University of Florida Journal of Law & Public Policy

Volume 8 | Issue 2 Article 6

1997

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THE PROPERTY RIGHTS MOVEMENT AND HISTORIC PRESERVATION IN FLORIDA: THE IMPACT OF THE BERT J. HARRIS, JR. PRIVATE PROPERTY PROTECTION ACT

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I. INTRODUCTION

In the *Second Treatise on Government*, John Locke expounded an understanding of property rights that took hold of the American consciousness. He wrote:

> Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*.[1]

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* This note received the Barbara W. Makar Writing Award for the outstanding note for Spring 1996.

** The author would like to thank Professor E. L. Roy Hunt for his encouragement and guidance in the research and writing of this note. The author dedicates this note to his siblings, James Marshall, Mary Marshall, William Marshall, and Nancy Shadick.

1. John Locke developed fully the common law theory of property in his *Second Treatise on Government*. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287-88 (Peter Laslett ed., Cambridge Univ. Press 1988) (3d ed. 1698).

Private property rights go to the core of the common law tradition. Property rights are natural or fundamental rights and as such receive the highest protection under the law.[2] In the wake of landmark environmental legislation passed during the 1960s and 1970s,[3] some private landowners charged that the sanctity of private property rights was slowly eroding.[4] Property rights proponents believed that strict new government land use regulations were taking land away from landowners without compensation.[5]

Property rights advocates have made their concerns known. Since 1991, grassroots efforts to enact state and federal property rights legislation have resulted in the passage of property rights laws in seventeen states.[6] In 1995, the U.S. House of Representatives approved a bill that would compensate private property owners for diminution in property value due to federal

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2. The framers of the Constitution acknowledge this fundamental right in the Bill of Rights: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. *But see* dissenting views expressed by legal skeptics, including the poet William Empson, who writes:

> Law makes long spokes of the short stakes of men./
> Your well fenced out real estate of mind/
> No high flat of the nomad citizen/
> Looks over, or train leaves behind//
> Your rights extend under and above your claim/
> Without bound; you own land in Heaven and Hell;/
> Your part of earth's surface and mass the same,/
> Of all cosmos' volume, and all stars as well.//
> Your rights reach down where all owners meet, in Hell's/
> Pointed exclusive conclave, at earth's centre/
> (Your spun farm's root still on that axis dwells);/
> And up, through galaxies, a growing sector.//

WILLIAM EMPSON, *Legal Fiction, in* COLLECTED POEMS (1949).

3. The proliferation of federal environmental legislation began with passage of the National Environmental Protection Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370(a), which was signed into law in 1970. The historic preservation movement had received its greatest boost four years earlier in 1966 with passage of the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470 to 470x-6. In 1971, President Nixon issued Executive Order No. 11,593, Protection and Enhancement of the Cultural Environment. 36 Fed. Reg. 8921 (1971). This Executive Order requires federal agencies to conserve, preserve, and restore the historic properties and the cultural properties held by them. *Id.*

4. *See generally* Nancie G. Marzolla, *State Private Property Rights Initiatives as a Response to "Environmental Takings,"* 46 S.C. L. REV. 613 (1995) (arguing that the property rights movement is fueled by frustration and outrage at the environmental regulatory initiatives of the 1970s and 1980s).

5. *Id. But see* Timothy Egan, *Unlikely Alliances Attack Property Rights Measures*, N.Y. TIMES, May 15, 1995, at A1 (noting that many fundamental Christians are opposing property rights legislation because it could prevent passage of zoning ordinances that keep adult entertainment establishments away from schools).

6. *See "Takings" Legislation Enacted in 11 States*, 14 PRESERVATION L. REP. 1221, 1222 (1995).

environmental and land use regulations.[7] In May of 1995, Florida shot to the forefront of the national property rights movement when Governor Lawton Chiles signed the Bert J. Harris, Jr. Private Property Protection Act (PRPA).[8]

The PRPA is a landmark measure because it creates a completely new cause of action by which property owners may challenge government regulations.[9] Although the PRPA adopts the lexicon of constitutional takings suits, the Florida Legislature intended that the PRPA be broader in scope. The PRPA provides compensation for landowners unlikely to receive compensation for takings under the Florida and U.S. Constitutions.[10] To clarify that the PRPA establishes a completely new cause of action, the PRPA explicitly rejects established state and federal "takings" jurisprudence.[11] Thus, Florida courts may give new definition to the constitutional "takings" vocabulary of "inordinate burden" and "investment backed expectations."[12] The courts' interpretation of the PRPA, as it impacts traditional takings concepts, promises to have far-reaching effects on the willingness of state and local governments to conserve natural and historic resources.[13]

The focus of this note is the potential impact of the PRPA on the preservation of Florida's historic and cultural resources. Although historic preservation and land use laws in existence prior to the date the PRPA was signed into law are unaffected by the PRPA,[14] the PRPA may scuttle or delay new initiatives targeted at expanding protections for historic resources and scenic landscapes. The inability to enact these new initiatives due to concern over a potential PRPA violation may have a far-reaching impact on

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7. On March 3, 1995, the House passed H.R. 925 as part of the Republican leadership's "Contract with America." H.R. 925, 104th Cong. (1995).

8. The Bert J. Harris, Jr. Private Property Protection Act (PRPA) was signed into law by Governor Lawton Chiles on May 12, 1995. 1995 FLA. LAWS ch. 95-181 (codified at FLA. STAT. § 70.001(1)-.001(13) (1995)); *see* Jane Cameron Hayman & Nancy Stuparich, *Private Property Rights: Regulating the Regulators*, FLA. B. J., Jan. 1996, at 55; David L. Powell et al., *Florida's New Law to Protect Property Rights*, FLA. B. J., Oct. 1995, at 12. The PRPA gathered support not only from property rights advocates but also from progressive land use interests, such as 1,000 Friends of Florida. *See* HENRY L. DIAMOND & PATRICK F. NOONAN, LAND USE IN AMERICA 18-19 (1996).

9. FLA. STAT. § 70.001(1).

10. *Id.*

11. *Id.*

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

13. *See* Ron Cunningham, *The Scam Over Property Rights*, GAINESVILLE SUN, May 14, 1995, at 2G (positing that the real losers under the PRPA will be rural communities, who stand to lose the ability to protect themselves from "exploitation"); Carl Hiaasen, *Homeowners Least Protected Under New Law*, MIAMI HERALD, May 7, 1995, at 1B (arguing that the PRPA threatens the autonomy of homeowners because they may no longer be able to make land-use decisions for their own neighborhoods and communities).

14. FLA. STAT. § 70.001(12).

Florida's ability to attract the continually growing industry that is heritage tourism.

At present, Florida's gross expenditures for the preservation of its historic resources exceed those of any other state.[15] While such expenditures are extraordinary, alone they are ineffective for managing rapid growth on the local level. Without appropriate regulations pertaining to the protection of historic and cultural resources, uncontrolled growth can compromise the beauty and integrity of existing open spaces and historic districts, two resources that have fueled Florida's tourist economy.[16]

Part I of this note examines the detailed provisions of the PRPA. Part II is divided into four subsections. Section A addresses the potential impact of the PRPA on the enactment of stronger design guidelines for historic districts. Section B focuses on the prospects for historic preservation and rural land conservation initiatives following passage of the PRPA. Section C examines the legal obstacles that the PRPA raises to the passage of viewshed or vista ordinances. Section D considers the role that Florida's progressive, comprehensive planning laws may play in mitigating the effects of the PRPA. Finally, part III concludes that the PRPA's greatest impact may be the "chilling effect" that it could have on municipal land use strategies, as cities and towns await definitiveinterpretation of the PRPA.[17]

II. THE ANATOMY OF THE BERT J. HARRIS, JR. PRIVATE PROPERTY PROTECTION ACT

The PRPA creates a new cause of action through which property owners may seek compensation for demonstrated decreases in the fair market value of property subject to government regulation.[18] This new cause of action is distinct from claims brought under the takings clause of the Florida or U.S.

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15. The State of Florida currently spends more on historic preservation than any other state in the country and nearly twice as much as states similarly endowed with historic properties. Telephone Interview with Fred Gaske, Division of Historic Resources, State of Florida (Apr. 4, 1996). In 1996, Florida will spend more than $15 million on historic preservation programs. *See id.* In comparison, Texas will spend $6.9 million in 1996, including a one-time special appropriation of $2.5 million, and the Commonwealth of Massachusetts will spend between $4.7 and $5.2 million on historic preservation programs. Telephone Interview with Nina Chamness, Staff Services Officer, Texas Office of Historic Resources (Apr. 4, 1996); Telephone Interview with Elsa Fitzgerald, Assistant Director, Office of the Massachusetts State Historic Preservation Officer (Apr. 4, 1996).

16. Richard B. Collins et al., AMERICA'S DOWNTOWNS: GROWTH POLITICS AND PRESERVATION 15 (1991).

17. TIMOTHY MCLENDON, FLORIDA HISTORIC PRESERVATION LAW V-33 (1995) (predicting that the PRPA may have a "chilling effect" on the regulatory initiative of local and state governments).

18. FLA. STAT. § 70.001(1).

Constitutions.[19] In fact, the drafters explicitly intended to provide recourse for landowners whose property may not be burdened to the extent of a 'taking' under the Florida or U.S. Constitutions, but which, nevertheless, experiences a significant reduction in property values.[20] Thus, the Florida Legislature lowered the degree of regulatory burden that landowners must allege to sustain a cause of action under the PRPA. Although the PRPA makes bringing a cause of action against a government entity easier, the PRPA contains provisions intended to discourage litigation.[21]

The PRPA provides a detailed statement of the procedural steps that a proposed claimant must follow to institute a claim in court.[22] Before landowners may bring a cause of action, the PRPA prescribes a formal grievance procedure for those landowners who believe they are burdened by a government land use regulation.[23] One hundred and eighty days before landowners can bring suit against the government in circuit court, they must give the regulatory entity formal notification of an existing "inordinate burden."[24] At this time, they must also provide proof of the "inordinate burden."[25] To prove the existence of an "inordinate burden," the claimant must attach a valid appraisal to the complaint, showing the decrease in the fair market value caused by the new regulation.[26] By giving formal notice to the government, landowners earn the right to bring suit in circuit court 180 days after the initial date of notification.[27] Prior to filing suit and in response to a landowner's notice, the regulatory entity must consider tendering a settlement offer.[28] The PRPA explicitly suggests nine types of settlements:

(1) making adjustments to the relevant standards governing local land use;

(2) modifying regulations controlling the "density, intensity, and use" of the proposed area of development;

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19. *Id.*

20. *Id.*

21. *See* David L. Powell et al., *A Measured Step to Protect Private Property Rights*, 23 FLA. ST. U. L. REV. 255, 276 (1995) (describing in detail the steps each party must take before a property owner may file a suit under the PRPA).

22. FLA. STAT. § 70.001(4)(a)-(5)(b).

23. *Id.* § 70.001(4)(a).

24. *Id.* There are two important exceptions to the reach of the PRPA. First, the landowner may not challenge land use regulations adopted by state, county, or municipal governments on or before the adjournment of the legislature on May 11, 1995. *Id.* § 70.001(12). Second, the PRPA does not apply to any governmental actions concerned with the development of transportation resources. *Id.*

25. *Id.* § 70.001(4)(a).

26. *Id.*

27. *Id.*

28. *Id.*

(3) facilitating the transfer of landowners' development rights;

(4) exchanging the property in controversy for another suitable piece of land;

(5) mitigating the effects of the proposed regulation, including payments to landowners in lieu of on-site mitigation;

(6) arranging for development to occur on the least sensitive part of the parcel;

(7) issuing a development order, a variance, a special exception, or other extraordinary relief;

(8) compensating landowners for diminution in fair market value; and

(9) enforcing the government regulation as originally conceived.[29]

If a landowner accepts the settlement offer, then the claim is resolved.[30] If the offer is rejected, then the governmental entity must issue a written "ripeness decision."[31] The ripeness decision states the property's permissible uses and notifies the circuit court that the landowner has exhausted all possible administrative channels.[32]

Having secured the ripeness decision and waited for 180 days, a landowner's cause of action may be brought in circuit court where the property is located. The circuit court will determine whether the regulation "inordinately burdens" either an existing or vested property right.[33] Should the court find the property to be "inordinately burdened," the governmental entity may pursue an interlocutory appeal of the circuit court's decision.[34] Meanwhile, the court will convene a jury to calculate the compensation owed to the landowner because of the decrease in fair market value.[35]

To aid the jury in determining a landowner's compensation, the legislature crafted a specific formula for juries to apply.[36] The jury compensates a landowner for the amount by which the fair market value of the property has decreased due to the government regulation.[37] Included in this sum is the accrual of interest on the property value between the time a landowner files the suit and the ultimate resolution by the jury.[38] The jury award does not include business damages,[39] and legal fees are awarded to a landowner only if the court finds that the governmental entity failed to

29. *Id.* § 70.001(4)(c)(1)-(11).
30. *Id.*
31. *Id.* § 70.001(5)(a).
32. *Id.*
33. *Id.* § 70.001(5)(b).
34. *Id.* § 70.001(6)(a).
35. *Id.* § 70.001(6)(b).
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*

make a genuine settlement offer.[40] Conversely, if the court believes that a landowner rejected a "bona fide" settlement offer, the court will force the owner to pay the government's attorney fees.[41] Finally, after a landowner receives compensation for the diminution in value of the land, the governmental entity receives title or other interest in the landowner's property.[42]

III. ENACTING PROTECTIONS FOR HISTORIC COMMUNITIES AFTER THE PASSAGE OF THE PRPA

For years, Florida has evoked images of Disney World, Sea World, Spring Training, and Busch Gardens in the minds of American vacationers.[43] Times are changing. Florida is being discovered for its precious buildings as well as its natural environment. Recently, the Art Deco splendor of Miami's South Beach has made that community the second largest attraction for out-of-state visitors.[44] The growing popularity of cultural and historic vacation destinations is an important national and international trend in tourism.[45] Increasingly, tourists are heading for destinations such as St. Augustine, South Beach, Cedar Key, Key West, Apalachicola, and Tampa's Ybor City.[46] Boasting restored buildings and bustling streetscapes lined with small shops and local restaurants, these cities offer visitors a variety of historic experiences, ranging from a Spanish colonial town to an antebellum cotton port to the exotic and extravagant architectural excess of Florida's boom era.[47]

Dubbed "heritage tourism" by the National Trust for Historic Preservation,[48] the search for distinctive vacation destinations by Americans

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40. *Id.* § 70.001(6)(c)(1).
41. *Id.* § 70.001(6)(c)(2).
42. *Id.* § 70.001(7)(b).
43. Theme parks will continue to be one of the state's major attractions. In 1995, Disney's Magic Kingdom, Epcot Center, Disney-MGM Studios, Universal Studios, and Sea World together attracted 46 million visitors. *Tourist Spots Where It Is — And Isn't — Happening*, WALL ST. J., Apr. 17, 1996, at F1.
44. John F. Berry, *Selling Florida Short*, FLORIDA TREND, Mar. 1996, at 94.
45. *Id.*
46. In the last decade, the undiscovered natural and historic attractions of north Florida have received increasing attention from the national press, including coverage in Travel and Leisure Magazine and the N.Y. Times Magazine's Sophisticated Traveler section. *See* Kevin Canty, *Big Fun in North Florida*, THE N.Y. TIMES MAG., Nov. 10, 1996, at 19; Bob Knotts, *"Florida Unplugged,"* TRAVEL & LEISURE, Feb. 1997, at E17.
47. Beth Dunlop, *Saving "the Bold, Bizarre, Beautiful,"* ARCHITECTURE, Apr. 1987, at 43 (describing the breadth of Florida's historic resources and the efforts to save the State's architectural icons).
48. Stephanie J. Carroll, *Living with Success: Preserving Community When Tourism Thrives*, NAT'L TRUST FOR HISTORIC PRESERVATION FORUM NEWS, Mar./Apr. 1996, at 1.

represents a fundamental transformation in travel interests.[49] Heritage tourism is an economic "golden egg" for communities that offer history instead of high-tech amusements, or bed and breakfasts instead of blocks of hotel rooms.[50] An important impetus in the economic revival of Florida's oldest communities has been the revitalization of historic buildings and the creation of historic districts.[51] Florida communities have achieved economic development through historic preservation.[52]

Prosperity, however, does not come without risks to historic resources. Commercial success brings intense pressure for physical expansion.[53] To continue thriving, these communities may need more than the protection of a historic district ordinance.[54] Historic cities and towns need to retain the ability to craft ordinances that will conserve views of the historic city skyline, protect old shade trees, control the dimension and location of signs and billboards, preserve open spaces, and regulate the height and massing of new buildings.[55]

These measures complement historic district ordinances and bolster

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49. *See* Berry *supra* note 44, at 94.

50. *See* Carroll *supra* note 48, at 1.

51. *See, e.g.*, Raul A. Barreneche, *Miami Beach Comes of Age*, ARCHITECTURE, Apr. 1996, at 98; Christina Binkley, *Blight in Miami Beach Becomes Grounds for Fight*, WALL ST. J., Mar. 13, 1996, at F1 (noting the success of South Beach's restored Delano Hotel and citing statistics showing that over the last eleven years, resort tax collections have increased nearly 300% and building construction activity has increased 100%).

52. WILLOUGHBY M. MARSHALL, ECONOMIC DEVELOPMENT THROUGH HISTORIC PRESERVATION 1 (1975).

53. The increasing popularity of the Florida Panhandle as a camping and beach vacation destination has spurred dramatic growth in northwest Florida. Christina Binkley, *Panhandle Beginning to Prosper, Puts Its Bumpkin Status to a Test*, WALL ST. J., May 15, 1996, at F1. The Panhandle is growing with a steady influx of new residents from states such as Texas, New York, and Ohio. *Id.* The region's natural beauty and comparatively low cost of living are two reasons for increases in population and house construction. *Id.*

54. *See* E.L. ROY HUNT, MANAGING GROWTH'S IMPACT ON THE MID-SOUTH'S HISTORIC AND CULTURAL RESOURCES 32 (1988). Commenting on the need for a regional, interstate, pact to protect the historic landscape and resources of the mid-southern states, Professor Hunt stressed that a preservation ordinance provides essential, but only basic protections:

> [I]n the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and non-governmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our region.

Id. at 33.

To protect the rural surroundings that are the backdrop for the mid-south's historic resources, Professor Hunt suggests a powerful interstate agreement. *Id.* at 33-34. Though an interstate agreement would be beneficial to those Panhandle communities who share a common heritage with the river towns of southern Georgia and Alabama, Professor Hunt sounds an even more important point — that comprehensive measures preserving the rural or natural context of historic resources are crucial to their continued integrity.

55. *See* Carroll, *supra* note 48, at 2.

historic communities.[56] The PRPA may deter the enactment of local measures that will stabilize historic communities. Under the PRPA, landowners may bring suit against local or state governments if a new ordinance or land use technique places an "inordinate burden" on the use of their land.[57] Faced with the threat of such a lawsuit and consequential damages therefrom, communities may feel it is too risky to adopt measures to protect historic resources. The following four sections of this note examine the prospects for aesthetic and land use ordinances following enactment of the PRPA.

A. *Design Guidelines and the PRPA*

Design guidelines and design review provisions constitute an important part of any historic district ordinance.[58] The power to review plans for a new structure or for renovations and additions to an existing structure is the power to require that new structures and modifications to existing structures are sympathetic to local architecture styles.[59] The design requirements contained in historic district ordinances vary widely in their requirements. Some are strict, requiring landowners to construct buildings in a particular architectural style, in a particular color scheme, and with materials identical to those used in adjacent historic buildings.[60] Other ordinances give landowners more leeway, encouraging new buildings in contemporary design and asking only that new construction respect the height and massing of surrounding structures.[61] While advantages exist for both approaches, strong design guidelines have proven to be a catalyst to the economic success of historic communities.[62]

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56. *Id.*

57. FLA. STAT. § 70.001(2), (3)(e) (1995).

58. *See* Christopher J. Duerksen, *Local Preservation Law, in* A HANDBOOK ON HISTORIC PRESERVATION 70 (1983) (describing the ordinary range of powers given to the preservation ordinance). Duerksen cites the language used in historic preservation ordinances that gives design review powers to preservation boards. *Id.* app. at A65. *See generally* DONALD G. HAGMAN & JULIAN JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 469 (1986); JULIAN JUERGENSMEYER & JAMES WADLEY, FLORIDA LAND USE AND GROWTH MANAGEMENT LAW ch. 7, at 34 (1997).

59. *See* WILLIAM J. MURTAGH, KEEPING TIME: THE HISTORY AND THEORY OF HISTORIC PRESERVATION IN AMERICA 106-11 (1993).

60. *Id.* Strict design guidelines are followed in Georgetown, D.C., Alexandria, Va., and Santa Fe, N.M. *Id.* at 106-07.

61. *Id.* The Society Hill Historic District in Philadelphia, as well as Savannah, Georgia's historic district, apply design guidelines that give landowners more latitude in the selection of an architectural style. *Id.*

62. NANTUCKET HISTORIC DIST. COMM'N., BUILDING WITH NANTUCKET IN MIND 5 (1978) [hereinafter BUILDING WITH NANTUCKET IN MIND]. In addition to Sante Fe and Georgetown, one of the leading examples of a community that adheres to strict design guidelines is Nantucket, Massachusetts. Nantucket considers the uniform appearance of

With the advent of the PRPA, municipalities may balk at adopting the stricter design guidelines.[63] Under the PRPA's "inordinate burden" standard, landowners may successfully challenge strict new design guidelines if those guidelines "permanently" prevent the realization of "reasonable, investment-backed expectations."[64] According to section (3)(e) of the PRPA, an "inordinate burden" can arise in one of two ways:[65] first, when a new land use regulation impairs "vested rights" to realize economic benefits anticipated at the time of the property's purchase; and second, when a regulation effects a change in land use standards such that property owners must bear an unreasonable or disproportionate burden for the public good.[66] Ultimately, the court's decision will rest on whether landowners should expect the "best and highest use" for their land or merely a reasonable use.[67]

Stringent design guidelines are often enacted following the establishment of a historic district. The strict requirements imposed by historic district ordinances can provide grounds for challenging local historic district designations.[68] Although the creation of completely new historic districts may occur from time to time, more frequently, cities and towns move to expand existing historic districts or improve the existing regulation.[69] Often, the objective of expanding existing historic districts is to ensure that new construction in buffer neighborhoods — those neighborhoods surrounding existing historic districts — conform to the architectural and aesthetic character of the existing districts.[70] In Miami Beach, for example, city officials expanded the existing South Beach Historic District in response to the construction of a new office building just outside the boundaries of the District.[71] The eight-story office building, which was constructed in the

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weathered clapboard shingles to be an essential part of the island's charm. *Id.* In order to preserve the visual coherence of the island's buildings, the Nantucket Historic District Commission makes exacting demands both of landowners and the prominent architects who the island's landowners may choose to design their homes. The Commission's guidelines are published in a widely distributed volume titled, BUILDING WITH NANTUCKET IN MIND. *Id.*

63. *See* MCLENDON, *supra* note 17, at V-19. *But see* Powell et al., *supra* note 21, at 296 (commenting that the Harris Act is not intended to chill new government land use initiatives).

64. FLA. STAT. § 70.001(3)(e).

65. *Id.*

66. *Id.*

67. *See* MCLENDON, *supra* note 17, at V-19.

68. Tippett v. City of Miami, 645 So. 2d 533 (Fla. 3rd DCA 1994) (holding that petitioner's challenge to the creation of the Bayside Historic District fails because the suit was premature). Significantly, the concurrence stressed the important public purpose served by historic preservation ordinances. *Id.* at 534 (Gersten, J., concurring).

69. *See* Barreneche, *supra* note 51, at 98.

70. *See* Peter Whoriskey, *Miami Vice*, ARCHITECTURE, Apr. 1996, at 51.

71. *Id.*; *see* Barreneche, *supra* note 51, at 98.

Southwestern Pueblo Deco Style, dwarfs its two- and three-story neighbors.[72] To prevent future construction that would potentially diminish the district's historic character, the city expanded the South Beach Historic District.[73] Because the expansion occurred after the Governor had signed the PRPA, aggrieved landowners can challenge the newly designated neighborhoods under the terms of the PRPA.[74] Important questions remain about how courts will interpret what measures qualify as new land use regulations.

The PRPA also poses an obstacle to the promulgation of planning or design guidelines aimed at preserving small-town character. Rural towns and counties that resolve to maintain the compact character of single stoplight towns may provoke legal challenges under the PRPA. In *Rural by Design*, Randall Arendt recommends design guidelines that will perpetuate the rhythm and shapes of the local streetscape.[75] The following four guidelines could be applied to buildings in a small town's commercial district:

(1) Building facades must abut the front edge of the property line.

(2) Shops must occupy the first floor of each building.

(3) Building height shall be no more than three stories.

(4) Structures must utilize local brick, stone, or other materials sympathetic to native architectural elements, including uniform roofline, window shape, and window placement.[76]

These restrictions, if adopted in the form of a local ordinance, may well open the ordinance to challenge. Assume for instance, that a town acting in accordance with these four principles, adopts new guidelines. Assume also that a main street landowner had, for several years, pursued plans to develop two vacant lots into a hotel. Although the landowner had previously agreed to build a three-story building with the local red brick and set aside the first floor for public use — as a restaurant, shops, and hotel lobby, the architectural renderings show a five-story building with inappropriate fenestration and a large setback from the town's main street. The owner insists that limiting the hotel's height to three stories would make the hotel unprofitable and that the significant setback from the street allows for a semicircular drop-off area for hotel guests. Although the landowner has not secured a building permit, the landowner relied on the town's original zoning scheme, which allowed for construction of a five-story building.

Prior to the enactment of the PRPA, the only recourse available to such

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72. Barreneche, *supra* note 51, at 98; Whoriskey, *supra* note 70, at 51.

73. Barreneche, *supra* note 51, at 98.

74. FLA. STAT. § 70.001(12).

75. RANDALL ARENDT, RURAL BY DESIGN 119 (1994).

76. *Id.* For the purposes of this hypothetical example, the design guidelines have been modified to make the maximum building height three floors, not five floors.

a landowner was a takings claim.[77] The PRPA, however, gives the landowner a new option. Under this new standard, the landowner need not show complete loss of value.[78] To trigger the PRPA's "inordinate burden" standard, the landowner need only show the loss of a vested right to build a five-story structure or the inability to realize an "investment backed expectation."[79] Historic design guidelines, such as the four hypothetical principles set forth by Randall Arendt, could be especially vulnerable to legal challenges because the status of an owner's "vested right" could turn on whether the owner had secured architectural or engineering services, including drawings, before the new ordinance was passed.[80]

B. *What Will Become of the Countryside? Rural Conservation and Preservation*

Design ordinances sustain the visual harmony of a historic district, discouraging awkward infill construction and unskillful additions to existing historic structures.[81] By coordinating the height, width, composition, and setback of buildings, an ordinance strengthens the coherence of a historic community. The same "affinity" that design guidelines promote among neighboring buildings in historic districts also exists between buildings and their natural surroundings.[82] Inherent in historic preservation in rural areas is a commitment to guarding open space for its aesthetic value.[83] Just as Florida's hill towns are punctuated by deep-blue lakes, gently sloping orange groves, and rolling horse pastures, so, too, are the river towns and old railroad whistle-stops of Florida's Panhandle enhanced by the surrounding piney woods and cypress swamps. Historic preservation in the rural context

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77. The leading takings case in Florida is *Graham v. Estuary Properties*, 399 So. 2d 1374, 1381 (1981) (outlining six factors that help determine whether a regulatory taking has occurred and holding that preservation of environmentally "sensitive" natural resources and the abatement of pollution are legitimate expressions of the police power); *see also* Richard J. Grosso & David J. Ross, *Takings Law in Florida: Ramifications of* Lucas *and* Reahard, 8 J. LAND USE & ENVTL. L. 431 (1993).

78. FLA. STAT. § 70.001(1)-.001(2).

79. *Id.*

80. *See* DIAMOND & NOONAN, *supra* note 8, at 19. The U.S. Supreme Court provides little guidance on the application of the inordinate burden standard. Although the Court first articulated the concept of "investment-backed expectation" in *Penn Central*, 438 U.S. at 124, the Court declined to define this concept in its subsequent takings opinions. Furthermore, as McLendon notes, the Court ignored the inordinate burden standard in *Keystone Bituminous Coal Ass'n v. De Benedictis*, 480 U.S. 470, 485 (1987). MCLENDON, *supra* note 17, at V-20 to V-21.

81. *See, e.g.*, BUILDING WITH NANTUCKET IN MIND, *supra* note 62, at 39 (noting that historic district, design guidelines preserve the visual tie that exists between structures and thus, protect an overarching sense of place).

82. *See* MURTAGH, *supra* note 59, at 129.

83. *Id.* at 137.

requires conservation of these green spaces.[84]

Open space zoning recognizes the importance of ties between the natural and man-made elements of a landscape.[85] The function of open space zoning is to maintain the "historical resonance" between buildings and the landscape.[86] Building on prime farmland at the crest of a hill or at the water's edge compromises this resonance. Open space zoning groups new buildings in compact areas and leaves the remaining rural land for conservation purposes.[87] As Arendt describes, open space zoning serves at least two purposes.[88] First, by setting a threshold size of 25 to 100 acres for each parcel of land, this zoning technique preserves land for potential agricultural uses.[89] Second, by requiring that proposed subdivision developments concentrate new housing units within a single "cluster,"[90] open space zoning maximizes the total land area conserved for its aesthetic, agricultural, or natural resource value.

For example, in an area zoned for light development, where each house is required to sit on 40 acres of land, a 240 acre development would maintain 234 acres of open space, while siting houses on the remaining six contiguous acres. The new homeowners benefit from open space zoning because they can either enjoy the land as open space or lease the land back to local farmers for agricultural purposes. Furthermore, if the landowners possess property that can be developed into additional lots, they may explore the option of granting an agricultural easement to local land conservation foundations or municipal land trusts.[91] In fact, sizeable tax benefits attach to these easements.[92]

Significantly, outside of Florida, state and local governments that advocate agricultural and natural resource conservation as a compelling interest have successfully rebuffed legal challenges to open space zoning.[93]

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84. *Id.* at 125.
85. *Id.* at 127.
86. *Id.* at 130.
87. *See* AREND, *supra* note 75, at 296-99.
88. *Id.*
89. *Id.* at 296.
90. *Id.* at 298.
91. Vivian Quinn, *Preserving Farmland with Conservation Easements: Public Benefit or Burden*, ANN. SURV. AM. L. 235, 240 (1994) (describing the legal requirements of and tax incentives for using conservation easements to preserve farmland).
92. *Id.* at 247-54.
93. *See* Agins v. City of Tiburon, 447 U.S. 255, 259 (1980) (validating Tiburon's open-space zoning ordinance); Gardner v. New Jersey Pinelands Comm'n, 593 A.2d 251, 262 (N.J. 1991) (holding that the low-density zoning requirements in New Jersey's Pinelands Conservation Area do not constitute an unconstitutional taking of private property); Boundary Drive Assoc. v. Shrewsbury Township, 491 A.2d 86, 87 (Pa. 1985) (upholding a municipality's power to preserve "prime" farmland from development); Board of Supervisors v. Machnick, 410 S.E.2d 607 (Va. 1991) (upholding Farquier County's 85% open-space

With passage of the PRPA, however, rural landowners may be able to argue that they are carrying a disproportionate burden of providing a public good.[94] Furthermore, under the PRPA landowners may assert that such low-density zoning requirements have deprived them of their "investment-backed expectation."[95] For example, if a municipality amended the local land use plan to allow only one dwelling per 40 acres, instead of one per 20 acres, a landowner who desires to develop a 200 acre parcel would be able to build only five houses instead of 10. Although the down zoning of the property would leave the landowner with an economically viable use, the landowner can argue that a fifty percent reduction in the development potential of his land amounts to an "inordinate burden."

The impact of the PRPA on open space zoning initiatives is already demonstrable. Only days after passage of the new law, planners in Palm Beach County anticipated a potential legal challenge under the PRPA and withdrew plans to implement open space zoning techniques.[96] Fearing lawsuits brought by local farmers, they abandoned plans to conserve prime farmland with open space zoning protections.[97]

C. *Vista and Viewshed Ordinances and the PRPA*

In addition to discouraging rural preservation and new design guidelines for historic districts, the PRPA may also adversely impact efforts to protect historic vistas.[98] Like old buildings, historic and natural vistas often need special protection.[99] To protect the view of the U.S. Capitol from all

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requirement in all subdivisions, both large and small, in a rural farming community). *But see* Hopewell Township Bd. of Supervisors v. Golla, 452 A.2d 1337, 1343 (Pa. 1982) (striking down as arbitrary a zoning ordinance that limited development on tracts of prime agricultural land to five houses regardless of tract size).

94. FLA. STAT. § 70.001(3)(e) (1995).

95. *Id.*

96. Peter Mitchell, *New Property Rights Law Sending City Planners Scrambling for Cover*, WALL ST. J., June 6, 1995, at F1 (noting that Palm Beach County officials had shelved plans to implement open-space zoning for farmland at the western edge of the county because of the fear of lawsuits brought by farmers).

97. *Id.*

98. *See* MCLENDON, *supra* note 17, at V-33; *see also* Mitchell, *supra* note 96, at F-1. Because of the 180-day, or six-month, waiting period before a cause of action can be filed in a circuit court, the earliest possible date that a suit could have been filed under the PRPA would have been December 12, 1995. FLA. STAT. § 70.001(4)(a).

99. Viewshed analyses are an integral component of rural preservation studies. Viewshed analyses employ a methodology for examining the visual and scenic qualities that give each rural area a distinct sense of place. A landmark rural preservation study, which included viewshed analysis, was completed for communities in the Sautee and Nacoochee Valleys of northeastern Georgia. *See* ALLEN D. STOVALL, THE SAUTEE AND NACOOCHEE VALLEYS: A PRESERVATION STUDY 54 (1992).

directions, Washington, D.C., limits building heights.[100] Likewise, to preserve Denver's historic tie to the Rockies, a viewshed ordinance ensures that the city's snow-capped mountain backdrop will remain an unobstructed resource.[101] Though popular in cities whose allure is based on impressive natural and built landmarks, the strict limitations imposed by viewshed ordinances have invited legal challenges.[102] Developers maintain that ordinances protecting vistas are either an inappropriate exercise of the municipal police power or a government "taking" of private property.[103]

While lawsuits aimed at viewshed ordinances generally have not been successful, the PRPA provides a firm basis for challenges to such regulations.[104] To protect vistas effectively, viewshed ordinances must be able to prevent construction that impairs or obstructs visual resources.[105] If a property owners can show that the ordinance prohibits a land use that was authorized under prior regulations, in other words, land uses to which they have a "vested right,"[106] then the property owner may file a claim for compensation with the regulatory entity.

Property owners can substantiate the impairment caused by a viewshed ordinance in one of two ways. First, they can show that the ordinance prevents them from realizing the economic potential that existed before the new regulation took effect.[107] Alternatively, the owners can argue that they bear a disproportionate burden of providing an unobstructed view for the public good.[108] The PRPA states that the burden of the regulation ought to be distributed more evenly among citizens.[109]

To date, there is no Florida case law concerning a challenge to viewshed ordinances. There is, however, at least one viewshed ordinance in place in

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100. The view of the Capitol building is protected by an act of Congress. This viewshed protection is codified at 40 U.S.C.A. § 121 (1996).

101. DENVER, CO., REV. CODE § 10-56 (1986).

102. *See, e.g.*, Landmark Land Co. v. City & County of Denver, 728 P.2d 1281, 1287 (Colo. 1986) (upholding Denver's view corridor ordinance and rejecting Landmark Land Company's takings claim); Polygon Corp. v. City of Seattle, 578 P.2d 1309, 1314 (Wash. 1978) (validating a building height ordinance enacted primarily for aesthetic purposes).

103. *Landmark Land Co.*, 728 P.2d at 1287; *Polygon Corp.*, 578 P.2d at 1314.

104. FLA. STAT. § 70.001(12).

105. *See, e.g.*, ROLLING HILLS ESTATES, CAL., CODE § 1950. This ordinance establishes a process of design review. Under this ordinance, a review board screens development proposals to ensure that they "maximize open space preservation; protect view corridors, natural vegetation, land forms, and other features; minimize the appearance of visually intrusive structures; [and] prevent the obstruction of property owners' views by requiring appropriate construction of new structures or additions to existing buildings or adjacent parcels." *Id.*

106. FLA. STAT. § 70.001(3)(a), (e).

107. *Id.* § 70.001(4)(e).

108. *Id.*

109. *Id.*

Florida. The State of Florida forbids obstruction of views of the Florida Capitol complex.[110] The law recognizes the importance of the Capitol as the seat of government and as a unifying image for the entire state and city.[111]

Viewshed ordinances also can play an important role in rural historic preservation. In rural settings, viewshed ordinances offer protection for both historic and natural vistas. Sight lines for battlefields, such as Gettysburg and Shiloh, and historic homesteads, such as Monticello and Mt. Vernon, often combine history with valuable open space resources, including forests, wetlands, shorelines, or mountain ranges. Florida has a number of towns whose histories are linked intimately to their physical environments: stretches of white sand coastline, pine forests, or hill country. For instance, Apalachicola, Florida, possesses perhaps the state's highest concentration of historic resources. The entire planned grid of the city constitutes a historic district.[112] Although once the third-largest port on the gulf coast, Apalachicola is now one of the most remote destinations in Florida.[113] Bordered on the south by Apalachicola Bay, to the east by the Apalachicola River Delta, and to the north and west by the Apalachicola National Forest, Apalachicola is an antebellum outpost nestled in the midst of Florida's most extensive and productive natural ecosystem.[114]

Like most of Florida's cities and towns with national historic district designation, Apalachicola receives important additional protection for its historic resources from a municipal preservation ordinance.[115] This ordinance allows the city to review design and development decisions that may affect the town's historic character.[116] Oriented towards the Apalachicola River because of its origins as a nineteenth-century cotton port and later as a shipping point for lumber, the city's oldest historic buildings command an unobstructed view of the river and the bay.

Maintaining the open vista along the riverfront allows Apalachicola to keep an important connection to its heritage as one of the United States great cotton ports both before and during the Civil War era.[117] The vista takes on national significance because of the Thomas Ormond House. Built in the early nineteenth century, the house is distinguished not only by its architec-

110. *See* FLA. STAT. ANN. § 272.12 (West 1996).

111. *Id.*

112. Apalachicola, Fla., Franklin County, Historic Dist. Ordinance (Mar. 5, 1987) incorporated into APALACHICOLA, FLA., ORDINANCE 917 (Dec. 3, 1991). The Apalachicola Historic District Ordinance includes a map of the city. *Id.*

113. *See* MARSHALL, *supra* note 52, at 1.

114. *Id.*

115. *See generally* APALACHICOLA, FLA., ORDINANCE 917.

116. *Id.*

117. *See generally* WILLIAM RODGERS, OUTPOSTS ON THE GULF (1986).

tural style, but also by its living history.[118] The home purportedly accommodated Robert E. Lee during his travels into the Florida Territory in the 1840s.[119] Less than twenty years later, given its strategic placement on a bluff near the mouth of the Apalachicola River, Confederate sympathizers used the house as a communications point.[120] Confederate ships received visual cues by means of a barrel placed on top of the roof, alerting blockade runners of Union ships in Apalachicola Bay.[121]

Imagine the following scenario in light of the PRPA. To complement the protection of its historic district ordinance and to protect both the natural and historic vistas, Franklin County passes an ordinance "to promote the health, safety, and welfare of the citizens of Franklin County" through the protection, enhancement, maintenance, and use of the views and sightlines that extend across the Apalachicola River Delta and Apalachicola Bay from the County's nationally significant historic resources.[122] Just after the county passes the new viewshed ordinance, a local business finalizes arrangements for the construction of a large microwave communications tower on a riverfront parcel.[123] The adjacent bay and wetlands present no topographical obstructions to the transmission of signals, and the tower will help meet the need for better cellular communications services in this remote area of the Florida Panhandle.

Although there is no Florida case law regarding challenges to viewshed ordinances, other jurisdictions have considered challenges similar to the hypothetical case outlined above.[124] In the leading Colorado case, *Landmark Land Co. v. City & County of Denver*,[125] the Supreme Court of Colorado considered the validity of Denver's Mountain View Ordinance.[126]

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118. Interview with the Honorable John Hodges, Senior Circuit Judge, Thirteenth Judicial Circuit, in Tampa, Fla. (July 16, 1996).

119. *Id.*

120. *Id.*

121. *Id.*

122. *See* Gumbley v. Board. of Selectmen, 358 N.E.2d 1011, 1015-16 (Mass. 1977) (holding, in part, that Nantucket's historic district ordinance could not serve as a valid basis for blocking development of a proposed subdivision that would compromise the visual integrity of Nantucket's historic landscape).

123. *See* Sleeper v. Old King's Highway Reg. Historic Dist. Comm'n, 417 N.E.2d 987, 988-89 (Mass. App. Ct. 1981) (validating the Historic District Commission's decision to deny plaintiff's request to erect a 65-foot radio antenna in an area of "historic significance").

124. *See* Brophy v. Town of Castine, 534 A.2d 663, 664 (Me. 1987) (upholding viewshed ordinance that establishes a 75-foot shoreline setback for all structures); Wilkinson v. Board of County Comm'n, 872 P.2d 1269, 1276-77 (Colo. Ct. App. 1993) (upholding the denial of a building permit for a low-impact subdivision on the basis that local government has authority to preserve visual impacts in areas of historical and archeological significance).

125. 728 P.2d 1281 (Colo. 1986).

126. *Id.* Denver's Mountain View Ordinance dates to 1950. *Id.* at 1283 n.2. The city council stated that the purpose of the viewshed ordinance was to protect Denver's "unique environmental heritage." *Id.* Since 1950, the Denver City Council has amended the ordinance

The Landmark Land Company joined two other local developers in bringing suit against Denver.[127] The developers challenged the city's enlargement of the ordinance area on several grounds, including the charge that the city council's action constituted a "taking" under the Fifth Amendment.[128] The developers argued that by subsuming their properties within the regulatory umbrella of the ordinance, the city significantly impaired their ability to realize the economic potential of their land.[129] In particular, Landmark argued that before the city council amended the ordinance, the city zoning ordinance had permitted the construction of a twenty-one-story office tower.[130] Following the amendment to the Mountain View Ordinance, commercial buildings were limited to a height of forty-two feet.[131]

The Supreme Court of Colorado rejected the takings claim.[132] The developers failed to carry the burden of showing that the new viewshed regulations prevented them from putting their properties to reasonable commercial uses.[133] Citing the U. S. Supreme Court's decisions in *Penn Central Transportation Co. v. New York City* and *Berman v. Parker*, the court concluded that parties cannot allege a taking solely because property owners are deprived of a land use that was originally available when they bought the property.[134] The court reasoned that the viewshed ordinance does not deprive landowners of anything because the use of the land as commercial property was still available under the existing zoning.[135]

In Colorado, as in other jurisdictions, takings claims can be defeated on the grounds that an ordinance leaves open the use of property for "reasonable purposes."[136] According to the Supreme Court of Colorado, viewshed ordinances can justify the reduction in return on land-based investments from the level of high yield to "reasonable" yield.[137] In *Landmark*, the court's decision suggests that in Colorado the income produced by a four-story building is a reasonable return on land that originally could have produced rental income from a twenty-one story building.[138]

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to encompass a greater geographic area. *Id.* One relevant section of the ordinance is § 10-56 of the Revised Municipal Code of the City and County of Denver. *Id.*

127. *Id.* at 1282-83.
128. *Id.* at 1284.
129. *Id.*
130. *Id.* at 1283.
131. *Id.*
132. *Id.* at 1287.
133. *Id.* at 1286.
134. *Id.* (citing *Penn Central*, 438 U.S. at 130; *Berman v. Parker*, 348 U.S. 26, 32-33 (1954)).
135. *Id.* at 1283.
136. *Id.* at 1287.
137. *Id.*
138. *Id.*

Although a Florida court could reach the same decision, the PRPA's explicit protection of landowners' "vested" property rights might allow for an outcome more favorable to landowners.[139] Before the PRPA, landowners were not entitled to compensation unless the aesthetic or environmental regulation deprived them of all potential economic benefit.[140] However, unlike challenges to aesthetic and environmental regulations before the PRPA, now challenges by landowners may be entitled to compensation from a governmental agency if they can show prior investment in the development of the property. Moreover, prior to the PRPA, landowners did not have grounds for compensation merely because the new regulation blocked them from pursuing one of several reasonable development strategies.[141] To merit compensation, a landowner had to be deprived of all reasonable uses of the property.[142] The PRPA, however, instructs courts to compensate those landowners who have proven an "inordinate burden" by showing "investment-backed expectations" or "vested rights" in the development of the property as planned prior to promulgation of the government regulation.[143]

D. *Combating Urban Sprawl After the PRPA*

Although the PRPA may discourage the enactment of new ordinances aimed at conserving views of historic and natural resources, important regulations are already in place that may check the spread of urban development into rural areas. Despite the continuing threat that the creeping advance of urban sprawl presents to rural resources,[144] Florida's forethought in the area of land use planning has blunted its spread.[145] The Florida State Comprehensive Planning Act of 1972 and subsequent amendments have allowed the state to implement rules and guidelines calling for the con-

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139. FLA. STAT. § 70.001(3)(e) (1995).

140. Tippet v. City of Miami, 645 So. 2d 533, 536 (Fla. 3rd DCA 1994) (Gersten, J., concurring) (citing Supreme Court precedent, which dictates that landowners can sustain "takings" claims only when they show "deprivation of all economically viable uses") (citation omitted).

141. Lee County v. Morales, 557 So. 2d 652, 655-56 (Fla. 2d DCA 1990).

142. *Id.*

143. FLA. STAT. § 70.001(5)(b).

144. The National Trust for Historic Preservation considers urban sprawl to be the single greatest threat to the integrity of the nation's rural landscapes and historic resources. Arnold Berke, *Striking Back at Sprawl*, HISTORIC PRESERVATION, Sept./Oct. 1995, at 55.

145. Florida is widely recognized as one of the top three states, along with Oregon and Vermont, in the area of comprehensive land use planning. *See generally* David L. Powell, *Managing Florida's Growth: The Next Generation*, 21 FLA. ST. U. L. REV. 223 (1993); James H. Wickersham, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489 (1994).

solidation and containment of urban sprawl.[146] Because these rules were in place before May 11, 1995, they cannot be challenged under the PRPA.[147]

Urban sprawl describes the stepwise progression of businesses from urban and suburban areas into the countryside.[148] The outward migration of chain restaurants, auto-repair shops, and super-department stores causes urban development to spread incrementally into previously undeveloped rural areas. Sprawl's impact is so palpable because the addition of only a few buildings into the rural landscape blurs the distinction between suburban and rural areas.[149] By compromising the aesthetic value of the rural countryside, sprawl impairs visual resources that comprise a growing base of the state's tourist economy.[150] Tourists in search of cultural and aesthetic attractions will become an increasingly important source of income for Florida in the next century.[151]

Florida's rural landscapes and historic resources receive significant protection with the implementation of rules and regulations targeted at stemming the tide of urban sprawl.[152] The state's effort to curb urban sprawl has three prongs: Florida's comprehensive plan;[153] the Florida State Comprehensive Planning Act (CPA);[154] and the Local Government

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146. The basis for state control of urban sprawl is the Florida State Comprehensive Planning Act (CPA). FLA. STAT. § 186.001 (1995). This measure was enacted in 1972 and subsequently amended in 1984, 1992, and 1993. *Id.*

147. FLA. STAT. § 70.001(12).

148. Florida's Department of Community Affairs (DCA) defines the phenomena of urban sprawl as "scattered, untimely, poorly planned urban development that occurs in urban fringe and rural areas and frequently invades lands important for environmental and natural resource protection." John DeGrove, *State and Regional Planning and Regulatory Activity: The Florida Experience and Lessons for Other Jurisdictions, in* 1994 ALI/ABA LAND USE INST.: PLAN., REG., LITIG., EMINENT DOMAIN, AND COMPENSATION 390, 436 (quoting Florida DCA, Technical Memo. 1989c). The Florida DCA describes urban sprawl as advancing by "(1) leap frog development; (2) ribbon or strip development; or (3) large expanses of low-density, single dimensional development." *Id.*

149. *See* WILLIAM H. WHYTE, THE LAST LANDSCAPE 16 (1968) (examining the profound effect of scattered development in rural areas). In particular, Whyte notes that farmers, and not large-scale developers, cause the greatest damage to the rural landscape. *Id.* In place of growing crops, farmers use highway frontage to build a new row of ranch style homes, a service station, or an ice cream stand. *Id.*

150. The State of Vermont provides the best example of a state that fights to keep urban sprawl from spoiling its countryside of dairy farms, white-fenced town greens, and rolling mountains. Recently, this battle centered on preventing Walmart from opening its first store in Vermont. *See* Berke, *supra* note 144, at 55. Although Vermont eventually gave Walmart approval to build its first store there, state and local government exacted agreements from Wal-Mart to soften significantly its commercial presence. *See id.* at 56.

151. *See* Berry, *supra* note 44, at 94.

152. *See* FLA. STAT. § 187.201 (1995).

153. *Id.*

154. FLA. STAT. § 186.001 (1995).

Comprehensive Planning and Land Development Regulation Act (LGCPA).[155] Enacted in 1972, the CPA provides the legal basis for local and regional planning, enumerating the state's overarching objectives for the conservation and development of economic, educational, health, historic, natural, public service, and transportation resources.[156] The CPA underscores that prudent management of the state's resources can occur only if municipal, county, and regional governments coordinate their objectives.[157] Prominent among these priorities is the objective that state and local governments plan for historic and natural resources in such a way as to "preserve and enhance the quality of life of the people of this state."[158]

While the CPA establishes the goals and statutory authority for the state's comprehensive plan, the LGCPA lays out the specific requirements for local compliance with the state comprehensive plan.[159] The LGCPA serves two important functions. First, it ensures that local governments formulate their comprehensive plans to include common core elements required by the state.[160] Second, the LGCPA mandates that local governments align their planning efforts with the general goals and policies contained in state and regional comprehensive plans.[161] Thus, the LGCPA makes overarching state policies applicable to municipalities.[162] Therefore, cities and towns must draft the land use component of their comprehensive plans to comply with the land use objectives of the state comprehensive plan, that is, to establish boundaries on the expansion of urban growth.[163] The Department of Community Affairs (DCA) examines all components of the comprehensive plans to ensure compliance with the objectives of the LGCPA and the state comprehensive plan. If the DCA determines that a plan is "compatible with" or "furthers" the goals of the state comprehensive plan, then the plan is approved.[164]

Although neither the state comprehensive plan nor the LGCPA

155. FLA. STAT. § 163.3161 (1995).
156. FLA. STAT. § 186.002(1)(a).
157. *Id.*
158. FLA. STAT. § 186.001(c).
159. FLA. STAT. § 163.3161.
160. *Id.* § 163.3177(1)-(11). The LGCPA outlines eleven required facets of the local comprehensive plan. *Id.* In addition to provisions relating to the allocation of land for particular uses (*e.g.*, commercial, conservation, residential, public facilities, and recreational), local comprehensive plans must address issues such as transportation, traffic, and sewage treatment. *Id.*
161. *Id.* § 163.3177(10)(a).
162. *Id.*
163. FLA. STAT. § 187.201 (1995). This statute articulates the state's fundamental public policy goals. *Id.* These goals are to be pursued through comprehensive planning at all levels of state government. *Id.*
164. FLA. STAT. § 163.3177(10)(a).

specifically address the issue of urban sprawl, the fundamental public policies articulated by comprehensive planning laws have provided the basis for the promulgation of more detailed and stringent antisprawl regulations.[165] Drawing on its legislatively delegated authority to require local government compliance with all state planning laws,[166] the DCA uses broad language in the state comprehensive plan,[167] the CPA,[168] and the LGCPA[169] to craft regulatory language requiring local governments to guard rural, natural, and historic resources from the effects of urban growth.[170] The DCA has interpreted these provisions as mandating the promulgation of antisprawl regulations.[171]

Responding to its statutory responsibility to ensure compliance with the goals of the state's comprehensive plan,[172] the DCA bases its active opposition to urban sprawl on at least three provisions of the state's comprehensive plan. First, the comprehensive plan calls for the state and local governments to establish distinct boundaries between urban and rural land use contexts.[173] Second, the plan encourages municipalities to locate new business and residential developments in existing urban areas.[174] Third, the plan urges cities and towns to protect and preserve historic resources.[175] In addition, the DCA draws on the CPA's concern that local and regional plans focus on defining specific locations suitable for urban growth[176] and on promoting the continued integrity of the state's natural and historic resources.[177] Furthermore, the DCA takes advantage of the fact that the LGCPA requires local government plans to include provisions

165. Under the authority of FLA. STAT. § 163.3177(10), the DCA oversees and enforces the formulation and review of local and regional comprehensive plans. Section 9J-5 of the Fla. Admin. Code articulates the formal requirements and guidelines that municipalities must follow in articulating regulations, including regulations regarding urban sprawl. *Id.*

166. *See* FLA. STAT. § 163.3177; Degrove, *supra* note 148, at 432.

167. FLA. STAT. § 187.201 (1995).

168. FLA. STAT. § 186.001 (1995).

169. FLA. STAT. § 163.3161.

170. *Id.*

171. *See* Degrove, *supra* note 148, at 436.

172. FLA. STAT. § 163.3177(10).

173. FLA. STAT. § 187.201(16)(b)(2) (1995). This subsection of the state comprehensive plan deals with land use policies. *Id.*

174. *Id.* § 187.201(17)(a). This subsection of the state comprehensive plan articulates a recommendation regarding "downtown revitalization." *Id.*

175. *Id.* § 187.201(19)(b)(3), (6) (stating the importance of preserving and perpetuating the state's archaeological, historic, and cultural resources); § 187.201(24)(b)(3) (recognizing that the preservation of the state's historic and cultural resources is vital to the tourism base of the state's economy).

176. FLA. STAT. § 186.009(2)(b), (e) (1995). This section of the state's planning law deals specifically with growth management. *Id.* Enacted in 1993, it requires that local and regional comprehensive plans possess a growth management "element." *Id.*

177. *Id.* § 186.002(1)(a).

for the stewardship of historic districts and properties,[178] as well as for the future allocation of land use for agricultural, conservation, commercial, and residential purposes.[179]

The provisions of the state comprehensive plan, the CPA, and the LGCPA precipitated the formulation and promulgation of Rule 9J-5. Rule 9J-5 outlines the essential elements that must be present in each local comprehensive plan.[180] Included among these elements is the requirement that each municipal comprehensive plan possess a "future land use element."[181] Given the recent adoption of the PRPA, the future land use element, which is already part of each local comprehensive plan, may represent the greatest asset that municipalities can use to ensure protection for rural, historic, and natural resources. A "future land use" plan must include development techniques that are sympathetic both to a community's built and natural surroundings.[182] In particular, the regulations require that municipalities conserve the historic and natural environment,[183] protect the distinctive characteristics of individual communities,[184] fight urban sprawl,[185] and explore forward-thinking land use and zoning schemes.[186] Urban sprawl is not an easy concept to define, yet Rule 9J-5 attempts to inform municipalities what sprawl is and how to prevent it.[187] It sets out thirteen steps to eliminate sprawl. The regulation directs local governments to restrict development of agricultural lands,[188] make clear distinctions between the development of urban and rural areas,[189] and institute development patterns that are sympathetic to rural landscapes.[190] By requiring local governments to revise their plans if sprawl is not sufficiently discouraged,[191] the state can ensure that municipalities will restructure their

178. FLA. STAT. § 163.3177(6)(a), (g)(10).

179. *Id.* § 163.3177(6)(a).

180. FLA. ADMIN. CODE ANN. r. 9J-5.006 (1986); *see* JUERGENSMEYER & WADLEY, *supra* note 58, ch. 4, at 46.

181. FLA. ADMIN. CODE ANN. r. 9J-5.006.

182. *Id.* r. 9J-5.006(3)(b)(1)-(11).

183. *Id.* r. 9J-5.006(3)(b)(4).

184. *Id.* r. 9J-5.006(3)(b)(3).

185. *Id.* r. 9J-5.006(3)(b)(8).

186. *Id.* r. 9J-5.006(3)(b)(10).

187. *Id.* r. 9J-5.006. *But see supra* note 148 and accompanying text for the DCA definition of urban sprawl.

188. FLA. ADMIN. CODE ANN. r. 9J-5.006(5)(g)(5).

189. *Id.* r. 9J-5.006(5)(g)(9).

190. *Id.* r. 9J-5.006(5)(g)(1), (3), (4), (12).

191. The DCA's application of the anti-sprawl provisions of Rule 9J-5.006 has been challenged on the grounds that the provisions do not rise to the level of a rule that can be enforced. Home Builders & Contractors of Brevard, Inc. v. Department of Community Affairs 585 So. 2d 965, 967 (Fla. 1st DCA 1991). Home Builders based their claim on the fact that Rule 9J-5 provides no definition of "urban sprawl." *Id.* In affirming the ruling of an administrative hearing officer, the First District Court of Appeal validated DCA's promul-

comprehensive plans to manage growth in a way that protects rural landscapes and historic properties.[192]

The state's requirement that local comprehensive plans implement land use strategies that prevent sprawl and conserve open space is especially significant following passage of the PRPA. The DCA's enforcement of regulations that deter sprawl and conserve traditional uses of rural land is important because municipalities must revise their local land use plans to correspond to these planning and development goals.[193] In the wake of the LGCPA, each Florida city and town brought its comprehensive land use plan in line with the goals articulated by the state comprehensive plan.[194] As a result, municipalities lacking sufficient controls on urban growth found ways to contain urban growth and protect existing open spaces and historic properties.[195] Ultimate compliance with the state comprehensive plan means that strong provisions ensuring the protection of rural landscapes and historic properties took effect long before the legislature's enactment of the PRPA.[196] Private property owners will be unable to use the PRPA to challenge the provisions of local comprehensive land use plans that were authorized before the adjournment of the legislature in May of 1995.[197]

IV. CONCLUSION

Design guidelines, open space land use regulations, view shed ordinances, and comprehensive planning represent just a few of the tools being used by communities throughout the country to preserve the character of their cities

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gation and enforcement of the anti-sprawl provisions. *Id.* at 966. Although the court conceded that "urban sprawl" is not specifically defined in Rule 9J-5, the court agreed with the hearing officer that this term need not be defined because there is a general understanding as to its definition. *Id.* at 968-69. Moreover, the court stressed that even without a definition of "urban sprawl," DCA provided sufficient guidance in its articulation of land use strategies to discourage urban sprawl. *Id.* at 969.

192. *See, e.g.*, Powell, *supra* note 145, at 291.

193. *See* Taylor v. Village of N. Palm Beach, 659 So. 2d 1167, 1168-69 (Fla. 4th DCA 1995). In dicta, the court describes the procedures by which North Palm Beach complied with the mandates of the LGCPA. *Id.*

194. *See* FLA. STAT. § 187.201 (1995).

195. *Id.* § 187.201(16)(b)(2), (17)(a), (19).

196. In *Taylor*, the court notes that the City of North Palm Beach had complied with the LGCPA and amended its municipal land use plan by November 1989. 659 So. 2d at 1168.

197. A private property owner may bring a cause of action under the PRPA against any land use regulation approved after the adjournment of the 1995 legislative session on May 11, 1995. FLA. STAT. § 70.001(12) (1995). Private property owners, however, will not be able to sustain actions under the PRPA merely because a municipality revises the land use element of its comprehensive plan at some date in the future. *Taylor*, 659 So. 2d at 1170. To sustain a facial challenge to a local land use plan, the private property owner must be able to show more than "mere enactment" of a change in a comprehensive plan. *Id.*

and towns.[198] Unfortunately, the PRPA may impair the ability of Florida's city planners, conservationists, preservationists, and neighborhood associations to use these tools to fashion more cohesive, attractive, and prosperous communities. The PRPA effectively chills state and local experimentation new, innovative land use strategies.[199]

The passage of the PRPA signals a significant public interest in identifying a new balance between the rights of individual landowners and the public welfare. This objective is important to achieve. In so doing, however, it is important to remember that Florida's natural and historic beauty are a "golden egg." Impeding historic preservation and rural land conservation for even a few years may have an immediate and irreversible impact on the state's distinctive and dramatic sense of place. The private property owner and the legislature must be aware of the long-term, as well as the near-term, economic benefits that appropriate regulation ensures.

198. *See* Collins et al., *supra* note 16, at 15.
199. *See* Hayman & Stuparich, *supra* note 8, at 60.