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Constitutional Issues in Local Coastal Resource Protection

by
Richard G. Hamann

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Richard G. Hamann
Principal Investigator

Center for Governmental Responsibility
College of Law
University of Florida
Gainesville, Florida 32611
(904) 392-2237

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CONSTITUTIONAL ISSUES IN LOCAL COASTAL RESOURCE PROTECTION

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I. INTRODUCTION

Florida's coast is a powerful magnet for growth and development. Planners estimate that by the year 2000, 85 percent of the state's population will be located in coastal counties.[1] Florida will also have become the nation's fourth most populous state, the residence of 14 million people and a temporary home for 55 million visitors annually.[2]

People are attracted to the coast of Florida because it is both beautiful and productive. The massive, rapid development of Florida jeopardizes the environment that attracts and supports its population. Most experts agree, however, that with proper planning and control of land development, the qualities and functions of coastal resources can be preserved. The burden of taking effective action rests largely on local government officials. Although federal, state and regional agencies play major roles in managing growth, land use control remains fundamentally a local responsibility. This paper is intended to assist local government officials to meet their responsibilities by examining constitutional issues that should be considered in developing and implementing land use controls to protect coastal resources.

Coastal resources management ordinances are governed by the same constitutional considerations that apply to other planning and zoning endeavors of local governments. To be valid, an ordinance must be enacted pursuant to authority granted by the state constitution or by valid statutory delegation. It must be reasonably related to valid regulatory objectives; the procedures for implementation must be fair; it cannot discriminate; and it cannot confiscate private property.

Although analysis of the case law reveals substantial judicial support for coastal zone regulation, it is impossible to state with certainty whether any particular coastal zone management regulation would be upheld. The law regarding the validity of land use controls is unsettled and flexible. As always, the outcome will depend on the specific facts of a case, the quality of the factual and legal presentation, and the opinions of the courts.

Coastal resources management is a developing area, both in the law and in the sciences applied to coastal resource protection. The facts are always crucial both to the correct legal determination, and to general policymaking. Thus, case law from other jurisdictions involving significant factual scenarios and legal developments has been presented, along with an analysis of the case law from federal and Florida courts which governs actions in this state.

II. THE EVOLUTION OF LOCAL LAND USE REGULATORY TECHNIQUES

The techniques of land use control have evolved rapidly in recent years.[3] Until the late 1920's, land use regulation was virtually nonexistent in the United States. Today, a variety of land use controls have been adopted in communities throughout Florida and across the nation.[4] The experience of innovative communities should be considered by local governments designing management programs.

Prior to the implementation of legislation establishing local controls, the judicial system resolved conflicts primarily under the common law of nuisance. One landowner could not unreasonably interfere with another's use of property by carrying on noxious, offensive or hazardous activities. There were few legislative or

administrative attempts to prevent such conflicts from arising, however, and the common law remedies were inadequate to afford much real relief, except in the most egregious cases.

Zoning was developed to segregate conflicting uses. Under traditional zoning, a community is divided into various districts and the types of land use allowed in each district are specified. Industrial, commercial and residential activities are thereby segregated. The zoning ordinance contains a map showing the districts and a text indicating allowable uses, with administrative and enforcement provisions. Although zoning can be more sophisticated, the basic concept remains the same. Allowable uses are divided into those which are permitted as of right (permitted uses); those which may be conducted only if specially approved (special exceptions or conditional uses); and prohibited uses. Changes in land use are controlled through procedures and criteria for special approval of uses within zones, or by rezoning.

Subdivision controls are often used to regulate the development of land for residential usage. The size and layout of lots can be regulated to control future densities and traffic patterns. Roads, utilities and other public services or facilities may be required and specifications established for their construction. Payments to the local government in lieu of providing facilities may be authorized. Parks and natural areas can be preserved and the subdivision can be laid out to avoid floodplains, wetlands and other sensitive lands. The procedure for accomplishing these objectives is review, approval and eventual recording of a subdivision plat.

Building codes regulate the actual construction of structures. The health and safety of occupants and the durability of buildings are

primary concerns in the establishment of building codes. Building codes are of particular importance in coastal areas because structures must withstand hurricane forces and be elevated above flood levels.

The basic techniques of land use control -- zoning, subdivision regulations and building codes -- have been substantially extended by many coastal communities to address newly recognized concerns. Criteria are often incorporated regarding the control of erosion; stormwater management; floodplain and wetland use; beach access; sewage treatment; tree protection and preservation of natural vegetation; and other management considerations. Special purpose ordinances may also be adopted.

The criteria themselves are of two basic types. Descriptive criteria prescribe specifically how land is to be developed: for example, lots shall be a minimum of one acre or buildings shall be set back 300 feet from mean high water. Performance standards directly address the positive or adverse effects of the development. The desired result is described and the developer is given latitude to design a means of achieving the required performance. For example, a performance standard might prohibit development from increasing the volume of offsite runoff. The developer would be responsible for designing a system capable of meeting that criterion, as well as others.

Communities in Florida tend to employ a mix of zoning, subdivision controls and building codes. Performance standards and prescriptive specifications may both be used. A few communities have revamped local land use regulations to create a single, comprehensive land development code. The best protection for coastal resources is

achievable through comprehensive, performance-based regulation of land use and development.[5]

III. AUTHORITY TO IMPLEMENT COASTAL ZONE MANAGEMENT ORDINANCES

The implementation of a coastal resource management ordinance will necessitate exercise by a local government of its land use regulatory power, whether by separate ordinance or as part of other zoning, subdivision or building code requirements. This subsection discusses the sources of local government authority in Florida to regulate land use and development.

A. State Authority to Regulate Land Use and Development

The Tenth Amendment to the United States Constitution reserves to the states an inherent, plenary power, commonly called the "police power."[6] The police power is defined generally as the power of the states:[7]

> ...to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and to add to its wealth and prosperity.

The Florida Supreme Court has defined this essential ingredient of state sovereignty as "that power by which the Government may destroy or regulate the use of property in order to 'promote the health, morals and safety of the community'".[8] It is generally accepted that zoning, subdivision, and building codes may be adopted pursuant to the police power.[9]

The police power, and thus the authority to regulate land use and development, is the state's. It may be delegated, however, to local governments by statute or by state constitutional law.[10] Thus,

delegation of the necessary land use control authority must occur before a local government may enact a land use ordinance. This delegation requirement, as it applies to the various types of local governments in Florida, is discussed below.

B. Delegation to Local Governments of State Authority to Regulate Land Use and Development

The State of Florida exercises only limited direct control over land use by regulating Developments of Regional Impact[11] and by regulating development in Areas of Critical State Concern.[12] However, state and regional permitting of dredge and fill projects, hazardous waste facilities, consumptive use of water and similar matters indirectly influence land use.[13] Most of the state's authority to directly regulate land use and development has been delegated to local governments through various provisions for home rule power.[14] The genesis of the home rule power is found in Article VIII of the Florida Constitution.[15] Article VIII grants general legislative authority to municipalities,[16] charter counties[17] and non-charter counties.[18] More specific legislative powers in the area of land use regulations have been delegated to these three types of local governments.

Florida's 1985 Growth Management legislation clearly established the authority and responsibility of all local governments in Florida to manage land use to protect coastal resources.[19] It also significantly increased state oversight of local land use planning and regulation. The State and Regional Planning Act of 1984 had previously mandated the development of a comprehensive state plan, including agency functional plans and comprehensive regional policy plans.[20]

The 1985 legislation adopted a State Comprehensive Plan[21] and required local governments to adopt comprehensive plans that are consistent with the state plan, the appropriate regional policy plan and other specific requirements of the Act.[22] The Florida Department of Community Affairs has primary responsibility for ensuring compliance with the Act.

The State Comprehensive Plan contains numerous policies expressing the state's commitment to coastal resource protection. It is the policy of the state, for example, to "prohibit development and other activities which disturb coastal dune systems...,"[23] and to "protect and restore the ecological functions of wetland systems...."[24]

In addition, the Act requires local governments in the coastal zone to adopt coastal management elements,[25] including:

1. An analysis of the effect of the land use plan on coastal resources.
2. An analysis of the effect of drainage systems and sources of pollution on coastal waters, with consideration of programs to protect and restore water quality;
3. Principles for mitigation and protection against natural disasters;
4. Principles for protecting and restoring beach and dune systems;
5. Principles for eliminating inappropriate and unsafe development;
6. A component addressing the need for public access and water-related facilities along beaches and other shorelines;
7. Designation of high-hazard coastal areas;
8. Plans for financing needed infrastructure; and
9. Port facility plans.

Each coastal management element must also identify regulatory and management techniques that the local government plans to adopt or has adopted to mitigate threats to human life, control development to protect the coastal environment, and give consideration to cumulative impacts.

The Act further emphasizes implementation by requiring that all land development, land development orders and land development regulations be consistent with the adopted comprehensive plan.[26] In addition, each local government is required to adopt a land development code which implements the comprehensive plan.[27] As a minimum, the land development code must:

1. Regulate land subdivision;
2. Regulate land use;
3. Provide for open space;
4. Regulate areas subject to flooding;
5. Provide for drainage and stormwater management;
6. Protect environmentally sensitive lands;
7. Regulate signs;
8. Require the provision of public facilities and services;
9. Provide for traffic flow onsite.

The Department of Community Affairs has responsibility for ensuring compliance with this section and is adopting rules for local land use regulation. Ultimately, the consistency of local regulations may be determined by the Governor and Cabinet.

The constitutional limitations on the exercise of these powers by local governments is discussed below.

IV. SUBSTANTIVE DUE PROCESS

A. Generally

One limitation on the power of local governments to regulate land use stems from the Fourteenth Amendment to the U. S. Constitution, which states: "Nor shall any state deprive any person of life, liberty or property without due process of law."[28]

The phrase "due process" has a rich tradition of judicial interpretation. Many fundamental rights have been recognized and protected by the judiciary through application of this constitutional provision. Due process protections have been classified in two categories. "Procedural due process" guarantees certain minimum procedural safeguards before a person's personal or property rights can be affected. "Substantive due process" refers to the criteria used by the courts in reviewing the content of police power regulation.

The Supreme Court of the United States first used substantive due process to review a police power enactment in Mugler v. Kansas,[29] decided in 1887. At issue was the validity of a statute prohibiting the manufacture and sale of alcoholic beverages. The Court first affirmed the power of the states to protect the public through exercise of the police power. The scope of judicial review for substantive due process was then described:[30]

> It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, the courts must obey the constitution rather than the lawmaking department of goverment, and must, upon their own responsibility determine whether, in any particular case, these limits have

> been passed. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.

The statute was then upheld in deference to the legislative determination.

From 1900 to 1936, the Court departed from the deferential attitude expressed in Mugler and frequently invoked substantive due process to invalidate economic or social legislation it thought was an unreasonable or unnecessary restriction on economic liberty.[31] In many instances it appeared the Court was substituting its own social and economic beliefs for those of legislative bodies. Beginning with Nebbia v. New York,[32] however, the Court began to recede from this policy.[33] The demise of economic substantive due process is apparent from the opinion in Ferguson v. Skrupa,[34] where the Court stated:[35]

> [T]he doctrine...that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely has long since been discarded. We have returned to the original proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.

Today, substantive due process acts as a significant restraint on the government's ability to act in matters of economic or social welfare only if fundamental constitutional rights or liberties are involved.[36] If the government seeks to deprive persons of fundamental rights, it must show that the law is necessary to promote a compelling or overriding state interest. Where no such fundamental right is restricted, the law need only bear some rational relationship to a legitimate end of government.[37]

In the area of land use regulation, the Supreme Court has been particularly unwilling to invade the province of legislative bodies. Substantive due process, as applied to land use regulation when no "fundamental right" is infringed, means simply that regulations are arbitrary, and thus unconstitutional, only when the regulations (the means) are not reasonably related to accomplishment of valid regulatory objectives (the ends).[38] The Supreme Court succinctly stated the applicable principles in Welch v. Swasey,[39] upholding the denial of a permit for a building which exceeded height limitations:[40]

> The statutes have been passed under the exercise of so-called police power, and they must have a fair tendency to accomplish or aid in the accomplishment of some purpose, for which the legislature may use the power. If the statutes are not of that kind, then passage cannot be justified under the power...If the means employed, pursuant to the statute, have no real, substantial relation to a public object which government can accomplish; if the statutes are arbitrary and unreasonable and beyond the necessities of the case, the courts will declare their invalidity.

In a later case the Court observed:[41]

> [It] is enough if it can be seen that in any degree or under any reasonably conceivable circumstances, there is an actual relationship between the means and the ends.

Thus, in applying the substantive due process doctrine to a specific land use regulation, such as a coastal zone management ordinance, it is necessary to address two requirements. First, the regulatory objectives must be valid. Objectives are legitimate subjects of the police power if they bear a substantial relationship to protection of the public health, safety, morals or general welfare. Second, the substantive content of the ordinance must be reasonably

related to the achievement of those valid objectives, both on its face and as applied in a specific situation. These requirements will be discussed more fully below.

B. Objectives

Local coastal zone management ordinances, like all other local regulations, are invalid unless enacted for purposes within the scope of permissible police power objectives. The scope of permissible regulatory objectives under the police power is very broad. In Berman v. Parker,[42] the U. S. Supreme Court stated, with regard to police power:[43]

> An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determination addressed to the purposes of government; purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive....
>
> Public safety, public health, morality, peace and quiet, law and order--these are some of the more conspicuous examples of the traditional application of police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it....
>
> The concept of the public welfare is broad and inclusive....The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

A coastal zone management ordinance may thus have one or more of many valid regulatory objectives. The most common regulatory objectives supporting coastal zone ordinances are discussed below.

1. Protection of the Environment

Protection of the environment is clearly established in Florida as a valid objective of local ordinances. Article II, Section 7, of the Florida Constitution provides:

> It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise.

In Graham v. Estuary Properties, Inc.,[44] the Florida Supreme Court said, "Protection of environmentally sensitive areas and pollution control are legitimate concerns within the police power." The Third District Court of Appeal stated this judicial position more fully in Moviematic Industries Corp. v. Bd. of County Commissioners of Metropolitan Dade County:[45]

> [C]ertainly, the irreversible effect on the area's ecological balance as the result of urban development can and should be considered and reflected in zoning codes. We find the inclusion of ecological considerations as a legitimate objective of zoning ordinances and resolutions is long overdue and hold that preservation of ecological balance of a particular area is a valid exercise of the police power as it relates to the general welfare. We are not alone in this determination as courts in other jurisdictions have recognized the importance of considering the ecological objectives in zoning matters.

Moreover, Florida courts have recognized the coastal zone as an area of special environmental sensitivity. For example, in the recent case of Town of Indialantic v. McNulty,[46] the court said:

> Through sad experience Florida has learned the importance of the barrier sand dunes which face its 'high energy' beaches.
>
> Sand beaches and dunes comprise a very small and unstable part of Florida's coastal zone. Forming a narrow band along the shores of the Atlantic Ocean and the Gulf of Mexico, they offer some of the state's most attractive and most hazardous

> locations for real estate development. Without adequate controls on construction and excavation, oceanfront development could destroy not only manmade structures but also beaches and dunes.

2. Protection of Aesthetic Values

In light of the obvious aesthetic values of the coastal zone, it is significant that courts have held that local governments may use zoning for aesthetic purposes.[47] In the recent case of City of Lake Wales v. Lamar Advertising Assoc., the Florida Supreme Court held:[48]

> We agree that "[z]oning solely for aesthetic purposes is an idea whose time has come; it is not outside the scope of the police power."

In Sea Ranch Ass'n, Ltd. v. California Coastal Commission,[49] a federal district court specifically upheld protection of aesthetics in the coastal zone as a legitimate governmental objective. The Florida Fourth District Court of Appeal suggested the same in City of Hollywood v. Hollywood, Inc.[50]

3. Protection of Economic Value of Existing Uses

Florida courts have consistently held that zoning may be employed to protect the economic value of existing uses.[51] Local governments may therefore legislate to protect fishing, tourist, residential or other beneficial uses of the coastal zone that may be harmed by new development. Note, however, that the local government may not employ zoning to restrict competition as that objective has been held to be outside the reach of the police power.[52]

4. Prevention of Serious Traffic Congestion

Due to the typical geographic attributes of barrier islands -- long, narrow and, of course, surrounded by water -- traffic congestion

is often a serious problem accompanying intensive development. The threat of hurricanes makes such congestion particularly dangerous in the coastal zone. Florida courts have held that prevention of traffic congestion through zoning is within the police powers of local government.[53]

5. Preservation of an Adequate Drinking Water Supply

Ensuring adequate drinking water in the coastal zone, particularly on barrier islands, may be a problem. Local governments may use their zoning powers to protect an adequate drinking water supply.[54]

6. Prevention of Flood Damage

The coastal zone is, of course, particularly susceptible to flooding. The devastating impact of hurricane storm surges is well-known. Within the general purpose of preventing floods, one may identify several constituent purposes. In a report commissioned by the U.S. Water Resources Council, Dr. Jon Kusler identified the following potential purposes: to prevent landowners from increasing flood heights and thereby increasing flood damage on other lands; to maintain flood storage capacity; to prevent victimization of landowners; to reduce the regulated landowner's own losses; to reduce public expenditures for public work and disaster relief; and, to maintain environmental quality.[55]

Judicial decisions have been very supportive of these objectives.[56] Preventing landowners from causing harm to others through development of flood-prone lands is particularly strong justification for regulation. Such a regulatory objective implements a basic principle of the common law that no person should use land so

as to injure a neighbor.[57] Numerous decisions have held landowners liable for damages caused by increased flooding on the land of others.[58] The intent of regulations designed to prevent such adverse effects has been similarly endorsed in a number of cases.[59] The Superior Court of New Jersey, for example, upheld a moratorium on construction in a floodplain noting: "In fact, construction which affects the flow of Fleischer Brook so as to damage upstream or downstream property owners may well subject a landowner who so increases the flows, and possibly a municipality and county, to damage suits."[60]

Although regulatory objectives intended to prevent landowners from endangering their own lives and property are less obviously justified, they have also been endorsed by the courts.[61] In Turnpike Realty Company, Inc. v. Town of Dedham,[62] the Supreme Judicial Court of Massachusetts held that "the protection of individuals who might choose, despite the flood dangers, to develop or occupy land on a floodplain" is a valid consideration of the public welfare. An injured person can become a charge of the state, flood damaged property can depress the value of surrounding areas and the economic and social disruption of flooding inevitably spreads to other parts of a community.[63]

In evaluating the validity of a flood management ordinance, one must go beyond consequences to the individual and consider the broader economic, social and environmental well being of the community. The person who decides to develop flood prone lands is not the only person subject to damage. Family members, guests, rescue workers and future owners or users of the development may also suffer losses. The public

is inevitably called upon to remedy the problem by constructing expensive and often destructive public works projects. Water quality maintenance, groundwater recharge and other beneficial functions of flood prone lands may also be affected to the detriment of the community at large. As a result, courts determining the validity of an ordinance typically evaluate the objectives as an interrelated set of purposes.

7. Preservation of Beach Access

The public has the right to use the navigable waters of Florida as well as the beach between ordinary or mean high and low water marks. The public cannot, however, trespass upon private property to gain access to public areas.[64] The right to use the beach is protected under the doctrine of public trust found in the Florida Constitution.[65] This right is of little value, however, if access to the beach is not provided.[66] For this reason, courts have held that protecting public access to beaches is a valid governmental objective.[67]

8. Protection of Dunes

In Spiegle v. Bor. of Beach Haven,[68] the constitutionality of a dune protection ordinance was at issue. The Borough of Beach Haven had passed an ordinance which prohibited almost all construction on, or interference with, the dunes fronting on the Atlantic Ocean. The ordinance recited the necessity for protecting the dunes as follows:[69]

> It has been clearly demonstrated that well established and protected sand dunes, together with berms, beaches and underwater slopes of suitable configuration and of proper grade and height, are a durable and effective protection against high tides and flooding, and against damage by the ocean under storm conditions, and are the natural protections of the coastal

> areas adjacent thereto, and the State and its subdivisions and their inhabitants have an interest in the continued protection thereof, and in the right to restore them in the event of damage or destruction.

In finding the ordinance valid the court did not find it necessary to even discuss whether this was a valid police power objective.

9. Protection of Salt Marshes

The protection of coastal salt marshes has been held to be a valid police power objective. In Sibson v. State[70] the New Hampshire Supreme Court said:

> Controlling and restricting the filling of wetlands is clearly within the scope of the police power of the State. The evidence in the case overwhelmingly supported the referee's findings on the importance of preserving salt marshes "as one of the most productive areas of nutrient per acre to be found anywhere".

In summary, courts uniformly recognize the importance of the coastal zone. Thus, it is extremely rare that a coastal zone management ordinance fails to meet the first substantive due process test, i.e., that the ordinance have a valid police power objective. Likewise, as shown in the next section, the reasonableness of the means chosen to accomplish the objective is usually upheld.

C. Reasonableness

Substantive due process requires not only that the local ordinance have a valid objective, but also that the means chosen to accomplish the objective be reasonable.[71] According to the U.S. Supreme Court, the means chosen for implementation must bear "a real and substantial relation to the object sought to be attained."[72] If the restrictions of the ordinance are "reasonably necessary for the accomplishment of

the purpose, and not unduly oppressive upon individuals,"[73] then the ordinance is a valid exercise of the police power. An exercise of the police power will be held "unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."[74]

Because the reasonableness of an ordinance can only be evaluated after considering a broad range of factors, a challenge to the facial validity of a regulation is difficult and unlikely to be successful. Facial validity is evaluated by examining only the language of the ordinance. An ordinance that is found to be facially invalid cannot be applied in any manner to any land. Before a court will find an ordinance unconstitutional on its face, the challenger must prove that the ordinance would be an unreasonable exercise of the police power in every conceivable application. If "any state of facts either known or which could be reasonably assumed affords support" for the ordinance, then it will be upheld.[75] It is thus very rare for land use controls to be struck down in their entirety.

Challenges contending an ordinance is unreasonable as applied to a particular site have been more successful. An ordinance that is found to be unreasonable as applied under specific facts, however, would not necessarily be unreasonable in different circumstances. It would be invalidated only as applied to the particular property in question and would remain enforceable with regard to other lands.

The courts have not developed and probably cannot articulate specific criteria for defining the limits of substantive due process.[76] Determination is made on a case-by-case basis by reference

to the facts and circumstances of the situation. What is reasonable for one situation may well be unreasonable in another.[77] "The reasonableness of each regulation depends upon the relevant facts."[78]

Reasonableness also depends on considerations of public policy. To determine whether an ordinance is reasonable, the courts must weigh the strength of public interest factors supporting the regulation. To a very large extent, a court's perception of the public interest will depend on its understanding of the facts of the case and of how the development at issue fits into larger patterns of land and water use.

The courts are, in essence, balancing two conflicting rights: "that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business."[79] Neither right is absolute. Each defines the limits of the other and these limits change over time.[82] As the U. S. Supreme Court observed in Euclid v. Ambler Realty Co.:[81]

> Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.

Thus, the courts generally find the means employed by local governments to accomplish valid objectives to be "reasonable". As discussed

in Section D below, judicial review of substantive due process challenges is characterized by great deference to legislative judgment. That is not to say, however, that courts will never strike down the means employed as being unreasonable. The following sections discuss judicial reaction to various regulatory measures adopted by local governments to achieve valid regulatory objectives in the coastal zone.

1. Population Limits

The Florida Fourth District Court of Appeal recently reviewed two local ordinances which used population caps as the means chosen to achieve valid regulatory objectives. In the first case, the ordinance was found invalid, while in the second it was upheld. Thus, comparing these two cases serves to illustrate clearly the manner in which Florida courts analyze the reasonableness of a chosen regulatory technique, and the importance of adequate factual support.

In City of Boca Raton v. Boca Villas Corp.,[82] the Fourth District Court of Appeal considered a density cap for the coastal community of Boca Raton. The cap had been enacted through the initiative and referendum method. In response to passage of the cap by the electorate, the city cut multifamily densities 50 percent across the board, and reduced single family densities according to a formula based on previous development. A property owner sued, claiming there was no rational relationship between the density cap and a permissible municipal purpose, or that the cap did not promote the health, safety, or welfare of the people.

The court agreed with the landowner, noting that the city planning department had never been consulted on the need for the cap. The

court also found it significant that the director of the planning department testified that, other than "community choice," he knew of no compelling reason for imposing a permanent fixed limitation on population or dwelling units.[83] Finally, the court considered the relationship of the cap to such aspects of community welfare as utility services, schools, fiscal soundness, water resources, air quality, noise levels and comprehensive planning. In each case, the court found the evidence inadequate to show that the cap promoted that aspect of community welfare.[84]

In a more recent case, however, another coastal community was able to prove a rational relationship between a density cap and the health, safety, and welfare of the people. In City of Hollywood v. Hollywood, Inc.,[85] it was again the Fourth District Court of Appeal deciding the validity of the cap. In that case, the City of Hollywood placed a 3,000 unit cap on an area adjacent to the Atlantic Ocean. To indicate the importance of developing adequate factual support, the court's opinion regarding the density cap is quoted at some length:[86]

> A multitude of factors was taken into consideration over and above traffic. Water and sewer capacities were measured as was the provision of services such as fire and police protection. The question of how to evacuate the residents in a hurricane with only two possible escape routes to the mainland, one at each end, was also considered concomitantly with maintenance of the dune line to protect against storm ravage. The fact that this, as the developer admitted, "is the last undeveloped beach area on the Gold Coast," is filled with desirable rare flora, is ecologically sensitive and crying out for environmental protection, is in desperate need of open space and easy public access to the ocean, were all addressed and considered in agonizing detail. Another important factor was that the area to be developed is never more than 400 feet wide from AlA to the dune line and is only 1 1/4 miles long. The placing of multi-family units in this narrow area at the former 80 units per acre density would necessitate long lines of high rise struc-

tures (which the developer's drawings depict running all the way to the ocean to the apparent exclusion of Surf Road) behind which the public would drive on A1A through another only too familiar Gold Coast sky-high concrete barrier with no sight, sound or smell of the ocean. The question of shadow on the public beach from these proposed monolithic structures was also addressed. The admitted truth is that the entire area was originally platted and earmarked for small single family dwelling lots, so that the area is now crisscrossed to A1A by some 20 paved dedicated east-west streets. It is conceded that dense development would require abandonment of many of these streets which provide access to the ocean front from A1A and this court cannot see how the city could be forced to abandon those rights of way and why it would not fight to retain them. Last but not least, the record shows that much thought was given to aesthetics. This court has recently held that aesthetics in and of themselves will support zoning and/or rezoning. City of Sunrise v. DCA Homes Inc., 421 So. 2d 1084 (Fla. 4th D.C.A. 1982). Before us is the last unspoiled beach area on the Gold Coast, a veritable Shangri-La in an otherwise endless Himalayan mountain range of cement to the south. It is surely a laudable governmental purpose to restrain excessive hotel and apartment house building on it and it is neither arbitrary nor capricious to do so. This is especially so when the parcel is over a mile long and forever protected from adjoining development, to the north by John Lloyd State Park, to the east by the ocean and to the west by the inland waterway.

* * *

We cannot conclude the subject of a unit cap without addressing this court's recent decision in City of Boca Raton v. Boca Villas Corp. ... wherein we upheld the trial court's conclusion that a 40,000 unit cap for the entire city "[did] not contribute substantially to the public health, morals, safety, and welfare [and was therefore] arbitrary and unreasonable." However, the facts in the Boca Raton case reveal that the cap was established by public referendum, the City planning department was never even consulted and when examined, the Boca Raton City Planning Director knew of no compelling reason for imposing this fixed limitation. In the case before us now, the City did not adopt any such Alice-in-Wonderland approach. The record is replete with comprehensive plans, studies, reports, public meetings and actual discussions with the developer over a period of years. Unlike the Boca

> Raton case, the City of Hollywood did not present its community purpose in the abstract, but presented a more than adequate case for the proposition that the proposed cap would contribute substantially to the public health, morals, safety and welfare of its citizens. The record also supports the proposition that the City has been attempting to accomplish a density slash since 1971 and that the developer has owned most of its holdings for fifty years. As a consequence, this was no sudden municipal zoning karate chop such as transpired in the Boca Raton case.

Thus, population caps may be upheld as a permissible means of protecting coastal values if the local goverment is careful in documenting the relationship of the cap to protection of the coast. Judicial reactions to other means employed by local governments to protect the coastal zone are discussed in the sections below.

2. Coastal Setbacks

Florida's Fifth District Court of Appeal recently reviewed the reasonableness of a stringent beach setback regulation in Indialantic v. McNulty.[87] The property in question was located between a road and the Atlantic Ocean. The town had established a regulatory dune line running approximately 20 feet seaward of the road and required residences to be set back 25 feet landward of the line. Building was thus effectively prohibited. The owner sought a variance to construct a house on stilts over the dunes, which was denied.

The opinion is exceptionally well reasoned. The validity of the ordinance on its face was first considered and upheld. After reviewing the applicable legal principles, the court considered the important natural resource functions of the dune system. It stabilizes the beach and protects life and property from erosion and storm surge. In addition, the dune system is a hazardous location for building. As the court stated:[88]

> There can no longer be any question that the "police power" may be exercised to protect and preserve the environment.... The wetlands and coastal areas are places of critical concern because of their important role in protecting the inland regions against flooding and storm danger. The ordinance in this case passes constitutional muster because it was not shown to be in any way arbitrary or discriminatory, or more severe or strict than necessary to achieve a valid police power purpose.

The validity of the ordinance as applied was then considered. Resolution of that issue turned on whether application of the ordinance constituted a "taking" and will therefore be discussed in Part V below.

3. Height Restriction

Height restrictions are sometimes imposed in the coastal zone for the purpose of protecting views, preventing the shading of public beaches and for other purposes. Such restrictions have generally been upheld by Florida courts as promoting the health safety and welfare of the people.[89] In City of Hollywood v. Hollywood, Inc.,[90] the Fourth District Court of Appeal said:

> A restriction placed on the ocean's edge which limits high-rise construction, preserves open space, cuts down on shadow and reduces densities to 7 units per acre to achieve its ends, is most definitely in the public good....

4. Transferable Development Rights

The use of transferable development rights (TDRs) to protect coastal zone values has very recently been upheld by Florida's Fourth District Court of Appeal. In City of Hollywood v. Hollywood, Inc.,[91] the court described TDRs as follows:[92]

> Basically, a TDR allows that development rights, attributable to one piece of land, be transferred to another. Summarizing from James H. Foster's article, The Transferability of Development Rights,

> 53 U.Colo.L.Rev. 165 (1981), a TDR plan provides a third alternative to either buying the land sought to be preserved (which most municipalities cannot afford) or simply abandoning any attempt to preserve ecologically sensitive areas. This third alternative consists of offering a developer "fair compensation" in the form of increased development rights on other land in return for land use restrictions on the land sought to be preserved.

The TDR program adopted by Hollywood allowed a particular owner of an oceanfront parcel to transfer the development rights attached to that part of the parcel directly on the ocean to that part of the parcel landward of a road running along the beach and splitting the parcel. The court held that protection of the beach was a valid municipal objective and that the use of the TDR system was a permissable means of doing so.[93]

5. Impact Fees and Subdivision Exactions

An impact fee is a fee collected by the local government at the time of development of land to help defray the costs to the community imposed by the development.[94] Recent Florida decisions have upheld the use of impact fees to defray the costs of providing water and sewer service,[95] county parks,[96] and most recently, roads.[97] One commentator has culled the following principles from the recent Florida cases by which the validity of an impact fee will be judicially reviewed:[98]

> --An impact fee ordinance should expressly cite statutory authority for local government regulation of the substantive area selected.
>
> --A need for the service or improvements from new development should be demonstrated.
>
> --The fee charged must not exceed the cost of improvements required by the new development.
>
> --The improvements funded must benefit adequately the development which is the source of the fee

(even if nonresidents of the development also benefit).

--In place of a rigid and inflexible formula for calculating the amount of the fee to be imposed on a particular development, a "variance" procedure should be included, so that the local government may consider studies and data submitted by the developers to decrease their assessment.

--Lastly, the expenditure of funds should be localized to the areas from which they were collected.

Related to the mechanism of impact fees is the use of subdivision exactions.[99] It is well-established that local regulations may require mandatory dedication by subdividers of essential community facilities including streets,[100] sidewalks[101] and water and sewer lines.[102] Whereas an impact fee is payment of money to the local government to provide essential services, a subdivision exaction is a dedication of land and/or facilities to the local government. Developers are often allowed to choose between dedicating land or paying a fee.

The term "exaction" is most often used when the local government requires the subdivider to not only dedicate streets, sidewalks, and the like, but also to provide land for schools, parks, beach access, and other amenities which may be used by nonresidents of the subdivision.[103] Courts throughout the nation have generally upheld such exactions if the subdivision creates a need for the service and the exaction constitutes a reasonable amount of land.[104]

Florida courts have also found exactions to be legal as long as certain standards are met. The development of Florida judicial response to exactions can be traced through four opinions: Admiral Development Corp. v. City of Maitland,[105] Contractors and Builders

Association of Pinellas County v. City of Dunedin,[106] Wald Corp. v. Metropolitan Dade County,[107] and Hollywood, Inc. v. Broward County.[108]

In Admiral Development, the City of Maitland required that five percent of all land in subdivisions be set aside for public park purposes. The Fourth District Court of Appeal invalidated the ordinance as being beyond the charter powers of the city.[109] The court also noted that the ordinance was infirm because the exaction was based on the acreage of the development rather than on the number of people that would live there. There was thus no nexus between the exaction and the need for parkland which would be created by the development.[110]

In City of Dunedin, the Florida Supreme Court invalidated a subdivision impact fee ordinance because there were insufficient restrictions on the use of the exactions. In other words, the proceeds of the fee were not sufficiently restricted to relieving the burdens on the community which would be imposed by the development.[111]

In Wald, the local ordinance required subdividers to dedicate drainage canal right-of-way and maintenance easements. The purpose of the ordinance was to protect the subdivision from periodic flooding and to protect up- and downstream owners from the effects of the subdivisions' stormwater runoff. The Third District Court of Appeal upheld this exaction as being sufficiently related to potential adverse effects of the development.[112]

Finally, in Hollywood, Inc. the ordinance at issue required dedication of land or payment of a fee for expanding the county park system to accomodate the new residents. The Fourth District Court of Appeal upheld this ordinance and summarized Florida law relating to subdivision exactions and impact fees:[113]

> From City of Dunedin, Wald, and Admiral Development, we discern the general legal principle that reasonable dedication or impact fee requirements are permissible so long as they offset needs sufficiently attributable to the subdivision and so long as the funds collected are sufficiently earmarked for the substantial benefit of the subdivision residents. In order to satisfy these requirements, the local government must demonstrate a reasonable connection, or rational nexus, between the need for additional capital facilities and the growth in population generated by the subdivision. In addition, the government must show a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the subdivision. In order to satisfy this latter requirement, the ordinance must specifically earmark the funds collected for use in acquiring capital facilities to benefit the new residents. The developer, of course, can attempt to refute the government's showing by offering additional evidence.

A subdivision exaction for the purpose of providing beach access was upheld in Sea Ranch Association v. California Coastal Commission.[114] In that case, however, the federal District Court applied a less restrictive standard than that prevailing in Florida. The court said:[115]

> These cases [California and federal] indicate planning bodies may condition development on aesthetic considerations or dedications of property for public recreational facilities or access. The fact that the development has no direct nexus to the condition [exaction], that the benefit to the public is greater than to the developer, or that future needs are taken into consideration, does not destroy the validity of the condition. The court is free to look at these factors, as well as the general goals behind the authorizing statute, in evaluating the reasonableness of the regulation.

The court then held the beach access exaction to be valid:[116]

> Applying these standards to the instant case it is clear that the challenged conditions must stand. The public need for access to state beaches on foot or visually and the importance the people of California place on that need have been embodied in the California Coastal Zone Conservation Act. The Act spelled out the need to maximize public access and views. As we noted earlier, failure to imple-

> ment these conditions would result in loss of public access and views on a substantial portion of the northern California coastline. Moreover, the gradual build-out at Sea Ranch, and like developments in the Region, with the likely attendant increase in local population and tourism, will increase the existing need for public access.

No Florida court has ruled on a local beach access exaction, but like California, Florida has statutory language encouraging provision of access by local governments.[117]

6. Moratoria

Florida courts have held that local governments may enact zoning moritoria while developing a comprehensive plan.[118] These courts recognized that last minute applications for inconsistent uses can destroy the viability of the plan to be adopted. As a safeguard, however, the local government enacting a moratorium must follow procedures for enacting zoning amendments, rather than procedures for general legislation.[119]

7. Floodplain Management

There is growing judicial support for the wisdom, necessity and validity of floodplain management measures. Because much of the coastal zone is flood-prone, these cases represent support for various local government initiatives to protect coastal values. Courts have upheld stringent land use restrictions in floodways and floodplains.

In Young Plumbing and Heating Co. v. Iowa Natural Resources Council,[120] the Iowa Natural Resources Council denied a permit to build a condominium which would be partially within a 200 foot floodway. The Council argued that building within the floodway would increase the level of flood waters with the burden of the increase

falling on property owners across the creek from the petitioner's land. It also argued that encroachment on the floodway would decrease the potential for development of the land abutting the creek on the opposite bank since a similar structure and modifications could not be undertaken on the opposite bank without greatly increasing the potential for flood damage. The court accepted these grounds as rational and upheld the council's denial. The court rejected the landowner's arguments that the action was unreasonable because the harm was only anticipatory and adjacent landowners had a damage remedy if the harm actually occurred. The court ruled that the council could use the "equal and opposite encroachment concept" to prevent future harm.[121]

In Usdin v. Dept. of Environmental Protection,[122] a New Jersey court upheld the denial of a permit to build a warehouse in a designated floodway. The court ruled the denial to be a legitimate exercise of police power[123]

> ...to prevent injury during flooding to potential employees of the warehouse or materials which may be stored, nearby citizens whose lives or property may be endangered by stored items being swept along in a flood, and to all residents who might drink water polluted because the stored items have entered an aqueduct or aquifer.

In Foreman v. State ex rel. Dept. of Natural Resources,[124] the Indiana Supreme Court upheld the authority of the state to prevent a landowner from placing deposits within a floodway and also upheld the state's authority to force the landowner to remove deposits previously made. The court said:[125]

> It is clear that the purpose of the Act and those means used to reach the purpose are rationally related and therefore within the police power of the State to promote order, safety, health and welfare of society. An uncontrolled river may at flood state become a destroyer of life and property. Controlling the use of rivers and

> adjoining property is of great importance to the welfare of society.

In addition to floodway regulations, strict land use controls within floodplains have also been upheld by courts. In Kraiser v. Zoning Hearing Bd. of Horsham Township,[126] a Pennsylvania court upheld a floodplain ordinance despite a finding that the landowner "finds himself for all practical purposes stuck with a useless property."[127] The court found that such hardship on the individual is constitutional because of the public harm which would be avoided. The court said:[128]

> Moreover, it can be properly concluded that building on the floodplain would increase flood height and conceivably increase the hazard to the inhabitants of other buildings both on and away from the zoned areas.

California property owners whose lands were within a floodplain were denied the right by ordinance to build any permanent structure on the land, which was limited to use as public parks and for recreational purposes. Holding that no taking had occurred, the court noted that "[t]he zoning ordinance in question imposes no restrictions more stringent than the existing danger demands."[129]

In Turner v. Town of Walpole,[130] the Massachusetts floodplain ordinance allowed the construction of new buildings for industrial and manufacturing purposes, but not for residential purposes. The court found this classification to be permissible given that it was not irrational for the town to conclude that industrial and manufacturing users might be better able to provide flood protection devices or cope with periodic flooding than residential or business users.[131] The court further noted that several policy considerations justified interference with private use of land in a floodplain. These included:[132]

> ...protection of individuals who might develop or occupy such land despite apparent dangers to life or property; protection of others from damage caused by the obstruction of the natural flood flow; and protection of the community as a whole from the public expenditures otherwise necessary to safeguard property located within a floodplain.

Strict regulation of floodplain activity for the purpose of pollution control has been upheld. In A.H. Smith Sand & Gravel Co. v. Dept. of Water Resources,[133] a Maryland appellate court upheld a statute which granted a state agency the authority to regulate within a 50-year floodplain to prevent pollution of the "waters of the state." Strict controls on a sand and gravel mine within the floodplain were thus upheld as constitutional.

Floodplains are sometimes included within the statutory definition of fresh water wetlands. For example, in State v. A. Capuano Bros., Inc.,[134] stringent restrictions on land uses within the 50-year floodplain were upheld as valid means of protecting Rhode Island's wetlands under the Fresh Water Wetlands Act.

It has often been argued that floodway and floodplain controls constitute a taking by the government of a "flowage easement." This position, however, has been consistently rejected by the courts as long as the government activity does not increase the flooding of the property which would otherwise naturally occur.[135]

In judging the validity of floodway and floodplain regulations, the consideration of cumulative impacts has been a factor.[136] The courts realize that although an individual use under consideration may have minimal impacts if considered in isolation, the cumulative impact of many such uses can have several detrimental impacts justifying regulation.[137] A comprehensive and expert assessment of those

impacts, though, seems needed.[138] Regulations are more likely to be upheld where they implement a comprehensive flood management study.[139] Moratoria or interim controls pending the development of such plans may be justified.[140]

Expensive engineering flood studies are not necessarily required. Historic evidence of flooding may justify regulation.[141] Regulation may also be based on case-by-case analysis.[142] If there is no evidence that the regulated land is subject to flooding, though, a court is likely to find floodplain regulations unreasonable.[143] Minor inaccuracies in mapping, however, are not fatal to the regulation if procedures exist for correcting errors.[144]

Balanced against these public interest considerations are the economic losses borne by regulated landowners. The extent to which the value or usability of land is diminished is a major factor in evaluating the reasonableness of regulation. Where cases have invalidated flood management regulations, it has frequently been on the basis that a challenging landowner has been excessively deprived of property value.[145] Substantial diminution in value, though, has been sustained.[146] In this regard, analysis for substantive due process overlaps the taking issue, which is discussed in Part V below.

A Florida case supporting the reasonableness of restrictions on land use for flood management purposes is Orange County v. Butler Estates.[147] That case involved review of a local zoning decision. The total area of the tract was 135 acres. Of this, 38 acres were deemed by the local government to be unsuitable for development because of flooding, and the allowable density was accordingly reduced. The developers claimed that density comparable to that of an

adjacent tract should have been allowed. The Fourth District Court of Appeal held such a determination was within the discretion of the local governing body. In view of "evidence the two properties were dissimilar in regard to soil types and flood prone areas,"[148] the decision was "fairly debatable and therefore proper."[149]

Another Florida decision upholding stringent land use controls in a floodplain is Smith v. City of Clearwater,[150] decided by the Second District Court of Appeal. The landowners in Smith owned property adjoining upper Tampa Bay. Part of the land was mangrove swamp and part was higher. All of it had been zoned to allow 34 residential units per acre. As the owners were preparing plans for highrise development, the city rezoned the land. Part of the land was rezoned to allow, in effect, 2.2 units per acre. Over half of the land was wetlands and put in an aquatic lands category, effectively limiting the use to recreational pursuits. In addition, the entire property was in a floodplain district, which required the elevation of residences to be at least 11 feet above mean high water. The net effect of these restrictions was to limit use of the land to a few residential units set high on stilts back from the wetland areas. The landowners claimed such restrictions were "void as being capricious, arbitrary, unreasonable, and confiscatory." The court disagreed and held the challengers had failed to prove the downzoning was not fairly debatable.

8. River Corridor Regulation

Local governments may regulate in river corridors for reasons that go beyond flood management. For example, in Pope v. City of Atlanta,[151]

the challenged ordinance restricted land uses to those uses "not harmful to the water and land resources of the stream corridor...[which do not] significantly impede the natural flow of flood waters, and [which] will not result in significant land erosion, stream bank erosion, siltation or water pollution."[152] The Georgia Supreme Court upheld the ordinance based on its findings that it promoted important public interests:[153]

> The interests advanced by the City of Atlanta for these restrictions on appellant's property relate to the public health and safety. Sediment is a major pollutant in the Chattahoochee River. Soil erosion not only damages the land, but the soil carried into the river increases the cost of water treatment and reduces channel capacity, resulting in an increased risk of flooding.
>
> * * *
>
> Clearing vegetation, grading or cut and fill operations which alter the natural elevation or slope of the land may increase surface water run-off and soil erosion. Further, the construction of impervious structures in the flood plain or within 150 feet of the watercourse means that rain water can not be absorbed by the earth. Surface water run-off, soil erosion and the risk of flooding are thus increased.
>
> * * *
>
> Requiring permits for grading and vegetation clearance, prohibiting cut and fill operations which alter the natural elevation and limiting the construction of impervious structures are reasonable means of guarding against the dangers of soil erosion, sedimentation and increased flooding.

9. Stormwater Runoff Control

Local stormwater runoff regulations have been upheld as legitimate exercises of the police power. For example, in Brown v. City of Joliet,[154] an Illinois appellate court upheld a local government's

denial of a subdivision plat because the plat did not adequately provide for stormwater runoff. The local government presented evidence that runoff from the proposed subdivision would create various problems for surrounding areas. The court held that prevention of such problems justified imposing added costs upon the developer of the subdivision.[155]

10. Soil Erosion Controls

Restrictions on the use of land and added costs to the landowner may be imposed for the purpose of preventing soil erosion. In Woodbury Cty. Soil Conservation Dist. v. Ortner,[156] the Iowa Supreme Court ruled that it was not unconstitutional to force a landowner to permanently seed or terrace his land to reduce erosion.[157]

11. Regulations Based on Cumulative Impacts

Local governments must often justify their environmental regulations including coastal zone ordinances on the cumulative impact of many relatively harmless acts. For example, in Pope v. City of Atlanta,[161] the landowner argued that construction of a tennis court within the designated river corridor of the Chattahoocheee River would not harm the public. The court responded:[162]

> When the state's interests in preventing flooding, halting land erosion and protecting the water supply are weighed against appellant's interest in constructing her tennis court within 150 feet of the river, the state's interests weigh heavier in the balance. The danger which flows from overintensive stream corridor development may render some property unsuitable for development, and the state is entitled to recognize this fact. Although one tennis court might affect the river only slightly, the state is justified in considering the cumulative effect of development when it makes land use plans.

An ordinance involving land subsidence in the coastal zone was at issue in Beckendorff v. Harris-Galveston Coastal Subsidence

District.[163] In that case, the amount of water drawn from individual wells was regulated in order to alleviate the subsidence problem. The Texas court upheld the regulatory program, saying:[164]

> The evidence produced during the trial of this case shows that the Legislature could have properly concluded that appellants' wells contributed to the subsidence which causes flooding. The contention that this contribution standing alone would not have caused the problem or that the contribution was small, is not sufficient rebuttal. An individual's action may be lawfully regulated when it works in concert with others' actions to produce an effect, even though the individual action of itself would be incapable of producing the effect, or is de minimus.

12. Coastal Wetlands Regulations

Prohibiting the destruction or alteration of wetlands to protect coastal values has been held to be a valid local government activity. The leading case in Florida is Graham v. Estuary Properties, Inc.,[162] where the landowner was prohibited from altering large areas of black and red mangrove wetlands. The Florida Supreme Court held that such regulation was valid in order to prevent harm to the public in the form of pollution of coastal waters.[163]

Courts in other states have held likewise. In Sibson v. State,[164] the New Hampshire Supreme Court upheld the denial of a permit to fill a salt marsh. The landowner had already legally filled two acres of an eight-acre marsh and had built a house on the fill. The court held that the landowner could be denied the right to fill the remaining six acres in order to preserve the value of the wetlands to the coastal environment.[165]

In Potomac Sand and Gravel Co. v. Governor of Maryland,[166] the Maryland high court upheld the denial of a permit which would have

allowed dredging for sand and gravel in wetlands of the Potomac River. The court ruled that this restriction on use was valid in order to protect fish spawning grounds and rare native vegetation, and to prevent water pollution.[167]

Similar decisions regarding wetlands regulations have been handed down by the New Jersey Superior Court in American Dredging Co. v. State, Dept. of Environmental Protection,[168] by the Wisconsin Supreme Court in Just v. Marinette County,[169] by the Rhode Island Supreme Court in State v. Capuano Bros., Inc.,[170] and by the California First District Court of Appeal in Candlestick Properties, Inc. v. San Francisco Bay Conservation and Development Commission.[171]

13. Protection of Waterbodies

Dredging may be prohibited to protect waterbodies from both temporary and long-term effects. In the Mayor and Aldermen of the City of Annapolis v. Annapolis Waterfront Company,[172] denial of a permit to build 42 additional slips at an Annapolis waterfront development was upheld, in part, because of increased turbidity during the period of construction, which might increase eutrophication of the creek involved. Increased navigational congestion, an increase in the amount of surface runoff water resulting from loss of permeable soil to the slips, and increased waste discharge from the boats were also considered.

14. Regulations to Protect Water Supply

A local government may prevent destruction or alteration of coastal features in order to protect the drinking water supply. In Lovequist v. Conservation Com'n of Town of Dennis,[173] a developer

posed to build a road across a marsh area by removing 6,000 cubic yards of peat - amounting to twenty percent of the marsh - and replacing it with sand and gravel. The local conservation commission denied the permit and the court upheld its action, saying:

> On the basis of these facts, the commission could properly find that the result of replacing the relatively impermeable peat with more permeable materials, through which groundwater could flow, would be a permanent groundwater loss for the town. All parties agreed that the water source on the plaintiffs' property is part of a much larger and important groundwater supply located in underground reservoirs throughout the adjoining area. Thus, the effect of the excavation could be aptly analogized, as one of the witnesses before the commission so stated, to "taking the plug out of a bathtub." Having held that the protection of groundwater is a valid public interest, [citation omitted], we think the commission did not act improperly in denying the plaintiffs permission for the proposed road construction.

15. Regulations to Protect Fish and Wildlife

A local government may regulate to protect coastal habitats and ecosystems. This protection usually takes the form of regulations to protect particular coastal or inland areas such as wetlands, river corridors, dunes and saltmarshes. These types of regulations are discussed in other sections of this paper, but one example will be given here. In Potomac Sand and Gravel Co. v. Governor of Maryland,[174] the court upheld the denial of a dredging permit due to the deleterious impact on wildlife and native vegetation that would be caused by the proposed disruption of the wetlands. The local government, as shown by the following quotation from the court's opinion, effectively presented evidence showing the connection between dredging and habitat destruction.[175]

It has already been noted that the sites in question support such species of fish as herring, American shad, hickory shad, striped bass, white perch and el perch, among others. These fish are sources for commercial fishing and sport fishing throughout Maryland. The testimony is undisputed that dredging would irreparably destroy the immediate marsh habitat, converting it into a deep-water habitat. Consequently, those anadromous fish which spawn in shallow waters and which instinctively return each year to the same spawning areas would be deprived of such spawning areas with a concomitant loss of the benefits of their reproductive process.

There was testimony that rare native vegetation at Mattawoman Creek would be destroyed by these particular dredging operations. Dredging increases the water's turbidity. Turbidity is the suspension of dirt particles in the water. A high turbidity reduces the amount of sunlight which reaches aquatic plants, which, through photosynthesis, produce oxygen for fish. The plants themselves are a food source for fish which would be reduced both due to the failure of plants to reproduce and by the smothering of plants by dirt particles.

Testimony also showed that Mattawoman Creek supports a declining but still substantial wildlife which would be frightened away by dredging noises as well as driven away by a loss of an accessible food supply. At Craney Island the diving ducks would be unable to readily retrieve their food fifty feet below the surface.

16. Regulations to Protect Public Safety

Protection of public safety in the coastal zone is a valid regulatory objective of local government. This is most often accomplished through the flood management techniques discussed in previous sections of this paper. Usdin v. State, Dept. of Environmental Protection[176] upheld the validity of a flood management ordinance on the ground that its purpose was to prevent injury during a flood to persons using the proposed structure and to others in the vicinity.[177] Construction has

been validly prohibited where such would raise the level of flood waters, thus endangering the public safety.[178]

D. Judicial Review For Substantive Due Process

In reviewing the enactments of local governments for compliance with substantive due process, the courts are governed by several closely related rules. These are the "presumption of validity", the "fairly debatable" rule and the "substantial relationship" rule. Although each is theoretically distinct, in application they have been so intermixed and confused by judicial decision that they can best be understood in the context of the language used by the courts.

In Euclid v. Ambler Realty Co.,[179] the landmark case establishing the constitutionality of zoning, the U. S. Supreme Court premised its holding by stating that if valid, the ordinance, like all similar regulatory laws, would have to find justification in the police power asserted for the public welfare.[180] The Court then laid down principles which have become the foundation for both the "fairly debatable" rule and the "substantial relationship" test. The Court held:[181]

> If the validity of the legislative classification be fairly debatable, the legislative judgment must be allowed to control. (Emphasis added.)
>
> * * *
>
> [B]efore the ordinance can be declared unconstitutional, (it must be shown) that such provisions are clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, morals or general welfare. (Emphasis added.)[182]

The Euclid court refused to go further than upholding the per se constitutionality of zoning against a due process attack, preferring to reserve judgment on the due process constitutionality of an ordi-

nance as applied until it was presented by an appropriate case.[183] Two years later, in Nectow v. City of Cambridge,[184] the Court decided an "as applied" case. After quoting the "substantial relationship" language of Euclid, the Court held the ordinance in question to be a denial of due process as applied to the plaintiff property owner. According to the Court, neither the health, safety, convenience nor general welfare of the part of the city affected would be promoted by applying the ordinance to the property.[185]

With one exception,[186] between 1928 and 1974, the Supreme Court did not review the substance of any land use ordinances. The formulations found in Euclid and Nectow thus became the basis for case-by-case development in the state courts of the constitutional limits of zoning power, and the parameters of the "substantial relationship" test and the "fairly debatable" rule.[187] The decisions of the Florida courts reflect the uncertainty of state courts in attempting to apply the concepts.

Florida courts, in addressing the validity of a regulation in terms of its relationship to valid police power objectives, have in most cases linked together the "substantial relationship" rule[188] and the "fairly debatable" rule.[189] Thus, the simplest means of understanding them is as interlocking rules which the courts use together to determine the validity of an ordinance.[190] The Florida Supreme Court, as early as 1931, stated that the courts should not disturb an ordinance "unless it clearly appears that it has no foundation in reason and is merely an arbitrary or irrational exercise of power having no substantial relationship to the general welfare."[191] Since that time, Florida courts have consistently decided the police power

question in light of the fairly debatable rule.[192] If an ordinance has no "substantial relationship" to the public health, welfare, safety, or morals, it is considered invalid and not "fairly debatable."[193]

A concept which must be considered together with the "fairly debatable" rule and the "substantial relationship" test is the "presumption of validity" afforded legislative enactments by the courts.[194] As legislative acts, land use regulations are presumed to be constitutional and valid. The presumption of constitutionality attaches to every duly enacted ordinance, and the attacking litigant has the burden of proving invalidity.[195] As the U. S. Supreme Court has stated:[196]

> Every possible presumption...is in favor of the validity of a statute, and this continues until the contrary is shown beyond a reasonable doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this statutory rule.

Ordinances are presumed valid in Florida both on their face and as applied to a particular property. In either case, the litigant contesting the ordinance has the heavy or "extraordinary" burden of proving invalidity.[197] Concerning facial validity, the Florida courts have held that ordinances are presumed to be valid enactments,[198] that courts are to presume that a reasonable and legal classification of land was intended by a zoning ordinance,[199] and that the very adoption of an ordinance raises the presumption that it is in furtherance of the police power.[200] The burden is not on the governing body to prove the facial validity of an ordinance; rather, the contesting litigant bears the burden of proving its invalidity.[201]

The same rule applies when reviewing the application of an ordinance to a particular site. A recent decision of the First District Court of Appeal illustrates this approach.[202] In upholding a local government's denial of rezoning of appellee's property from a residential to a commercial category, the court reiterated a 1978 Florida Supreme Court statement that "zoning or rezoning is the function of the appropriate zoning authority and not the courts."[203] The opinion also pointed out that:[204]

> If application of a zoning classification to a specific parcel of property is reasonably subject to disagreement, that is, if its application is fairly debatable, then the application of the ordinance by the zoning authority should not be disturbed by the courts.

In practice, then, the Florida courts have intermingled the "substantial relationship" rule and the "fairly debatable" rule with the "presumption of validity" concept. One commentator has succinctly summed up the interrelationship of these concepts: "To satisfy a court that an ordinance is invalid, then, the landowner must prove that it is not fairly debatable that a substantial relationship between the ordinance and a valid exercise of the police power exists."[205] This is an extraordinarily heavy burden.

V. THE TAKING CLAUSE

A. Introduction

Strict regulation of land use within the coastal zone is likely to lead to challenges based on the taking clause of the U.S. Constitution.[206] Taking, in the land use context, ordinarily refers to the physical invasion or appropriation of land by a governmental body with condemnation authority. Land use regulations are usually

held to be exercises of the state's police power, not requiring compensation; invalidation of any constitutional regulation is the traditional remedy. However, an overly restrictive regulation which does not meet the tests discussed below may give rise to a constitutional challenge that a taking has occurred, and that compensation should be paid. The extent, however, to which local governments are limited by the taking clause is often exaggerated: few recent cases have invalidated coastal management regulation as a "taking" of property. To the contrary, stringent restrictions causing substantial diminution of property values have been sustained where necessary to protect the public interest from the effects of harmful land development. This is not to say that the taking issue should be ignored, or that the constitutional protections do not significantly restrain regulation, but rather that needed restrictions should not be withheld because of unreasonable fear of "taking" regulated lands.

Perhaps no area of constitutional law is as poorly defined. A single phrase provides the basis for discussion. The Fifth Amendment to the U.S. Constitution states, "nor shall private property be taken for public use without just compensation."[207] Although a land use ordinance does not transfer ownership of regulated land to the government, but merely regulates the use, it is subject to challenge as a taking. The allegation in litigation attempting to establish a taking is that the challenged regulation so restricts the owner's use of property that it effectively amounts to an expropriation of the owner's interest and should be treated as such by law. The result is that government must erase the restriction or purchase the property, and in some states, pay monetary damages.[208]

One confusing aspect of the taking issue is its relationship to substantive due process. The courts do not clearly distinguish the two concepts. Several statements may be safely made. It is a denial of due process to "take" property without compensation. In determining whether a "taking" has occurred, the courts balance many of the same factors they use to determine compliance with the due process clause, with more emphasis given to diminution in value as a factor.

B. Historical Background

The taking clause of the Fifth Amendment seems to have been included in the Bill of Rights as a protection against arbitrary and uncompensated seizures of private property.[209] English kings apparently had a propensity for arbitrarily seizing the lands of their subjects in order to raise funds. During the Revolutionary War, property was frequently impressed. The Fifth Amendment was intended to limit such activities by requiring authorization by the legislature and compensation.

For well over a hundred years, the taking clause was held to extend only to cases where the government took actual, physical possession or title to land in order to use it for some public purpose such as building a road.[210] Regulation, under this view, could not effect a taking. In fact, very burdensome regulations were quite commonly imposed on owners of property.[211] Although the U.S. Supreme Court doesn't seem to have considered the scope of the compensation clause during this period, state courts did address it.[212] One noteworthy case, Commonwealth v. Tewksbury,[213] was decided by the Supreme Judicial Court of Massachusetts in 1846. The case involved a

challenge by a landowner to a statute that prohibited the removal of stones, sand or gravel from beaches in a certain town. The landowner contended this restriction amounted to a taking.

The legislation had been enacted to preserve the integrity of natural beaches that formed and protected the harbor of Boston. A narrow strip of land protecting the harbor of Plymouth Beach had been breached some years before, after the owner had cleared it of trees. The public had born great expense to reconstruct it by artificial means. The court therefore recognized that "the protection and preservation of beaches, in situations where they form the natural embankments to public ports and harbors, and navigable streams, is obviously of great public importance."[214] Accordingly, the court held:[215]

> [S]uch a law is not a taking of the property for public use, within the meaning of the constitution, but is a just and legitimate exercise of the power of the legislature to regulate and restrain such particular use of property as would be inconsistent with, or injurious to the rights of the public.

C. Taking Analysis by the U.S. Supreme Court

1. Taking By Physical Invasion

In the case of Pumpelly v. Green Bay Co.,[216] decided in 1871, the U.S. Supreme Court significantly expanded the limits of action that could constitute a taking. The Green Bay and Mississippi Canal Company had built a dam, pursuant to authorization by the State of Wisconsin, across a navigable river. The dam raised the waters of the river:

> ...[so] high as to forcibly and with violence overflow all (of the plaintiff's) land,...the water coming with such violence...as to tear up his trees and grass by the roots, and wash them with his hay by tons away, to choke up his drains and fill up

> his ditches, to saturate some of his lands with water, and to dirty and injure other parts by bringing and leaving on them deposits of sand....[217]

Accepting these facts as true, the Supreme Court held that "where real estate is actually invaded by super-induced additions of water, earth, sand or other material, or by having an artificial structure placed on it so as to effectually destroy or impair its usefulness, it is a taking."[218]

Subsequent cases have clearly established that government action that increases flooding above natural levels will constitute a taking.[219] Other types of physical invasion may also give rise to such a claim. Overflights by noisy aircraft, for example, may take a partial interest in land,[220] as may allowing the public to navigate a privately owned waterway.[221]

Very significant levels of uncompensated damage by physical invasion have been allowed, however, where important public interests were involved. For example, in Bedford v. U.S.,[222] erosion control measures constructed along the banks of the Mississippi River by the Army Corps of Engineers had interfered with natural patterns to such an extent as to increase erosion of the plaintiff's land. The Court held that the invasion was "consequential damage," not a compensable appropriation.

2. Regulatory Takings

(a) Mugler v. Kansas

The issue of whether regulation without physical invasion could ever effect a taking was first thoroughly analyzed by the Supreme Court in Mugler v. Kansas,[223] decided in 1887. Mugler owned a

brewery. Kansas enacted a law prohibiting the manufacture of alcoholic beverages, greatly devaluing that property. Mugler claimed the law was invalid because it constituted a taking of his property without compensation and a denial of due process of law. The Supreme Court disagreed and in a strong opinion by Justice Harlan, upheld the power of states to regulate the use of private property.

The constitutional guarantee, wrote Justice Harlan, "has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."[224]

Justice Harlan perceived a clear distinction between the power of eminent domain and the police power. Eminent domain, which must be compensated, involves the seizure of private property or the devotion of it to some use by the public. Police power regulation involves a restriction on the owner's use of property to protect valid public interests. He wrote:[225]

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interest....The power which the states have of prohibiting such use by individuals of their property, as will be prejudicial to the health, the morals, or the safety of the public, is not, and consistently with the existence and safety of organized society, cannot be, burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.

> The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner. It is true, when the defendants in these cases purchased or erected their breweries, the laws of the state did not forbid the manufacture of intoxicating liquors. But the state did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged.

This position was reinforced in subsequent cases.[226] Hadacheck v. Sebastian,[227] for example, involved a Los Angeles city ordinance which forbade brickmaking in certain parts of the city. The petitioner owned land containing a bed of clay which he used for making bricks. The land was worth about $800,000 for brick making purposes, but was virtually useless for any other purposes because of excavations he had made.[228] The City of Los Angeles passed an ordinance prohibiting brickmaking, which the petitioner claimed was a taking of his property. The Court held that because of the "effect upon the health and comfort of the community," the city could prohibit brick making under its police powers.[229] The Court remarked:[230]

> It is to be remembered that we are dealing with one of the most essential powers of government, one that is least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation on it when not exerted arbitrarily.

(b) Pennsylvania Coal v. Mahon

In 1922, a new dimension was added to taking analysis by Justice Holmes, who wrote the majority opinion in Pennsylvania Coal Co. v.

Mahon.[231] The case arose in the coal mining regions of Pennsylvania where expanding underground mining had caused extensive surface subsidence problems.[232] Most landowners had bought their property from the coal companies, who had inserted covenants in the deeds restricting private rights not to have the land undermined. The legislature had thereafter prohibited the mining of coal beneath inhabited buildings. When a homeowner sought to enjoin a coal company from mining beneath his home, the company responded by claiming the statute was an unconstitutional deprivation of its mineral rights. The Supreme Court agreed and held the regulation was invalid as an uncompensated taking.

Justice Holmes, writing for the majority, sketched a new approach to the taking issue, one that gave more weight to the impact of regulation on property owners. First, he noted:[233]

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power.

But the police power also had limits, he said:[234]

> One fact for consideration in determining such limits is the extent of diminution [of value]. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts.

The "general rule" developed by Holmes was that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[235] Applying these concepts to the case at issue, the Court determined that since the coal company's mineral rights had been effectively extinguished by the statute, it was an invalid taking.

Considerable confusion has resulted from the diminution in value test enunciated in Pennsylvania Coal. A common misconception is that diminution in value is the only factor to look at in determining whether a taking has occurred. Although Justice Holmes indicated that diminution in value was only one consideration to be used in analyzing the facts of a particular case, he failed to articulate what those other considerations might be. His test, instead, looked to a conclusion--if regulation goes "too far" it will be a taking--and gave no guidance for determining when it had gone "too far". Finally, despite an apparent conflict in approach to the resolution of taking issues, Holmes never cited or discussed, much less properly overruled, Mugler v. Kansas.

The continuing validity of Mugler is demonstrated by a case decided only six years after Pennsylvania Coal. Miller v. Schoene[236] involved the literal destruction of private property--red cedar trees. Virginia had passed a statute requiring the destruction of red cedar trees that were found to be infected by cedar rust. Although cedar rust is not harmful to cedar trees, it may be transported by wind to apple trees on which it destroys the fruit and foliage. The plaintiff in Miller owned cedar trees which were destroyed pursuant to the statute. He claimed they had been taken without compensation. The Court first noted that apple orchards have a relatively greater economic value than ornamental cedar trees. In effect, the state had been forced to choose between the preservation of one or the other. The exercise of such a choice, the Court held, does not constitute a taking:[237]

> The state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which,

> in the judgment of the legislature, is of greater value to the public. It will not do to say that the case is merely one of a conflict of two private interests and that the misfortune of the apple growers may not be shifted to cedar owners by ordering the destruction of their property; for it is obvious that there may be, and here there is, a preponderant public concern in the preservation of the one interest over the other...And where the public interest is involved, preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property....We need not weigh with nicety the question whether the infected cedar trees constitute a nuisance according to the common law; or whether they may be so declared by statute....For where, as here, the choice is unavoidable, we cannot say that its exercise, controlled by considerations of social policy which are not unreasonable, involves any denial of due process.

Just as the Court in Pennsylvania Coal had ignored Mugler, the Court in Miller ignored Pennsylvania Coal. It failed to explain the distinction between choosing apple trees over cedar trees and choosing inhabited buildings over coal mining rights.

(c) Recent decisions

Subsequent decisions of the Court failed to resolve the inherent tension between Mugler and Pennsylvania Coal. The next major case to analyze the taking issue was Goldblatt v. Town of Hempstead,[238] decided in 1962. The town had enacted an ordinance to prohibit mining without a permit and require the filling of existing excavations below the water table. Permits for future mining would only be granted if excavations did not extend below the water table and if stringent berm, slope and fence requirements were met.[239] The effect was to prohibit further mining.

The plaintiff, owner of a sand and gravel mine, brought suit claiming the ordinance was a taking. The Court linked together Mugler

and Pennsylvania Coal in its analysis. It first quoted at length three sections of Mugler indicating that a police power restriction intended to curb harmful behavior can never be a taking,[240] but then indicated that regulation could constitute a taking if sufficiently onerous.[241] In making this determination, though, the Court noted, "there is no set formula to determine where regulation ends and taking begins. Although a comparison of values before and after is relevant...it is by no means conclusive."[242] Because the plaintiff had introduced no evidence as to diminution of value, however, the Court found no taking.

The Supreme Court's most recent, thorough treatment of the taking issue is in Penn Central Transportation Co. v. New York City,[243] involving a challenge to New York City's historic landmark protection ordinance by the owner of Grand Central Station. The station had been designated as a historic landmark under that ordinance, which gave the city a right to prevent alterations of the structure that would be incompatible with its architectural values. The ordinance also gave owners of landmark property development rights that could be transferred to other sites. When the city rejected plans to cantilever a 50-story addition over the landmark, the owner filed suit claiming a taking.

The opinion thoroughly reviews taking law. The determination of what constitutes a taking "has proved to be a problem of considerable difficulty,"[244] acknowledged the Court, and no "set formula"[245] has been developed. Taking cases have been decided on an "essentially ad hoc, factual"[246] basis and their resolution has depended "largely upon the particular circumstances."[247] The ultimate goal has been to

determine where "justice and fairness require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[248]

The Court identified several factors used in determining whether a taking has occurred. One is economic impact on the regulated landowner and "particularly, the extent to which the regulation has interfered with distinct investment-backed expectations."[249] The other is the character of government action. A "physical invasion" of land by the government is more likely to result in a taking than "some public program adjusting the benefits and burdens of economic life to promote the common good."[250]

The Court then reviewed a number of instances where governmental action adversely affecting recognized economic values had been upheld. Taxing, for example, does not "take" property.[251] Nor does governmental interference with interests that are not "sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes."[252] Private interests in navigable waters, for example, are not a property right in this sense. Land use regulations are a third example:[253]

> [I]n instances in which a state tribunal reasonably concluded that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land, this court has upheld land use regulations that destroyed or adversely affected recognized real property interests.

Nevertheless, the Court also recognized the continuing validity of the proposition set forth in Pennsylvania Coal, that otherwise valid regulation "may so frustrate distinct investment-backed expectations as to amount to a 'taking'."[254] In addition, the Court noted,

"government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute [a] 'taking.'"[255]

After reviewing these principles, the Court analyzed the facts at issue and determined there had been no taking. Several factors were influential. First, the property interest of the owners had not been destroyed, but merely diminished. The existing use of the property was not affected by the regulation. The owners of Grand Central Station could continue using it as it had been used for 65 years.[256] Furthermore, a lower court had found this use allowed a "reasonable return" on the investment.[257] Although the owners argued in favor of a taking because their use of the air above the terminal had been completely denied, the Court rejected this approach:[258]

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.

The parcel, as a whole, was still useful.[259] Second, the financial impact of regulation was mitigated by transferable development rights.[260] The owners were able to increase density on adjacent tracts of land by exercising these rights. Although the transferable development rights might not serve as "just compensation" in place of money, had a taking occurred, they were sufficiently valuable to mitigate the effects of regulation and thereby help to avoid creation of a taking.[261] Third, although a permit to build the desired structure had been denied, there was a possibility of receiving a permit in the future to construct some alternative consistent with the regulatory standards."[262]

Although Penn Central summarizes the status of the law in this area, it fails to resolve the inherent conflict between Mugler and Pennsylvania Coal. Regulation may severely devalue or even destroy private property in certain instances, depending on the facts and circumstances of the case. In other instances, under other facts and circumstances, governmental action that devalues property may result in a taking. The distinction between valid regulation and invalid expropriation is made by an ad hoc balancing of the public interest served by regulation versus the private benefits and harms that result.

Two more recent decisions give little further guidance. Agins v. City of Tiburon[263] involved a challenge to the facial validity of an ordinance limiting the density of expensive residential property from one to five units per acre in order to preserve "open space." The landowners claimed enactment of the ordinance constituted a taking of their property. The U.S. Supreme Court disagreed, citing several factors. First, the ordinance substantially advanced "legitimate governmental goals."[264] The conversion of open space to urban use has numerous "resultant adverse impacts" such as noise, water pollution, destruction of scenic beauty, disruption of the environment and increased flood hazards.[265] Lowered density and careful review of development plans help to avoid those impacts. Second, the owners of the land at issue would share with other landowners the benefits and burdens of such regulation. They were not unfairly targeted.[266] Finally, substantial use of the property was possible. The landowners could submit a development plan and, conceivably, receive permission to build as many as five houses on the land.[267] Consequently, there was no taking.

No majority decision was reached on the merits in San Diego Gas & Electric Company v. San Diego,[268] involving a claimed taking resulting from the downgrading of portions of the utility's coastal property to open space uses. A majority of the U.S. Supreme Court declined to decide the issue, ruling that the Court had no jurisdiction due to lack of a final judgment below.[269] Justice Brennan dissented, arguing that the Court did have jurisdiction, and that it was illogical to distinguish between the effects and remedies for physical takings, and excessive regulatory authority.[270]

> Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it. From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property. Appellees implicitly posit the distinction that the government intends to take property through condemnation or physical invasion whereas it does not through police power regulations.... But "the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does." ...It is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a "taking", and therefore a de facto exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property.

Three other Justices joined in the dissent.[271] Justice Rehnquist, in a concurring opinion, stated that he would "have little difficulty in agreeing with much of what is said in the dissenting opinion.[272]

Although it is not known with which parts of the dissent he agrees, Justice Rehnquist stated himself ready to "formulate federal constitutional principles of damages for land-use regulation which amounts to a taking."[273]

Thus, further erosion of the distinction between a regulatory exercise of the police power and the exercise of eminent domain seemed possible. However, in 1985 the issue again came before the Court in Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,[274] involving a taking claim resulting from restrictions on the development of a subdivision. The claim was rejected on procedural grounds--there had been no final agency action so that a taking claim was not ripe and the landowner had failed to seek compensation through available state procedures. The Court took the opportunity, though, to set forth an alternative theory to that expressed by Justice Brennan in his San Diego Gas dissent regarding whether damages for a regulatory taking are constitutionally mandated.

The local planning commission argued that a regulation which is unconstitutionally oppressive violates the due process clause, which need not be remedied by just compensation, rather than the Fifth Amendment.[275] In response, the Court noted that in Pennsylvania Coal and earlier opinions authored by Justice Holmes, "the Court did not view overly restrictive regulation as triggering an award of compensation, but as an invalid means of accomplishing what constitutionally can be accomplished only through the exercise of eminent domain."[276] Justice Stevens, in a concurring opinion, stated that once a regulation is seen as unconstitutionally excessive, "there is nothing in the Constitution that prevents the Government from electing to abandon the

permanent-harm-causing regulation."[277] Thus, a taking would be avoided.

The opinion also referred to the standard for determining whether a taking has occurred in less absolute terms than in earlier decisions. The economic impact of regulation on reasonable investment-backed expectations is referred to as "among the factors of particular significance in the inquiry."[278]

Resolution of these issues must await a future decision. A taking case is again before the Court.[279] Clear rules of decision may never be articulated. The ad hoc balancing of public interest factors versus the impact on regulated property owners is likely to continue, as will the debate and stream of writings on the subject.[280] The next section will examine a number of "tests" or factors that have been used by the courts in resolving taking challenges to land use regulations.

D. Factors in Taking Analysis

The determination of when a coastal regulation becomes a taking of private property is not a simple matter. An ad hoc inquiry must always be made and the outcome depends on the particular facts and circumstances of the case. A number of factors have influenced the courts. Most opinions reflect a balancing of the factors and the use of several tests.[281] This section will summarize the relevant factors.

1. Diminution in Value

The effect of regulation on the monetary value of property is clearly a major factor in taking analysis. The importance of diminution in value was emphasized in Pennsylvania Coal.[282] Decisions that

have invalidated land use regulations as takings have done so primarily because property values were too severely depressed.[283]

The law is clear, however, that diminution in the value of regulated property does not, in and of itself, establish a taking.[284] It is only one factor to be considered by the courts. In fact, numerous decisions have sustained stringent regulations against taking challenges even though property values were very substantially reduced. In Euclid v. Ambler Realty Co.,[285] zoning was upheld despite a 75 percent diminution of value. The owner of the regulated brickworks in Hadacheck v. Sebastian[286] sustained a 93 percent loss in the value of his property (from $800,000 to $60,000), yet the regulation was sustained. The practical effect of Goldblatt v. Town of Hempstead,[287] was to prohibit further operation of a rock and gravel mine. In Miller v. Schoene,[288] the regulated property, cedar trees, was completely destroyed.

2. Reasonable Use Test

Another factor in judging the effects of regulation is to look, not at the extent of diminution, but at whether any reasonable use remains after regulation.[289] A taking only occurs when there has been a virtual destruction of the property interest by regulation.[290] In determining whether such a total destruction has occurred, the courts look to possible remaining uses. If the potential exists for the owner to make some reasonable use of the regulated property, then no taking will be found.[291] Such a possibility is inherent to most permitting systems. Denial of a permit does not preclude the possibility that a property owner may be able to return in the future with an

alternative plan that meets the requirements of the regulation and obtain a permit.[292] Thus, denial of a permit, it may be argued, does not destroy the value of property.

In determining whether reasonable potential uses for a regulated parcel of land remain, the courts have determined in some cases that indigenous uses are reasonable uses in view of the public harms that would result from more intensive development. Thus, regulations that prohibit most forms of development, but allow such uses as woodland, grassland, wetland, agriculture, horticulture, recreation, open space, density credit transfer, nature trails, scenic vista, hunting, fishing, and wildlife observation have been held not to deny all reasonable use.[293]

The reasonableness of a proposed use may also be evaluated. If the property owner is proposing an unreasonable use of the regulated land, then denial of a permit does not prohibit all reasonable use. From this perspective, courts have held that construction of residential structures in flood prone areas is not a reasonable use of land.[294] Filling wetlands, destruction of sand dunes, pollution of public waters, and other such harmful activities may also be considered unreasonable uses of land, the denial of which, therefore, does not deny reasonable use of land, but merely requires the owner to act reasonably.[295]

Another qualification to the reasonable use test is that the entire parcel of property owned by the challenger is examined for reasonable remaining uses, not just the regulated portion.[296] If a parcel contains both wetlands and upland, for example, and development of wetlands is restricted, the courts take into account whatever uses

might be allowed of the uplands in determining whether sufficient reasonable uses remain for the parcel as a whole.[297]

3. Harm/Benefit Test

Courts frequently distinguish valid regulation from invalid expropriation by the application of a "harm/benefit" test.[298] If the purpose of regulation is to protect the public from the harmful effects of the prohibited use, it is a valid exercise of the police power.[299] Restraint of an unreasonable use to prevent a public harm does not constitute a taking.[300] If, on the other hand, the purpose is to acquire some benefit for the public that it could not otherwise enjoy, acquisition of that interest without compensation may be treated as a "taking". The use of land in a manner that creates flood hazards has frequently been found to be the creation of a public harm or an injurious use of property that may be prohibited.[301]

The difficulty with this test is that it invites conclusory reasoning. Harm and benefit are essentially two sides of the same coin. An action designed to prevent a harm may also be characterized as providing a benefit. For example, a flood management ordinance may be characterized as conferring a benefit on the community, i.e., use of an owner's land as a water retention area[302] or, alternatively, as preventing a harm, i.e., prevention of harmful interference with flood water storage.[303] If the regulation may be characterized as acquiring for the public some right that it had not previously enjoyed, then it is more likely to be held a taking. By this reasoning, the public would be entitled to continue enjoying the "benefit" of not having flood waters obstructed, displaced or otherwise altered to the harm of

public interests, and appropriate regulatory action would be characterized as the prevention of harm. If regulation required landowners to store on their property more water than would have naturally occurred there, the public would be acquiring the benefit of new and additional flood storage capacity and the regulations would be legally treated as a taking.[304]

4. Nuisance-like Effects

Preventing one landowner from causing harm to others is an ancient, well-established goal of the legal system. The Latin maxim, Sic utere tuo ut alienum non laedas, meaning "Use your own property in such a manner as not to injure that of another," expresses the basis for the common law of nuisance. Nuisance law constrains landowners in the use of their property. The common law has long been available to restrain landowners who increase flooding[305] or cause pollution to public or private lands or waters.[306] Regulation that prevents landowners from causing nuisance-like effects merely enforces the common law principles.[307] Regulation that prevents harmful uses of property does not, therefore, take property because there was never any property right to cause harm in the first place.[308] For example, denial of a permit to use an individual sewage disposal system on the grounds that it presented potential harm to the surrounding marsh environment, through the introduction of nitrogen, nitrates and phosphates and because of not-uncommon maintenance problems, was upheld against a claim of taking in Milardo v. Coastal Resources Management Council. The Rhode Island Supreme Court held:[309]

> In essence, plaintiff is asserting a right not only to use his property but also to discharge waste into the surrounding area. This is a "property right" that this court has refused to recognize....

5. Reciprocal Benefits

A regulation is sometimes justified against a taking claim on the basis that it confers benefits on the regulated landowner that help to offset the regulatory burdens.[310] A broadly applicable regulation that helps to protect landowners from each other may find support in this factor. A regulation that prevents landowners from polluting a shallow aquifer beneath other lands, for example, also protects those same landowners from having their own water supply polluted. All similarly situated landowners must share the burdens of regulation as well as the benefits. Elegibility for flood insurance is one recognized benefit.[311] Regulation that implements a comprehensive state-wide[312] or regional[313] program also seems favored.

6. Existing Uses

Existing uses seem entitled to greater protection than speculative future uses.[314] If regulation restricts changes in the land to make it suitable for proposed future uses, the courts are less likely to find a taking. If the owner may continue to use the land as it has been used in the past, it is difficult to argue that there has been a destruction of reasonable use. Increases in the value of property based on speculation that it may be physically altered or converted to some other use are not given the same protection against regulation as existing uses.[315] Several courts have held there is no inherent right to alter the natural characteristics of the land when harm to the public interest would result.316

California law holds that no property owner has a property interest in any particular type of zoning, existing or anticipated.[317] To the extent that landowners' expectations are based on their own business judgments, they are likewise not entitled to protection:[318]

> A property owner cannot, by voluntarily preparing his property for intensive development, circumscribe the City's power and authority to legislate in the public interest.

The court also held that property owners have no legally cognizable expectation that they would be permitted to change the uses to which their properties may be devoted. And it has been held that property owners who were on notice of potential problems in obtaining a building permit, were charged with knowledge of zoning and building restrictions in effect at the time they acquired the property so that no property interest arose which could have been taken by denial of the building permit.[319]

7. Public Trust and the Navigation Servitude

All property is subject to exercise of the state's police power.[320] Two additional sources of power come into play with regard to public waters. The federal government holds a navigational servitude in natural navigable waters that is superior to all private interests.[321] The federal government can dam rivers, block navigational channels and build works that induce erosion, without recourse by adjacent landowners. It can also exercise stringent regulatory powers over wetlands and other property adjacent to navigable waters in order to protect the public interest embodied in the navigation servitudes.

Ownership of the beds of navigable waters is generally vested in the states.[322] These submerged lands are held subject to a public

trust.[323] Even where submerged lands have been sold, they remain subject to the public trust. The public trust doctrine may impose a duty on the state, or at least a greater right, to protect the public interest in navigable waters.[324] It can be argued that lands subject to the public trust may not be used in ways that are incompatible with the public's interest in the property.[325] The strong public interest in navigable waters may also strengthen the argument in favor of regulations applicable to lands that are not strictly subject to the trust, but which affect the trust.[326]

8. Balancing

No single "test" adequately explains the results of all taking cases. No single factor seems of overriding importance. The best explanation seems to be that the courts balance the various factors, weigh the respective public and private interests and then decide what is fair and just.[327] Such an approach is no different than the balancing used to determine whether regulation complies with the requirements of substantive due process. For that reason, essentially the same factors are used by the courts in deciding cases.

E. Florida Law

Florida's constitution has its own taking clause. Article I, §9, provides: "No person shall be deprived of...property without due process of law...." To date, Florida courts have not said whether this clause provides any more protection than that of the U.S. Constitution. In general, the federal precedent discussed above is applied by Florida courts as if the meaning of the two clauses were identical.

Thus, citing both federal and Florida precedent, the Florida Supreme Court in Graham v. Estuary Properties recently summarized the law of taking as follows:[328]

> There is no settled formula for determining when the valid exercise of police power stops and an impermissible encroachment on private property rights begins. Whether a regulation is a valid exercise of the police power or a taking depends on the circumstances of each case. Some of the factors which have been considered are:
>
> 1. Whether there is a physical invasion of the property.
>
> 2. The degree to which there is a diminution in value of the property. Or stated another way, whether the regulation precludes all economically reasonable use of the property.
>
> 3. Whether the regulation confers a public benefit or prevents a public harm.
>
> 4. Whether the regulation promotes the health, safety, welfare, or morals of the public.
>
> 5. Whether the regulation is arbitrarily and capriciously applied.
>
> 6. The extent to which the regulation curtails investment-backed expectations.

The court examined the issue of whether denial of the landowner's right to develop an area of black mangroves was a taking, despite its conclusion that the regulation was reasonable. The court thus implied that otherwise reasonable regulation might take private property. In Estuary Properties, however, no taking occurred.

Several factors led to the court's conclusion. First, the state proved the development plans of Estuary Properties would have adversely affected important public interests in the estuary. The land-

owner, on the other hand, had failed to prove that regulation had destroyed its beneficial interest. The size of permissible development was reduced to one half of that proposed and the developer should have known that "part of it was totally unsuitable for development". The court agreed with the rationale in the Wisconsin case of Just v. Marinette,[329] that proximity and potential harm to public waters justifies more stringent regulation and that landowners have no absolute right to change the character of their land when to do so would injure the rights of others.

The regulation in Estuary Properties was upheld using a harm/benefit test. Recognizing the inherent ambiguity of that test, the court offered some clarification of the distinction between harm and benefit:[330]

> As previously stated, the line between the prevention of a public harm and the creation of a public benefit is not often clear. It is a necessary result, that the public benefits whenever a harm is prevented. However, it does not necessarily follow that the public is safe from harm when a benefit is created. In this case, the permit was denied because of the determination that the proposed development would pollute the surrounding bays, i.e., cause a public harm. It is true that the public benefits in that the bays will remain clean, but that is a benefit in the form of maintaining status quo. Estuary is not being required to change its development plans so that public waterways will be improved. That would be creation of a public benefit beyond the scope of the state's police power.

The taking issue was also decided in Moviematic Industries Corp. v. Bd. of County Commissioners of Dade County,[341] in which property was downzoned from heavy industrial use to single family residential at a density of one unit per five acres in order to protect the water resources of western Dade County. The owner claimed the rezoning so

impaired use of the property that it could not be put to any reasonable use and therefore a taking had occurred. The court upheld the zoning.

The zoning did, in fact, allow development and use of the property, though at a greatly reduced density. All the owner could show, therefore, was that the market value of the property had been reduced. The court held that this was insufficient to prove a taking in view of the overall reasonableness and public necessity of the restrictions.

Smith v. City of Clearwater[332] upheld an even more stringent restriction against a taking challenge. The city had rezoned half of the challengers' property as "aquatic lands", limiting use to recreational pursuits.

In rejecting the taking claim, the court emphasized the natural limitations of the site and the need to maintain environmental integrity:[333]

> While there is no doubt that appellants will not be able to do much with their wetlands in the face of aquatic zoning, there wasn't very much they could have done with this land without such zoning. Except for a thirty foot strip above the high water mark, all of the property involved was submerged land. There were no bulkhead lines, and the record reflects that it was most unlikely that appellants would have been able to obtain permission to fill the land. Also, as the trial court pointed out, there were serious environmental considerations which justified the placing of appellants' wetlands within the aquatic lands zone.

In Town of Indialantic v. McNulty,[334] the owner of beachfront land was denied a variance to construct a house in the dunes and claimed that action was invalid as a taking. The Fifth District Court of Appeal held McNulty failed to prove a taking:[335]

> We recognize that in a close case it is difficult to determine when a regulation or limitation becomes a "taking" and therefore unconstitutional as applied to a particular property. A certain amount of balancing or weighing of the harm intended to be prevented for the public good against the property owner's rights is involved. In this case, the harm intended to be prevented is substantial. In such a case, the property owner has a heavier burden to show his intended use of his property will not likely cause the dangers or harm intended to be prevented by the ordinance, to occur.
>
> Further, because the constitutional issue involved in these cases is whether or not the property owner is being substantially deprived of the use of his property, he should also show that it would be reasonably possible for him to use his property in the manner he intended. A "taking" cannot be said to have occurred if it was not feasible to build a residence in the place forbidden by ordinance.

Further, the possibility for McNulty to build on this property had not been permanently denied.[336] His application for a variance had been denied for failure to demonstrate he could build safely and without injuring the substantial public interests protected by the ordinance. The possibility of submitting another plan remained.

VI. EQUAL PROTECTION

The Fourteenth Amendment to the U.S. Constitution provides: "No state shall...deny to any person within its jurisdiction the equal protection of the laws." Article I, §2, of the Florida Constitution provides: "All natural persons are equal before the law...."

A zoning ordinance may be challenged on the grounds that it violates these equal protection clauses. Unless the zoning classification impinges on a fundamental right (e.g., free speech, freedom of religion) or is based on a suspect class (e.g., race or religion), the

local government need only show that there is a rational relationship between the classification and a legitimate governmental objective. Those issues are rarely involved in land use regulation.[337] In Stone v. City of Maitland,[338] the court noted the similarity between equal protection and substantive due process analysis:

> So in a sense equal protection and due process are not different concepts at all in that they both center around the discovery of a rational relationship between the specific non-universal restriction and additional benefit to a public interest.

Moreover, the same deference shown by the courts for legislative judgment in the area of substantive due process is accorded when the challenge is based on equal protection.[339] An aspect of this deference is that courts do not require that a legislative body address all apparently similar evils at once. The Fifth Circuit Court of Appeal explains:[340]

> It is important to recognize exactly what the Equal Protection Clause entails. If the legislature senses an evil, it may deal with it. At the same time it is under no compulsion to deal with all other evils that are seen to be equally serious. The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be different dimensions and proportions, requiring different remedies. Or so the legislature may think.
>
> * * *
>
> Or the reform may take one step at the time, addressing itself to the phase of the problem which seems most acute to the legislative mind.
>
> * * *
>
> The legislature may select one phase of one field and apply a remedy there, neglecting the others.
>
> * * *
>
> The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."

Thus, it is not a violation of the equal protection clause for a local government to regulate one type of environmentally sensitive land differently than another similar type. For example, in J.M. Mills, Inc. v. Murphy,[341] an owner of fresh water wetlands claimed that an act regulating fresh water wetlands differently than salt water wetlands denied him equal protection. The Rhode Island Supreme Court disagreed:[342]

> In order to establish a denial of equal protection in the instant case, plaintiffs must show that the owners of fresh and salt water wetlands are similarly situated and that the differences in procedure adopted by the Coastal Wetlands Act...and the instant Act lack all rational basis.

The court had no trouble finding reasonable explanations for using different procedures for salt and fresh water marshes: greater development pressure on the coast; high incidence of state ownership in coastal wetlands; and the probable interdependence and interactions of coastal wetlands as compared to the more random pattern of fresh water wetlands. Thus, the use of different procedures for the two types of wetlands did not violate the equal protection clause.[343]

A similar case is Potomac Sand and Gravel Co. v. Governor of Maryland,[344] where a state law prohibited the dredging of sand and gravel from wetlands but not excavations from inland pits. The Maryland Court of Appeals held that the classification was "rational...in light of the potential and real harm caused by dredging as testified by experts for both parties."[345]

The landowners in Potomac Sand and Gravel also argued that the equal protection clause was violated because what was prohibited in one county was allowed in the next. The court cited the U.S. Supreme

Court case of McGowan v. Maryland[346] for the applicable principle: "[T]he Equal Protection Clause relates to equality between persons as such, rather than between areas, and...territorial uniformity is not a constitutional prerequisite."[347]

In Sands Point Harbor, Inc. v. Sullivan,[348] the classification of coastal wetlands subject to regulation was based upon the degree of development already existing in the different areas. The New Jersey Superior Court held that such was a rational basis upon which to apply differing wetlands regulations.[349]

In Santini v. Lyons,[350] the Rhode Island Supreme Court upheld, against an equal protection challenge, the singling out by the legislature of the coastal zone for added regulatory protection:[351]

> Mindful of the multifaceted importance and use of the coastal environment and recognizing the damage already done, the Legislature could rationally conclude that it was necessary to single out coastal areas for specific regulation. A more uniform regulation of the environment cutting across all types of land would be "less sensitive" to the specific needs of the coastal environment.

The court also rejected the landowner's claim that his right to equal protection was violated because construction similar to his rejected proposal was located in the immediate vicinity. Mere existence of such similar construction, the court ruled, did not constitute a violation of equal protection.[352]

In Liberty v. California Coastal Com'n,[353] a landowner seeking to build a restaurant challenged a parking requirement imposed by the Coastal Commission. The landowner argued that other restaurants had not been burdened with the same parking requirements and thus his equal protection rights had been violated. The evidence revealed that

the past failure to impose strict parking requirements had created a serious parking problem in the area. The court held that the government need not continue "to pursue a course shown to be inadequate, thus compounding an existing condition."[354] Moreover, the common practice of "grandfathering", i.e., exempting existing uses from restrictions placed on future uses, does not deny equal protection.[355]

Equal protection claims are sometimes based on the contention that the benefits or burdens of a regulation are unequally distributed. For example, in Responsible Citizens v. City of Asheville,[356] landowners in a flood area claimed that regulations benefited persons outside the flood area at their expense and that this violated equal protection. The North Carolina Supreme Court rejected the claim on two grounds. First, the court noted that an unequal distribution of benefits and burdens results from any governmentally imposed classification; the only question is whether the classification is rational. Second, the court found that the landowners in the flood area actually benefited from the ordinance: they received protection from flood damage and became eligible for flood insurance.

In Nichols v. Tullahoma Open Door, Inc.,[357] the challenged zoning ordinance singled out a particular group upon which benefits would be conferred. rather than burdens imposed. The ordinance, which granted special treatment to group homes for the handicapped, was ruled by the Tennessee court to be rational and valid based on the special needs of the handicapped.[358]

Finally, equal protection claims are sometimes based on allegations of unequal enforcement of the zoning regulations. Here again,

courts allow local governments great flexibility. The law in Florida on this issue was summarized in Meristem Valley Nursery, Inc. v. Metropolitan Dade County:[359]

> [T]here is no denial of equal protection as a result of the County's enforcement of the ordinances against Meristem in this case. The ordinances themselves are valid on their face. Meristem's contention that County ordinances are never enforced with respect to trailers and shade houses and that by singling out Meristem for unequal treatment because of a citizen's complaint the law is unconstitutional as applied finds no support in the record or the law. The Florida Supreme Court has held that mere failure to prosecute all offenders is no ground for a claim of denial of equal protection, and that in order to constitute such a denial, selective enforcement must be deliberately based on an unjustificable or arbitrary classification....We find that enforcement of the ordinance in this case, whether the result of a neighbor's complaint or otherwise, is not deliberately based on an "unjustifiable or arbitrary classification."

It can thus be seen that equal protection challenges to application or enforcement of land use regulations are rarely successful. A local government may treat landowners differently in a multitude of ways without running afoul of the equal protection clause. Unless the classification impinges upon a fundamental right or is based on sex, race, religion, etc., the local government need only provide a rational explanation for the distinction.

VII. PROCEDURAL DUE PROCESS

The Fourteenth Amendment to the U.S. Constitution protects persons from deprivation of property interests by the state without due process of law:[360]

> The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of hearing is paramount. But the range of interests protected by procedural due process is not infinite.

There are thus three issues in any procedural due process land use case:

1. Is there a protected property interest at stake?
2. Was an appropriate hearing provided?
3. Was the deprivation the result of "state action"?

The question whether the deprivation was the result of "state action" rarely arises in the land use context. For purposes of the due process clause, actions of local governments are "state actions".[361] Within the land use context, it is more likely that disputes will arise over whether a protected property interest is at stake, and whether adequate procedures were followed.

Whether a protected property interest exists or not is a matter of state law. The U.S. Supreme Court said in Roth v. Board of Regents:[362]

> Property interests, of course, are not created by the constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Thus, in Succession Suarez v. Gelabert,[363] the First Circuit looked to Puerto Rican law to determine if the landowner had been

deprived of any protected property interest. The plaintiffs in that case owned land from which they had previously extracted sand. The Department of Natural Resources (DNR) for Puerto Rico approved the plaintiffs' application to resume extraction of sand. The approval, however, was subject to several conditions and was revocable at any time. One condition was that the plaintiffs obtain from the Board on Environmental Quality of Puerto Rico an emission source permit before starting operations. This permit was denied and the landowners sued, alleging a deprivation of property without due process of law.

The court first looked to Puerto Rican law to determine the plaintiffs' right to the sand lying beneath the property. The court found that title to all mines in Puerto Rico was vested in the state; individuals exploiting the mines were considered concessionaires, never owners of the minerals.[364] The court thus concluded that the plaintiff had no property right to the sand according to Puerto Rican law.

The due process analysis did not, however, end there. Further inquiry was needed, the court said, because "the interests protected by the due process clause are not limited to traditional notions of property rights but may extend to the realm of interests in government-afforded benefits".[365] A remaining question was thus whether the initial approval of the application by DNR constituted such a "government-afforded benefit". The court said:[366]

> The guidelines to this analysis are the reasonable reliance and legitimate expectation a party may have in state conferred benefits.... We believe that plaintiffs' expectations in the validity of the permit initially granted by the DNR were legitimate. It was reasonable for them to conclude that after the DNR permit was issued they had the government's approval and that they could rely on this permit as valid.... Such reliance, although

> very limited considering the highly conditioned characteristics of the permit and its revocable and temporary nature...was entitled to some procedural protection that would guarantee that plaintiffs receive a fair opportunity to protect their interest. We must examine then if plaintiffs were denied their expectations in the benefit derived from the DNR permit without adequate due process because of an unreasonable, arbitrary, capricious or discriminatory exercise of the Commonwealth's police power over its natural resources.

In deciding this question, the court first looked at whether the agency had treated the landowners arbitrarily or discriminatorily by deviating from established procedures. The court found that the established procedures had been followed by the agency. The court then judged the sufficiency of the procedures themselves by way of the traditional three-part analysis: (1) the private interest at stake; (2) the risk that the procedures used will lead to erroneous results and probable value of the suggested procedural safeguard; and (3) the governmental interest affected.[367] The court concluded that the established procedures were adequate in light of the "fragile" property interest of the plaintiff, and the importance Puerto Rico placed on environmental protection.[368]

Another case illustrating the application of state law to determine the existence of protected property rights is Cloutier v. Town of Epping.[369] The plaintiff's claims in that case arose out of a refusal by the local government to provide sewer to and approve the plaintiff's proposed mobile home park. The refusal resulted from local regulations prohibiting the placement of mobile home parks within the sewered parts of the town.

The first question addressed by the court was whether the plaintiff had any vested rights in the completion of the project. The court said:[370]

> The State of New Hampshire follows the common law rule that a property owner has no vested right to complete his project unless he has engaged in substantial construction, or has incurred substantial liability on then-existing ordinances.

The court concluded that the plaintiff had no vested property rights since he was on clear notice that the town ordinances prohibited mobile home parks within the sewered parts of the town.[371]

Next, the court considered the plaintiff's argument that it had a "natural" or "vested" right to locate a mobile home park anywhere within the town. The court said:[372]

> The courts of this state have upheld the constitutionality of zoning ordinances and land use policies which regulate the number and location of mobile homes as a legitimate regulation "where governed by standards relating to the advancement of health, safety and general welfare".... These decisions recognize the reasonableness of such regulation in light of the need to preserve the quality of life and to protect citizens from the burden of shouldering excessive and disproportionate tax burdens for the purpose of maintaining public facilities to accommodate the needs of a population which, in the main, is transient.

In Molgaard v. Town of Caledonia,[373] the plaintiffs argued that they had a protected property interest in the local government's adherence to procedures established by state law. This attempt by the plaintiffs to make the property interest and the procedure the same thing was rejected by the court. The court ruled that an independent property interest must be shown before a court may look to see if proper procedures were followed.[374]

If the landowner succeeds in showing a property interest under state law, it must then be shown that the local government failed to provide adequate procedural safeguards before deprivation of that interest. This, too, has been a difficult showing in land use due

process cases. It is not enough to show mere deviation from established procedures.[375] When deviation from established procedures is alleged, the court will only look to see if the plaintiff has been treated arbitrarily or discriminatorily.[376]

It is likewise difficult to show that the established procedures fail to meet due process standards. It appears to be sufficient within the land use context that landowners be given notice of the relevant public hearing; be allowed to be represented by counsel to present their views; that the government body give consideration to the information presented by the landowners and that there be an avenue for judicial review in state court.[377] It is rare that these minimum procedural safeguards are not provided by local land regulation schemes.

In Gulf and Eastern Development Corp. v. City of Fort Lauderdale,[378] the Florida Supreme Court held that notice of planning commission meetings must be provided to landowners where the commission had power to effect interim zoning controls. Procedural due process required this, even though final rezoning authority reposed in the city commission. The court in that case further held that zoning authorities must adhere to whatever procedures they adopt, even though such may not be required by procedural due process.

VIII. REMEDIES

A. Introduction

The remedy available to the landowner who proves that the local government has enacted an unconstitutional land use regulation varies

depending upon the nature of the unconstitutional act. An unconstitutional land use regulation may be nullified by a court ordered injunction against its enforcement. In some states and in some federal districts, regulatory "takings" may create a cause of action for damages or for inverse condemnation. Each of these potential remedies is discussed below within the context of taking law; the sections on Section and injunctive relief apply equally to alleged violations of due process and equal protection.

B. Uncompensated Physical Taking

1. Inverse Condemnation

The activities of government may sometimes, inadvertently or otherwise, result in the uncompensated taking of private property by actual physical invasion. Such situations occur when the government fails to perform its duty to exercise its power of eminent domain before the physical invasion occurs. In State Road Department of Florida v. Darby,[379] the First District Court of Appeal said:[380]

> Those agencies which under the power of eminent domain set about to perform works that require the use of private property are charged with the responsibility of procuring the title to or easements over and upon all such property as may be required for their purposes, and the constitutional requirement to pay just compensation to the private owner will not be frittered away by failure to take the preliminary precaution of acquiring the necessary interests in the manner provided by law.

Not all governmental activities which have a physical impact on property constitute takings. Physical taking has been defined as:[381]

> [E]ntering upon private property for more than a momentary period and, under the warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof.

Inverse condemnation is the name given the cause of action the landowner may bring against the government to recover the value of the property under such circumstances.[382] The term "inverse" is used because the action is by the landowner against the government after the taking. The usual condemnation action, by contrast, is by the government against the landowner before the taking.

An illustrative case is Leon County v. Smith.[383] In that case, Leon County was responsible for a drainage system which resulted in the unnatural flooding of the plaintiff's land. The First District Court of Appeal upheld the trial court's finding that "a taking resulted from flooding which rendered the land useless and permanently deprived plaintiff of all beneficial enjoyment thereof."[384] The plaintiff was awarded compensation for the easement which the county was held to have taken.

The intrusion onto the land need not be by something as tangible as water. In City of Jacksonville v. Schuman,[385] the City of Jacksonville expanded the city airport to handle military and commercial jet airplanes. Nearby homeowners alleged that the resulting noise and disruption had deprived them of "the free and unmolested use and quiet enjoyment of their respective properties...without just compensation...."[386] The Florida Supreme Court held that the owners had stated a cause of action for inverse condemnation.[387]

2. Alternative Remedies

The only relief available in an inverse condemnation action is monetary compensation for the property taken. However, the landowner may, through other causes of action, seek alternative forms of relief. The possible alternative remedies are damages, injunctive relief, prohibition and mandamus.388

C. Regulatory Taking

1. Injunction

An injunction is the traditional remedy available when government acts beyond its authority in regard to private property. Injunctive relief is a court order that directs the government to take or to refrain from taking some action. Injunctive relief has been awarded by both state and federal courts in cases challenging uncompensated regulatory takings.[389] In the usual case, the court enjoins the government from further enforcement of the offending regulation. In some zoning cases, the courts have gone further and set a minimum intensity of use at which the property must be rezoned.[390] A court may not, however, perform the legislative function of choosing a particular zoning category in which the property must be placed.[391]

2. Inverse Condemnation

The use of inverse condemnation in the area of uncompensated regulatory takings is problematic.[392] This is because the underlying issue of whether monetary compensation should be available to remedy regulatory takings has yet to be resolved. Florida courts have consistently held that monetary compensation is not available to remedy regulatory takings.[393] The only available remedy is invalidation of the offending ordinance through injunctive relief.[394]

The question of whether a landowner has a constitutional right to monetary compensation to remedy damage caused by regulatory takings has reached the U.S. Supreme Court several times, but the Court has avoided deciding the issue on each occasion. In San Diego Gas & Electric Co. v. City of San Diego,[395] the California Supreme Court had

ruled that an action for inverse condemnation was not available to remedy regulatory takings. The majority of the U.S. Supreme Court declined to decide the issue, however, ruling that the Court had no jurisdiction due to a lack of a final judgment below.[396] Justice Brennan dissented, arguing that the Court did have jurisdiction, and expressed his opinion regarding monetary compensation for regulatory takings in the form of a proposed rule:[397]

> The constitutional rule I propose requires that, once a court finds that a police power regulation has effected a "taking", the government entity must pay just compensation for the period commencing on the date the regulation first affected the "taking", and ending on the date the government entity chooses to rescind or otherwise amend the regulation.

Although three other Justices joined in the dissent, and although Justice Rehnquist indicated that he agreed with much of what was said (it is unknown whether that includes adoption of the proposed rule), the Supreme Court, since that 1981 decision, has never decided the issue on the merits. However, post-San Diego Gas, there has been further indication by the Court that the answer to the issue may not be adoption of Justice Brennan's proposed rule.

In his concurring opinion in Williamson County Regional Planning Commission, et al. v. Hamilton Bank of Johnson City,[398] where the Court again refused to address the issue of temporary taking because the case was not ripe, Justice Stevens discussed an alternative approach to the issue of temporary takings. He noted that almost all challenges to governmental action, from traffic court infractions to health regulations, to zoning ordinances, inevitably result in some temporary harm to the individual:[399]

> Even though these controversies are costly and temporarily harmful to the private citizen, as long as fair procedures are followed, I do not believe there is any basis in the Constitution for characterizing the inevitable byproduct of every such dispute as a "taking" of private property.

In Justice Stevens' analysis, harm caused to a private citizen during a challenge to an unconstitutiona taking "is fairly characterized as an inevitable cost of doing business in a highly regulated society".[400]

The federal district courts in the aftermath of San Diego Gas and Hamilton Bank, have reached differing results on the temporary taking issue.[401] Significant to the development of land use law in Florida is an opinion from the former Fifth Circuit in 1981, which serves as a precedent for the Eleventh Circuit until such time as the U.S. Supreme Court or the Eleventh Circuit definitively addresses the question.[402] In Hernandez v. City of Lafayette,[403] the plaintiff alleged that the city's zoning classification of his property "denied him any reasonable, economically viable use of his land, and, therefore, constituted a taking without just compensation in violation of the Fifth and Fourteenth Amendments." Relying in part on Justice Brennan's dissent in San Diego Gas & Electric, the Fifth Circuit ruled:[404]

> Since the just compensation clause applies to the states through the due process clause of the fourteenth amendment...an action for damages will lie under §1983 in favor of any person whose property is taken for public use without just compensation by a municipality through a zoning regulation that denies the owner any economically viable use thereof. The measure of damages in such a case will be an amount equal to just compensation for the value of the property during the period of the taking.

The court lessened the impact of its ruling, however, with the following qualification:[405]

> [I]n cases such as the one before us, where the application of a general zoning ordinance to a particular person's property does not initially deny the owner an economically viable use of his land, but thereafter does come to result in such a denial due to changing circumstances, or where a zoning classification initially denies a property owner an economically viable use of his land, but the owner delays or fails to timely seek relief from such a classification, we conclude that a "taking" does not occur until the municipality's governing body is given a realistic opportunity and reasonable time within which to review its zoning legislation vis-a-vis the particular property and to correct the inequity.

It should be noted that the Fifth Circuit was relying heavily on existing state law providing a monetary remedy for regulatory taking.[406]

The Supreme Court's refusal to decide the damage issue has caused problems at the state court level as well.[407] The Florida Supreme Court had the opportunity to rule on the proposed temporary damage rule in Graham v. Florida Estuaries, Inc.,[408] but declined to do so, although Judge Adkins stated in his dissent that the proposed rule should control Florida law on the subject.[409]

Florida's Second District seems disinclined to adopt Justice Brennan's suggested rule. In Pinellas County v. Ashley,[410] although discussing the issue of potential temporary takings, the court did not even mention the Brennan dissent, but instead relied on established Florida law that the available relief is a judicial determination that a regulation is invalid, citing Dade County v. National Bulk Carriers.[411] The court characterized any temporary damage resulting from the regulatory action as temporary impairment of use, rather than temporary taking.

The Florida Supreme Court has recognized certain limited situations in which a constitutional exercise of police power may nonetheless result in an uncompensated regulatory taking that will support an inverse condemnation action for money damages. In Dade County v. National Bulk Carrier,[412] the court noted that several of Florida's regulatory statutes contemplated that a state or regional agency permit denial might result in a taking. The legislature thus provided a remedy in Chapter 78-85, Laws of Florida, for takings arising under Chapters 161, 253, 373, 380 and 403, Florida Statutes. However, the court reaffirmed that a zoning ordinance which is held to be confiscatory cannot be the subject of an action for monetary damages, and that striking the unconstitutional ordinance is the appropriate remedy.[413]

The issue of temporary damages resulting from a regulatory taking is a significant one. Traditionally, governments have not been held to what amounts to a strict liability standard in the exercise of their police powers, such that even an inadvertently unconstitutional enactment would result in the imposition of money damages. As Justice Stevens noted in this Hamilton Bank concurring opinion, all manner of governmental action is successfully challenged by citizens, with no constitutionally mandated action for damages incurred during the interim.[414] Thus, even if the U.S. Supreme Court does hold that a Fifth Amendment taking can occur from an unconstitutional regulation, requiring monetary damages, temporary damages are not a necessary part of that formula, and permanent damages can still be avoided by invalidating the regulation once it is determined to be unconstitutional. And, even if the Court holds that temporary damages, as suggested by

Justice Brennan in his San Diego Gas dissent, are constitutionally mandated, they still may not pose an overwhelming obstacle to land use planning. The actual accrual of damages may not commence until the governmental body is given a realistic opportunity to review the zoning ordinance with respect to a particular piece of property and to correct the inequity, as suggested by the Fifth Circuit in Hernandez v. City of Lafayette.[415]

Even if not constitutionally mandated by the Fifth Amendment, temporary damages may be recovered under the Fourteenth Amendment. By alleging a deprivation of due process under the Fourteenth Amendment, an injured party can bring an action for monetary damages under Section 1983. See discussion, infra. However, the elements of damages under the different amendments could prove significant. For instance, if it is held that damages are constitutionally mandated for a regulatory taking under the Fifth Amendment, then it seems plausible that the same elements of damages a state court uses in an eminent domain proceeding for an actual physical appropriation or invasion would be used to determine the damages; just compensation would be required. However, under the Fourteenth Amendment, it is possible that a Section 1983 claimant would use the federal common law to determine the elements of damages, proximate cause would be an issue, and the results might be significantly different from a just compensation case.

If it is ultimately established that monetary compensation for regulatory takings is constitutionally mandated, an action for inverse condemnation would be only one of at least three methods for seeking such compensation in court. Section 1983 actions and direct actions under the federal Constitution are discussed infra.

The most significant characteristics of an inverse condemnation action are:

(i) The governmental agency against which the action is brought must have the power of eminent domain.[416]

(ii) The prevailing party would not usually be entitled to attorneys fees.[417]

(iii) There must have been a taking; a person could not use inverse condemnation to seek compensation for a land use regulation which violated some other constitutional right such as equal protection or substantive due process.[418]

(iv) Local governments have no immunity from inverse condemnation actions.[419]

(v) The relief is in the form of monetary compensation for the value of the property interest taken.[420]

3. Section 1983

Section 1983 of the federal Civil Rights Act provides:[421]

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

In Monell v. Dept. of Social Services,[422] the U.S. Supreme Court held that a city is a "person" within the scope of Section 1983. More recently, the U.S. Supreme Court has implicitly held that use of Section 1983 is appropriate to remedy the effect of unconstitutional land use regulations.[423] Thus, Section 1983 may be a remedy available

to landowners injured by an unconstitutional land use regulation.[424] This would include injury due to violations of the taking, equal protection or due process clauses of the federal Constitution. The traditional remedy for all such violations in the land use context (except uncompensated physical takings) has been invalidation of the offending regulation; courts have been reluctant to award damages because of fear that monetary relief would place unreasonable financial burdens on local governments and belief that injunctive remedies provide adequate relief.[425]

Although a potentially potent legal device, Section 1983 provides no panacea for landowners claiming zoning abuses. First, Section 1983 is purely procedural; it does not create or enhance any constitutional rights.[426] As shown above, the courts grant great deference to legislative bodies and are thus loath to find violations of the taking, equal protection or due process clauses. One might expect the courts to be even more deferential if public coffers are threatened with huge monetary awards resulting from inadvertent unconstitutional land use regulations.

Second, federal courts will look to state law to determine what property rights are subject to constitutional protection.[427] The significance of this is shown by the recent Florida decision of Graham v. Estuary Properties, Inc.,[428] where the Florida Supreme Court agreed with the Wisconsin Supreme Court that "[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others."[429] This restrictive view of property rights would be applied

by a federal court in determining whether a Florida landowner's constitutional property rights had been violated.[430]

Third, the landowner must also overcome the abstention doctrine which allows federal courts which otherwise have jurisdiction to decline to decide a case until the state law on the subject is clarified.[431] However, it should be noted that state courts have jurisdiction to hear Section 1983 claims. Two theories of abstention are relevant within the zoning context: a federal court will usually abstain (1) when resolution of an unclear state law may render the federal question moot;[432] and (2) when the federal action would substantially interfere with a unified state regulatory scheme.[433] Federal courts have, in fact, abstained from deciding land use cases based on these theories.[434]

Fourth, the litigant must ensure that the issue is ripe and that state procedures for compensation have been exhausted. Although Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City[435] left open the issue of the appropriateness of compensation for regulatory takings, it did provide some indication of the procedural steps necessary before the question of a taking will be considered. A party challenging a regulation must ensure that the governmental entity charged with making a final decision on the regulation has done so; the issue is then final and ripe for appellate determination. Thus, applications for variances and modifications which might affect the case must be made prior to bringing a lawsuit on the matter.[436] This is not exhaustion of administrative remedies (which is not required before bringing a Section 1983 claim), but a requirement of finality by the initial decision maker.[437] However,

the second procedural lesson from Hamilton Bank is that a litigant must also seek compensation through any measures afforded at the state level.[438]

The United States Supreme Court's decision in Monell v. Department of Social Services[439] abolished the absolute immunity of local governments from damage suits under Section 1983, which had resulted in the dismissal of many zoning actions. After Monell, a local government could be sued under Section 1983 when the execution of its "policy or custom, whether made by its lawmakers or by those whose edicts represent official policy" inflicts injury under the Constitution.[440] Later it was decided that a local government could not assert even a qualified good faith immunity to liability under Section 1983.[441] A local government is not, however, liable for punitive damages under section 1983.[442]

In contrast to the local government itself, its agents and employees are entitled to various degrees of immunity when they are sued under Section 1983 in their individual capacity. When performing legislative functions, local officials are entitled to an absolute immunity from personal liability under Section 1983.[443] The official need not be elected, but only performing a legislative funtion.[444] Note, however, that whenever local officials act in a legislative capacity, they are necessarily establishing and simultaneously acting pursuant to the policy of the local government. Thus, although the official is immune from personal liability in this circumstance, the local government itself would be subject to liability under the Monell ruling.[445] The actions of high executive officers within the local government may also be found to represent the official policy of the local government.[446]

Local zoning officials performing executive rather than legislative functions are entitled only to a qualified good faith immunity.[447] In general, officials acting in an executive capacity are protected by good faith immunity as long as they do not act with malice or contrary to clearly established law.[448]

Because land use procedures are often characterized by officials acting in multiple capacities, the following principle is particularly important in land use cases:[449]

> The type of immunity accorded a public official depends not on the defendant's position in government, or title of his office, but on the nature of the governmental function being performed....

Thus, in Altaire Builders, Inc. v. Village of Horseheads,[450] the court ruled a city commission was entitled to only qualified good faith immunity in its disapproval of a proposed planned unit development, although the commission was the legislative body for the city, because when deciding upon proposed PUDs, it was acting in an executive capacity.[451]

Similarly, in Hernandez v. City of Lafayette,[452] the Fifth Circuit held that the veto of a land use ordinance by one holding the executive title of mayor was nevertheless a legislative act, and so accorded absolute immunity to the mayor.[453] It is therefore important to look beyond the titles given to land use officials when determining what level of immunity obtains.

Landowners seeking to challenge coastal zone protection activities of local governments through Section 1983 have difficult hurdles to overcome. An attractive aspect of Section 1983, however, is that attorneys fees are available to the prevailing party.[454] Thus, if the

landowner succeeds in overcoming the hurdles the local government may face liability for both damages and attorneys fees.

4. Direct Action Under Constitution

In 1961, the U.S. Supreme Court ruled that local governments were not "persons" within the scope of Section 1983.[455] This decision, as discussed in the previous section, was overruled in 1978.[456] In the interim, the U.S. Supreme Court accepted the argument that an action could be brought based directly on the constitutional provision allegedly violated. This cause of action was first recognized in Bivens v. Six Unknown Agents[457] and is often termed a Bivens or direct constitutional action. The Court held that damages are an appropriate remedy for constitutional violations.

There are several differences between a Bivens action and a Section 1983 action. The prevailing party in a Bivens action is not entitled to attorneys fees as in a Section 1983 action.[458] The local government may be held responsible for all actions of its agents and employees under a direct action; under Section 1983, a local government is liable only if the action of the agent or employee is taken pursuant to the official policy of the local government.[459] This may make little difference in the area of zoning where contested actions are virtually always pursuant to official policy or ordinance.

Ultimately, a Bivens action may not be available at all for redress of local government constitutional abuses. The U.S. Supreme Court has held that a Bivens action is not appropriate "when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the

Constitution and viewed equally as effective."[460] Several courts have ruled that Section 1983 provides such a substitute for suing local governments.[461] In all likelihood, therefore, Section 1983 will be utilized for remedying constitutional abuses by local governments.

Frequently, claims for violation of due process from land use regulations are brought under both Section 1983 and as direct actions under the Fourteenth Amendment. In Southern Cooperative Development Fund v. Driggers,[462] the landowners used both causes of action when they were denied a building permit despite the fact that they had met all requirements for issuance. The Eleventh Circuit, noting that the city had denied the permit because of community disapproval of the plaintiffs' project, held that violations of due process had occurred, affirmed the trial ordered issuance of the building permit, and remanded for a trial on damages. Unfortunately, there is no printed opinion concerning the nature or type of damages involved, nor the status of that case on remand.

The former Fifth Circuit ordered temporary damages in a Section 1983 and direct action case decided after San Diego Gas. In Wheeler v. City of Pleasant Grove,[463] where, after community uproar over plaintiffs' proposed apartment complex, an ordinance was passed which prohibited the construction of new apartment buildings, despite the fact that plaintiffs had a previously-issued and valid building permit on which they had relied to initiate preliminary construction. The district court found that the ordinance prohibiting new apartment construction had been specifically enacted to prevent the plaintiffs from exercising their building permit, was confiscatory, and violated their due process rights, but that the city and its officials were

immune from suit for damages; injunctive relief and attorneys fees were ordered. The Fifth Circuit affirmed the court in part, but ordered the case remanded for a determination of damages. Presumably these would be temporary damages or nominal damages, since issuance of the building permit was ordered. On remand, the district court refused to award damages, holding, inter alia, that defendants' actions were not the proximate cause of any damage sustained by the plaintiffs. The Eleventh Circuit reversed, holding that the earlier opinion was the law of the case, and that it had implicitly ruled that damages had been sustained, so that the district court's sole function was to determine the amount thereof.[464] It remanded, again, for a determination of the amount of damages. As of this printing, there is no reported decision on the status of the case before the district court.

IX. CONCLUSION

Land use planners with an understanding of the constitutional issues involved face no hardship in their efforts to protect and conserve Florida's coastal resources. The traditional authority of the states, and through them the local governing bodies, to enact measures for the public good and for the benefit of future generations, is strongly supported by the courts. Analysis of the case law shows a growing understanding on the part of the executive branch and the judiciary of the complexity of land use planning and the need for flexibility and creativity in land use and conservation efforts. A great measure of discretion is accorded land use planners. With an

understanding of the constitutional limitations involved, appropriate land use planning can be undertaken which will withstand judicial scrutiny, protect the public trust, and avoid infringement on the rights of property owners beyond that which the courts have held acceptable.

Footnotes

1. Glenn Robertson, Looking at Florida's Future: A Summary of Growth Related Statistics, Governor's Office of Planning and Budgeting (January, 1983).

2. Id.

3. See generally, D. MANDELKER AND R. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS (1979).

4. For specific information on land use control techniques see URBAN LAND INSTITUTE, MANAGEMENT AND CONTROL OF GROWTH Vols. I-V (collections of articles); J. KUSLER, REGULATING SENSTIVE LANDS (1982); C. THUROW, W. TONER AND D. EARLY, PERFORMANCE CONTROLS FOR SENSITIVE LANDS (1975) (American Society of Planners).

5. Researchers at the Center for Governmental Responsibility are developing a model land development code, scheduled for completion in late 1986.

6. U.S. CONST. amend. X.

7. Barbier v. Connolly, 113 U.S. 27, 31 (1885).

8. Adams v. Housing Authority of City of Daytona Beach, 60 So. 2d 663, 666 (Fla. 1952).

9. See JUERGENSMEYER AND WADLEY, FLORIDA LAND USE RESTRICTIONS, §3.01 (1980).

10. Id.

11. FLA. STAT. §380.06 (1985).

12. Id., §380.05.

13. See Finnell, Coastal Land Management in Florida, 1980 ABF RES. J. 303-400 (1980); Maloney and Hamann, Integrating Land and Water Management, Publication No. 54, Florida Water Resources Research Center (1981).

14. For an excellent discussion of the development of home rule in Florida see Committee on Community Affairs, Florida House of Representatives, The History and Status of Local Government Powers in Florida, (July 31, 1972).

15. FLA. CONST. art. VIII, §§1 and 2 (1968).

16. FLA. CONST. art. VIII, §2 (1968).

17. FLA. CONST. art. VIII, §1(g) (1968).

18. FLA. CONST. art. VIII, §1(f) (1968).

19. See generally, Pelham, Hyde and Banks, Managing Florida's Growth: Toward an Integrated State, Regional, and Local Comprehensive Planning Process, 13 F.S.U. L. REV. 515-598 (1985).

20. Ch. 84-257 Laws of Florida. See generally, Rhodes and Apgar, Charting Florida's Course: The State and Regional Planning Act of 1984, 12 F.S.U. L. REV. 582-606 (1984).

21. FLA. STAT. ch. 187 (1985).

22. FLA. STAT. §§163.3184, .3177, .3178, .3191 (1985).

23. FLA. STAT. §187.201(9)(b)9 (1985).

24. FLA. STAT. §187.201(10)(b)7 (1985).

25. FLA. STAT. §163.3178 (1985).

26. FLA. STAT. §163.3194 (1985).

27. FLA. STAT. §§163.3202, .3213 (1985).

28. U.S. CONST. amend. XIV.

29. 123 U.S. 623 (1887).

30. Id. at 661.

31. See, e.g., Lochner v. New York, 198 U.S. 45 (1905); Coppage v. Kansas, 236 U.S. 1 (1915); Adkins v. Children's Hospital, 261 U.S. 525 (1923). See, also, GUNTER, CASES AND MATERIALS ON CONSTITUTIONAL LAW, 603-604 (9th ed. 1975).

32. 291 U.S. 502 (1934).

33. GUNTER, supra note 31, at 405. See, also, Day Brite Lighting v. Missouri, 342 U.S. 421 (1952); U.S. v. Carolene Products Co., 304 U.S. 144 (1938); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

34. 372 U.S. 726 (1963). See, also, New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978); Dandridge v. Williams, 397 U.S. 471 (1970).

35. 372 U.S. at 730.

36. In the land use context see, e.g., Kuzinich v. County of Santa Clara, 689 F.2d 1345 (9th Cir. 1983) (freedom of expression); Deerfield Medical Center v. City of Deerfield Beach, 661 F.2d 328 (5th Cir. 1981) (privacy); Felix v. Young, 536 F.2d 1126 (6th Cir. 1976) (freedom of expression); Gordon v. City of Cartersville, 522 F. Supp. 753 (N.D.Ga.

1981) (race discrimination); Bossier City Medical Suite v. City of Bossier City, 483 F. Supp. 633 (W.D.La. 1980) (privacy).

37. GUNTER, supra note 31, at 409-10 (9th ed. 1975); Poe v. Ullman, 367 U.S. 497 (1961); Griswold v. Connecticut, 381 U.S. 479 (1965); Carey v. Population Services International, 431 U.S. 678 (1977).

38. Nectow v. City of Cambridge, 277 U.S. 183 (1928).

39. 214 U.S. 91 (1909).

40. Id. at 105.

41. Stephenson v. Binford, 287 U.S. 251 (1932).

42. 348 U.S. 26 (1954).

43. Id. at 33.

44. 399 So. 2d 1374, 1381 (Fla. 1981), cert. denied, 454 U.S. 1083 (1981).

45. 349 So. 2d 667, 669 (Fla. 3d D.C.A. 1977) (citations omitted).

46. 400 So. 2d 1227, 1231 (Fla. 5th D.C.A. 1981) (quoting from Maloney and O'Donnell, Drawing the Line at the Oceanfront, 30 U. FLA. L. REV. 383, 389 (1978)).

47. See, e.g., City of Lake Wales v. Lamar Advertising Assoc., 414 So.2d 1030 (Fla. 1982); City of Sunrise v. D.C.A. Homes, Inc., 421 So. 2d 1084 (Fla. 4th D.C.A. 1982); Lamar-Orlando Outdoor Advertising v. City of Ormond Beach, 415 So.2d 1312 (Fla. 5th DCA 1982); Stone v. City of Maitland, 446 F.2d 83 (5th Cir. 1971). See generally, Rowlett, Aesthetic Regulation Under the Police Power: The New General Welfare and the Presumption of Constitutionality, 34 VAND. L. REV. 603 (1981); Comment, Aesthetics and the Constitution: Houston's Sign Ordinance, 18 HOUS. L. REV. 629 (1981); Costonis, Law and Aesthetics: A Critique and a Reformulation of the Dilemmas, 80 MICH. L. REV. 355 (1982); Schropp, Reasonableness of Aesthetic Zoning in Florida: A Look Beyond the Police Power, 10 FLA. ST. U. L. REV. 441 (1982).

48. 414 So. 2d 1030, 1032 (Fla. 1982); (quoting from Westfield Motor Sales Co. v. Town of Westfield, 324 A.2d 113, 119 (1974) (N.J. Super. 1974).

49. 527 F. Supp. 390 (N.D. Cal. 1981).

50. 432 So. 2d 1332, 1334-35 (Fla. 4th D.C.A. 1983).

51. See, e.g., Trachsel v. City of Tamarac, 311 So. 2d 137, 140 (Fla. 4th D.C.A. 1975); County of Brevard v. Woodham, 223 So. 2d 344, 348 (Fla. 3d D.C.A. 1969); Watson v. Mayflower Property Inc., 223 So. 2d 368, 373 (Fla. 4th D.C.A. 1969).

52. See, e.g., Wyatt v. City of Pensacola, 196 So. 2d 777 (Fla. 1st D.C.A. 1967); Abdo v. City of Daytona Beach, 147 So. 2d 598 (Fla. 1st D.C.A. 1962).

53. See, e.g., Trachsel v. City of Tamarac, supra note 51; County of Brevard v. Woodham, supra note 51; Watson v. Mayflower Property Inc., supra note 51.

54. See Moviematic Industries v. Metro Dade County, 349 So. 2d 667 (Fla. 3d D.C.A. 1977).

55. Kusler, Floodplain Regulations: Judicial Response in the 1970s, U.S. Water Resources Council, REGULATION OF FLOOD HAZARD AREAS TO REDUCE FLOOD ZONES, Volume 3 (1984).

56. Id.

57. This principle is expressed in the Latin maxim "sic utere tuo ut alienum non laedas," which the U.S. Supreme Court has said "ordinarily will furnish a fairly helpful clew" in determining the validity of police power regulation. Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

58. For a discussion of the common law regarding interference with surface waters, see Maloney, Hamann and Canter Stormwater Runoff Control: A Model Ordinance for Meeting Local Water Quality Management Needs, 20 NAT. RESOURCES J. 713, 721-27 (1980).

59. Young Heating and Plumbing Co., et al. v. Iowa Natural Resources Council, 276 N.W.2d 377 (Iowa 1979); Krahl v. Nine Mile Creek Watershed District, 283 N.W.2d 538 (Minn. 1979); Subaru of New England, Inc. v. Board of Appeals of Canton, 395 N.E.2d 880 (Mass. 1979); Maple Leaf Investors v. State, Department of Ecology, 565 P.2d 1162 (Wash. 1977); Metropolitan St. Louis Sewer District v. E. Zykan, 495 S.W.2d 643 (Mo. 1973); Foreman v. State, Department of Natural Resources, 387 N.E.2d 455 (Ind. App. 1979); Turner v. County of Del Norte, 24 Cal. App. 3d 311 (1972); Brown v. City of Joliet, 247 N.E.2d 47 (Ill. 1969).

60. Cappture Realty Corp. v. Bd. of Adjustment of Elmwood Park, 313 A.2d 624 (N.J. Sup. Ct. 1973).

61. See U.S. Water Resources Council, REGULATION OF FLOOD HAZARD AREAS TO REDUCE FLOOD LOSSES, Vol. I, pp. 308-314, for a discussion of cases supporting regulations intended to protect people from the consequences of their own acts.

62. 284 N.E.2d 891 (Mass. 1972).

63. See Kusler, Floodplain Regulations: Judicial Response in the 1970s, U.S. Water Resources Council, REGULATION OF FLOOD HAZARD AREAS TO REDUCE FLOOD ZONES, Volume 3 (1984).

64. OP. ATT'Y GEN. FLA. 072-326 (1972).

65. FLA. CONST. art. X, §11 (1968). New Jersey has given the greatest effect to the public trust doctrine to protect beach access. See Mathews v. Bay Head Improvement Assoc., 471 A.2d 355 (N.J. 1984).

66. See Borough of Neptune City. v. Borough of Avon-By-The-Sea, 294 A.2d 47, 56 (N.J. 1972) (Francis, J., dissenting); Note, Public Access to Beaches: Common Law Doctrine and Constitutional Challenges, 48 N.Y.U. L. REV. 369, 383-84 (1973).

67. See, e.g., Sea Ranch Ass'n v. California Coastal Commission, 527 F. Supp. 390 (N.D. Cal. 1981). But see, Liberty v. California Coastal Commission, 113 Cal. App. 3d 491 (1980). For more on the subject of beach access, see Maloney and Fernandez, Development of County and Local Ordinances Designed to Protect the Public Interest in Florida's Coastal Beaches, Florida Sea Grant Technical Paper (1977); Comment, Easements: Judicial and Legislative Protection of the Public's Rights in Florida's Beaches, 25 U. FLA. L. REV. 586 (1973); Comment; Public Beach Access Exactions: Extending the Public Trust Doctrine to Vindicate Public Rights, 28 UCLA L. REV. 1049 (1981); Note, The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine, 79 YALE L.J. 762 (1970); Evans, Problems of Beach Access: Local Government Remedies, ENVIRONMENTAL COMMENT 4 (March 1980); Cohen, The Right to the Sand, ENVIRONMENTAL COMMENT 10 (March 1980); Note, Public Access to Beaches, 22 STAN. L. REV. 564 (1970); Comment, Public or Private Ownership of Beaches: An Alternative to Implied Dedication, 18 UCLA L. REV. 795 (1971); Comment, Public Access to Receding Beaches, 13 HOUS. L. REV. 984 (1976); Note, Hawaiian Beach Access: A Customary Right, 26 HASTINGS L.J. 823 (1975); Roberts, Beaches: The Efficiency of the Common Law and Other Fairy Tales, 28 U.C.L.A. L. REV. 169 (1980); Note, This Land is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches, 44 S. CAL. L. REV. 1092 (1971); Note, Access to Public Municipal Beaches: The Formulation of a Comprehensive Legal Approach, 7 SUFFOLK U.L. REV. 936 (1973); Eikel and Williams, The Public Trust Doctrine and the California Coastline, 6 URB. LAW. 519 (1974); Note, Assault on the Beaches: "Taking" Public Recreational Rights to Private Property, 60 B.U.L. REV. 933 (1980); Cohen, The Constitution, The Public Trust Doctrine, and the Environment, 1970 UTAH L. REV. 388; Comment, Public Access and the California Coastal Commission: A Question of Overreaching, 21 SANTA CLARA L. REV. 395 (1981).

68. 218 A.2d 129 (N.J. 1966).

69. 218 A.2d at 131-32.

70. 336 A.2d 239, 240 (N.H. 1975).

71. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962).

72. Nebbia v. New York, 291 U.S. 502, 524 (1934).

73. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962).

74. Nebbia v. New York, 291 U.S. 503, 517 (1934).

75. Goldblatt v. Town of Hempstead, 369 U.S. 590, 591 (1962).

76. Id. at 590.

77. Nebbia v. New York, 291 U.S. 502, 511 (1934).

78. Id.

79. Id. at 510.

80. JUERGENSMEYER AND WADLEY, FLORIDA ZONING -- ATTACKS AND DEFENSES, §4-3.

81. 272 U.S. 365, 388 (1926).

82. 371 So. 2d 154 (Fla. 4th D.C.A. 1979).

83. Id. at 155.

84. Id. at 156-157.

85. 432 So. 2d 1332 (Fla. 4th D.C.A. 1983).

86. Id. at 1334-36.

87. 400 So. 2d 1227 (Fla. 5th D.C.A. 1981).

88. Id. at 1232.

89. See, e.g., Neubauer v. Town of Surfside, 181 So. 2d 707 (Fla. 3d D.C.A. 1966); Town of Bay Harbor Islands v. Burk, 114 So. 2d 225 (Fla. 3d D.C.A. 1959).

90. 432 So. 2d 1332, 1337 (Fla. 4th D.C.A. 1983).

91. Id.

92. Id. at 1337.

93. Id. at 1338. See generally Comment, Land Use Planning in the Coastal Zone: Protecting a Sensitive Ecosystem With Transferable Development Credits, 21 SANTA CLARA L. REV. 439 (1981); Comment, Transferability of Development Rights, 53 U. COLO. L. REV. 165 (1981); Richards, Transferable

Development Rights: Corrective, Catastrophe, or Curiosity, 12 REAL EST. L. J. 26 (1983).

94. See generally Juergensmeyer and Blake, Impact Fees: An Answer to Local Governments' Capital Funding Dilemna, 9 FLA. ST. U.L. REV. 415 (1981); Note, Development Fees: Standards to Determine Their Reasonableness, 1982 UTAH L. REV. 549.

95. Contractors and Builders Association of Pinellas Co. v. City of Dunedin, 329 So. 2d 314 (Fla. 1976), cert. denied, 444 U.S. 869 (1979).

96. Hollywood Inc. v. Broward County, 431 So. 2d 606 (Fla. 4th D.C.A. 1983).

97. Home Builders and Contractors Association of Palm Beach County, Inc. v. Palm Beach County, 446 So. 2d 141 (Fla. 4th D.C.A. 1983), petition for rev. denied, 451 So. 2d 848 (Fla. 1984), appeal dismissed 105 S.Ct. 376 (1985).

98. Connelly, Road Impact Fees Upheld in Noncharter County, 18 FLA. BAR J. 54, 57 (Jan. 1984).

99. See HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW, §138 (1971); See JUERGENSMEYER AND WADLEY, FLORIDA LAND USE RESTRICTIONS, Chap. 9.

100. Coronado Development Co. v. City of McPherson, 368 P.2d 51 (Kan. 1962).

101. Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 271 N.Y.S.2d 955, 218 N.E.2d 673 (1966).

102. Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965) appeal dismissed, 385 U.S. 4 (1966).

103. See Juergensmeyer and Wadley, FLORIDA LAND USE RESTRICTIONS, §9.02.

104. Id. See also, Ayres v. City Council of Los Angeles, 207 P.2d 1 (Cal. 1949); Associated Home Builders of Greater East Bay v. City of Walnut Creek, 484 P.2d 606 (Cal. 1971), appeal dismissed, 404 U.S. 878 (1971); Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964); Aunt Hack Ridge Estates, Inc. v. Planning Comm. of Danbury, 230 A.2d 45 (Conn. Super. Ct. 1967). See generally, Comment, Subdivision Regulation: Requiring Dedication of Park Land or Payment of Fees as a Condition Precedent to Plat Approval, 1961 WIS. L. REV. 310; Note, Mandatory Dedication of Land by Land Developers, 26 U. FLA. L. REV. 41 (1973); Landau, Urban Concentration and Land Exactions for Recreational Use: Some Constitutional Problems in Mandatory Dedication Ordinances in Iowa, 22 DRAKE L. REV. 71 (1972); Johnston, Constitutionality of Subdivision Control Exactions: The Quest for a Rationale, 52 CORNELL L.Q. 871 (1967); Comment,

The Permissible Scope of Compulsory Requirements for Land Development in Colorado, 54 U. COLO. L. REV. 447 (1983).

105. 267 So. 2d 860 (Fla. 4th D.C.A. 1972).

106. 329 So. 2d 314 (Fla. 1976).

107. 338 So. 2d 863 (Fla. 3d D.C.A. 1976), cert. denied, 348 So. 2d 955 (Fla. 1977), cert. denied, 444 U.S. 867 (1979).

108. 431 So. 2d 606 (Fla. 4th D.C.A. 1983).

109. 267 So. 2d 860, 862.

110. Id. at 863.

111. 329 So. 2d 314, 321.

112. 338 So. 2d 863, 868.

113. 431 So. 2d 606, 611-12 (footnotes omitted).

114. 527 F. Supp. 390 (N.D. Cal. 1981).

115. Id. at 395 (footnotes omitted).

116. Id. at 395.

117. See FLA. STAT. §§161.091(1)(e), 163.3177(6)(e) (1984).

118. See, e.g., Franklin County v. Leisure Properties, Ltd., 430 So. 2d 475 (Fla. 1st D.C.A. 1983); City of Sanibel v. Buntrock, 409 So. 2d 1073 (Fla. 2d D.C.A. 1981); City of Miami v. Ross, 76 So. 2d 152 (Fla. 1954); Amster v. Dade County, 43 Fla. Supp. 22 (11th Cir. Ct. 1975); Jason v. Dade County, 37 Fla. Supp. 190 (11th Cir. Ct. 1972).

119. City of Sanibel v. Buntrock, 409 So. 2d 1073 (Fla. 2d D.C.A. 1981).

120. 276 N.W.2d 377 (Iowa 1979).

121. Id. at 382-84. See also, Subaru of New England v. Board of Appeals of Canton, 395 N.E.2d 880 (Mass. App. Ct. 1979).

122. 414 A.2d 280 (N.J. 1980), aff'd 430 A.2d 949 (N.J. Super. App. Div. 1981).

123. Id. at 290. See also, Maple Leaf Investors v. State, Dept. of Ecology, 565 P.2d 1162 (Wash. 1977).

124. 387 N.E.2d 455 (Ind. Ct. App. 1979).

125. Id. at 461.

126. 406 A.2d 577 (Pa. Commw. Ct. 1979).

127. Id. at 579.

128. Id. at 578.

129. Turner v. County of Del Norte, 24 Cal. App. 3d 311 (1972).

130. 409 N.E.2d 807 (Mass. App. Ct. 1980).

131. Id. at 808.

132. Id. See also, Turnpike Realty Co. v. Town of Dedham, 284 N.E.2d 891 (Mass. 1972), cert. denied, 409 U.S. 1108 (1973).

133. 313 A.2d 820 (Md. 1974).

134. 384 A.2d 610 (R.I. 1978).

135. See, e.g., Turner v. County of Del Norte, 24 Cal. App. 3d 311 (1972); Foreman v. State ex rel. Dept. of Natural Resources, 387 N.E.2d 455 (Ind. Ct. App. 1979).

136. Flooding is an easily recognized and calculated cumulative impact. Floodways are determined by calculating cumulative impacts.

137. Chokecherry Hills Estates v. Deuel County, 294 N.W.2d 654 (S.D. 1980); Beckendorff v. Harris-Galveston Coastal Subsidence District, 558 S.W.2d 75 (Tex. Civ. App. 1977); Pope v. City of Atlanta, 249 S.E.2d 16 (Ga. 1978).

138. Pope v. City of Atlanta, 249 S.E.2d 16 (Ga. 1978).

139. Krahl v. Nine Mile Creek Watershed District, 283 N.W.2d 538 (Minn. 1979); Chokecherry Hills Estates v. Deuel County, 294 N.W.2d 659 (S.D. 1980); Cappture Realty Corp. v. Board of Adjustment of Elmwood Park, 313 A.2d 624 (N.J. Sup. Ct. 1973).

140. Krahl v. Nine Mile Creek Watershed District, 283 N.W.2d 538 (Minn. 1979); Lindquist v. Omaha Realty, Inc., 247 N.W.2d 684 (S.D. 1976); Cappture Realty Corp. v. Bd. of Adjustment of Elmwood Park, 313 A.2d 624 (N.J. Sup. Ct. 1973).

141. Turner v. County of Del Norte, 24 Cal. App. 3d 311 (1972).

142. Foreman v. State, Dept. of Natural Resources, 387 N.E.2d 455 (Ind. Ct. App. 1979).

143. Sturdy Homes, Inc. v. Township of Redford, 186 N.W.2d 43 (Mich. 1971).

144. Turnpike Realty Co., Inc. v. Town of Dedham, 284 N.E.2d 891 (Mass. 1972); Just v. Marinette County, 201 N.W.2d 761 (Wisc. 1972).

145. MacGibbon v. Board of Appeals of Duxbury, 340 N.E.2d 487 (Mass. 1976); Dooley v. Town Plan & Zoning Commission, 197 A.2d 770 (Conn. 1964); Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 193 A.2d 232 (N.J. 1963); Sturdy Homes, Inc. v. Township of Redford, 186 N.W.2d 43 (Mich. 1971); American National Bank and Trust Company of Chicago v. Village of Winfield, 274 N.E.2d 144 (Ill. 1971).

146. In Turnpike Realty Co. v. Town of Dedham, 284 N.E.2d 891 (Mass. 1972), an ordinance was sustained despite evidence the value of property was depreciated from $431,000 to $53,000.

147. 328 So. 2d 864 (Fla. 4th D.C.A. 1976).

148. Id. at 866.

149. Id.

150. 383 So. 2d 681 (Fla. 2d D.C.A. 1980).

151. 249 S.E.2d 16 (Ga. 1978).

152. Id. at 18.

153. Id. at 19.

154. 247 N.E.2d 47 (Ill. 1969).

155. Id. at 50. See also, National Merritt, Inc. v. Weist, 41 N.Y.2d 438, 393 N.Y.S.2d 379, 361 N.E.2d 1028 (1977); Metropolitan St. Louis Sewer District v. Zykan, 495 S.W.2d 643 (Mo. 1973); Cappture Realty Corp. v. Board of Adjustment of Borough of Elmwood Park, 313 A.2d 624 (N.J. 1973); Hamlin v. Matarazzo, 293 A.2d 450 (N.J. 1972).

156. 279 N.W.2d 276 (Iowa 1979).

157. Id. at 279.

158. 249 S.E.2d 16 (Ga. 1978).

159. Id. at 19-20.

160. 558 S.W.2d 75 (Tex. Civ. App. 1977).

161. Id. at 81.

162. 399 So. 2d 1374 (Fla. 1981).

163. Id. at 1381.

164. 336 A.2d 239 (N.H. 1975).

165. Id. at 243.

166. 293 A.2d 241 (Md. 1972).

167. Id. at 249.

168. 391 A.2d 1265 (N.J. 1978).

169. 201 N.W.2d 761 (Wis. 1972).

170. 384 A.2d 610 (R.I. 1978).

171. 11 Cal. App. 3d 557 (1970).

172. 396 A.2d 1080 (Md. Ct. App. 1979).

173. 393 N.E.2d 858, 865 (Mass. 1979).

174. 293 A.2d 241 (Md. 1972).

175. Id. at 249.

176. 414 A.2d 280 (N.J. 1980).

177. Id. at 290. See also, Foreman v. State, Dept. of Natural Resources, 387 N.E.2d 455, 461 (Ind. Ct. App. 1979).

178. See, e.g., Kraiser v. Zoning Hearing Board of Horsham Township, 406 A.2d 577, 578 (Pa. Commw. Ct. 1979); Turner v. Town of Walpole, 409 N.E.2d 807, 808 (Mass. App. Ct. 1980); Turnpike Realty Co. v. Town of Dedham, 284 N.E.2d 891 (Mass. 1972), cert. denied, 409 U.S. 1108 (1973).

179. 272 U.S. 365 (1926).

180. Id. at 387.

181. Id. at 388 (emphasis added).

182. Id. at 395 (emphasis added).

183. "[This court] has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise...." Id. at 397.

184. 277 U.S. 183 (1928).

185. Id. at 188.

186. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962). The Court held that a town ordinance regulating dredging and pit excavating was a valid police power regulation as applied to defendant's property.

187. The Supreme Court has consistently applied these concepts in zoning cases. See Moore v. City of East Cleveland, 431 U.S. 494 (1977).

188. See Davis v. Sails, 318 So. 2d 214 (Fla. 1st D.C.A. 1975) in which the court stated at page 217:

> The substantial relationship rule is substantive law, and may be simply stated as follows: In order for a zoning ordinance to be valid, it must have some substantial relationship to the promotion of the public health, safety, morals or general welfare.

189. The rule purports to prevent a court from substituting its judgment for that of the zoning authority. In applying the rule, most courts have attempted to define it, resulting in a multitude of slightly variant statements of the rule. See, e.g., City of Miami Beach v. Lachman, 71 So. 2d 148, 152 (Fla. 1953) (an ordinance may be said to be fairly debatable when for any reason it is open to dispute or controversy on grounds that make sense or point to a logical deduction that in no way involves its constitutional validity); Orange County v. Butler Estates Corp., 328 So. 2d 864, 866 (Fla. 4th D.C.A. 1976) (though a judicial forum might disagree with a zoning decision, it is not permitted to substitute its discretion for that of the legislative body if the issue is fairly debatable); Davis v. Situs, Inc., 275 So. 2d 600, 602 (Fla. 1st D.C.A. 1973) (the fact that there is a dispute as to the propriety of the existing zoning classification does not mean that the classification is fairly debatable).

190. See JUERGENSMEYER AND WADLEY, FLORIDA ZONING--ATTACKS AND DEFENSES, §4-3. In Davis v. Sails, 318 So. 2d 214, 217 (Fla. 1st D.C.A. 1975), the court noted the substantial relationship rule and the fairly debatable rule have often been intertwined. The court opined that they should be kept distinct--the first being a rule of substantive law and the second a rule of procedure or application. Most Florida courts, however, have linked the two rules together. Id.

191. State ex rel. Taylor v. City of Jacksonville, 101 Fla. 1241, 133 So. 114, 116 (1931). The test may be phrased as "whether the ordinance can reasonably be expected to accomplish the legislative objective." JUERGENSMEYER AND WADLEY, FLORIDA ZONING--ATTACKS AND DEFENSES, §8-4. The intent is to be determined primarily from the language of the ordinance itself and not conjecture. Rinker Materials Corp. v. City of North Miami, 286 So. 2d 552 (Fla. 1973).

192. Alachua County v. Reddick, 368 So. 2d 653 (Fla. 1st D.C.A. 1979); City of Jacksonville v. Imbler, 235 So. 2d 526. 527 (Fla. 1st D.C.A. 1970) (the court stated the issue as being

whether it is fairly debatable that the particular legislative action is reasonably related to the public welfare). See also, Trachsel v. City of Tamarac, 311 So. 2d 137, 140 (Fla. 4th D.C.A. 1975).

193. See JUERGENSMEYER AND WADLEY, FLORIDA ZONING -- ATTACKS AND DEFENSES, §4-3.

194. If not successfully rebutted, the presumption of validity prevents a court from substituting its judgment for that of governing bodies. See Parking Facilities, Inc. v. City of Miami Beach, 88 So. 2d 141 (Fla. 1956).

195. See R. ANDERSON, 1 AMERICAN LAW OF ZONING, §§2.14, 2.15 (1978).

196. Powell v. Pennsylvania, 127 U.S. 678, 684-85 (1888).

197. See, e.g., Alachua County v. Reddick, 368 So. 2d 653 (Fla. 1st D.C.A. 1979). Rural New Town v. Palm Beach County, 315 So. 2d 478 (Fla. 4th D.C.A. 1975); Blank v. Town of Lake Clarke Shores, 161 So. 2d 683 (Fla. 2d D.C.A. 1964).

198. See, e.g., Town of Belleair v. Moran, 244 So. 2d 532 (Fla. 2d D.C.A. 1971); City of Miami Beach v. Ocean & Inland Co., 147 Fla. 480, 3 So. 2d 364 (1941).

199. City of Miami v. Rosen, 151 Fla. 677, 10 So. 2d 307 (1942).

200. Rural New Town, Inc. v. Palm Beach County, 315 So. 2d 478 (Fla. 4th D.C.A. 1975).

201. City of St. Petersburg v. Aiken, 217 So. 2d 315 (Fla. 1968); Metropolitan Dade County v. Kanter, 200 So. 2d 624 (Fla. 3d D.C.A. 1967); Blank v. Town of Lake Charles Shores, 161 So. 2d 683 (Fla. 2d D.C.A. 1964).

202. Alachua County v. Reddick, 368 So. 2d 653 (Fla. 1st D.C.A. 1979).

203. Id. at 659 (quoting Skaggs-Albertson's v. ABC Liquors, Inc., 363 So. 2d 1082, 1091 (Fla. 1978)).

204. Id. at 659.

205. JUERGENSMEYER AND WADLEY, FLORIDA ZONING -- ATTACKS AND DEFENSES, §4-4.

206. See generally, Bowden, Take It or Leave It: Uncertain Regulatory Standards and Remedies Threaten California's Open Space Planning, 15 U.C.D. L. REV. 371 (1981); Comment, New Jersey's Pinelands Plan and the "Taking" Question, 7 COLUM. J. ENVTL. L. 227 (1982); Note, Open-Space Zoning and The Taking Clause: A Two Part Test, 46 MO. L. REV. 868 (1981); Bricklemyer, Florida Test for Taking: A Critical Analysis of Graham v. Estuary Properties, Inc., 57 FLA. BAR J. 87 (1983); Norris, Finding a Taking: Standard for Fairness, 16 U.S.F.L. REV. 743 (1982); Kmiec, Regulatory

Takings: The Supreme Court Runs Out of Gas in San Diego, 57 IND. L. J. 45 (1982).

207. The Fifth Amendment applies to the states through the Fourteenth. Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897). A similar provision is in Florida's Constitution. FLA. CONST. art. X, §6.

208. Justice Brennan's dissent in a recent U.S. Supreme Court opinion suggests a possible new remedy. See discussion of San Diego Gas and Electric Company v. City of San Diego, 450 U.S. 621 (1981), infra accompanying notes 405-407.

209. For a comprehensive and insightful analysis of the history and development of takings jurisprudence, see BOSSELMAN, CALLIES AND BANTA, THE TAKING ISSUE, 53-138 (1973).

210. As one commentator noted in 1857, "It seems to be settled that, to entitle the owner to protection under this clause the property must be actually taken in the physical sense of the word...." Id. at 114 (quoting SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW, 519-520 (1st ed. 1857)).

211. Id. at 82-88.

212. Id. at 106-114.

213. 11 Metc. at 55 (Mass. 1846).

214. Id. at 58.

215. Id.

216. 80 U.S. 166 (1871).

217. Id. at 167.

218. Id. at 181.

219. See, e.g., U.S. v. Lynah, 188 U.S. 445 (1903); U.S. v. Cress, 243 U.S. 316 (1917).

220. See, e.g., Griggs v. Allegheny County, 369 U.S. 84 (1962).

221. Kaiser Aetna v. United States, 444 U.S. 164 (1979).

222. 192 U.S. 217 (1904). See also, Transportation Co. v. Chicago, 99, U.S. 635 (1878).

223. 123 U.S. 623 (1887).

224. Id. at 665.

225. Id. at 668-69.

226. See e.g., Northeast Laundry v. City of Des Moines, 239 U.S. 486 (1916) (ordinance upheld prohibiting uses of property that might emit smoke); Denver and Rio Grande R.R. Co. v. City and County of Denver, 250 U.S. 241 (1919) (ordinance upheld requiring the removal of railroad tracks from a busy intersection).

227. 239 U.S. 394 (1915).

228. Id. at 405.

229. Id. at 411.

230. Id. at 410.

231. 260 U.S. 393 (1922).

232. For a description of the factual background to Pennsylvania Coal, see BOSSELMAN, CALLIES AND BANTA, THE TAKING ISSUE, 126-33 (1973).

233. 260 U.S. 393, 413.

234. Id.

235. 260 U.S. 393, 415.

236. 276 U.S. 272 (1928).

237. Id.at 279-280.

238. 369 U.S. 590 (1962).

239. Id. at 592.

240. Id. at 593.

241. Id. at 594.

242. Id.

243. 438 U.S. 104 (1978).

244. Id. at 12.

245. Id. at 124.

246. Id.

247. Id.

248. Id.

249. Id.

250. Id.

251. Id.

252. Id. at 125.

253. Id.

254. Id. at 127.

255. Id. at 128.

256. Id. at 136.

257. Id.

258. Id. at 130.

259. Id. at 131.

260. Id. at 137.

261. Id.

262. Id.

263. 447 U.S. 255 (1980).

264. Id. at 261.

265. Id. at 261, n.8.

266. Id. at 262.

267. Id.

268. 450 U.S. 621 (1981).

269. Id. at 632.

270. Id. at 652 (Brennan, J., dissenting).

271. Id. at 622. Justice O'Connor has since replaced one of the dissenters, but has not authored an opinion on the subject.

272. Id. at 633-634 (Rehnquist, J., concurring).

273. Id. at 636.

274. 105 S.Ct. 3108 (1985).

275. Id. at 3116.

276. Id. at 3123.

277. Id. at 3125 (Stevens, J., concurring).

278. Id. at 3119, 3124 (emphasis supplied).

279. MacDonald, Sommer & Frates v. County of Yolo, prob. juris. noted 106 S.Ct. 244 (1985). The opinion of many experts who attended oral argument on March 26, 1986, is that the Court is again not likely to reach the taking issue. Remarks of Fred Bosselmen, Seminar, Land Use Planning and Regulation: The Role of the Local Comprehensive Plan, presented by the Florida Bar Environmental and Land Use Law Section, May 8-10, 1986, Sarasota, Florida.

280. See, e.g., Freilich, Solving the "Taking" Equation: Making the Whole Equal the Sum of Its Parts, 15 URB. LAW. 447 (1983); Costonis, Fair Compensation and the Accommocation Power: Antidotes for the Taking Impassee in Land Use Controversies, 75 COLUM L. REV. 1021 (1975); Sax, Takings and the Police Power, 74 YALE L.J. 36 (1964); Note, Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance, 26 STAN. L. REV. 1439 (1974); Binder, Taking vs. Reasonable Regulation: A Reappraisal in Light of Regional Planning and Wetlands, 25 U. FLA. L. REV. 1 (1972); Note, Inverse Condemantion Unavailable As Remedy for Deprivation of Property Value by City Zoning Ordinance, 1979 WASH. U. L.Q. 1121 (1979); Mandelker, Land Use Takings: The Compensation Issue, 8 HASTINGS CONST. L.Q. 491 (1981); Humback, A Unifying Theory for the Just-Compensation Cases: Takings, Regulation and Public Use, 34 RUTGERS L. REV. 243 (1982); Stoebuck, Police Power, Takings and Due Process, 37 WASH. & LEE L. REV. 1057 (1980).

281. For an excellent discussion of these factors, see Kusler, Floodplain Regulations: Judicial Response in the 1970s, U.S. WATER RESOURCES COUNCIL, REGULATION OF FLOOD HAZARD AREAS TO REDUCE FLOOD ZONES, Volume 3 (1984).

282. See discussion supra accompanying notes 234-38.

283. See, e.g., Annicelli v. Town of South Kingston, 463 A.2d 133 (R.I. 1983); State v. Johnson, 265 A.2d 711 (Me. 1970); MacGibbon v. Board of Appeals of Duxbury, 200 N.E.2d 254 (Miss. 1964); Morris County Land Improvement Co. v. The Township of Parsippany-Troy Hills, 193 A.2d 232 (N.J. 1963).

284. Penn Central Transportation Co. v. New York City, 438 U.S. 104, 131 (1978). Turnpike Realty Co. v. Town of Dedham, 284 N.E. 891, 900 (Mass. 1972).

285. 272 U.S. 365 (1926).

286. 239 U.S. 394 (1915).

287. 369 U.S. 590 (1962).

288. 276 U.S. 272 (1928).

289. Penn Central Transportation Co. v. New York, 438 U.S. 104 (1978); Krahl v. Nine Mile Creek Watershed District, 283 N.W.2d 538 (Minn. 1979).

290. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

291. Moskow v. Commissioner of the Dept. of Environmental Management, 427 N.E.2d 750 (Mass. 1981); Loveladies Harbor, Inc. v. Dept. of Environmental Protection, 422 A.2d 107 (N.J. Super. Ct. App. Div. 1980); Pope v. City of Atlanta, 249 S.E.2d 16 (Ga. 1878); Maple Leaf Investors, Inc. v. State, Dept. of Ecology, 565 P.2d 1162 (Wash. 1977).

292. Brecciaroli v. Connecticut Comm'n of Environmental Protection, 362 A.2d 948, 952 (Conn. 1975).

293. Krahl v. Nine Mile Creek Watershed District, 283 N.W.2d 543 (Minn. 1979); Brecciaroli v. Connecticut Comm'n of Environmental Protection, id., Turnpike Realty Co. v. Town of Dedham, 284 N.W.2d 899 (Mass. 1972), cert. denied, 409 U.S. 1108 (1973). See also, Usdin v. State, Dept. of Environmental Protection, 414 A.2d 290 (N.J. 1980); State v. Capuano Bros. Inc., 384 A.2d 610, 615 (R.I. 1978); Sibson v. State, 336 A.2d 239 (N.H. 1975).

294. Maple Leaf Investors Inc. v. State, Dept. of Ecology, 565 P.2d 1166; Turner v. County of Del Norte, 24 Cal. App. 3d 311; Spiegle v. Borough of Beach Haven, 218 A.2d 129, 137 (N.J. Super. 1966).

295. Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972); Spiegle v. Borough of Beach Haven, 218 A.2d 137 (N.J. Super. 1966).

296. Penn Central Transportation Co. v. New York, 438 U.S. 130 (1978); Moskow v. Commissioner of the Dept. of Environmental Management, 427 N.E.2d 753 (Mass. 1981).

297. Loveladies Harbor, Inc. v. Dept. of Env. Protection, 422 A.2d 107 (N.J. Super. Ct. App. Div. 1980); American Dredging Co. v. State, Dept. of Environmental Protection, 404 A.2d 42 (N.J. Super. Ct. App. Div. 1979).

298. As Professor Freund phrased it: "It may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful.... From this results the difference between the power of eminent domain and the police power, that the former recognizes a right to compensation, while the latter on principle does not." E. FREUND, THE POLICE POWER 546-47 (1904).

299. Usdin v. State, Dept. of Env. Protection, 414 A.2d 289 (N.J. 1980); Maple Leaf Investors, Inc. v. State, Dept. of

Ecology, 565 P.2d 1166; Just v. Marinette County, 201 N.W.2d 767 (Wis. 1972).

300. Goldblatt v. Town of Hempstead, 369 U.S. 590, 593 (1962).

301. Turner v. County of Del Norte, 24 Cal. App. 3d 311 (1972); Usdin v. State, Dept. of Env. Protection, 414 A.2d 280 (N.J. 1980); Pope v. City of Atlanta, 249 S.E.2d 16 (Ga. 1978); Maple Leaf Investors, Inc. v. State, Dept. of Ecology, 565 P.2d 1162 (Wash. 1977); Turnpike Realty Co., Inc. v. Town of Dedham, 284 N.E.2d 891 (Mass. 1972); Just v. Marinette County, 284 N.E.2d 891 (Mass. 1972).

302. Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 193 A.2d 232, 240 (N.J. 1963).

303. Am. Nat'l Bank & Trust Co. of Chicago v. Village of Winfield, 274 N.E.2d 144, 146 (Ill. 1971).

304. Turner v. County of Del Norte, 24 Cal. App. 3d 311 (1972).

305. For a discussion of the common law regarding interference with surface waters, see Maloney, Hamann and Canter, Stormwater Runoff Control: A Model Ordinance for Meeting Local Water Quality Management Needs, 20 NAT. RESOURCES J. 713, 721-27 (1980).

306. Maloney, Judicial Protection of the Environment: A New Role for Common-Law Remedies, 25 VAND. L. REV. 145 (1972).

307. It is not necessary, however, to characterize action as a nuisance in order to prohibit it. Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 134, n.30.

308. Usdin v. State Dept., 414 A.2d 280, 289 (N.J. 1980).

309. 434 A.2d 266, 269 (R.I. 1984).

310. Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 134-35 (1978); Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926); Krahl v. Nine Mile Creek Watershed District, 283 N.W.2d 538 (Minn. 1979).

311. Turner v. Town of Walpole, 409 N.E.2d 807, 809 (Mass. App. Ct. 1980).

312. Cappture Realty Corp. v. Board of Adjustment of Borough of Elmwood Park, 313 A.2d 624 (N.J. 1973).

313. Turner v. Town of Walpole, supra note 314 at 809; Young Plumbing and Heating Co. v. Iowa Natural Resources Council, 276 N.W.2d 377, 384, n.4.

314. Sibson v. State, 336 A.2d 239 (N.H. 1975).

315. Chokecherry Hills Estates v. Deuel County, 294 N.W.2d 654 (S.D. 1980).

316. Sibson v. State, 336 A.2d 239 (N.H. 1975); Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972).

317. Furey v. City of Sacramento, 592 F. Supp. 463 (E.D. Cal. 1984).

318. Id. at 470.

319. County of Ada v. Henry, 105 Idaho 263 (1983).

320. Usdin v. State, 414 A.2d 289 (N.J. 1980).

321. See generally, Bartke, The Navigation Servitude and Just Compensation - Struggle for a Doctrine, 48 OR. L. REV. 1 (1968); Morreale, Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation, 3 NAT. RESOURCES J. 1 (1963); Note, The Navigational Servitude and the Fifth Amendment, 26 WAYNE L. REV. 1505 (1980).

322. See generally, Maloney, The Ordinary High Water Mark: Attempts at Settling an Unsettled Boundary Line, 13 Land and Water L. Rev. 465 (1978); Maloney & Ausness, The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping, 53 N.C. L. REV. 185 (1974).

323. Commentary, The Public Trust Doctrine and Ownership of Florida's Navigable Lakes, 29 U. FLA. L. REV. 730 (1977).

324. See generally, Sax, Takings and the Police Power, 74 YALE L. J. 36 (1964); Rice, "Taking" by Regulation and the North Carolina Coastal Area Management Act, 40-58, University of North Carolina Sea Grant Program Publication UNC-SG-75-26 (1976).

325. State v. Superior Ct. of Lake Co., 625 P.2d 239 (Cal. 1981).

326. Loveladies Harbor, Inc. v. Dept. of Environmental Protection, 422 A.2d 107, 111 (N.J. Super. Ct. App. Div. 1980); Just v. Marinette County, 201 N.W.2d 761, 765 (Wis. 1972).

327. Usdin v. State, 414 A.2d 280, 289 (N.J. 1980); Woodbury County Soil Conservation District v. Ortner, 279 N.W.2d 276, 278 (Iowa 1979); Maple Leaf Investors, Inc. v. State, Dept. of Ecology, 565 P.2d 1162, 1164 (Wash. 1977); Turnpike Realty Co., Inc. v. Town of Dedham, 284 N.E.2d 891, 900 (Mass. 1972).

328. 399 So. 2d 1374, 1380-81 (Fla. 1981).

329. Turnpike Realty Co. v. Town of Dedham, 284 N.E.2d 891 (Mass. 1972); Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972).

330. 399 So. 2d 1374, 1382.

331. 349 So. 2d 667 (Fla. 3d D.C.A. 1977).

332. 383 So. 2d 681 (Fla. 2d D.C.A. 1980).

333. Id. at 685.

334. 400 So. 2d 1227 (Fla. 4th D.C.A. 1981).

335. Id. at 1233 (footnotes omitted).

336. Id.

337. See Sarasota County v. Barg, 302 So. 2d 737, 743 (Fla. 1974); Cloutier v. Town of Epping, 547 F. Supp. 1232, 1243 (D.N.H. 1982); Contra Costa Theatre, Inc. v. City of Concord, 511 F. Supp. 87, 91 (N.D. Cal. 1980); Kinzli v. City of Santa Cruz, 539 F. Supp. 887 (N.D. Cal. 1982).

338. 446 F.2d 83, 88 (5th Cir. 1971).

339. See, e.g., Fischer v. State of Florida, 379 So. 2d 947, 948 (Fla. 1979); Epifano v. Town of Indian River Shores, 379 So. 2d 966 (Fla. 4th D.C.A. 1979); Donaldson v. City of Titusville, 345 So. 2d 800, 801-02 (Fla. 4th D.C.A. 1977).

340. Stone v. City of Maitland, 446 F.2d 83, 88.

341. 352 A.2d 661 (R.I. 1976).

342. Id. at 668.

343. Id. at 669.

344. 293 A.2d 241 (Md. 1972).

345. Id. at 251.

346. 366 U.S. 420 (1961).

347. 293 A.2d 241, 251.

348. 346 A.2d 612 (N.J. 1975).

349. Id. at 614.

350. 448 A.2d 124 (R.I. 1982).

351. Id. at 127.

352. Id. at 127.

353. 113 Cal. App. 3d 491, (1980).

354. 113 Cal. App. 3d 491, 495. See also, Blodgett v. County of Santa Cruz, 698 F.2d 368, 369 (9th Cir. 1982) (change in public policy regarding growth control and subdivision of rural land justified treating new applicants for subdivision approval differently than previous applicants).

355. See, e.g., Long Island Court Homeowners Ass'n v. Methner, 254 N.W.2d 57 (Mich. 1977).

356. 302 S.E.2d 204 (N.C. 1983).

357. 640 S.W. 2d 13 (Tenn. Ct. App. 1982).

358. Id. at 18.

359. 428 So.2d 726, 728 (Fla. 3d D.C.A. 1983) (citations omitted). See also, Franklin County v. Leisure Properties, Ltd., 430 So. 2d 475 (Fla. 1st D.C.A. 1983); Gouge v. City of Snellville, 287 S.E.2d 539 (Ga. 1982); Jones v. Hendricks County Plan Commission, 435 N.E.2d 82, 84 (Ind. Ct. App. 1982); Bell v. State, 369 So. 2d 932 (Fla. 1979); Stocks v. Lee, 144 Fla. 627, 198 So. 211 (1940); City of Miami Beach v. Lincoln Investments, Inc., 214 So. 2d 496 (Fla. 3d D.C.A. 1968); City of Miami v. Walker, 169 So. 2d 842 (Fla. 3d D.C.A. 1964), cert. denied, 176 So. 2d 511 (Fla. 1965); Glassman v. Township of Falls, 547 F. Supp. 362 (E.D. Pa. 1982).

360. Board of Regents v. Roth, 408 U.S. 564 (1972) (footnote omitted).

361. Edelman v. Jordon, 415 U.S. 651 (1974); Lovell v. City of Griffin, 303 U.S. 444 (1938).

362. 408 U.S. 564, 577.

363. 541 F. Supp. 1253 (D.P.R. 1982), aff'd 701 F.2d 231 (1st Cir. 1983).

364. Id. 1259.

365. Id. at 1261.

366. Id.

367. Id. at 1264.

368. Id.

369. 547 F. Supp. 1232 (D.N.H. 1982).

370. Id. at 1241.

371. Id.

372. Id. at 1242.

373. 527 F. Supp. 1073 (E.D. Wis. 1981).

374. Id. at 1079-80.

375. 680 F.2d 822, 833 (1st Cir. 1982) (footnotes and citations omitted).

376. See, e.g., Glassman v. Township of Falls, 547 F. Supp. 362, 369-70 (E.D. Pa. 1982).

377. See, e.g., Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 830-31 (1st Cir. 1982); Molgaard v. Town of Caledonia, 527 F. Supp. 1073, 1082-83 (E.D. Wis. 1981).

378. 354 So. 2d. 57 (Fla. 1978).

379. 109 So. 2d 591 (Fla. 1st D.C.A. 1959).

380. Id. at 593.

381. Poe v. State Road Department, 127 So.2d 898 (Fla. 1st D.C.A. 1961).

382. State Dept. of H.R.S. v. Scott, 418 So. 2d 1032, 1033 (Fla. 2d D.C.A. 1982); City of Jacksonville v. Schuman, 167 So. 2d 95, 98 (Fla. 1st D.C.A. 1964), cert. denied 172 So. 2d 597 (Fla. 1965).

383. 397 So. 2d 362 (Fla. 1st D.C.A. 1981).

384. Id. at 364.

385. 167 So. 2d 95 (Fla. 1st D.C.A. 1964).

386. Id. at 97.

387. Id. at 103. For other inverse condemnation cases see Village of Tequesta v. Jupiter Inlet Corp., 371 So. 2d 663 (Fla. 1979); State Road Department v. Bender, 147 Fla. 15, 2 So. 2d 298 (1941); Sarasota-Manatee Airport Authority v. Alderman, 238 So. 2d 678 (Fla. 2d D.C.A. 1970); Hillsborough County Aviation Authority v. Benitez, 200 So. 2d 194 (Fla. 2d D.C.A. 1967), cert. denied 204 So. 2d 328; State Road Department v. Harvey, 142 So. 2d 773 (Fla. 2d D.C.A. 1962); State Road Department of Florida v. Darby, 109 So. 2d 591 (Fla. 1st D.C.A. 1959).

388. For a complete discussion of these remedies in the context of uncompensated physical takings, see Florida Bar, Florida Eminent Domain Practice and Procedure, Chap. 12 (3d ed. 1977).

389. See, e.g., Burritt v. Harris, 172 So. 2d 820 (Fla. 1965); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

390. See, e.g., Burritt v. Harris, 172 So. 2d 820, 823.

391. Id.

392. See generally, Comment, Inverse Condemnation Unavailable as Remedy for Deprivation of Property Value by City Zoning Ordinance, 1979 WASH. U.L.Q. 1121; Bozung, Judicially Created Zoning With Compensation: California's Brief Experiment With Inverse Condemnation, 10 ENVTL. L. 67 (1979); Comment, Penn Central Transportation Co. v. New York City: Easy Taking-Clause Cases Make Uncertain Law, 1980 UTAH L. REV. 369; Comment, Property: Kansas Recognizes Plotting or Planning in Anticipation of a Public Improvement Can Be Inverse Condemnation, 19 WASHBURN L. J. 374 (1980); Comment, San Diego Gas and Electric Co. v. City of San Diego: Blueprint For A New Terminable Inverse Condemnation?, 8 COLUM. J. ENVTL. L. 211 (1982).

393. See, e.g., Florio v. City of Miami Beach, 425 So. 2d 1161, 1162 (Fla. 3d D.C.A. 1983); Mailman Development Corp. v. City of Hollywood, 286 So. 2d 614, 615 (Fla. 4th D.C.A. 1973), cert. denied 419 U.S. 844 (1974).

394. Id.

395. 450 U.S. 621 (1981).

396. Id. at 632-33.

397. Id. at 658.

398. 105 S.Ct. 3124 (1985).

399. Id. at 3127.

400. Id.

401. The Ninth Circuit has indicated concern that California's state law prohibition against money damages for regulatory takings has been undercut by the dissent. Martino v. Santa Clara Valley Water District, 703 F.2d 1141 (9th Cir. 1983). The Eighth Circuit has followed the temporary damage rule in Nemmers v. City of Dubuque, 764 F.2d 502 (8th Cir. 1985), as did the Sixth Circuit in Hamilton Bank of Johnson City v. Williamson County Regional Planning Commission, 729 F.2d 402 (6th Cir. 1984).

402. The Eleventh Circuit adopted the former Fifth Circuit's decisions rendered prior to October 1, 1981. Bonner v. City of Prichard, 61 F.2d 1206 (11th Cir. 1981) (en banc).

403. 643 F.2d 1188 (5th Cir. 1981), reh. denied, 649 F.2d 336 (5th Cir. 1981), cert. denied, 455 U.S. 907 (1982), aff'd after remand, 699 F.2d 734 (1983).

404. Id. at 1200 (citations and footnote omitted).

405. Id. at 1200 (footnote omitted).

406. Arkansas Louisiana Gas Company v. City of Minden, 341 So. 2d 607 (La. App. 1977). It should be noted that the printed opinion in Hernandez contains what appears to be a typographical error on page 1197, where Agins v. City of Tiburon, 447 U.S. 255 (1979) is cited for the proposition that denial of "an economically viable use of his land" creates a taking. The quotation from Agins, correctly cited in Hernandez later at footnote 2, is that a taking occurs if owners are denied "any [not an] economically viable use of their land."

407. One California court has refused to follow the dissent, and held itself bound to follow the state supreme court decision prohibiting such a remedy--Aptos Seascape Corporation v. County of Santa Cruz, 138 Cal. App. 3d 484 (1982)--while another California court held that a federally created cause of action could be stated, despite California state law--Gilliland v. City of Palmdale, 179 Cal. Rptr. 627 (1982). The Supreme Court of North Dakota has adopted Justice Brennan's suggested rule for damages for temporary takings, Rippley v. City of Lincoln, 330 N.W.2d 505 (N.D. 1983) as has the Supreme Court of New Hampshire, Burrows v. City of Keene, 432 A.2d 15 (N.H. 1971), and the Supreme Court of Wisconsin, Zinn v. State, 334 N.W.2d 67 (Wis. 1983). New Jersey appears to have recognized a damage remedy for temporary takings as a matter of state law, prior to the San Diego Gas dissent. Sheerr v. Township of Evesham, 445 A.2d 46 (N.J. 1982).

408. 339 So. 2d 1374 (Fla. 1981).

409. Id. at 1383 (Adkins, J., dissenting).

410. 464 So. 2d 176 (Fla. 2nd D.C.A. 1985).

411. 450 So. 2d 213 (Fla. 1984).

412. Id. at 215. See also, Atlantic International Investment Corp. v. State, 478 So. 2d 805 (Fla. 1985).

413. Id. at 216.

414. 105 So.Ct. 3128, 3126.

415. 643 F.2d 1188, 1200 (5th Cir. 1981).

416. Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353, 1358 (9th Cir. 1977). But see, Fountain v. Metro Atlanta Rapid Transit Auth., 678 F.2d 1038 (11th Cir. 1982), (the court rejected the requirement that the governmental agency have eminent domain powers before an action could be brought for inverse condemnation).

417. The American Rule would apply whereby each party pays its own attorneys fees. See, Alyeska Pipeline Service Co. v. Wilderness Soc., 421 U.S. 240 (1975).

418. State Dept. of H.R.S. v. Scott, 418 So. 2d 1032, 1034 (Fla. 2d D.C.A. 1982); Pinellas County v. Brown, 420 So. 2d 308, 309 (Fla. 2d D.C.A. 1982).

419. Leon County v. Smith, 397 So. 2d 362, 363-64 (Fla. 1st D.C.A. 1981).

420. Village of Tequesta v. Jupiter Inlet Corp., 371 So. 2d 663, 669 (Fla. 1979).

421. 42 U.S.C. {1983 (Supp. III 1979).

422. 436 U.S. 658 (1978).

423. See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979).

424. See generally, Bley, Use of the Civil Rights Acts to Recover Money Damages for the Overregulation of Land, 14 URB. LAW. 223 (1982); Note, The Availability of 42 U.S.C. {1983 in Challenges of Land Use Planning Regulations: A Developers Dream Come True?, 1982 UTAH L. REV. 571 (1982).

425. See Rockwell, Constitutional Violations in Zoning: The Emerging Section 1983 Damage Remedy, 33 U. FLA. L. REV. 168, 168-69 (1981); Freilich, Solving the "Taking" Equation: Making the Whole Equal the Sum of Its Parts, 15 URB. LAW. 447, 470 (1983).

426. See Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979).

427. See Arnett v. Kennedy, 416 U.S. 134 (1974); Rockwell, Constitutional Violations in Zoning: The Emerging Section 1983 Damage Remedy, 33 U. FLA. L. REV. 168, 181-83 (1981);

428. 399 So. 2d 1374 (Fla. 1981).

429. 399 So. 2d at 1382, quoting from Just v. Marinette County, 201 N.W.2d 761, 768 (Wis. 1972).

430. Federal courts have looked to state law to determine the existence of constitutionally protected property rights in land use disputes in the following recent cases: Succesion Suarez v. Gelabert, 701 F.2d 231 (1st Cir. 1983); Espanola Way Corp. v. Meyerson, 690 F.2d 827 (11th Cir. 1982), cert. denied, 460 U.S. 1039 (1983); Windward Partners v. Ariyoshi, 693 F.2d 928 (9th Cir. 1982); Contra Costa Theatre, Inc. v. City of Concord, 686 F.2d 798 (9th Cir. 1982); Cote v. Seaman, 625 F.2d 1 (1st Cir. 1980); Beacon Syracuse Assoc. v. City of Syracuse, 560 F. Supp. 188 (N.D.N.Y. 1983);

Cloutier v. Town of Epping, 547 F. Supp. 1232 (D.N.H. 1982); Glassman v. Township of Falls, 547 F. Supp. 362 (E.D. Pa. 1982); Molgaard v. Caledonia, 527 F. Supp. 1073 (E.D. Wis. 1981).

431. See generally, Note, Land Use Regulation, the Federal Courts, and the Abstention Doctrine, 89 YALE L.J. 1134 (1980).

432. Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941); A J. MOORE, FEDERAL PRACTICE par. 0.203[1] (1980); C. WRIGHT, LAW OF FEDERAL COURTS §52 (2d ed. 1970).

433. Burford v. Sun Oil Co., 319 U.S. 315 (1943); A J. Moore, supra at par. 0.203[1].

434. See, e.g., Fountain v. Metro Atlanta Rapid Transit Auth., 678 F.2d 1038 (11th Cir. 1982); Rancho Palos Verdes Corp. v. City of Laguna Beach, 390 F. Supp. 1004 (C.D. Cal. 1975) aff'd, 547 F.2d 1092 (9th Cir. 1976); Beck v. State of California, 479 F. Supp. 392 (C.D. Cal. 1979); Kent Island Joint Venture v. Smith, 452 F. Supp. 455 (D. Md. 1978); Williams v. Patton, 410 F. Supp. 1 (E.D. Pa. 1976); Brosten v. Scheeler, 360 F. Supp. 608 (N.D. Ill. 1973). See, also, Urbanizadora Versalles, Inc. v. Rivera Rios, 701 F.2d 993 (1st Cir. 1983); Heritage Farms Inc. v. Solebury Township, 671 F.2d 743 (3d Cir. 1982) cert. denied 456 U.S. 990; Lerner v. Town of Islip, 272 F. Supp. 664 (E.D. N.Y. 1967) (abstention inappropriate in these land use cases).

435. 105 S.Ct. 3108 (1985).

436. Id. at 3117.

437. Id. at 3120.

438. Id. at 3121.

439. 436 U.S. 658 (1978).

440. Id. at 694.

441. Owen v. City of Independence, Mo., 445 U.S. 622 (1980).

442. City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).

443. Espanola Way Corp. v. Meyerson, 690 F.2d 827 (11th Cir. 1982); Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981), cert. denied, 455 U.S. 907; Bruce v. Riddle, 631 F.2d 272 (4th Cir. 1980); Gorman Towers v. Bogoslavsky, 626 F.2d 607 (8th Cir. 1980).

444. Lake Country Estates, Inc., 440 U.S. 391 (1979).

445. See Altaire Builders, Inc. v. Village of Horseheads, 551 F. Supp. 1066, 1070 (W.D. N.Y. 1982).

446. See, e.g., Westborough Mall, Inc. v. City of Cape Girardeau, Mo., 693 F.2d 733, 741 (8th Cir. 1982) (city manager's acts reflected official policy).

447. See Wood v. Strickland, 420 U.S. 308 (1975); Espanola Way Corp. v. Meyerson, 690 F.2d 827 (11th Cir. 1982); Scheur v. Rhodes, 416 U.S. 232 (1974).

448. Harlow v. Fitzgerald, 451 U.S. 800 (1982); Procunier v. Navarette, 434 U.S. 555 (1978); Espanola Way Corp. v. Meyerson, 690 F.2d 827 (11th Cir. 1982).

449. Altaire Builders, Inc., supra note 455 at 1071.

450. Id.

451. Id. at 1074-75.

452. 643 F.2d 1188 (5th Cir. 1981).

453. Id. at 1193-94.

454. 42 U.S.C. {1988 (Supp. V 1981).

455. Monroe v. Pape, 365 U.S. 167 (1961).

456. 436 U.S. 658 (1978).

457. 403 U.S. 388 (1971).

458. The American Rule would apply to a Biven's action. 421 U.S. 240 (1975).

459. 436 U.S. 658 (1978).

460. Carlson v. Green, 446 U.S. 14, 19-20 (1980) (emphasis in original).

461. See, e.g., Rogin v. Bensalem Township, 616 F.2d 680 (3rd Cir. 1980); Turpin v. Mailet, 591 F.2d 426 (2d Cir. 1979); Cale v. City of Covington, 586 F.2d 311 (4th Cir. 1978); Kedra v. City of Philadelphia, 454 F. Supp. 652 (E.D. Pa. 1978). But see, Goss v. San Jacinto Junior College, 588 F.2d 96 (5th Cir. 1979) (court had jurisdiction under both Civil Rights Act and Bivens), modified, 595 F.2d 1119 (5th Cir. 1979); T & M Homes v. Township of Mansfield, 393 A.2d 613 (N.J. Law Div. 1978) (Bivens action available until Supreme Court rules otherwise); Kinzli v. City of Santa Cruz, 539 F. Supp. 887 (N.D. Cal. 1982) (both direct and {1983 actions survive motion for summary judgment).

462. 696 F.2d 1347 (11th Cir. 1983), cert. denied, 463 U.S. 1208 (1983).

463. 664 F.2d 99 (5th Cir. 1981), cert. denied, 456 U.S. 973 (1982).

464. 746 F.2d 1437 (11th Cir. 1984).