableness” factor of taking regulation).

46. FLA. STAT. § 70.001(9).

This section provides a cause of action for governmental actions that may not rise to the level of a taking under the State Constitution or the United States

Under the Act, it is intended that the threshold level of an owner's reasonable investment-backed expectation for the Act's purposes may be lower than that required to find a taking. There is no nexus required by the Act between the time of land purchase, or the specific action creating the burden, and the time of fulfillment of the expectation. Economic expectations continually evolve and their reasonableness cannot be easily judged at a fixed point in time. In the case of takings, this difficulty is mitigated somewhat by the requirement that the result of government action is that no substantial use of the property can be made,⁴⁷ thereby applying to the extraordinary case. However, the Act does not establish any specific threshold of property value loss, so that theoretically, an inordinate burden can apply to any property value loss. Thus, under the Act, the question of economic expectations will arise more frequently and its importance has become more significant.

An important aspect of the inordinate burden definition is that the property owner must be "permanently" unable to attain the reasonable investment-backed expectation for the use of the property.⁴⁸ However, what constitutes a "permanent" restriction is very problematic. For example, a property which is classified for more liberal uses under the future land use element of the comprehensive plan than what is permitted by existing zoning regulations may not be "permanently" restricted because the future land use plan projects a more liberal classification for the future. The Supreme Court of Florida has recognized that comprehensive planning under the state's growth management laws reasonably incorporates such a timing aspect.⁴⁹ Indeed, comprehensive plans are required to be periodically updated and land use regulations must be updated to be consistent with the plans under

Constitution. This section may not necessarily be construed under the case law regarding takings if the governmental action does not rise to the level of a taking.

Id.

47. *Graham*, 399 So. 2d at 1383 (citing *Zabel v. Pinellas County Water & Navigation Control Auth.*, 171 So. 2d 376 (Fla. 1965); *Askew v. Gables-By-The-Sea, Inc.*, 333 So. 2d 56 (Fla. 1st Dist. Ct. App. 1976), *cert. denied*, 345 So. 2d 420 (Fla. 1977)).

48. FLA. STAT. § 70.001(3)(e).

49. *See Board of County Comm'rs v. Snyder*, 627 So. 2d 469, 475 (Fla. 1993). "A comprehensive plan only establishes a long-range maximum limit on the possible intensity of land use The present use of land may, by zoning ordinance, continue to be more limited than the future use contemplated by the comprehensive plan." *Id.* (citing *City of Jacksonville Beach v. Grubbs*, 461 So. 2d 160, 163 (Fla. 1st Dist. Ct. App. 1984), *rev. denied*, 469 So. 2d 749 (Fla. 1985)).

the state's growth management laws.⁵⁰ As a result of the permanent restriction criterion, "rate of growth" regulations, focusing on the timing of development, may become the development management tool of choice for local governments.⁵¹ For similar reasons, concurrency programs which should not be adversely affected by the Act if they are properly incorporated in the comprehensive plan, include achievable and maintainable level of service standards based on a financially feasible capital improvements element, and are implemented in accordance with adopted land development regulations.

4. Specific Action

The trigger for a claim under the Act is when a governmental agency takes "specific action" which affects real property. The governmental agency may be a state, regional, or local government (including special districts).⁵² A specific action includes an action on an application or permit.⁵³ The Act does not create a cause of action as to the mere adoption of a law, regulation, rule, or ordinance but only as to specific action that is applied to real property.

The Private Property Rights Act provides that it is to have a prospective effect; that is, no cause of action exists under the statute as to the application of a law, rule, regulation or ordinance adopted prior to May 11, 1995 or noticed for adoption or enactment prior to that date. If these grandfathered laws, regulations, rules and ordinances are amended, the Act applies only to the extent that the application of the amendatory language imposes an inordinate burden apart from the grandfathered law.⁵⁴ However, it can be expected that the courts will be asked to apply the Act to governmental actions on permit applications that take place after that date. Property

50. See FLA. STAT. § 163.3191(1)-(4).

51. See, e.g., DANIEL R. MANDELKER & ROGER A. CUNNINGHAM, *PLANNING AND CONTROL OF LAND DEVELOPMENT* 565 (2d ed. 1984); Barbara Childs, *Constitutionality of Phased Growth Zoning Ordinances*, 8 URB. LAW. 512 (1976); Note, *Phased Zoning: Regulation of the Tempo and Sequence of Land Development*, 26 STAN. L. REV. 585 (1976).

52. FLA. STAT. § 70.001(3)(c). The definition specifically excludes actions of the United States or any of its agencies or any state, regional, or local agency exercising its powers through a formal delegation of federal authority.

53. *Id.* § 70.001(3)(d). Section 70.001(3)(e) excludes from the definition of "inordinate burden" temporary impacts; the abatement, prohibition, prevention or remediation of a public nuisance or noxious use; or governmental actions taken to grant relief to a property owner under the Act. *Id.* § 70.001(3)(e).

54. *Id.* § 70.001(12).

owners will argue that an inordinate burden created by the improper or unauthorized application of a prior-enacted or noticed law, regulation, rule, or ordinance should trigger a claim under the Act, lest government attempt to explain all such subsequent actions as simply implementation of prior law.

For example, a permit application may be denied or delayed at times or conditions and exactions may be imposed for which there is no clear authority or legal justification. Applicants suspect that a government entity has little to lose by stretching the envelope of demands, when at worst the unauthorized denial, delay, exaction or condition would be invalidated by the courts. However, under the Act, if this activity is found to be a specific action creating an inordinate burden under the Act, an injured property owner has a cause of action for compensatory damages.

5. Real Property

The Act's definition of "real property" focuses exclusively on property's physical attributes, including land, its appurtenances and improvements thereto, and other relevant real property in which the property owner has a relevant interest.⁵⁵ This simplified and narrow focus on the tangible interests in real property, to the exclusion of the intangible interests, ignores the remainder of the "bundle of rights" which constitutes property.⁵⁶ It is thus unclear to what extent the Act would protect such intangible interests as the "right to exclude" the public from use of private property. In recent United States Supreme Court taking cases, this right has been the bedrock upon which the Court has based its decisions to find a taking for public use without compensation.⁵⁷

III. ADMINISTRATIVE AND JUDICIAL PROCESSES UNDER THE ACT

A. Claims

The Act establishes a 180-day process for resolution of a claim prior to the time that the owner may bring that claim to a circuit court. Within a year of the government action complained of, the landowner must file a written claim with each governmental agency which was either involved in

55. *Id.* § 70.001(3)(g).

56. *Hodel v. Irving*, 481 U.S. 704 (1987); *Andrus v. Allard*, 444 U.S. 51 (1979); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

57. *See Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994) (citing *Kaiser Aetna*, 444 U.S. at 176); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987).

the action or whose participation is necessary for a complete resolution of all the relevant issues.⁵⁸ The claim must be accompanied by an appraisal. Within fifteen days, the governmental entity must report the claim and information regarding a government contact person to the Florida Department of Legal Affairs. The governmental entity must also provide written notice of the claim to adjacent property owners and to "all parties to any administrative action that gave rise to the claim," although no specific time frame is required for such notice.⁵⁹

B. *Settlement Offers*

During this statutory 180-day period,⁶⁰ the governmental entity must make a written settlement offer to the owner. The settlement offer may provide for adjustment of the regulations that apply to the use, for mitigation of the regulatory effect, such as transfers of development rights, or for attachment of conditions to the use. The settlement offer may require that the use be addressed on a more comprehensive basis. It may also provide for "no changes to the action of the governmental entity."⁶¹

The settlement offer will be considered by the court in determining if the government has inordinately burdened the real property.⁶² A jury must be impaneled to determine compensation in the event of a valid claim. The jury must also consider the settlement offer. For this reason, a generous offer can be an opportunity for the government to reduce potential damages in the event of liability.⁶³ Finally, the settlement offer will be considered by the court in any award of attorney's fees to the prevailing party, as

58. FLA. STAT. § 70.001(4)(a). The section states:

If the action of government is the culmination of a process that involves more than one governmental entity, or if a complete resolution of all relevant issues, in the view of the property owner or in the view of a governmental entity to whom a claim is presented, requires the active participation of more than one governmental entity, the property owner shall present the claim as provided in this section to each of the governmental entities.

Id.

59. *Id.* § 70.001(4)(b). Presumably, at the same time, the governmental entity will also provide notice to those other governmental entities which, in its view, must actively participate for a complete resolution of all relevant issues. *See id.* § 70.001(4)(a).

60. The period may be extended by the parties. FLA. STAT. § 70.001(4)(c).

61. *Id.* § 70.001(4)(c)11.

62. *Id.* § 70.001(6)(a).

63. *Id.* § 70.001(6)(b).

mitigated by the knowledge available to the governmental entity and the property owner during the 180-day notice period.⁶⁴

It is reasonable to expect a prudent government, therefore, to make a settlement offer, backed up by its appraiser's valuation of the property. It can be further expected that the settlement offer will extend compensation beyond what the government believes its liability might actually be to reduce the risk in the event liability is found. The owner's risk in not accepting such a settlement offer is that it will not prevail and the court will award higher attorney's fees to the government, based on the owner's unreasonableness in not accepting an offer.⁶⁵ In either event, the parties are encouraged to settle, rather than proceed to court, by incentives not applicable in common law actions. This is precisely why there may not be a wealth of case law resulting from claims filed under the Act and why there is likely to be a considerable number of claims filed and resolved in settlement.⁶⁶

The Act builds in extraordinary flexibility for the governmental entity to effectuate a settlement. In addition to issuing a variance, special exception, or other extraordinary relief, the governmental entity in the settlement of a claim under the Act may agree to actions which otherwise would have the effect of contravening applicable statutes.⁶⁷ However, in this instance the parties must obtain court approval under a standard which requires the court to find that such relief "protects the public interest served by the statute at issue and is the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property."⁶⁸ By permitting a court to effectuate a settlement agreement that overrides state law, the Act may be permitting an unlawful delegation of legislative authority to the courts.

This provision may also engender unnecessary litigation to create court jurisdiction over the settlement agreement. The Act provides that "the governmental entity and the property owner shall jointly file an action . . . for approval of the settlement agreement by the court"⁶⁹ Parties with

64. *Id.* § 70.001(6)(c)1.-2.

65. FLA. STAT. § 70.001(6)(c)2.

66. See Robert C. Downie II, *Property Rights: Will Exceptions Become the Rule?*, 69 FLA. B.J. 69 (Nov. 1995).

67. The contravention of local ordinance, however, may not be allowed, as the Act only specifically allows "contravening the application of a *statute* as it would otherwise apply to the subject real property" FLA. STAT. § 70.001(4)(d)2. (emphasis added).

68. *Id.*

69. *Id.* § 70.001(4)(d)2.

conflicting interests may contest the validity of an agreement under existing law. Will parties who have entered into an agreement which purports to have resolved their conflicts, have the necessary controversy or standing to file such an action without an opposing party?⁷⁰ To avoid a collusive or "friendly" lawsuit, the parties could only enter into a settlement agreement contravening a statute after waiting out the 180-day notice period, while at the same time remaining in an adversarial posture. The parties could then institute a lawsuit under the Act and bring it to issue so that the court could have jurisdiction to consider the jointly filed action for approval of the settlement agreement.

C. *Ripeness Decisions*

If the property owner rejects the settlement offer, then the governmental entities with whom a claim has been filed must issue a "ripeness decision" which identifies allowable uses to which the subject property may be put. Once the ripeness decision has been issued, and at the expiration of the 180 days, the owner need not exhaust administrative remedies but may file the claim in circuit court.⁷¹ Commentators have heralded this provision as among its most significant,⁷² arguing that remedies under takings law have proven inadequate in large part because of the stringency of court requirements that an action be ripe for adjudication.⁷³ The ripeness decision, like the settlement offer, will be considered by the court in determining whether the government has inordinately burdened real property, and in determining attorney's fees that may be awarded to the prevailing party. Likewise, the jury may consider the ripeness decision in awarding compensation for a successful claim.⁷⁴

D. *Court Proceedings*

The owner must file the claim in the circuit court in the county where the real property is located. The claim must be filed on each of the governmental entities that made a settlement offer and a ripeness decision

70. *See* *Muskrat v. United States*, 219 U.S. 346 (1911).

71. FLA. STAT. § 70.001(5)(a)-(b). The parties may agree to an extension of time.

72. Richard Grosso, *Analysis of CS/HB 863 (1995): Florida's New Property Rights Legislation*, Remarks at the Annual Environmental Land Use Law Update (Aug. 17-19, 1995).

73. Wade L. Hopping, *Address at the Annual Environmental and Land Use Law Update* (Aug. 18, 1995).

74. FLA. STAT. § 70.001(6)(b).

which were rejected by the owner.⁷⁵ It is the court's responsibility to determine if a property right exists, as defined under the statute, and whether the government has inordinately burdened the property, apportioning the responsibility as necessary between each governmental entity involved.⁷⁶ An opportunity is provided for an interlocutory appeal of the court's finding that there is an inordinate burden, but a government which does not prevail in the interlocutory appeal is subject to costs and the reasonable attorney's fees incurred by the property owner.⁷⁷

If an inordinate burden has been found, the court must impanel a jury to determine the compensation due to the owner. Compensation is determined by calculating the difference in fair market value of the property that is due to the inordinate burden placed on the property at the time of the governmental action at issue. The jury must also consider the government's settlement offer and ripeness decision in determining the loss in market value.⁷⁸

The Act provides that "[t]his section does not affect the sovereign immunity of government."⁷⁹ It has been argued that, as a later enacted statute, the Act supersedes sovereign immunity limitations.⁸⁰ However, the plain meaning of this sentence would appear to be that whatever sovereign immunity is available to government is not changed by the Act. Sovereign immunity for damages in tort is limited by the *Florida Statutes*.⁸¹ Statutes are to be construed *pari mater*i, and the Act does not specifically conflict with the sovereign immunity statute.⁸² Furthermore, the compensatory relief available from the Act arguably is for a new form of statutory "tort,"⁸³ and thus only limited compensation is available under the Act.

75. *Id.* § 70.001(5)(b).

76. *Id.* § 70.001(6)(a).

77. *Id.*

78. *Id.* § 70.001(6)(b).

79. FLA. STAT. § 70.001(13)

80. Rhodes, Teleconference Remarks, *supra* note 13. See *State v. Dunmann*, 427 So. 2d 166, 168 (Fla. 1983) (holding that last expression of legislature will prevail in case of conflict).

81. See FLA. STAT. § 768.28 (1995).

82. *Singleton v. State*, 554 So. 2d 1162 (Fla. 1990). For further discussion on state sovereign immunity in tort actions, see *District Sch. Bd. v. Talmadge*, 381 So. 2d 698 (Fla. 1980).

83. Constitutional takings have been described as "constitutional torts" for many years, with the courts applying statutes of limitations applicable to tort actions as a result. See, e.g., *Wilson v. Garcia*, 471 U.S. 261 (1985); *Monroe v. Pape*, 365 U.S. 167 (1961). This analogy would also be applicable to the Act, as it so apparently mimics takings law and specifically includes constitutional due process violations in its coverage.

E. *Further Impacts to Government and Landowners*

The processes under the Act are cumbersome for both the government and the property owner, but most particularly for the government. The Act anticipates that multiple parties will be involved to resolve disputes under the Act. Not only must each government agency involved in a challenged action participate in the Act's processes, but if either the property owner or one of the named governmental entities believes another governmental agency's participation is necessary for "complete resolution of all relevant issues,"⁸⁴ then those other governmental entities may be brought into the process. Given the complex nature of development permits, one might expect that the majority of property rights claims would involve the Department of Environmental Protection, the Department of Community Affairs, a regional water management district, a local government, and perhaps several special districts. Adjacent property owners must also be notified, as well as all parties to an administrative action that gives rise to the claim. "Parties" to administrative actions may include not only governmental agencies, but also citizen interest groups, banks or mortgage companies, development companies, and generally all persons who are defined as parties under the state Administrative Procedure Act.⁸⁵ Although the Act does not provide these administrative parties the full status of a party under its provisions, the Act's participants will necessarily consider their interests as well.

Assuming that the process for arriving at a settlement offer is confidential and privileged,⁸⁶ the process for achieving a meaningful settlement offer places a significant burden on the local government. Unlike the typical situation where litigation is in process, the government may be acting without full knowledge of the relevant facts regarding the property and the property owner's expectations for his land. Because a suit will not

84. FLA. STAT. § 70.001(4)(a).

85. FLA. STAT. § 120.52(12)(a)-(d) (1995).

86. The Public Records Act exempts disclosure of work product prepared in anticipation of imminent litigation or proceedings until the conclusion of the litigation or proceedings. See FLA. STAT. § 119.07 (1995). It is reasonable to assume that once a landowner files a written claim with the government agency under § 1(4)(a) of the Act, imminent litigation or proceedings can legitimately be anticipated. However, the records must have been prepared by the government attorney, or at his express direction, and must reflect a "mental impression, conclusion, litigation strategy or legal theory of the attorney or the agency." *Id.* § 119.07(1); see also *City of Orlando v. Desjardins*, 493 So. 2d 1027, 1029 (Fla. 1986); *Smith & Williams, P.A. v. West Coast Regional Water Supply Auth.*, 640 So. 2d. 216, 217 (Fla. 2d Dist. Ct. App. 1994).

have yet been filed in circuit court, it is doubtful that discovery under the *Florida Rules of Civil Procedure* will be available to assist the government in determining the pertinent facts. At a minimum, the government is well advised to immediately hire an appraiser to review the appraisal submitted with the written claim. It must investigate the history of the property's use and to the extent it is possible, the expenditures made by a property owner so as to determine any reliance expenditures for vested rights purposes, and to determine which expectations were "investment-backed."

Unlike settlements made during the course of litigation, the Act does not provide for counter offers and continuing negotiations for settlement. Thus, if the parties continue to negotiate, it is unclear if further settlement offers will be considered either by the court or the jury during court proceedings.

In addition to making a settlement offer, the government entity or entities must issue a ripeness decision which identifies allowable uses to which the subject property may be put. The advantage of a ripeness decision to the property owner appears to be more procedural than substantive. The ripeness decision ostensibly allows the property owner to know how his property may be used under the governmental regulations, but in reality it is more likely to act simply as the property owner's ticket to the courthouse. Governmental regulation, as a practical matter, more often describes what a property owner cannot do rather than what he can do. Obviously, this is of great frustration to the property owner. However, it reflects the reality that government regulation is to prevent public harm, and not to be responsible to specify the details of development of private property, which is an entrepreneurial activity involving more complex decisions than merely regulatory ones. Moreover, in making allowances for specific proposals that may be permitted under the proper circumstances, the government may provide for a great range of conditional uses. Rather than describing developments which may be appropriate under specific conditions, which would require the government agency to plan in some detail for the property, it is likely that the government may only realistically be able to repeat back to the property owner the regulation itself.

In the face of numerous parties with differing legal responsibilities and authorities, the ability to arrive at a settlement offer or ripeness decision within 180 days will be a considerable task for each of the governmental entities involved. Arriving at an agreed upon settlement offer or ripeness decision involving numerous parties will challenge even the most astute, best intentioned, and best managed governmental entities.

At the same time, the 180-day time period presents its own difficulties to the landowners. From the landowner's perspective, the time frames in the

Act are *not* realistic or conducive to resolving the situation without litigation. A delay of 180 days to initiate litigation and then more delay to bring it to a conclusion can be the death knell of any development project. Such a delay may result in a proposed development missing the market, losing financing, and losing the value of the money invested in the land or project. In addition, these costs as reflected in an appraisal, if ultimately considered by the jury in an award, may involve compensation that could cripple many governmental budgets.⁸⁷ The potential gain could encourage marginally successful development projects to be shelved by some land owners, in the hope of achieving a compensatory payoff higher than market risks might justify by proceeding with the project.

The new cause of action and remedy created by the Act is not exclusive. The property owner will be able to bring a collateral action on a claim under the Act, for example, to invalidate an exaction condition to a permit. If a specific action is found to be a violation of substantive due process and creates an inordinate burden under the Act, even though not at the level of a *Nollan* or *Dolan* taking, then the property owner would nonetheless be eligible to bring an action for both compensation and invalidation of the improper condition, with the ability to elect the most favorable remedy.

At present, the incentive has been for a developer to move forward with the project, even if questionable conditions or exactions were required as a condition of approval. Often the marginal project either did not advance to completion, or if it did, it survived at the edge of profitability. Now a new business decision will come into play: whether to continue the quest for the necessary development permits and proceed with the project, or put it in mothballs, play the compensation game, and seek compensation with a property appraisal based on rose colored sales projections without incurring the risk of up front development or marketing costs.

The administrative and judicial processes set out in the Act will severely disadvantage third parties. Although the government must give notice to "contiguous" property owners when a claim is filed,⁸⁸ these

87. Current value based on potential profit from a venture is a legitimate method of appraisal. The appraisal will be of more than the mere dirt (land), but also includes the value of the right to use the land and the potential to make a profit from its development, which increases its present value. For a detailed discussion on evaluating the proper interests of parties along with the proper determination of fair market value in condemnation proceedings, see *Board of Comm'rs of State Insts. v. Tallahassee Bank & Trust Co.*, 100 So. 2d 67, 69-70 (Fla. 1st Dist. Ct. App. 1958) (per curiam).

88. FLA. STAT. § 70.001(4)(b).

owners or other affected parties who are not government entities have no formal role in the process. Indeed, property owners whose properties may be negatively affected by a settlement under the Act are specifically prohibited from bringing their own claims under the Act. The Act precludes claims based on "impacts to real property caused by an action of a governmental entity taken to grant relief to a property owner under this section."⁸⁹ Presumably, settlement offers made under the Act must be approved by local governments at public meetings. However, the extent to which affected parties will be able to influence decisions made at that late date is questionable. For other governmental agencies' actions which are not formalized at public meetings, such as certain state governmental actions, affected parties do not have a point of entry under the Act.

The consequences of a successful claim under the Act based on an unlawful denial, condition, or delay, jeopardizing the success of a viable development project, may go far beyond what has been contemplated. The following example illustrates such consequences. With a residential real estate project, between 20%-30% of the total sales value can be attributed to the land. If 25% of the total sales price of a dwelling unit were to be attributed to land, a 100-acre five dwelling unit per acre project with a \$200,000 per dwelling unit sales price would yield \$100,000,000 with \$25 million attributable to land or \$50,000 per dwelling unit. If the land owner paid \$100,000 an acre for land, but could recoup \$250,000 an acre at sale after incurring the costs of land development necessary to allow for the construction of dwelling units, then the theoretical increase in the value of the land at sale would be \$15,000,000.

A property owner could make a compensation demand for the difference between value as inordinately burdened and the value of the land as enhanced by its theoretical land value at retail sale, the reasonable investment-backed expectation. A jury will determine the total amount of compensation for the loss in value due to the inordinate burden and will by necessity rely heavily on appraisal testimony to set an award within a broad range of values. The property appraiser could use the "development approach," a long accepted method of valuation of vacant acreage which, by definition, is not speculative. Instead, it is a method which demonstrates how present value has been enhanced by what could have been achieved but for the governmental action creating the alleged inordinate burden.⁹⁰

89. *Id.* § 70.001(3)(e).

90. *See, e.g.,* *Yoder v. Sarasota County*, 81 So. 2d 219 (Fla. 1955); *Boynton v. Canal Auth.*, 265 So. 2d 722 (Fla. 1st Dist. Ct. App. 1972); *see also* *Earle*, *supra* note 19, § 9.32 at 223. The development method of valuation would avoid the "business damage" exception

If compensation is awarded to a property owner under the Act, the government entity which pays compensation then obtains the title and rights of use in the property interest. The court will determine the form of the right which is to be transferred and the recipient of that right.⁹¹ The consequences of this provision are very uncertain. For example, will the rights to build to a certain height limit be able to be effectively used by a governmental agency? In accruing a number of partial interests in land, will the government become entangled in various real property and title disputes as time marches on? Title insurers and county record clerks are sure to have their duties complicated by such disparate interests.

IV. CONCLUSION: WHAT WILL THE PRIVATE PROPERTY RIGHTS ACT MEAN FOR FLORIDA'S FUTURE?

Doctors are taught that in their medical practice they must "first do no harm." The legislative process involves more experimentation and risk taking than would be condoned if practiced by a physician, and it is not uncommon for the legislative cure to be worse than the disease, or for a faulty diagnosis to result in a legislative cure for the wrong disease.

Will a new cause of action and remedy, creating new legal rights and legal procedures which force judicial activism, move Florida forward to a better system of government planning and land development regulation that protects both the public interest and private property owners' constitutional rights? The following will consider what could happen.

Landowners with viable development projects that are funded and designed to meet near term market conditions will gain no direct benefit from a new opportunity under the Act to go to court and collect compensation, which at best would be a break-even proposition. However, a landowner who is ready to proceed with a development project that meets the market, is consistent with the applicable comprehensive plan, and is able to meet applicable land development regulations, could gain a greater degree of certainty if the Act causes local governments and agencies to more closely adhere to their adopted plans and regulations.

Government agencies will be, and should be, wary of straying from their adopted plans and regulations, especially when tempted to deviate for political or other reasons not related to the plans and regulations. As local governments go through the statutorily mandated evaluation and review process, increased attention will be paid to the potential for the plan to

in the Act. FLA. STAT. § 70.001(6)(b).

91. FLA. STAT. § 70.001(7)(b).

create present rights, not simply future rights. The plan will thus take on increased importance as a regulatory tool, not simply a planning tool.

There is a danger that government entities will “freeze at the stick” and avoid making decisions out of fear of violating the Act. Certainly, government agencies have more incentive now to avoid making tough land use decisions that might attract litigation under the Act. Unjustified delay, however, may subject a local government to a mandamus action to force a decision. If an unlawful delay is construed to be a specific action, then the governmental agency may also run the risk of being required to pay compensation to cover the loss of property values caused by the delayed developer that has missed a market opportunity. However, if the Act causes a greater recognition of the risk of deviating from adopted law, then it may have the beneficial effect of causing greater respect for the rule of law by both landowners and government.

As a result of the Act, litigation over the nature of regulation and property rights will now be more, rather than less, complex. Property owners now already faced with a menu of causes of action, including federal, state and administrative claims, petitions for writs of mandamus, certiorari review, de novo actions, and claims involving jury issues and non-jury issues, will find litigation management to be more challenging than ever. For reasons explained above, settlement negotiations will be more complicated, more legally oriented, more adversarial, and less productive.

It is common in the Florida Legislature for landmark legislation to be followed by a “glitch bill” to revise it, often before there has been sufficient time and experience invested in finding meaning and practical application of the original legislation. The legislature will be in session at the time of publication of this article. Attempts to tinker at the edges of this Act before it is understood and implemented could cause more harm than good. The authors believe that any action on the Act should be limited to its repeal. Otherwise, the outcome will consist of further confusion and uncertainty.

Both government and landowners must struggle to reconcile their planning needs and the need to balance property rights with public protection. It may be many years before the full effect of the Act can be truly ascertained. The authors hope that reasonable people may meet on common ground and work together to develop a fair and effective system of planning and regulation that will make the Act’s provisions moot.