

Fredric G. Levin College of Law
Center for Governmental Responsibility

Spessard L. Holland Law Center
230 Bruton-Geer Hall
PO BOX 117629
Gainesville, FL 32611-7629
352-273-0835
352-392-1457 Fax

**IMPLEMENTATION OF THE MODEL LAND DEVELOPMENT
CODE
FOR FLORIDA SPRINGS PROTECTION**

Richard Hamann, Associate in Law
Thomas Ruppert, Assistant in Environmental Law

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TABLE OF CONTENTS

SUMMARY	i
I. Local Government Authority	1
A. General Authority.....	1
B. Preemption by the State.....	1
II. Florida Growth Management Growth Management Framework.....	3
1. Areas of Critical State Concern	4
A. Local Government Comprehensive Planning and Land Development Regulation Act... 7	
B. The Content of Local Government Comprehensive Plans	8
C. Adoption, Amendment and Update of Plans	12
D. Adoption of Land Development Regulations.....	14
F. Consistency of Development Orders.....	15
G. Joint Planning and Intergovernmental Coordination.....	15
III. State Preemption.....	17
A. Agriculture	17
B. Pollution Control Programs.....	18
C. Consumptive Use of Water	20
1. Overview of Water Management District Authority.....	20
a) Planning.....	21
b) Regulation of Consumptive Use.....	23
c) Minimum Flows and Levels and Reservations.....	24
2. Preemption of Local Government Authority	26
3. Coordination of local and regional planning.....	27
D. Environmental Resource Permitting.....	28
1. Overview of ERP Program	28
2. Preemption of Local Government Authority	31
3. Onsite Treatment and Disposal Systems (Septic Tanks)	32
IV. Constitutional Limits on Land Use Regulation.....	35
A. Due Process	35
B. Substantive Due Process	35
C. Equal Protection	36
D. Expropriation.....	37
V. Bert J. Harris, Jr. Private Property Rights Protection Act	42
A. Overview	42
B. Settlement Procedure.....	43
C. Inordinate Burden.....	45
D. Existing Use	47
E. Vested Rights	48
F. Recent Cases Under the Act.....	49
G. Conclusion.....	50
VI. Transfer of Development Rights	51
A. Overview	51
B. Use of TDRs in Florida	51
1. Florida Statute References to TDRs.....	51
2. Case law	52
3. Transferable Rural Land Use Credits (TRLUCs)	53
C. Types of TDR Programs.....	54
1. Mandatory TDRs.....	54
2. Voluntary TDRs.....	55
3. Universal TDR System	55
D. Recommendations	56

SUMMARY

Local Government Authority

The Florida Constitution creates three kinds of local governments: charter and non-charter counties and municipalities. Each type of local government has similar authority to exercise the powers of self-government. These include the authority to adopt plans and regulations to protect the quality and quantity of water in springs. Additional authority may also be delegated to local governments by the Legislature.

The powers of local governments may also be limited by the Legislature through either express preemption or implied preemption. Express preemption occurs when the Legislature clearly states that laws passed by it override the laws of local governments. Implied preemption, while not favored by the courts, may occur if state law implicitly demonstrates intent by the legislature to preempt a specific area of law.

In the absence of any preemption, local governments may regulate concurrently with the state legislature but may not conflict with state law. Local government regulation must also be consistent with the state and federal constitutions.

Florida Growth Management

Florida's growth management framework consists of a State Comprehensive Plan, eleven regional planning councils, and local comprehensive plans. The state has greatest authority in dealing with Developments of Regional Impact (DRIs) and Areas of Critical State Concern (ACSC). Outside of these areas, however, the bulk of responsibility for growth management resides with local governments.

Florida's Local Government Comprehensive Planning and Land Development Regulation Act (hereinafter "Growth Management Act") establishes an integrated planning process to promote orderly development and regulate impacts to environmental resources. The Growth Management Act requires that local governments adopt comprehensive plans that are "consistent" with the goals, objectives, and policies of the State Comprehensive Plan and the Strategic Regional Policy Plan of the relevant Regional Planning Council. The Act requires that local land development regulations be consistent with and implement the goals, objectives and policies of the adopted comprehensive plan. It also requires that land development be consistent with the adopted plan.

A local government's comprehensive plan must incorporate various elements potentially relevant to protecting springs and springsheds. Four of the most pertinent elements are: a Future Land Use Element; a Sanitary Sewer, Solid Waste, Drainage, Potable Water, and Natural Groundwater Recharge Element; a Conservation Element; and an Intergovernmental Coordination Element.

The Future Land Use element must include protections for potable water wellfields and protection of environmentally sensitive lands. Furthermore, when the Department of

Community Affairs (DCA) gives assistance to local governments with their comprehensive plan, DCA must consider, among other things, groundwater recharge. The Sanitary Sewer, Solid Waste, Drainage, Potable Water, and Natural Groundwater Recharge Element requires identification of natural drainage features/groundwater recharge areas, assessment of current land use regulations related to these issues, and objectives and policies for implementation of land use regulation to protect drainage and recharge functions. The Conservation Element must identify natural resources, including groundwater, and incorporate objectives and policies to conserve such resources. Finally, the Intergovernmental Coordination Element requires analysis of current intergovernmental coordination, specific objectives for future coordination, and policies addressing each objective. This element could serve a crucial role in encouraging the intergovernmental coordination necessary for effective transfer of development rights programs. Coordination also must exist to adequately account for springs protection during water supply planning and under water management district regulatory programs. Sources of water supply adequate to provide for planned growth must be identified.

Local governments must evaluate and update their comprehensive plans every seven years. This evaluation includes consideration of water management district regional water supply plans and major groundwater issues. Water management districts, the Department of Environmental Protection (DEP), and DCA all have an opportunity to comment on draft evaluations of local government comprehensive plans, thus giving them a chance for input to help protect springs.

In addition to comprehensive planning, the Florida Legislature has adopted laws permitting the designation of certain areas as “areas of critical state concern” in order to promote protection of and reverse deterioration of water resources in those areas. The statute authorizing areas of critical state concern specifically refers to environmental resources and aquifer recharge areas. While designation as an area of critical state concern could help preserve springs, only five percent of the state can be so designated, thus limiting the usefulness of this tool in its current form.

State Preemption

State statutes expressly preempt local government authority to regulate in several areas. For example, agricultural activities do not fall within the scope of “development” for the purposes of comprehensive plans and thus are not regulated by comprehensive plans. Local governments may not enforce new regulations for agricultural activities already regulated by or subject to best management practices promulgated by DEP, the Department of Agriculture and Consumer Services (DACS), a water management district, or a federal entity. Thus, while agriculture poses serious threats to springs and springsheds in many areas of the state, counties and municipalities have limited authority to improve their regulation of agricultural practices.

One potential area of preemption relates to the establishment of local pollution control programs, which must be approved by DEP. Current law is unclear as to which local government laws constitute a “local pollution control program” and thus require DEP

approval. DEP asserts that it need not approve local government regulations that may affect pollution if the regulation does not form part of a local pollution control program, the local government has not requested a delegation of authority from DEP, and DEP and the local government have no current delegation agreement. It remains unclear whether the courts will follow this same approach and allow local governments to regulate sources of pollution even if DEP does not consider the regulation part of a delegation or a local pollution control program.

Another area in which local governments cannot regulate due to preemption by the state is the consumptive use of water. That authority is vested exclusively in DEP and the water management districts. Consumptive use permits may only be granted if the proposed use does not interfere with existing legal uses of water, is a reasonable-beneficial use, and is consistent with the public interest. The criteria for these conditions are located in the districts' rules and include criteria enabling the districts to protect the quantity of water discharged by springs by denying or imposing conditions on consumptive use permits. The districts also have authority to impose additional restrictions on current consumptive use permits if a water shortage threatens serious harm to water resources. Additional tools the districts have at their disposal for springs protection include minimum flows and levels (MFLs) and reservations of water. MFLs could play a significant role in protecting the flow of springs by providing the basis for denying consumptive use permits that would diminish spring flow below the MFL, which is designed to protect water resources from significant harm. Finally, the districts can "reserve" water for the protection of fish and wildlife or the public health and safety. The reserved water cannot be granted to users by a consumptive use permit. Use of reservations could serve as a better tool for springs protection than MFLs since a reservation does not require a determination of what constitutes "significant harm" to the water resources. MFLs and reservations must be considered in developing regional water supply plans. Local government water supply plans must be consistent with regional water supply plans and must include specific plans for water supply projects.

The water management districts also have authority to regulate buildings, roads, parking lots, ditches, and other activities affecting surface waters through the issuance of Environmental Resource Permits (ERP). Mitigation is often required to offset the unavoidable impacts of development pursuant to ERP permits. While local government authority over mitigation is preempted in several ways, local governments may still exercise many concurrent powers with the districts to improve water quality and protect springs. For example, local governments may usually require greater stormwater retention than the water management district in order to improve the quality of discharged water.

A final preemption issue emerges with regard to septic tanks. The Department of Health has exclusive authority to approve and permit septic systems. This authority, however, does not prevent local governments from imposing more stringent performance standards to protect the environment and groundwater from excessive nitrates discharged by septic systems.

Constitutional Limitations on Land Use Regulation

The United States Constitution, in amendments V and XIV, forbids the taking of private property for a public use without just compensation or without due process of law. U.S. Supreme Court precedent has expanded the idea of a taking from physical appropriation of land to include regulation of land use in some instances. A taking that results from regulation is called inverse condemnation. Takings law in general seeks to find a balance between honoring private property rights and protecting the common good by regulation of what property owners may do with their land or on their land. Only two types of actions clearly lead to a finding of inverse condemnation. The first occurs when the government itself physically invades the property without permission or permits another to do so. The second occurs when government regulation eliminates all economically viable use of the property. Regulation, however, seldom removes all economically viable use of land. Furthermore, there are exceptions. All economically viable use of land may be prohibited if that use would constitute a nuisance or is prohibited by underlying principles of property law.

Most cases, however, fall outside of these two categories of inverse condemnation. Thus, in the majority of cases, the test is whether the regulation goes “too far.” This “test” is really just an ad hoc factual inquiry by the reviewing court. While no hard and fast rules exist for this test the U.S. Supreme Court has identified various factors to consider in determining if a questioned regulation has gone “too far.” These include: the character of the government action, the economic impact of the regulation, and the extent to which the action interferes with the reasonable investment-backed expectations of the property owner.

Character of the government regulation refers to how the government is regulating. As noted above, if the government physically invades the land or allows a member of the public to do so, a taking occurs. Courts appear more likely to find a taking as well if the regulation eliminates a substantial property right such as the right to use or possess or dispose of the property.

The economic impact of the regulation relates to how much the regulation diminishes the value of the land. Courts determine this by looking to the land’s value before and after imposition of the challenged regulation. As noted, in the unusual case that all economically viable use of the land is destroyed, a taking will be found.

Finally, the consideration of reasonable investment-backed expectations involves an inquiry into whether the owner retains uses that were reasonably expected to be available for the property and for which the owner paid when purchasing the land. This factor usually makes it difficult, if not impossible, for a landowner to challenge regulations that affected the value of uses of the property before the landowner took possession of the property.

Bert J. Harris, Jr. Private Property Rights Protection Act

The Bert J. Harris, Jr. Private Property Rights Protection Act (Act) reflects the judgment of the Florida Legislature that takings jurisprudence under the U.S. and Florida constitutions did too little to protect private property and placed too much of the burden of regulation for the common good on private property owners. The Act thus specifically seeks to create a separate and distinct cause of action from takings law.

Local government regulations intended to control the negative environmental impacts of development in sensitive ecological areas could give rise to claims under the Act, since the Act applies to any law, regulation, or rule noticed for adoption or adopted after May 11, 1995. The Act requires compensation to landowners for regulations that “inordinately burden” property. The remedy for the landowner may include compensation for the actual loss to the fair market value of the land resulting from the government regulation.

The Act contains a settlement procedure before a property owner can bring suit for the government action in question. The procedure requires that the property owner give notice to the government entity imposing the regulation along with a property appraisal to support the claim of “inordinate burden.” The government entity then must make a settlement offer, after which an unsatisfied property owner may file suit in circuit court.

Judicial interpretation of key terms in the Act has so far been minimal. Thus, at this point in time, it remains difficult to predict what facts or economic impacts might lead to a government action losing in a claim under the Act. While few claims have made it to circuit court, many claims under the Act have been filed and settled before going to court. Thus, the Act presents a possible cost in legal and settlement expenses for local governments even for those cases that never reach the courtroom.

Open space requirements, prohibitions on development in some sensitive areas, and mandatory transfer of development right programs represent some of the regulations most likely to provoke Bert Harris and constitutional taking claims. Constitutional takings claims can usually be avoided in most of these areas by ensuring that landowners retain some development right on the property or the property as a whole retains some significant value. It is, however, much more difficult to predict whether claims under the Bert Harris Act will result in substantial costs to local governments. In any case, the Act specifically allows that settlement offers to aggrieved land owners may include, among others, such things as modifications to permits or development densities, land swaps, transfer of development rights, and variances or special exceptions.

Transfer of Development Rights

Transfer of development rights (TDR) programs developed in response to a desire to give landowners the value of potential development on their land while not permitting the development. TDR programs accomplish this by separating the development rights of property from the physical location of the property and allowing the property owner to transfer those development rights to another parcel. Florida law encourages the use of TDRs as a growth management tool. TDR programs can serve a crucial role both in preventing takings claims and eliminating, settling, or ameliorating claims under the Bert Harris Act.

In the past many TDR programs have failed to live up to their great theoretical potential because of poor design or management. If there is insufficient demand for the TDR credits granted to property owners in lieu of development of their own property, then those credits will lack value. If a landowner has no right or an extremely limited right to develop the landowner's property and the TDR credits granted in place of such development rights have little or no value, a takings claim or Bert Harris claim will likely arise, and those claims are more likely to be successful.

Local government should emphasize a cautious market approach to TDR program design in order to ensure that TDR credits have value and that the credits to a particular landowner appropriately reflect the value and environmental sensitivity of the land protected by the TDR program.

I. Local Government Authority

A. General Authority

The Florida Constitution provides for three kinds of general local governments: charter and non-charter counties and municipalities. Non-charter counties have the most limited constitutional authority; they can act within the scope of whatever authority is delegated by the Legislature.¹ Counties with an approved charter² and municipalities³ have home-rule authority. Although the constitutional wording differs for each, they generally have all the powers of the state needed for self-government except as limited by statutes. The Florida Legislature has essentially extended similar powers of home-rule to municipalities and both classes of counties.⁴ Local governments generally have the same regulatory power to protect springs as the state does. A local government can regulate in areas not addressed by state legislation, or may regulate concurrently with the state, adopting stricter standards it deems locally warranted. Local regulation cannot, however, conflict with state statutes. The superior authority of the state legislature will preempt conflicting local regulations.

B. Preemption by the State

The authority of local governments is subject to limitation by the Legislature in one of two ways. The Legislature may expressly preempt local governments from regulating in a particular area, or preemption may be implied “where the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature.”⁵ Preemption is not favored. The First District Court of Appeal has stated that, “[t]he courts should be careful in imputing an intent on behalf of the Legislature to preclude a local elected governing body from exercising its home rule powers.”⁶ Preemption is limited to the “the specific area where the Legislature has expressed their will to be the sole regulator.”⁷ Local governments can legislate concurrently with the state, but cannot conflict with state law.⁸ A conflict arises where the local government prohibits what the Legislature has “expressly licensed, authorized or required” or authorizes “what the

¹ FLA. CONST. art. VIII, §(1)(f).

² FLA. CONST. art. VIII, §(1)(g). State *ex rel.* Dickinson v. Volusia Cty, 269 So.2d 41 (Fla. 1972).

³ FLA. CONST. art. VIII, §(2)(b).

⁴ FLA. STAT. §§ 125.01(1)(j), 166.021 (2006).

⁵ Tallahassee Mem’l Reg’l Med. Ctr. v Tallahassee Med. Ctr., 681 So. 2d 826, 831 (Fla. 1st DCA 1996).

⁶ *Id.*

⁷ *Id.*

⁸ Thomas v. State, 614 So. 2d 468, 470 (Fla. 1993).

legislature has forbidden.”⁹ The courts will give deference to the interpretation of the state agency charged with implementing a law regarding whether it preempts local authorities.¹⁰

In summary, this means that local governments may not regulate a subject area at all if the state has expressly preempted the area. A local government may, however, impose stricter regulations if the state has neither expressly nor implicitly preempted the area and the local government’s regulation does not conflict with state regulation.

⁹ *Id.* at 470, quoting *Rinzler v. Carson*, 262 So.2d 661, 668 (Fla. 1972).

¹⁰ *GLA and Assoc. v. Boca Raton*, 855 So. 2d 278 (Fla. 4th DCA 2003).

II. Florida Growth Management Growth Management Framework

Florida has a system of growth management that relies primarily on the development and implementation of local comprehensive plans, with limited state oversight. Florida has an adopted State Comprehensive Plan¹¹ and requires the state's eleven regional planning councils¹² to adopt Strategic Regional Policy Plans.¹³ For land use regulation in a few areas, primarily in designated Areas of Critical State Concern,¹⁴ the state plays a significantly stronger role. The state and regional agencies have also historically played a significant role in regulating certain large developments known as Developments of Regional Impact (DRI).¹⁵ For most purposes, however, the duty of growth management falls on local governments.

Florida's State Comprehensive Plan¹⁶ establishes broad goals and policies to provide guidance for state agencies,¹⁷ Strategic Regional Policy Plans,¹⁸ and local government comprehensive plans.¹⁹ The State Comprehensive Plan includes several goals and policies that support the protection of groundwater and springs. The following sections are particularly relevant: Water Resources,²⁰ Natural Systems and Recreational Lands,²¹ and Land Use.²²

¹¹ FLA. STAT. ch. 187 (2006).

¹² FLA. STAT. § 186.50 (2006).

¹³ FLA. STAT. §§ 186.507-186.511(2006).

¹⁴ FLA. STAT. § 380.05 (2006).

¹⁵ Fla. Stat. § 380.06 (2006).

¹⁶ Fla. Stat. ch. 187 (2006).

¹⁷ FLA. STAT. § 186.008(4)(5)(2006). Interpretation of the plan is limited by the terms of the adopting statute. FLA. STAT. § 187.101 (2006). The State Comprehensive Plan does not create new regulatory authority and may be implemented only to the extent resources are allocated. The plan must be construed and applied as a whole, only if it is reasonable, economically and environmentally feasible, not contrary to the public interest, and consistent with the protection of private property rights. *Id.*

¹⁸ Fla. Stat. § 186.508(1) (2006).

¹⁹ Local governments are required to "address" relevant plans and policies of the state comprehensive plan but have sole discretion to determine the extent of implementation through expenditures in any given year. FLA. STAT. § 163.3177(10)(b) (2006).

²⁰ FLA. STAT. § 187.201(7) (2006). The goal states "Florida . . . shall maintain the functions of natural systems and the overall present level of surface and ground water quality. Florida shall improve and restore the quality of waters not presently meeting water quality standards."

1. Areas of Critical State Concern

One option for increasing the level of state involvement in land use decisions affecting springs would be to designate certain springs and their springsheds as Areas of Critical State Concern (ACSC). Under the Florida Environmental Land and Water Management Act (FELWMA),²³ the Department of Community Affairs (DCA), serving as the state land planning agency,²⁴ may from time to time recommend to the Administration Commission²⁵ that specific geographic areas be designated areas of critical state concern.²⁶ The purpose of the program is to:

protect the natural resources and environment of this state as provided in s. 7, Art. II of the State Constitution, ensure a water management system that will reverse the deterioration of water quality and provide optimum utilization of our limited water resources, facilitate orderly and well-planned development, and protect the health, welfare, safety, and quality of life of the residents of this state.²⁷

Before an Areas of Critical State Concern can be designated, a Resource Planning and Management Committee must be designated²⁸. The committee must include local elected officials and planners from each affected jurisdiction, as well as appropriate state and regional agencies. The purpose of the committee is to develop "a voluntary, cooperative resource planning and management program to resolve existing, and prevent future,

²¹ FLA. STAT. § 187.201(9) (2006). "Florida shall protect. . .unique natural habitats and natural systems."

²² FLA. STAT. § 187.201(15) (2006).

²³ FLA. STAT. § 380.05 (2006).

²⁴ FLA. STAT. § 380.03(18) (2006).

²⁵ FLA. STAT. § 380.031(1)(2006). The Administration Commission is composed of the Governor and independently elected cabinet officers, with the Governor as chairperson. FLA. STAT. §14.202 (2006) They also sit as the Florida Land and Water Adjudicatory Commission (FLWAC). FLA. STAT. §380.07(2006) The FLWAC acts as a quasi-judicial body to review appeals from orders of proposed regional development in areas of critical state concern and issue a decision granting or denying permission to develop. *Id.*

²⁶ FLA. STAT. § 380.05(1)(a) (2006). In addition, under Chapter 380.05(3), regional planning agencies designated by the state land planning agency and local governments in an area without a regional planning agency may make suggestions to the Administration Commission as to areas to be recommended.

²⁷ Fla. Stat. § 380.021 (2006).

²⁸ FLA. STAT. §380.045 (2006).

problems. . .²⁹ The committee has no more than 12 months to develop recommendations for a program³⁰.

Once designated, ACSCs are subject to stringent state oversight of development. To guide this regulation, the DCA must include in its recommendation to the Administration Commission a report of “the dangers that would result from uncontrolled or inadequate development of the area and the advantages that would be achieved from the development of the area in a coordinated manner . . . and specific principles for guiding development within the area . . .”³¹ In addition, the DCA is required to recommend actions that the local government and state and regional agencies must take to implement the principles for guiding development.³² These actions may include revisions of the local comprehensive plan and adoption of land development regulations, density requirements, and special permitting requirements.³³ Each of these recommended actions could be employed locally to bring about springs protection. For example, if excessive development in an area threatens springs with nutrient pollution, DCA could recommend that a local government adopt measures restricting the density of development in a particularly vulnerable area or impose stricter standards for the control of stormwater runoff.

Upon receiving the DCA’s recommendation, the Administration Commission must, within forty-five days, either reject the recommendation as proposed or adopt the recommendation with or without modification and, by rule, designate the area of critical state concern.³⁴ As in the DCA’s recommendation, any rule promulgated by the Administration Commission to designate an area of critical state concern must contain statutorily specified information, including principles for guiding development,³⁵ and a precise checklist of actions which, when implemented, will result in repeal of the designation by the Administration Commission.³⁶ The ultimate goal is implementation of principles sufficient to eventually allow the removal the designation.³⁷

²⁹ FLA. STAT. §380.045(1) (2006).

³⁰ FLA. STAT. §380.045 (3) (2006).

³¹ FLA. STAT. § 380.05(1)(a) (2006).

³² Id.

³³ Id.

³⁴ FLA. STAT. § 380.05(1)(b) (2006).

³⁵ FLA. STAT. § 380.05(1)(b)2 (2006).

³⁶ FLA. STAT. § 380.05(1)(b)4 (2006).

³⁷ However, if, after repeal of such designation, DCA determines that the administration of the local land development regulations or comprehensive plan within a formerly designated area is inadequate to protect that area, DCA may recommend to the commission that the area be re-designated. FLA. STAT. § 380.05(1)(d) (2006).

As a final level of state oversight, a rule adopted by the Administration Commission designating an area of critical state concern and principles for guiding development must be submitted to the President of the Senate and the Speaker of the House of Representatives for review no later than 30 days prior to the next regular session of the Legislature.³⁸ The Legislature may then reject, modify, or take no action relative to the adopted rule.³⁹ Because the Legislature, independent of the Administration Commission, has final decision-making authority, designating areas of critical state concern requires the combined political will of both the executive and legislative branches of government. This harmony of political will makes designation of an ACSC difficult.

Only statutorily enumerated types of land may be designated an ACSC. Included, *inter alia*, are areas:

containing, or having a significant impact upon, environmental or natural resources of regional or statewide importance, including, but not limited to, state or federal parks, forests, wildlife refuges, wilderness areas, aquatic preserves, major rivers and estuaries, state environmentally endangered lands, Outstanding Florida Waters, and aquifer recharge areas, the uncontrolled private or public development of which would cause substantial deterioration of such resources.⁴⁰

While these land classifications could be interpreted to include springs and springsheds, making them eligible for protection, the combined size of Florida's springs and springsheds may create an obstacle under current law. Under FELWMA, at no time may a new area of critical state concern be designated if that designation results in more than five percent of the state being so designated.⁴¹ There are currently five designated areas of critical state concern: Big Cypress, Green Swamp, Florida Keys, Apalachicola Bay, and Key West.⁴² In addition to the extent of existing areas of critical state concern, the combined area of just first magnitude springsheds exceeds 4.6 million acres,⁴³ over eight percent of Florida. Thus, in its current form, FELWMA only offers the possibility of protecting a few springs, necessitating a careful prioritization of springs and springsheds to utilize this approach.

Florida case law addressing areas of critical state concern is limited and does not appear

³⁸ FLA. STAT. § 380.05(1)(c) (2006).

³⁹ *Id.*

⁴⁰ FLA. STAT. § 380.05(2)(a) (2006).

⁴¹ FLA. STAT. § 380.05(20) (2006).

⁴² <http://www.dca.state.fl.us/fdcp/dcp/acsc/index.cfm> (visited 2-13-07). The total area of Florida is 58,560 square miles or 37,478,400 acres. Five percent of that is about 1,873,920 acres. Florida Division of Historical Resources, at <http://www.flheritage.com/facts/stats/quick/> (visited 2-13-07).

⁴³ Communication with Harley Means, Geologist II, Geological Investigations Section, Florida Geological Survey (Feb. 16, 2004).

to preclude use of FELWMA to protect springs. Though FELWMA was originally ruled an unconstitutional delegation of legislative authority,⁴⁴ subsequent amendments have repaired this constitutional defect.⁴⁵ In addition, FELWMA has recently withstood a claim that its provisions constitute an unconstitutional special law.⁴⁶ Most recently, the Third District Court of Appeal ruled that FELWMA is subject to the common law standard for the vesting of development rights: namely that vested rights to develop in an area of critical state concern are only established if the land was platted prior to its designation, and if property owner has, in good faith reliance upon section 380.05(18), F.S.,⁴⁷ made such a substantial change in position that it would make it highly inequitable to interfere with the acquired right.⁴⁸ Thus, subject to the limitations of already-vested development rights, there is no case law suggesting that FELWMA could not be used to protect Florida's springs.

A. Local Government Comprehensive Planning and Land Development Regulation Act

⁴⁴ *Askew v. Cross Key Waterways*, 372 So.2d 913 (Fla. 1978). In *Askew*, the Florida Supreme Court invalidated the Administration Commission's designation of the Green Swamp and Florida Keys as ACSCs. At the time of the decision, section 380.05(2)(a), Florida Statutes, merely required that “[a]n area of critical state concern may be designated ... for ... An area containing, or having a significant impact upon, environmental or natural resources of regional or statewide importance.” The court ruled that by failing to establish priorities to aid the Commission in deciding which areas were of critical concern, the legislature had “unconditionally delegated to an agency of the executive branch the policy function of designating the geographic area” to be subjected to that agency's development regulations. *Id.* at 920.

⁴⁵ In 1979, the legislature responded to *Askew* by amending section 380.05(2) to provide more detailed criteria for the designation of areas of critical state concern, and to require legislative approval of the designation. FLA. STAT. § 380.05(1)(c) (1979). *See also* *Rathcamp v. Dep't of Cmty. Affairs*, 740 So. 2d 1209, 1209 (Fla. 3rd DCA, 1999)(holding that section 380.0552(7), F.S., giving DCA the power to restrict rental periods in an area of critical state concern, was not an unconstitutional delegation of legislative authority to an administrative agency).

⁴⁶ *Schrader v. Florida Keys Aqueduct Authority*, 840 So.2d 1050 (Fla. 2003). In *Schrader*, the issue was whether a state law (i.e. FELWMA) authorizing local governments in Monroe County, and only Monroe County, to pass wastewater laws more restrictive than those provided for under general law is a special law. *Id.* at 1055.

⁴⁷ Section 380.05(18) states “[n]either the designation of an area of critical state concern nor the adoption of any regulations for such an area shall in any way limit or modify the rights of any person to complete any development that has been authorized.”

⁴⁸ *Monroe County v. Ambrose*, 2003 WL 22900537 (Fla. 3rd DCA 2003).

Florida's Local Government Comprehensive Planning and Land Development Regulation Act⁴⁹ (hereinafter "Growth Management Act") establishes an integrated planning process to promote orderly development and regulates impacts to environmental resources. The Growth Management Act requires that local governments adopt comprehensive plans that are "consistent"⁵⁰ with the goals, objectives and policies of the State Comprehensive Plan⁵¹ and the Strategic Regional Policy Plan of the relevant Regional Planning Council. Criteria for the review of comprehensive plans and plan amendments have been adopted by the Florida Department of Community Affairs.⁵² The Act requires the adoption of local land development regulations that are consistent with and help implement the goals, objectives and policies of the adopted comprehensive plan.⁵³ It also requires that land development be consistent with the adopted plan.⁵⁴ Equally or more importantly, capital facilities must be provided concurrently with development⁵⁵.

B. The Content of Local Government Comprehensive Plans

The Growth Management Act requires local governments to prepare or amend comprehensive plans, which include a number of required and optional elements related to the orderly growth of the local jurisdiction.⁵⁶ The elements of the comprehensive plan must be consistent with each other and the plan must be economically feasible. Rule 9J-5 of the Florida Administrative Code has been adopted by DCA for determining whether a plan or amendment complies with the Act. In addition to the comprehensive plan, each county and municipality must adopt or amend land development regulations⁵⁷ that include provision for protection of potable water wellfields⁵⁸ and for protection of environmentally sensitive lands.⁵⁹

⁴⁹ FLA. STAT. ch. 163, Pt. II (2006).

⁵⁰ Consistency of the local comprehensive plan with the state comprehensive and the strategic regional policy plan exists if the local plan is compatible with and furthers those plans. It is "compatible" if it does not conflict and it "furthers" a plan if it takes "action in the direction of realizing" the goal or policies of the plan. FLA. STAT. § 163.3177(10)(b) (2006). Consistency with regional water supply plans is also effectively required. FLA. STAT. § 3177(6)(2006).

⁵¹ FLA. STAT. ch. 187 (2006).

⁵² Fla. Admin. Code r. 9J-5.

⁵³ Fla. Stat. § 163.3202 (2006).

⁵⁴ FLA. STAT. §§ 163.3161, 163.3194(1)(a), 3 (2006).

⁵⁵ FLA. STAT. §§ 163.3180, 3202(2)(g) (2006); FLA. ADMIN. CODE r. 9J-5.0055.

⁵⁶ Fla. Stat. § 163.3177 (2006).

⁵⁷ Fla. Stat. § 163.3202(1) (2006).

⁵⁸ Fla. Stat. § 163.3202(2)(c) (2006).

⁵⁹ Fla. Stat. § 163.3202(2)(e) (2006).

One very important set of requirements relates to the sufficiency of the data and analysis supporting the plan. The Growth Management Act and Rule 9J-5 require the elements to be based on “relevant and appropriate data” and analyses.⁶⁰ Data must be “the best available existing data” from “professionally accepted existing sources” or collected through studies that meet “professionally accepted standards.”⁶¹ DCA cannot determine that one methodology is better than another and cannot require original data collection.⁶² To the extent that DEP, USGS or the water management districts have identified springsheds, conduits, areas of aquifer vulnerability, water quality degradation, etc., local governments may be required to use that data if it meets the legal tests.

The DCA may not require a local government’s comprehensive plan to duplicate or exceed a permitting program that a federal, state or regional agency has implemented, nor may the DCA require implementation of such a permitting program in the local government’s land development regulations.⁶³ When the DCA provides assistance to local governments regarding their comprehensive plans, it must consider several factors, including the existence of natural resource features such as groundwater recharge areas and water wells.⁶⁴

The required elements of a local comprehensive plan⁶⁵ most relevant to groundwater and springs protection are:

- Future Land Use Element;
 - Sanitary Sewer, Solid Waste, Drainage, Potable Water, and Natural Groundwater Aquifer Recharge Element;
 - Conservation Element;
 - Intergovernmental Coordination Element
- *Future Land Use Element*⁶⁶

The future land use element allows designation of future land use patterns.⁶⁷ The existing land use map must show existing and planned public potable water wells and

⁶⁰ FLA. STAT. §§ 163.3177(8), 163.3177(10)(e) (2006); FLA. ADMIN. CODE r. 9J5-.005(2).

⁶¹ Id.

⁶² FLA. STAT. § 163.3177(10)(e) (2006).

⁶³ FLA. ADMIN. CODE r. 9J-5.001(5).

⁶⁴ FLA. ADMIN. CODE r. 9J-5.002(2)(c).

⁶⁵ FLA. STAT. § 163.3177 (2006).

⁶⁶ FLA. STAT. § 163.3177(6)(a) (2006). FLA. ADMIN. CODE r. 9J-5.006.

⁶⁷ FLA. ADMIN. CODE r. 9J-5.006.

wellhead protection areas.⁶⁸ The element must also, for each objective, contain policies that address implementation activities for protection of potable water wellfields by designation of appropriate activities and land uses within wellhead protection areas and environmentally sensitive land.⁶⁹ The future land use element must contain objectives that ensure the protection of natural resources.⁷⁰ In addition, the land use plan should discourage urban sprawl. An indicator of a plan's failure to discourage such sprawl is that natural resources, including natural groundwater aquifer recharge areas and environmentally sensitive areas, are not adequately protected.⁷¹

- *Sanitary Sewer, Solid Waste, Drainage, Potable Water and Natural Groundwater Aquifer Recharge Element*⁷²

This planning element must contain objectives addressing conservation of potable water resources⁷³ and protection of functions of natural groundwater recharge areas and natural drainage features, with high recharge and prime recharge areas receiving a level of protection commensurate with their significance to natural systems or status as current or future sources of potable water.⁷⁴ The element must also contain policies for each objective addressing implementation activities for regulating land use and development to protect the functions of natural drainage and natural groundwater aquifer recharge areas.⁷⁵

This element is also intended to provide for necessary public facilities and services correlated to future land use projections.⁷⁶ The data and analysis requirements most relevant to springs protection include:

- Identification of major natural drainage features and natural groundwater aquifer recharge areas⁷⁷
- Identification and assessment of existing regulations and programs that govern land use and development of natural drainage features and groundwater recharge areas⁷⁸

⁶⁸ FLA. ADMIN. CODE r. 9J-5.006(1)(b)1.

⁶⁹ FLA. ADMIN. CODE r. 9J-5.006(3)(c)6.

⁷⁰ FLA. ADMIN. CODE r. 9J-5.006(3)(b)4.

⁷¹ FLA. ADMIN. CODE r. 9J-5.006(5)(g)4.

⁷² FLA. STAT. § 163.3177(6)(c) (2006). FLA. ADMIN. CODE r. 9J-5.011.

⁷³ FLA. ADMIN. CODE r. 9J-5.011(2)(b)4.

⁷⁴ FLA. ADMIN. CODE r. 9J-5.011(2)(b)5.

⁷⁵ FLA. ADMIN. CODE r. 9J-5.011(2)(c)4.

⁷⁶ *Id.*

⁷⁷ FLA. ADMIN. CODE r. 9J-5.011(1)(g).

- Identification of potable water facilities,⁷⁹ including the operational entity responsible, the service area, the design capacity, current demand on capacity, and level of service currently provided by the facility.⁸⁰

Recent amendments strengthened the requirements to plan for potable water supply. Local plans must be consistent with regional water supply plans adopted by water management districts and include in this element a ten-year work plan for the facilities needed to meet the water supply needs of both existing and new development.⁸¹ Maps showing existing and planned waterwells and cones of influence from such wells must also be included.⁸²

- *Conservation Element*⁸³

This element seeks to promote conservation, use and protection of natural resources.⁸⁴ The local government must identify and analyze natural resources including groundwaters.⁸⁵ The local government must also identify current and projected water needs and sources (for the next 10-year period), taking into consideration existing levels of water conservation, use and protection.⁸⁶ The element must contain objectives that address conservation, appropriate use and protection of the quality and quantity of current and projected water sources.⁸⁷ The element needs to contain policies for each objective addressing implementation activities for protection of water quality by restricting activities and land uses known to adversely affect the quality and quantity of identified water sources (including natural groundwater recharge areas, wellhead protection areas and surface waters used as a source of public water supply).⁸⁸

⁷⁸ FLA. ADMIN. CODE r. 9J-5.011(1)(h).

⁷⁹ FLA. ADMIN. CODE r. 9J-5.011(1)(d).

⁸⁰ FLA. ADMIN. CODE r. 9J-5.011(1)(e)1-5.

⁸¹ FLA. STAT. §§163.3177(6)(c),(d) .3191(2)(l) (2006). Reporting to the district is also required.

⁸² FLA. STAT. § 163.3177(6)(d)1 (2006).

⁸³ FLA. STAT. § 163.3177(6)(d) (2006). FLA. ADMIN. CODE r. 9J-5.013.

⁸⁴ Fla. Admin. Code r. 9J-5.013.

⁸⁵ FLA. ADMIN. CODE r. 9J-5.013(1)(a)1.

⁸⁶ FLA. ADMIN. CODE r. 9J-5.013(1)(c).

⁸⁷ FLA. ADMIN. CODE r. 9J-5.013(2)(b)2.

⁸⁸ FLA. ADMIN. CODE r. 9J-5.013(2)(c)1.

- *Intergovernmental Coordination Element*⁸⁹

This element is intended to identify and resolve incompatible goals, objectives, policies and development proposed in local government comprehensive plans and to deal with the need for coordination processes and procedures.⁹⁰ Intergovernmental coordination can involve areas of concern for municipalities and their adjacent municipalities, the county and counties surrounding the municipality, and areas of concern for counties, their included municipalities, and their adjacent counties and municipalities.⁹¹ The element must have an analysis of existing coordination mechanisms, including intergovernmental agreements,⁹² and proposed growth and development in the area of concern.⁹³ The element must also have a goal statement establishing one or more specific objectives⁹⁴ of the intergovernmental coordination activities.⁹⁵ The specific objectives can ensure that local governments coordinate to address the impacts of development, proposed in the comprehensive plan, upon adjacent municipalities, the county, adjacent counties, the region, and in the state.⁹⁶ In addition, the element must contain one or more policies for each objective addressing 1) the coordination of planning activities with other local governments,⁹⁷ 2) review of the relationship of proposed development of the area to the existing comprehensive plans of adjacent local governments⁹⁸ and, 3) review of development proposed in the comprehensive plan.⁹⁹

C. Adoption, Amendment and Update of Plans

Because every local government in Florida has an approved local comprehensive plan, the focus of implementation is now on amendments and updates. Plans may be periodically amended, and future land use maps (FLUMs) often are amended to accommodate proposed development. Amendments must be consistent with the plan as a whole and otherwise meet the standards of Rule 9J-5.

⁸⁹ FLA. STAT. § 163.3177(6)(h) (2006). FLA. ADMIN. CODE r. 9J-5.015.

⁹⁰ Fla. Admin. Code r. 9J-5.015.

⁹¹ FLA. ADMIN. CODE r. 9J-5.015(1).

⁹² FLA. ADMIN. CODE r. 9J-5.015(2)(a).

⁹³ FLA. ADMIN. CODE r. 9J-5.015(2)(c).

⁹⁴ FLA. ADMIN. CODE r. 9J-5.015(3)(b).

⁹⁵ FLA. ADMIN. CODE r. 9J-5.015(3)(a).

⁹⁶ FLA. ADMIN. CODE r. 9J-5.015(3)(b)2.

⁹⁷ FLA. ADMIN. CODE r. 9J-5.015(3)(c)1.

⁹⁸ FLA. ADMIN. CODE r. 9J-5.015(3)(c)5.

⁹⁹ FLA. ADMIN. CODE r. 9J-5.015(3)(c)7.

Comprehensive updates to plans are not typically done unless required. Every local government is required to prepare an evaluation and appraisal report (EAR) at least once every seven years and revise the comprehensive plan based on that analysis.¹⁰⁰ The EAR must include consideration of “major issues” as determined by the local government with input from state and regional agencies as well as adjacent local governments and the public.¹⁰¹ This gives DCA, DEP, the water management districts and other state agencies the opportunity to assert that issues of groundwater depletion or contamination, spring flows, quality of recharge water and spring discharge water are “major issues” and thus need to be addressed by the EAR. The EAR must consider the appropriate water management district’s water supply plan as well as evaluate the potable water element’s ten year work plan for providing necessary potable water facilities.¹⁰² The EAR must be submitted to the Florida Department of Community Affairs (DCA) to review for sufficiency. If a local government fails to submit an EAR when required, the local government may not amend its comprehensive plan.¹⁰³ Plan amendments are also prohibited beginning one year after a determination by DCA that a submitted EAR is insufficient.¹⁰⁴ The plan must be revised within 18 months of submitting a sufficient EAR.

Local governments first submit plan amendments to the DCA for review.¹⁰⁵ DCA then sends to the local government an Objections, Recommendations and Comments (ORC) report, including comments from relevant agencies. The local government then adopts the plan or plan amendment by ordinance and sends it to DCA for a formal determination of whether it is in compliance with the Act. If DCA determines the plan is out of compliance, the state land planning agency and the local government may enter into a compliance agreement.¹⁰⁶ Otherwise, the plan amendment is sent to the Division of Administrative Hearings (DOAH) for a hearing. The local government’s determination that the plan is in compliance is presumed to be correct. The determination will be sustained unless by a preponderance of evidence it is shown that the plan is not in

¹⁰⁰ FLA. STAT. § 163.3191 (2006).

¹⁰¹ FLA. STAT. § 163.3191(1)(c) (2006).

¹⁰² FLA. STAT. § 163.3191(1)(l) (2006).

¹⁰³ FLA. STAT. § 163.3187(6)(a) (2006). There are exceptions for Developments of Regional Impact and ports. *Id.*

¹⁰⁴ FLA. STAT. § 163.3187(6)(b) (2006).

¹⁰⁵ FLA. STAT. § 163.3184(15)(a)(2006). Small scale plan amendments are exempt from review by DCA, FLA. STAT. § 163.3187(1)(c)(2006), but may be challenged by affected persons. FLA. STAT. § 163.3187(3)(a)(2006). Small scale amendments, however, are legislative not quasi-judicial and therefore must only be “fairly debatable.” *Coastal Development of N. Fla. v. Jacksonville Beach*, 788 So. 2d 204 (2001).

¹⁰⁶ FLA. STAT. § 163.3184(16) (2006).

compliance.¹⁰⁷ If it is determined to be in compliance, a hearing may be demanded by citizens with legal standing. The local plan or amendment will be found in compliance if the local government's determination of compliance is fairly debatable.¹⁰⁸

The hearing results in a recommended order from the Administrative Law Judge (ALJ), which is transmitted to DCA. DCA can issue a final order determining the plan is in compliance but only the Governor and Cabinet can issue a final order determining the plan is out of compliance. A local government may refuse to bring the plan into compliance, but significant financial sanctions may be levied by the Governor and Cabinet.

D. Adoption of Land Development Regulations

The Growth Management Act requires that within one year of the date it submits its comprehensive plan for review by the DCA, a local government must adopt or amend and enforce land development regulations (LDR) that are consistent with and implement the goals, objectives and policies of the comprehensive plan.¹⁰⁹ The Act encourages “the use of innovative LDRs which include provisions such as transfer of development rights and performance zoning.”¹¹⁰ Thus the plan, as related to groundwater and springs protection, must provide the basis for adoption of LDRs. The Act requires that any existing LDR that is not consistent with the plan must be amended so as to be consistent. In any interim period during which unamended regulations remain inconsistent with the adopted comprehensive plan, the plan itself will govern any action taken in regard to an application for a development order. Once LDRs are adopted, citizens who are “substantially affected persons” have twelve months to challenge LDRs as inconsistent with the comprehensive plan.¹¹¹

DCA may require a local government to submit to DCA one or more land development regulations if DCA has reasonable grounds to believe that a local government has totally failed to adopt land development regulations required by statute.¹¹² DCA and the local

¹⁰⁷ FLA. STAT. § 163.3184(10)(a) (2006).

¹⁰⁸ FLA. STAT. § 163.3184(9)(a) (2006).

¹⁰⁹ FLA. STAT. §163.3194, .3202 (2006).

¹¹⁰ FLA. STAT. § 163.3202(3) (2006); FLA. ADMIN. CODE r. 9J-5.022 (1) and 9J-5.006(5)(l)(clustering and open space provisions encouraged to discourage urban sprawl).

¹¹¹ FLA. STAT. § 163.3213 (2006).

¹¹² FLA. STAT. § 163.3202(4) (2006). Ordinarily such awareness on the part of DCA would only arise due to a citizen complaint since DCA does not typically review land development regulation adoption or lack thereof by local governments.

government then enter into a review and consultation process.¹¹³ If, after review and consultation, the DCA determines that a local government has not adopted or amended the required land development regulations, it may file suit in circuit court to require adoption of the regulations.¹¹⁴

F. Consistency of Development Orders

Development orders¹¹⁵ must also be consistent with the adopted plan. Citizens who are “aggrieved or adversely affected” can challenge development orders in circuit court as inconsistent with the adopted plan.¹¹⁶ Development orders themselves can only be issued through a quasi-judicial process that provides procedural due process.¹¹⁷ Courts strictly scrutinize development orders for consistency with the plan.¹¹⁸ To be consistent, the permitted development must be “compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan.”¹¹⁹

G. Joint Planning and Intergovernmental Coordination

Many springsheds encompass parts of more than one local jurisdiction. Effective protection of the quality and quantity of water discharged by springs thus requires a similar level of effort by all of the governments with jurisdiction over that area. The need for coordination is particularly acute where springs protection depends on the regional transfer of development rights from areas where aquifers are particularly vulnerable to areas better able to accommodate increased density or intensity of development.¹²⁰

¹¹³ Id.

¹¹⁴ Id.

¹¹⁵ Development orders are action by local government granting, denying or granting with conditions a development permit, defined as any official action “having the effect of permitting the development of land.” FLA. STAT. § 163.3164(7) (2006). Development permits include building or zoning permits, rezonings, subdivision approvals, special exceptions, variances and certifications. FLA. STAT. § 163.3164(8) (2006).

¹¹⁶ FLA. STAT. §163.3215 (2006).

¹¹⁷ Snyder v. Brevard Cty., 627 So.2d 469 (Fla. 1993).

¹¹⁸ Id.

¹¹⁹ FLA. STAT. § 163.3194(3)(a) (2006). *See also* B.B.McCormick & Sons v. Jacksonville, 559 So. 2d 252 (Fla. 1st DCA 1990); Machado v. Musgrove, 519 So.2d 629, 632 (Fla. 3rd DCA 1987).

¹²⁰ Department of Community Affairs Recommendations to the Wekiva River Basin Coordinating Committee for Enhanced Comprehensive Planning and Land Development Regulations, 1-23, 7-10 (undated report attached to letter from Colleen M. Castille, Secretary, DCA to The Honorable Lee Constantine, Chair, Wekiva River Basin Coordinating Committee, December 8, 2003).

Because of the potential impacts of water supply development on spring flows, coordination with the water supply planning and consumptive use regulatory programs of the relevant water management district is also necessary.¹²¹

These issues can be addressed in several ways. Local governments can enter into joint planning agreements, sometimes creating joint local planning agencies. Annexation, transfer of development rights and other issues can be addressed through such agreements. Urban service delivery agreements can be used to facilitate development of desired areas while discouraging the development of vulnerable areas or development that is not served by adequate water supply, stormwater and wastewater treatment facilities. The experience of local governments within the Wekiva springshed may be helpful. DCA has recommended model goals, objectives and policies for intergovernmental coordination¹²².

The authority to enter into such agreements is broad. The Florida Interlocal Cooperation Act authorizes local governments to enter into interlocal agreements with each other and with state and regional agencies regarding the joint exercise of their respective powers.¹²³ Municipalities and counties may jointly plan for development and growth,¹²⁴ adopt and amend comprehensive plans¹²⁵ and implement comprehensive plans.¹²⁶ Neighboring communities, particularly those sharing natural resources, are encouraged to create collective visions for greater-than-local areas.¹²⁷ Municipalities within a county or counties may also jointly exercise power.¹²⁸ In addition, the Department and a local government may enter into agreements with each other.¹²⁹

¹²¹ Mary Jane Angelo, Integrating Water Management and Land Use Planning: Uncovering the Missing Link in the Protection of Florida's Water Resources?, 12 U. FLA. J.L. & PUB. POL'Y 223-249 (Spring 2001).

¹²² Florida Department of Community Affairs, Division of Community Planning, Model Goals, Objectives and Policies for the Wekiva Study Area, Goal 1, Objective 7, June 7, 2006. Available at <http://www.dca.state.fl.us/fdcp/DCP/wekiva/wekivaact/index.cfm> visited 2-14-07.

¹²³ FLA. STAT. § 163.01 (2006).

¹²⁴ FLA. STAT. § 163.3167(1)(a) (2006).

¹²⁵ FLA. STAT. § 163.3167(1)(b) (2006).

¹²⁶ FLA. STAT. § 163.3167(1)(c) (2006).

¹²⁷ FLA. STAT. § 163.3167(11) (2006).

¹²⁸ FLA. STAT. § 163.3171(3) (2006). The same authority extends to any contribution of counties and municipalities.

¹²⁹ FLA. STAT. § 163.3171(4) (2006).

III. State Preemption

A. Agriculture

The authority of local governments to regulate agricultural activities is expressly preempted by several statutes. Agricultural activities are specifically exempt from state or local planning and land use regulatory jurisdiction under Chapter 380 and Chapter 163, Pt. II, Florida Statutes. The Local Government Comprehensive Planning and Land Development Regulation Act authorizes local governments to plan for and regulate “development.” Development, however, is defined to exclude “the use of any land for the purpose of growing plants, crops, trees, and other agricultural or forestry products; raising livestock; or for other agricultural purposes.”¹³⁰ It might be possible to interpret this provision as not applying to the conversion of undeveloped land to agricultural use or to base local government regulation on more general authorities, but there are more comprehensive preemptions discussed below.

The Agricultural Lands and Practices Act (ALPA)¹³¹ prohibits counties from from adopting regulations for regulating “an activity of a bona fide farm operation on land classified as agricultural land” for ad valorem tax purposes¹³² if the activity is regulated through “implemented best management practices, interim measures or regulations” adopted by DEP, DACS or a WMD or USDA, USACOE or EPA. There are limited exceptions for emergencies,¹³³ wellfield protection,¹³⁴ land application of sewage sludge,¹³⁵ farm operations adjacent to homesteads or businesses established as of 1982,¹³⁶ and for certain counties.¹³⁷ The most important exception is that ALPA only prohibits the adoption of new rules; the enforcement of existing regulations is not preempted.¹³⁸ Most agricultural activities that might potentially impact the quality or quantity of groundwater are thus probably exempt from new regulation by counties, but are not

¹³⁰ FLA. STAT. § 380.04 (2006), referred to by FLA. STAT. §163.3164(6) (2006).

¹³¹ Ch. 2003-162, Laws of Florida, codified as FLA. STAT. §163.3162 (2006). For a review of right-to-farm laws, see Terence J. Centner, Creating an "Undeveloped Lands Protection Act" for Farmlands, Forests and Natural Areas, 17 Duke Env't'l L. & Pol'y F 1 (2006).

¹³² FLA. STAT. §163.3162(4) (2006). The statute fails to define a "bona fide farm operation". See David and December McSherry v. Alachua Cty. and Dept. of Community Affairs, Case No. 03-3665GM, Recommended Order, DOAH, Oct 18, 2004, ¶201.

¹³³ FLA. STAT. §163.3162(4)(a) (2006).

¹³⁴ Id.

¹³⁵ FLA. STAT. §163.3162 (4)(d) (2006).

¹³⁶ FLA. STAT. §163.3162 (4)(b) (2006).

¹³⁷ FLA. STAT. §163.3162 (4)(c) (2006).

¹³⁸ J-II Investments v. Leon Cty., 908 So. 2d 1140 (Fla. 1st DCA 2005).

protected against the enforcement of existing regulations. Regulation of agricultural activities by municipalities is similarly preempted by a duplicative section of the Florida Right to Farm Act.¹³⁹

The preemption of local government authority over agricultural lands was further extended in 2006 to prohibit restrictions on their conversion to non-agricultural land uses.¹⁴⁰ Under this Act, comprehensive plan amendments for land defined as an "agricultural enclave" are presumed to be consistent with rule 9J-5.006(5) if they allow uses similar to those on adjacent lands.¹⁴¹ An "agricultural enclave" can be as large as 4,480 acres, provided that 75% of its perimeter is bordered by existing or proposed industrial, commercial or residential development, it is located in an unincorporated area and certain other conditions are met.¹⁴² The ability of local governments in unincorporated areas to limit urban expansion into springsheds is thus seriously compromised.

B. Pollution Control Programs

Under the Florida Air and Water Pollution Control Act (PCA),¹⁴³ the Department of Environmental Protection (DEP) is charged with "the power and the duty to control and prohibit pollution of air and water."¹⁴⁴ The definition of pollution includes the "alteration of the chemical, physical, [or] . . . biological integrity of water in quantities or at levels which are or may be potentially harmful or injurious . . . [to] animal or plant life . . . or which unreasonably interfere with the enjoyment of life or property, including outdoor recreation."¹⁴⁵ Because of the potential effects, "pollution" can be interpreted to include the addition of excess nutrients to groundwater, and consequently to the water that recharges springs.

¹³⁹ FLA. STAT. § 823.14(6) (2009). Ironically, this section is entitled "Limitation on Duplication of Government Regulation." The emphasis of the Florida Right to Farm Act is to limit the ability of neighboring landowners to seek relief for nuisances. FLA. STAT. § 823.14(2) (2006).

¹⁴⁰ Ch. 2006-255, §2, Laws of Florida.

¹⁴¹ FLA. STAT. §163.3162(5)(2006).

¹⁴² FLA. STAT. §163.3164(33)(2006).

¹⁴³ FLA. STAT. §§ 403.011 *et. seq.* (2006).

¹⁴⁴ FLA. STAT. § 403.061 (2006). The Pollution Control Act defines water as including "underground waters", which is in turn defined to comprise "all underground waters passing through pores of rock or soils or flowing through in channels, whether manmade or natural." FLA. STAT. Ch. 403.031(13) (2006).

¹⁴⁵ FLA. STAT. § 403.031(7) (2006).

As part of its pollution control duties, the DEP is required to adopt rules to implement the provisions of the PCA,¹⁴⁶ and to “[e]xercise general supervision of the administration and enforcement of the laws, rules, and regulations pertaining to air and water pollution.”¹⁴⁷ In addition, each county and municipality, or combination thereof, may establish and administer a local pollution control program if it complies with the state law.¹⁴⁸ All local pollution control programs must, among other things, provide for requirements compatible with, or stricter or more extensive than those imposed by the state¹⁴⁹ and, more important to the question of preemption, be approved by the DEP as adequate to meet the requirements of the statute.¹⁵⁰ Thus, local pollution control programs are subject to DEP approval.

While the DEP has exclusive authority under the PCA to require and issue permits, it may delegate this authority to local pollution control organizations if the DEP finds it necessary or desirable to do so.¹⁵¹ In practice, the DEP does not review ordinances proposed by local governments unless (a) DEP considers the local ordinance(s) to be a local pollution control program, (b) those governments request the DEP for a delegation of authority or (c) there is a specific operating agreement entered into by the local government and DEP delegating to the local government all or part of a pollution control program, and the operating agreement requires approval.¹⁵² As an example, in *Azurix North America Residuals Management, Inc. v. Desoto County*, the DEP did not consider Desoto County ordinances regulating the transportation and landspreading of sewage sludge to constitute a local pollution control program.¹⁵³ In the absence of either a delegation of authority from DEP to the County, or a specific operating agreement between DEP and the County, the DEP did not believe that the Desoto County ordinances required DEP approval. Thus, whether local land development regulations will require DEP approval will depend primarily on whether there is a delegation of DEP authority to the local government, an operating agreement between the local government and DEP, and whether the DEP determines the regulations constitute a local pollution control program.¹⁵⁴

¹⁴⁶ FLA. STAT. § 403.061(7) (2006).

¹⁴⁷ FLA. STAT. § 403.061(6) (2006).

¹⁴⁸ FLA. STAT. § 403.182 (2006).

¹⁴⁹ FLA. STAT. § 403.182(1)(b) (2006).

¹⁵⁰ FLA. STAT. § 403.182(1)(a) (2006).

¹⁵¹ FLA. STAT. § 403.182(2) (2006).

¹⁵² Affidavit of Betsy Hewitt, Deputy General Counsel for, and authorized to testify on behalf of, DEP, given in *Azurix North America Residuals Management, Inc. v. Desoto County*, Case No. 2:01-cv-428-FTM-29DNF (M.D. Fla. 2001).

¹⁵³ *Id.*

¹⁵⁴ *Id.* There is, however, no published opinion in *Azurix*, so it is unknown whether the court upheld DEP’s position that the ordinances did not require DEP approval.

Florida courts, however, may not hold the same view of Chapter 403.182 as DEP. The First District Court of Appeal appears to have interpreted Chapter 403.182 to require DEP approval for any local ordinance that regulates pollution, regardless of whether it is part of a DEP- recognized pollution control program.¹⁵⁵ In *Florida Rock*, Alachua County had proposed a Clean Air Ordinance that created requirements stricter than those required by state law.¹⁵⁶ Florida Rock, a local business whose construction of a facility would have been impacted by the ordinance, challenged the ordinance because it had not been approved by DEP.¹⁵⁷ The opinion does not indicate whether DEP had delegated authority to the local government, whether there existed an operating agreement between DEP and the local government requiring DEP approval, or whether DEP considered the Clean Air Ordinance to be a local pollution control program.¹⁵⁸ The court merely states “[a] plain reading of section 403.182 establishes that this ordinance may not, either standing alone or as part of a local pollution program, be effective in the absence of approval from DEP.”¹⁵⁹ Absent a discussion of the specifics of the relationship between DEP and Alachua County, this holding indicates that the court could consider any local ordinance that regulates pollution to require DEP approval.

This narrow interpretation by the court of the authority of local governments to regulate activities involving “pollution” contrasts markedly with DEP’s interpretation that local governments have very broad authority to regulate pollution without explicit DEP approval. If the interpretation in *Florida Rock* is applied broadly, then many land development regulations intended to prevent water quality degradation or other forms of “pollution” may be invalid and many of the provisions of the Local Government Comprehensive Planning and Land Development Regulation Act would seem meaningless. Such a result would not be consistent with legislative intent. A future court deciding the validity of local springs protection regulations should consider the views of DEP and the requirements of other statutes.

C. Consumptive Use of Water

1. Overview of Water Management District Authority

¹⁵⁵ See *Florida Rock Industries v. Alachua County*, 721 So.2d 741, 743 (Fla. 1st DCA, 1998).

¹⁵⁶ *Id.* at 742.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 743.

Consumptive use of water is managed under authority of the Florida Water Resources Act of 1972.¹⁶⁰ Responsibility for implementing the Water Resources Act resides primarily with the Florida Department of Environmental Protection (DEP) and five regional water management districts (WMD). Most of the authority for managing the consumptive use of water has been delegated to the water management districts.¹⁶¹ The districts and DEP share authority for regulating surface water management facilities and construction activities in wetlands through the Environmental Resource Permitting (ERP) program.¹⁶² The water management districts were established to include entire surface water basins and have comprehensive authority to gather information and develop plans; construct and operate works; acquire lands for water management; regulate well construction and license well drillers; regulate surface water management facilities and construction in wetlands; and regulate the consumptive use of water through permitting, water shortage plans, and water emergency orders.

Each district is governed by a board of gubernatorial appointees.¹⁶³ Governing boards members serve without pay for fixed terms and are subject to confirmation by the Senate. The governing boards hire an executive director, adopt rules, set budgets, issue permits, and otherwise govern the affairs of the districts. The districts are subject to the general supervisory authority of DEP, which can appeal district rules and orders to the Governor and Cabinet.¹⁶⁴ A Water Resources Implementation Rule (WRIR), adopted by DEP, establishes the policy framework for District programs.¹⁶⁵ District budgets are reviewed by the Executive Office of the Governor and, although the Districts can levy ad valorem taxes, there are constitutional and statutory millage caps.¹⁶⁶

a) Planning

¹⁶⁰ Ch. 72-299, Laws of Florida, codified at FLA. STAT. ch. 373 (2006). The Water Resources Act was based largely on a proposal for water law reform developed at the University of Florida. *See* F. MALONEY, R. AUSNESS, J. MORRIS, A MODEL WATER CODE (1972).

¹⁶¹ FLA. ADMIN. CODE r. 62-113.200(12); FLA. STAT. § 373.103 (2006). Delegation is statutorily encouraged. FLA. STAT. § 373.016(5) (2006) (“to the greatest extent practicable . . . power should be delegated to the governing board of a water management district”).

¹⁶² FLA. ADMIN. CODE r. 62-113.200(12). *See e.g.* FLA. ADMIN. CODE r. 40C-4.

¹⁶³ Governing board members are subject to geographic restrictions and confirmation by the Senate.

¹⁶⁴ FLA. STAT. § 373.114 (2006).

¹⁶⁵ FLA. ADMIN. CODE r. 62-40. DEP has the exclusive authority to review rules for consistency with the WRIR. FLA. STAT. § 373.114(2) (2006).

¹⁶⁶ Fla. Const. art. 7, §9; FLA. STAT. §373.503 (2006).

Planning was an integral part of the Florida Water Resources Act of 1972.¹⁶⁷ The Act envisioned that water resource planning would be the essential foundation for all water management decisions, including water allocation. Disputes over state vs. regional control, as well as conflict over substantive elements of proposed plans, led to delays in planning. A State Water Policy, adopted in 1981, gave uniform direction to the water management districts and required them to develop district water management plans. In 1988, the State Water Policy was amended to require the districts to assess water needs for a twenty-year planning horizon and develop a “course of remedial or preventive action . . . for each current and anticipated future critical problem.”¹⁶⁸ In 1996, Governor Chiles directed the Districts to develop regional water supply plans for each area with inadequate water supplies.¹⁶⁹ In 1997, the Florida Legislature codified and significantly expanded the mandate for the Districts to develop regional water supply plans.¹⁷⁰ These plans must include minimum flows and levels with associated prevention and recovery strategies and may provide for the reservation of water. The districts are directed to work “in coordination and cooperation with . . . affected and interested parties.”¹⁷¹

The statute distinguishes between water supply and water resource development. Both must be addressed in the plan, but the water management districts have primary responsibility for planning and water resource development. The latter phrase is defined to mean “the formulation and implementation of regional water resource management strategies.”¹⁷² It includes data collection and analysis, technical assistance and “structural and nonstructural programs to protect and manage water resources.”¹⁷³

Water supply development is more narrowly defined as “the planning, design, construction, operation, and maintenance of public or private facilities for water collection, production, treatment, transmission, or distribution for sale, resale, or end use.”¹⁷⁴ Water supply development is generally the responsibility of local governments, regional water supply authorities and utilities.¹⁷⁵ The water supply development

¹⁶⁷ Unfortunately, the state and the water management districts were slow to implement the planning provisions of the Water Resources Act of 1972. See F. Maloney and R. Hamann, *Integrating Land and Water Management*, Publication No. 54, Water Resources Research Center, University of Florida (1981).

¹⁶⁸ FLA. ADMIN. CODE r. 17-40.090. Effective 12-5-88, 14 F.A.W. 46/4637.

¹⁶⁹ Executive Order 96-297, §3. Planning was to be initiated by October 1, 1998, completed within 18 months and updated every five years.

¹⁷⁰ Ch. 97-160, Florida Statutes, sometimes referred to as HB 715. See FLA. STAT. §§ 373.036, .0361, .042, .0421 (2006).

¹⁷¹ FLA. STAT. § 373.0361(1) (2006).

¹⁷² FLA. STAT. § 373.019(19) (2006).

¹⁷³ *Id.*

¹⁷⁴ FLA. STAT. § 373.019(21) (2006).

¹⁷⁵ FLA. STAT. § 373.0831(2)(c) (2006).

component of the regional water supply plan, however, must quantify the water supply needs for all existing and projected future uses for conditions up to a 1:10 year drought and identify options for meeting them. The estimated costs and potential sources of funding for water supply development must be included.

To the extent that water resource development projects are required to support water supply development, they must be listed, with estimates of the quantities that will be made available, timetables, costs, sources of funding and implementation plans.¹⁷⁶ The plan must contain a “funding strategy for water resource development projects, which shall be reasonable and sufficient to pay the cost of constructing or implementing all of the listed projects.”¹⁷⁷ Given the broad scope of this category, the Districts must include in the regional water supply plans a reasonable budget for many of its water management activities. Measures to protect and restore natural systems would certainly fit the definition of a water resource development project. In addition, the statute requires a plan to include any minimum flows and levels that have been established in the planning region¹⁷⁸ and the associated recovery and prevention strategy.¹⁷⁹

b) Regulation of Consumptive Use

Water management district governing boards or the Florida Department of Environmental Protection (DEP) are authorized to require permits for consumptive use of water and to impose reasonable conditions to ensure the use is consistent with the overall objectives of the district and not harmful to the water resources of the area.¹⁸⁰ In addition, permit applicants must demonstrate compliance with three conditions. The proposed use cannot interfere with any presently existing legal use of water; it must be “reasonable-beneficial”¹⁸¹; and it must be consistent with the public interest.¹⁸² Applicants have a right to twenty year permits “if there is sufficient data to provide reasonable assurance that the conditions for permit issuance will be met for the duration of the permit.”¹⁸³

DEP has adopted a Water Resource Implementation Rule interpreting these criteria.¹⁸⁴ This rule was formerly known as the State Water Policy.¹⁸⁵ The water management

¹⁷⁶ FLA. STAT. § 373.0361(2)(b) (2006).

¹⁷⁷ FLA. STAT. § 373.0361(2)(d) (2006).

¹⁷⁸ FLA. STAT. § 373.0831(2)(g) (2006).

¹⁷⁹ FLA. STAT. § 373.0831(2)(c) (2006).

¹⁸⁰ FLA. STAT. § 373.219(1) (2006).

¹⁸¹ FLA. STAT. § 373.019(4) (2006).

¹⁸² FLA. STAT. § 373.223(1) (2006).

¹⁸³ FLA. STAT. § 373.236(1) (2006).

¹⁸⁴ FLA. ADMIN. CODE r. 62-40.410.

¹⁸⁵ FLA. STAT. § 373.019 (20), .036 (2006).

districts have adopted consumptive use permitting criteria¹⁸⁶ and a detailed “Basis of Review” for evaluating permit applications. These criteria clearly provide a basis for protecting the quantity of water discharged by springs by denying or conditioning consumptive use permits.

Another set of restrictions applies during water shortages. Consumptive use permits are intended to allocate water up to 1:10 year drought conditions. Under more severe water shortages, additional restrictions may be imposed on permittees. The Districts are required to adopt water shortage plans by rule, based on classifying uses by source of supply, method of withdrawal and type of use.¹⁸⁷ When the District determines there will be insufficient water to meet the needs of users, or use must be reduced to prevent serious harm to water resources, it may order implementation of the plan for one or more classes of users. If implementation of the plan is not sufficient during an emergency water shortage condition to protect the public health, safety or welfare, the health of wildlife, or other reasonable uses, the District may issue emergency orders.¹⁸⁸

c) Minimum Flows and Levels and Reservations

District water supply plans must include the minimum flows and levels (MFL) established for the area.¹⁸⁹ Under the 1972 Florida Water Resources Act, the Districts were required to establish minimum flows for all surface watercourses as “the limit at which further withdrawals would be significantly harmful to the water resources or ecology of the area.”¹⁹⁰ Minimum levels were to be established for aquifers and surface waters at a level that protects the “water resources of the area” from significant harm.¹⁹¹ The protection of nonconsumptive uses must be considered and may be protected through the establishment of MFLs.¹⁹² MFLs may reflect seasonal variations and must be based on the “best information available.”¹⁹³ Any substantially affected person may request independent scientific peer review of the data, methodologies, models and assumptions used to establish an MFL.¹⁹⁴

¹⁸⁶ See e.g. FLA. ADMIN. CODE rr. 40C-2 and 40C-20. Most districts have an “Applicant’s Handbook” or “Basis of Review” that provides more detailed criteria.

¹⁸⁷ FLA. STAT. § 373.246(1) (2006).

¹⁸⁸ FLA. STAT. §§ 373.175, .246 (2006).

¹⁸⁹ FLA. STAT. § 373.0361(1)(g)(2006).

¹⁹⁰ FLA. STAT. § 373.042(1)(a) (2006).

¹⁹¹ FLA. STAT. § 373.042(1)(b) (2006).

¹⁹² FLA. STAT. § 373.042(1)(b) (2006).

¹⁹³ Id.

¹⁹⁴ FLA. STAT. § 373.042(4) (2006).

The establishment of minimum flows and levels has been delayed for many years due to technical difficulties and policy concerns. Beginning in 1993, the courts, the Governor and Cabinet and the Legislature all ordered the water management districts to implement the 1972 statute.¹⁹⁵ Because the Districts have been slow to adopt MFLs, in many areas, existing flows and levels of water may be below the levels that would otherwise be adopted. In other cases, projected withdrawals would violate MFLs. In 1997 the Legislature directed the Districts to adopt recovery and prevention strategies as part of regional water supply plans.¹⁹⁶ The Legislature also authorized the districts to establish MFLs below historic levels under certain circumstances.¹⁹⁷

Minimum flows and levels should be adopted for all springs. One important example of a minimum flow and level for springs protection is the MFL adopted by the St. Johns River Water Management District to protect Blue Springs as a thermal refuge for the endangered Florida manatee.¹⁹⁸ The water management districts have been ordered to develop MFLs for all first magnitude springs and for all second magnitude springs on state and federal conservation lands.¹⁹⁹

¹⁹⁵ A citizen suit on behalf of lakefront property owners in Northeast Florida resulted in a court order to the St. Johns River Water Management District to begin establishing MFLs. *Concerned Citizens of Putnam County for Responsive Govt. v. St. Johns River Water Management District*, 622 So. 2d 520 (Fla. 5th DCA 1993). The Florida Land and Water Adjudicatory Commission (FLWAC), comprised of the Governor and Cabinet, then ordered the St. Johns and Southwest Florida Water Management Districts to begin establishing MFLs. *Lake Brooklyn Civic Assoc. v. St. Johns River Water Management District* (Final Order, FLWAC, 9/30/93); *Pinellas County, Florida v. Southwest Florida Water Management District* (Final Order, FLWAC, 2/13/96). In 1996 the Legislature directed the Southwest Florida Water Management District to establish priority lists for establishing MFLs, subject to review and approval by DEP, s. 2, ch 96-339, Laws of Florida. In 1997 that mandate was extended to all of the districts, s. 5, ch. 97-160, Laws of Florida, effectively codifying an executive order by Governor Lawton Chiles. Executive Order 96-297.

¹⁹⁶ FLA. STAT. § 373.0421 (2006).

¹⁹⁷ FLA. STAT. § 373.0421(1) (2006). The statute allows the Districts to consider the constraints placed on the hydrology of a waterbody by hydrologic alterations, but not to the extent of allowing significant harm caused by withdrawals. FLA. STAT §373.0421(1)(a) (2006). The Districts are allowed to establish MFLs that are inconsistent with the recovery of historic conditions in areas other than the Everglades Protection Area. FLA. STAT §373.0421(1)(b) (2006).

¹⁹⁸ FLA. ADMIN. CODE r. 40C-8.031, F.A.C.

¹⁹⁹ FLA. STAT. § 373.042(2) (2006). An exception is provided for all springs in the Suwannee River Water Management District and all second magnitude springs in other areas of the state provided the district submits a report demonstrating no current or expected adverse impacts to the spring from consumptive uses over a twenty year period.*Id.*

Reservations under state law are another means of securing water for the environment. District governing boards are authorized to reserve water from use by permit applicants “in such locations and quantities, and for such seasons of the year, as . . . may be required for the protection of fish and wildlife or the public health and safety.”²⁰⁰ “Existing legal uses of water” are protected from the reservation “so long as such use is not contrary to the public interest.”²⁰¹ An existing legal use of water is one that is permitted or exempt under the statute. Since all permits have limited duration, the protection would logically extend only for the duration of the permit. Uses that are significantly harming fish and wildlife or interfering with the restoration of important habitat are arguably contrary to the public interest.

Protecting water for the environment through a reservation avoids some of the potential objections to a minimum flow or level. It is not necessary to demonstrate that further withdrawals would cause “significant harm,” only that the water reserved is “required for the protection of fish and wildlife or the public health and safety.” The level of harm that is “significant” is thus not an issue. In the context of springs protection, the requirements for fish and wildlife must be established in order to implement a reservation.

The importance of minimum flows and levels and reservations is that they establish numeric criteria against which the cumulative effects of withdrawals for consumptive uses or other purposes can be evaluated. These criteria may be used in evaluating individual permit applications or in the context of broader water management planning.

2. Preemption of Local Government Authority

The Water Resources Act provides for regional management of water as a state resource.²⁰² Although it implements a policy of “local sources first,” it does allow for the transfer of water outside of its basin of origin and across political boundaries.²⁰³ The Legislature clearly intended that local government authority to regulate the consumptive use of water should be preempted. It stated that Part II of the Act should “provide the exclusive authority for requiring permits for the consumptive use of water and for authorizing transportation thereof.”²⁰⁴ It declared that other laws, ordinances, rules and regulations “shall be deemed superseded for the purpose of regulating the consumptive

²⁰⁰ FLA. STAT. § 373.223(4) (2006).

²⁰¹ Id.

²⁰² *Osceola Cty v. St. Johns River Water Management District*, 504 So. 2d 385 (Fla. 1987).

²⁰³ Fla. Stat. §§ 373.223(2), (3), .2295 (2006).

²⁰⁴ FLA. STAT. § 373.217(2) (2006).

use of water.”²⁰⁵ Making the same point yet again, it said that Part II “preempts the regulation of the consumptive use of water.”²⁰⁶

3. Coordination of local and regional planning

The water management districts have been directed to provide a great deal of information to local governments that is relevant to springs protection. In 1982, the Legislature required the districts to produce “groundwater basin resource inventories” and submit them to each local government.²⁰⁷ These were intended to include hydro-geologic studies of groundwater basins and associated recharge areas.²⁰⁸ In 1985, the districts were required to determine “prime groundwater recharge areas” for the Floridan and Biscayne aquifers.²⁰⁹ In 1989, the water management districts were directed to provide technical assistance to local governments in the development and revision of local comprehensive plans, including descriptions of groundwater characteristics, aquifer recharge areas, and water quality information.²¹⁰

Regional water supply plans, mandated in 1997, were clearly intended to assist local governments in planning for water supply development.²¹¹ Until recently, however, there was no requirement for local governments to consider the availability of water resources for water supply.²¹² This “missing link” has been addressed by the Legislature. in 2002.²¹³ Local governments are now required to assess their water supply needs for at least a ten-year period and include in their comprehensive plans a workplan for building those water supply facilities necessary to serve existing and new development.²¹⁴ The local plan must be consistent with the regional water supply plan must be considered by the local government in developing the plan²¹⁵ and identify facilities sufficient to supply

²⁰⁵ FLA. STAT. § 373.217 (3) (2006).

²⁰⁶ FLA. STAT. § 373.217 (4) (2006).

²⁰⁷ FLA. STAT. § 373.0395 (2006).

²⁰⁸ FLA. STAT. § 373.0395 (1) (2006).

²⁰⁹ FLA. STAT. § 373.0395 (2006).

²¹⁰ FLA. STAT. § 373.0391 (2006).

²¹¹ FLA. STAT. §§ 373.0361, .0831 (2006).

²¹² Mary Jane Angelo, *Integrating Water Management and Land Use Planning: Uncovering the Missing Link in the Protection of Florida’s Water Resources?*, 12 U. Fla. J. L & Pub. Pol’y 223-249 (2001). Local governments were only required to consider the capacity of withdrawal, treatment and distribution systems, not whether there was sufficient water to supply those facilities.

²¹³ Chs., 2002-296, 2004-381, 2005-290, 2005-291, Laws of Florida.

²¹⁴ FLA. STAT. § 163.3177(6)(c) (2006).

²¹⁵ *Id.*

the needs identified by the water management district addressed in the intergovernmental coordination element.²¹⁶ To the extent that a regional water supply plan incorporates minimum flows and levels or other measures to protect springs discharge, and does not delay compliance through the prevention and recovery plans, it would seem difficult for a local government to adopt a plan that relied on water supply sources that would result in violations of those criteria. It will also be difficult for a local government to avoid developing water supplies sufficient for the level of growth planned for the area, which may result in greater pressure to continue using or developing aquifers that supply springs. Given the likely prohibition on permitting such withdrawals, the amendments are most beneficial in forcing local governments to face the need to develop alternative water supplies.

D. Environmental Resource Permitting

1. Overview of ERP Program

The Environmental Resource Permitting (ERP) program provides for the regulation by the Florida Department of Environmental Protection (DEP) or one of the water management districts of most development activities affecting surface water.²¹⁷ The ERP program regulates the construction and operation of buildings, roads, parking lots, stormwater systems, ditches, borrow pits, mines and similar facilities. Development directly in wetlands or surface waters must meet additional criteria, but all development is subject to regulation. Although ERP jurisdiction comes from affecting surface waters, the purpose of regulation is to ensure that development does not adversely affect water resources; thus groundwater recharge and habitat of wildlife are relevant in ERP permit considerations.

ERP rules provide for two sets of criteria. There is a set of “conditions” applicable to all ERP permits and “additional conditions” applicable to activities located in wetlands or other surface waters.²¹⁸ The conditions-for-issuance rules used by SJRWMD are typical

²¹⁶ *Id.*

²¹⁷ FLA. STAT. § 373.403 (2006). For many years the ERP program was not implemented in the Northwest Florida Water Management District due to refusal by the Legislature to fund the program. That is about to change. Ch. 2006-228, Laws of Florida. Each of the other water management districts has adopted consistent implementing regulations. *See generally* ENVTL. AND LAND USE SECTION OF THE FLORIDA BAR, TREATISE ON FLORIDA ENVIRONMENTAL AND LAND USE LAW, Vol. 1, 9.6--9.22 (Feb. 2004).

²¹⁸ The distinction was created when the public interest review criteria of DEP’s wetland permitting program merged into the criteria of the Management and Storage of Surface Waters programs of the water management districts to create a single ERP

of those rules used by the other WMD's and DEP, and therefore are laid out below as an example.

40C-4.301 Conditions for Issuance of Permits

(1) In order to obtain a . . . permit . . . an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of a surface water management system:

. . .

- c. Will not cause adverse impacts to existing surface water storage and conveyance capabilities;
- d. Will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters;
- e. Will not adversely affect the quality of receiving waters such that the water quality standards set forth in chapters 62-3, 62-4, 62-302, 62-520, 62-522, and 62-550, F.A.C., including any antidegradation provisions . . . and any special standards for Outstanding Florida Waters . . . will be violated;
- f. Will not cause adverse secondary impacts to the water resources;
- g. Will not adversely impact the maintenance of surface or ground water levels or surface water flows established in chapter 40C-8, F.A.C.;

. . .

- k. Will comply with any applicable special basin or geographic area criteria established in chapter 40C-41, F.A.C.²¹⁹

permitting program. It was the Legislative intent not to change the criteria, but to merge the programs. FLA. STAT. § 373.414(9) (2006).

²¹⁹ FLA. ADMIN. CODE r. 40C-4.301 (2006); *see also* ENVTL. AND LAND USE SECTION OF THE FLORIDA BAR, TREATISE ON FLORIDA ENVIRONMENTAL AND LAND USE LAW, Vol. 1, 9.13-4 – 9.13-5 (Feb. 2004). Chapter 40C-41 of the Florida Administrative Code establishes additional criteria that are used in reviewing the ERP applications for projects that are located in one of the eight hydrologic regulatory basins adopted by the Governing Board. An example of such a basin is the Wekiva River Hydrologic Basin, for which the St. Johns River Water Management District has developed additional basin-specific standards to ensure that the basin's resources will be adequately protected. These Wekiva Basin rules were adopted under the authority of Florida Statutes Section 373.415, which directs the District to adopt protection zones adjacent to the water courses in the Wekiva river system to prevent harm to the water quality, water quantity, hydrology,

The additional conditions for issuance of a permit adopted by SJRWMD are also typical of those used by other WMD's and the DEP, and thus provide the following example.

40C-4.302 Additional Conditions for Issuance of Permit

(1) In addition to the conditions set forth in section 40C-4.031, F.A.C., in order to obtain a . . . permit . . . an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal, and abandonment of a system:

a. Located in, on, or over wetlands or other surface waters will not be contrary to the public interest, or if such an activity significantly degrades or is within an Outstanding Florida Water, that the activity will be clearly in the public interest, as determined by balancing the following criteria as set forth in subsections 12.2.3 through 12.2.3.7 of the Applicant's Handbook: Management and Storage of Surface Waters:

. . .

i. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;

. . .

i.v. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;

. . .

wetlands, and wildlife species caused by the systems regulated under Chapter 373, Part IV of the Florida Statutes. Those special basin criteria were recommended for application in the springshed of the Wekiva Springs because they are protective of groundwater quality. SJRWMD, *Preliminary Report to the Wekiva River Basin Coordinating Committee Pursuant to Executive Order No. 03-112*, page 6 of 27 (Wekiva River Basin Coordinating Committee Final Draft Report and Recommendations, January 29, 2004). The Wekiva Parkway Protection Act required the district to protect predevelopment recharge volume. FLA. STAT. §369.318(4) (2006). Special criteria for the basin have been incorporated into section 11.3, Applicants Handbook: Management and Storage of Surface Waters (Dec. 3, 2006). The District is also prohibited from issuing ERP permits in the Wekiva River Protection Area before receiving notification from the local government that a development is consistent with the comprehensive plan and land development regulations. FLA. STAT. §373.415(2)(2006).

- v.ii. The current condition and relative value of functions being performed by areas affected by the proposed activity.
- b. Will not cause unacceptable cumulative impacts upon . . . surface waters as set forth in subsections 12.2.8 through 12.2.8.2 of the Applicant's Handbook: Management and Storage of Surface Waters . . .
- c. Located in, adjacent to or in close proximity to Class II waters . . . will comply with the additional criteria in subsection 12.2.5 of the Applicant's Handbook: Management and Storage of Surface Waters.²²⁰

Preventing adverse impacts to both water quality and ground water levels are primary objectives of the regulatory criteria contained in the ERP program. To the extent that ERP criteria are not sufficient to protect springs or to provide a greater level of local control in the decision-making process, local governments should consider adopting local criteria through land development regulations.

2. Preemption of Local Government Authority

There are several specific areas of local government preemption within the ERP program. The preemption of local government authority is mainly limited to the context of mitigation, and thus it does not appear that preemption should be a major concern for local governments.

First, local governments may not require permits or otherwise impose regulations governing the operation of mitigation banks.²²¹ Second, local governments cannot deny the use of mitigation banks due to the location being outside of its jurisdiction.²²²

There are further areas of local government preemption within the ERP program for activities in surface waters and wetlands. If mitigation requirements imposed by a local government for surface water impacts of an activity also regulated under the ERP program cannot be reconciled with the mitigation requirements approved under an ERP permit for that same activity, then the mitigation requirements for surface water and wetland impacts are controlled by the ERP permit.²²³ Moreover, when activities for a

²²⁰ FLA. ADMIN. CODE r. 40C-4.302(1); FLA. STAT. § 373.414 (2006); ENVTL. AND LAND USE SECTION OF THE FLORIDA BAR, TREATISE ON FLORIDA ENVIRONMENTAL AND LAND USE LAW, Vol. 1, 13-7 (Feb. 2004).

²²¹ FLA. STAT. § 373.4136(8) (2006). They can, however, regulate construction activities associated with mitigation banks. *Id.*

²²² FLA. STAT. § 373.4135(2) (2006).

²²³ FLA. STAT. § 373.414(1)(b)(4) (2006).

single project regulated under this part of the ERP program occur in more than one local government jurisdiction, and where permit or regulatory requirements imposed by a local government are different from the requirements of an ERP permit for those same activities, then the permit or regulatory requirements shall be controlled by the ERP permit.²²⁴ Finally, Uniform Mitigation Assessment Method (UMANM) for wetlands and other surface waters had been adopted as a rule that binds local governments.²²⁵

The areas of local government preemption under the ERP program seem quite extensive at first. Yet, local governments still have a broad range of authority within the areas of ERP permitting because the majority of the local government's preempted powers deal only with mitigation procedures and requirements. Therefore it appears that a local government would not be preempted from requiring, for example, greater levels of stormwater retention or detention unless the ERP permitted activity at issue is in a surface water or wetland and extends beyond the jurisdiction of that one local government.

3. Onsite Treatment and Disposal Systems (Septic Tanks)

a) Overview of Department of Health Authority

The Department of Health (DOH) has a duty to regulate septic tanks and other forms of onsite treatment and disposal.²²⁶ DOH performs application reviews and site evaluations, issues permits, and conducts inspections and investigations related to the construction, installation, maintenance, operation, use, and abandonment of onsite sewage treatment and disposal systems, more commonly known as septic tanks and drain field, for residences and other establishments with an estimated domestic sewage flow of 10,000 gallons or less per day, or an estimated commercial sewage flow of 5,000 gallons per day or less per day.²²⁷ The DOH also adopts rules for enforcement activities such as imposing fines or issuing citations to carry out their regulations for septic tank design and construction.²²⁸ Furthermore, DOH is charged with developing a comprehensive program to ensure that onsite sewage treatment and disposal systems are sized, designed, constructed, installed, repaired, used, operated, and abandoned in compliance with DOH rules to “prevent groundwater contamination and surface water contamination and to preserve the public health.”²²⁹

Several provisions addressing septic tanks are directly related to the protections of water quality. DOH must not allow an onsite sewage treatment and disposal system to be

²²⁴ FLA. STAT. § 373.414(1)(c) (2006).

²²⁵ FLA. STAT. § 373.414(18) (2006).

²²⁶ FLA. STAT. § 381.0065(3) (2006).

²²⁷ FLA. STAT. § 381.0065(3)(b) (2006). Larger systems may be regulated by DEP.

²²⁸ FLA. STAT. §§ 381.0065(3)(a, h) (2006).

²²⁹ FLA. STAT. § 381.0065(3)(c) (2006).

placed closer than: ten feet from any storm sewer pipe whenever possible, but never closer than five feet; seventy-five feet from the mean high-water line of a tidally influenced surface water; seventy-five feet from the normal flood line of a permanent nontidal surface water; or fifteen feet from the high-water line of retention areas, detention areas, swales that are designed to contain water for less than seventy-two hours after a rainfall, normally dry drainage ditches, or normally dry individual lot storm water retention areas.²³⁰

One of the major intentions of the Legislature in enacting Florida Statute Section 381.0065 was to ensure that onsite sewage treatment and disposal systems did not significantly degrade groundwater or surface water.²³¹ The regulatory emphasis, however, has been on protecting human health. Thus, while DOH might not allow contamination to the point that human health is at risk, the seepage of nitrates from septic tanks is slowly leaking into Florida's groundwater and harming springs.²³²

b) Preemption of Local Government Authority

Within DOH's regulation of the septic tank industry, there is only one area of express preemption: building permitting. A local government may not issue a building or plumbing permit for any building that requires the use of an onsite sewage treatment and disposal system, unless the owner or builder has already received a construction permit for such a system from DOH.²³³ Also, a building or structure may not be occupied, and no local government, state agency, or federal agency may authorize occupancy, until the DOH approves the final installation of the onsite septic system.²³⁴ Finally, no local government may approve any change in occupancy or tenancy of a building that uses an onsite sewage treatment and disposal system until the DOH has reviewed the use of the septic system with the proposed change, approved the change, and amended the operating permit.²³⁵

State regulations thus establish only minimum standards for septic systems. Local governments appear able to mandate stricter regulations of the use of septic tanks, such as larger lot sizes, additional setbacks or the use of more advanced systems, so long as they are approved by DOH. Thus, it does not appear that the DOH's regulation of onsite sewage treatment and disposal systems would generally preempt local governments from further restricting the type and uses of septic tanks within their jurisdictions to enhance

²³⁰ FLA. STAT. § 381.0065(4)(e) (2006).

²³¹ FLA. STAT. § 381.0065(4)(e) (2006).

²³² See generally, Heather Darden, *Wastewater in the Florida Keys: A Call For Stricter Regulation of Nonpoint Source Pollution*, 16 J. Land Use & Env'tl. Law 200 (2001).

²³³ FLA. STAT. § 381.0065(4) (2006).

²³⁴ FLA. STAT. § 381.0065(4) (2006).

²³⁵ FLA. STAT. § 381.0065(4) (2006).

the protection of Florida's springs. In one specific area, however, the Legislature may have expressly preempted local authority. Onsite sewage treatment and disposal systems for single family residences that are designed and certified by registered professional engineers can be approved by DOH despite the action of a county health department.²³⁶ Furthermore, DOH regulation of septic systems in no way, however, prejudices local government authority to regulate in ways that incidentally affect the amount of development permitted and thus, by default, the number of septic systems that will be constructed. For example, local government may reduce permitted density or increase minimum lot size.

²³⁶ FLA. STAT. §381.0065(4)(j)3(2006).

IV. Constitutional Limits on Land Use Regulation

A. Due Process

The U.S. Constitution forbids state action²³⁷ that deprives property owners of property “without due process of law.”²³⁸ Such due process includes both substantive and procedural due process.

Procedural due process requires that state action affecting a landowner gives notice to a landowner before the application of an ordinance or regulation.²³⁹ Similarly, due process requires that landowners who would be affected by a proposed state action have the opportunity to appear before a local decision making body in a public hearing.²⁴⁰ The formality of the hearing procedures must be proportional to the severity of the possible deprivation of property interest.²⁴¹

B. Substantive Due Process

Substantive due process examines the reasonableness of regulation. The three-part test enunciated by courts asks 1) if there is a valid public purpose for the regulation, 2) if the means intended to be used are reasonably related to achievement of the goals, and 3) if the regulations are unduly oppressive on individuals.²⁴² The determination of whether a land use regulation unduly oppresses an individual generally occurs in the context of a takings analysis.

²³⁷ Local government action is “state action.” *Edmondson v. Jordon*, 415 U.S. 651, 667 n. 12 (1974).

²³⁸ U.S. Const. amends. V, XIV.

²³⁹ The requirement for individualized due process notice is limited to situations in which the legislative action has a distinct and significant impact on a limited part of the population; generally applicable land use matters, such as the adoption of policies or ordinances that affect a large group of citizens, do not require individualized due process. *Bi-Metallic Inv. Co. v. Board of Equalization*, 239 U.S. 441 (1915); *Brown v. McGarr*, 774 F.2d 777, 784-85 (7th Cir. 1985).

²⁴⁰ *Irvine v. Duval County Planning Comm’n*, 504 So. 2d 1265 (Fla. 1st DCA 1986).

²⁴¹ *Little v. Streater*, 452 U.S. 1 (1981); *Brown v. McGarr*, 774 F.2d 777, 784-85 (7th Cir. 1985).

²⁴² *See* *Lawton v. Steele*, 152 U.S. 133, 137 (1894); *see also*, *Kaiser Dev. Co. v. City and County of Honolulu*, 649 F. Supp. 926, 943 (D. Hawaii 1986) (citing *Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955)).

For many years the Supreme Court’s jurisprudence had created confusion regarding the validity of regulation of land and takings law. In the case of *Agins v. Tiburon*²⁴³ the Court stated that regulation “effects a taking if [such regulation] does not substantially advance legitimate state interests”²⁴⁴ This language, however, mirrors the due process test for the validity of a regulation. Thus, the *Agins* decision confused questions of the legitimacy of a regulation as opposed to the effect of the regulation on private property. The U.S. Supreme Court finally eliminated this confusion in 2005 in the case of *Lingle v. Chevron*²⁴⁵ when it abrogated the rule in the *Agins* case and held that the proper inquiry in *Agins* as to the legitimacy of a regulation was a due process question and not a method for determining a taking.²⁴⁶ *Lingle* clarified that the questions of whether a land use regulation is valid and whether the regulation effects a taking are distinct questions.

In the context of land development regulations aimed as springs protection, the valid public purpose of regulation (i.e.—protection of springs) does not present an issue. However, the reasonable relation of proposed regulations to the valid public purpose of springs protection may give rise to disputes about the amount of data and pollutant modeling necessary to assure that the land development regulations “reasonably relate” to the goal of springs protection. Similarly, regulations viewed as unduly oppressive on individuals may be questioned; this inquiry, however, will typically take place in the context of a “takings” claim.

C. Equal Protection

Both the U.S. Constitution and the Florida Constitution have similar requirements regarding equal protection under the laws for all citizens.²⁴⁷ An equal protection claim may be either “facial” or “as applied.” A facial challenge to a regulation or law requires that the law involve a fundamental right or race or some other suspect class. In such a challenge, a court will strictly scrutinize whether the law or regulation is needed to further a compelling state interest.²⁴⁸ The remedy for a facial challenge is an injunction on the enforcement of the regulation.²⁴⁹

An “as applied” challenge may be pursued if no fundamental right nor race nor any other suspect class is implicated by the law or regulation. In such a case courts inquire whether

²⁴³ 447 U.S. 255 (1980).

²⁴⁴ *Id.* at 260.

²⁴⁵ *Lingle v. Chevron U.S.A. Inc.* 544 U.S. 528 (2005).

²⁴⁶ *Id.* at 542-43.

²⁴⁷ U.S. Const. amend. XIV; Fla. Const. art. I, §2, (“All natural persons are equal before the law.”).

²⁴⁸ *Eide v. Sarasota County*, 908 F. 2d 716, 722 (11th Cir. 1990).

²⁴⁹ *Id.*

there exists a rational relationship between the classification within the law or regulation and a legitimate state interest.²⁵⁰

D. Expropriation

The U.S. Constitution forbids the taking of private land for a public purpose without “just compensation.”²⁵¹ The government may still “take” private property, but if it does, the government must pay compensation for what it has taken.²⁵² For more than a century the understanding of the fifth amendment’s prohibition on takings without compensation did not extend beyond cases involving the government taking possession of property or effectively “ousting” the property owner.²⁵³ In 1922 this changed when the U.S. Supreme Court introduced the idea that *regulation* of private property could be so onerous as to effectively merit treatment as a physical occupation of the property or an ouster of the owner.²⁵⁴ Thus, today, the “taking” of private land for a public purpose includes not only the state exercising eminent domain powers to take title to land, but also “inverse condemnation” or “regulatory takings” when government regulations become too onerous.²⁵⁵

Since the 1922 recognition of regulatory takings, courts have confronted the persistent problem of determining when a regulatory taking has occurred. Regulatory takings jurisprudence has evolved to recognize two types of cases in which a taking will be found *per se*: 1) physical invasion of property and 2) elimination of all economically viable use of land.

When the government “physically invades” or requires that a member of the public be allowed to enter the property, a taking will almost always be found, “no matter how minute the intrusion, and no matter how weighty the public purpose behind it.”²⁵⁶ The second type of categorical taking is “where regulation denies all economically beneficial

²⁵⁰ *Id.*

²⁵¹ U.S. Const. amend. V.

²⁵² *Lingle v. Chevron U.S.A. Inc.* 544 U.S. 528, 536 (2005) (citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987)).

²⁵³ See, e.g. *id.* at 537.

²⁵⁴ *Id.* at 537-38 (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

²⁵⁵ See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426-28 (1982); *First English Evangelical Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028-29 (1992).

²⁵⁶ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); see also, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

or productive use of land.”²⁵⁷ A loss of all economic viability cannot be supported by simply asserting important public interests, but can be justified only where the regulation is aimed at preventing a common law nuisance.²⁵⁸ The U.S. Supreme Court noted that most cases do not result in a loss of all economic viability.²⁵⁹

Most regulatory takings cases, however, do not involve either of these rules resulting in a categorical taking. Rather, most cases involve regulations that affect a property owner’s exercise of certain sticks in the “bundle of rights” that comprise property ownership, thus impacting the value of the property. As Justice Holmes in *Pennsylvania Coal Co. v. Mahon* stated: “[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”²⁶⁰ The Supreme Court has not enunciated a clear, concise test for when regulations go “too far.” Instead, the Supreme Court has stated that it will engage in a case-by-case factual inquiry. This ad hoc factual inquiry first appeared in the case of *Penn Central Transportation Co. v. City of New York*.²⁶¹

In making its “ad hoc” inquiry, the Supreme Court has identified three factors of particular importance in determining whether government action works a taking: (1) the character of the government action; (2) the economic impact of the regulation; and (3) the extent to which the action interferes with reasonable investment-backed expectations.²⁶²

If the government's action can be characterized as a physical invasion of the property, a court will be more likely to find a taking.²⁶³ If the action can be characterized as eliminating substantial rights held in property, such as the right to possess, use, and dispose of the property, and the right to exclude others, courts may also be more likely to find a taking.²⁶⁴

The U.S. Supreme Court determines the economic impact of a regulation by comparing the value of the property before and after the regulation's interference with the property.²⁶⁵ However, the fact that property value diminished as a result of government regulation does not necessarily amount to a compensable taking. The denial of a

²⁵⁷ Lucas, 505 U.S. at 1015.

²⁵⁸ *Id.* at 1029-31.

²⁵⁹ *Id.* at 1017.

²⁶⁰ 260 U.S. 393, 415 (1922).

²⁶¹ 438 U.S. 104, 124 (1978).

²⁶² *Id.*

²⁶³ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

²⁶⁴ *Loveladies Harbor, Inc. v. United States*, 15 Cl.Ct. 381, 391 (1988).

²⁶⁵ *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987).

development permit may, however, create a taking if the effect of the denial is to prevent all economically viable use of the land in question.²⁶⁶

Finally, courts will consider the impact of the action on the property owner's reasonable investment-backed expectations.²⁶⁷ Reasonable investment-backed expectation analysis looks at what property rights, both economic and non-economic, the regulation takes away. In *Penn Central*²⁶⁸ the U.S. Supreme Court held that because a New York City landmark law did not interfere with current uses of the parcel and allowed a reasonable return on the original investment made in the property, the law did not interfere with plaintiff's investment-backed expectations.²⁶⁹ The decision also noted that the regulation's stated rationale would benefit the owners of the parcel in that it "benefit[s] all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole."²⁷⁰

Furthermore, a taking does not necessarily occur simply because regulations do not permit a property holder the highest and best use of property if that use creates a public harm.²⁷¹ A landowner does not have an absolute right to change the natural condition of the land when the purpose of the change is not appropriate to the natural state of the land and the change would injure others.²⁷²

This leaves the question as to how much loss of economic benefit of land must occur before a compensable taking may be found as the case law is inconsistent on this point.

Open space requirements (OSR) as an environmental protection measure will usually not run afoul of Fifth Amendment takings jurisprudence. One key factor is whether the OSR permits some sort of reasonable use for any given lot. If the OSR permits a house to be built on a lot, this will typically avoid the claim that all value has been taken from the land.²⁷³

OSR may interact with lot size to determine the possibility of allowing even one single-family dwelling on a lot. However, a requirement of 100% open space on a small lot

²⁶⁶ See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Bowles v. United States*, Fed. Cl. 37, 48-51 (1994); *Florida Rock Indus. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994).

²⁶⁷ *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 136.

²⁷⁰ *Id.* at 134-35.

²⁷¹ *Graham v. Estuary Properties*, 399 So. 2d 1374 (Fla. 1981).

²⁷² *Id.* at 1381-82.

²⁷³ *Palazzolo v. Rhode Island*, 533 U.S. 606, 621 (2001).

may not leave any way to meaningfully utilize the property.²⁷⁴ In such a case, a grant to the landowner of transferable development credits may be sufficient to ward off a takings claim.²⁷⁵

Some landowners might argue that even if they have a large lot, an OSR requirement of 80% effects a complete taking of 80% of their property. Takings jurisprudence, however, clearly indicates that forcing a landowner to build on a portion of a lot and leave another part open does not automatically constitute a taking.²⁷⁶ Therefore, OSRs that both retain some economic value for the land and some development potential, however small, will rarely qualify as a taking. At the opposite end of the spectrum, if an OSR applied to a specific property leaves neither development potential nor value in the form of viable TDR (transfer of development rights) credits, a taking might be found. The cases which one cannot safely predict are those falling in between these two extremes: the land retains no development potential and only minimal value as open area, or the land's only value resides in TDR credits. Such cases require case-by-case evaluation.

Similarly, if a landowner has a sinkhole on a property and regulations allow for no use of that portion of the property, the landowner could claim that the portion of the property around the sinkhole has been taken. Takings jurisprudence does not, however, look favorably on landowner attempts to separate property into various parcels in an attempt to claim a complete taking of a portion of the property.²⁷⁷ The denominator problem poses

²⁷⁴ A clever, and arguably malevolent, approach to this by a developer might be to design individual parcels in a development anticipating that the parcels could not be built upon due to environmental regulations such as OSR, thus providing a takings claim. Such tactics could be easily countered by noting that the *Penn Central* test, *supra* notes 25-26, 31-34 and accompanying text, focuses on “reasonable investment-backed expectations.” A developer dividing an environmentally sensitive landscape in a springshed into small lots cannot reasonably expect to build on such lots, thus failing the “reasonable investment-backed expectations analysis in *Penn Central*.”

²⁷⁵ For more on this question, see note 358, *infra*.

²⁷⁶ *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497-98 (1987) (rejecting the notion that a “requirement that a building occupy no more than a specified percentage of the lot on which it was located” is any more of a taking than the claim the court rejected in the decision).

²⁷⁷ *Villas of Lake Jackson, Ltd. v. Leon County*, 906 F. Supp. 1509, 1517 (N.D. Fla. 1995)(citing *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 643-44 (1993)); *State Dept. of Env’tl. Reg. v. Schindler*, 604 So. 2d 565, 568 (2d DCA 1992) (“The focus is on the nature and extent of the interference with the landowner’s rights in the parcel *as a whole* in determining whether a taking of private property has occurred. Prohibition on certain *portions* of the tract does not in itself effect an unconstitutional taking.”) (quoting *Fox v. Treasure Coast Reg’l Planning Council*, 442 So. 2d 221, 226 (Fla. 1st DCA 1983)).

the question of what is the relevant property interest that has been burdened. A landowner will find that courts will not lend a sympathetic ear if the landowner breaks property into smaller parcels so that the relative burden on certain parcels increases.

V. Bert J. Harris, Jr. Private Property Rights Protection Act

A. Overview

In 1995, the Florida legislature adopted the Bert J. Harris, Jr., Private Property Rights Protection Act (Act),²⁷⁸ which purports to create a new cause of action for landowners complaining of government interference with property rights. It provides that:

when a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property, the property owner of that real property is entitled to relief, which may include compensation for the actual loss to the fair market value of the property caused by the action of government, as provided in this section.²⁷⁹

As expressed in the statute, the intent of the legislature was to create “a separate and distinct cause of action from the law of takings”²⁸⁰ and to provide “for relief, or payment of compensation, when a new law, rule, regulation, or ordinance . . . , as applied, unfairly affects real property.”²⁸¹

The Act does not apply to any governmental action by the U.S. government nor any act by a Florida state governmental entity exercising powers of the U.S. or its agencies through delegation to the state.²⁸² The Act also does not apply to any law, ordinance, rule or regulation adopted, or formally noticed for adoption before May 11, 1995.²⁸³ The amendment of an existing ordinance or comprehensive plan could fall within the scope of the Act “to the extent that the application of the amendatory language imposes an inordinate burden apart from the law, rule, regulation, or ordinance being amended.”²⁸⁴

²⁷⁸ FLA. STAT. § 370.001 (2006).

²⁷⁹ FLA. STAT. § 70.001(2) (2006). The Act does not allow for compensation for an incidental loss of market value to property that is not the subject of regulation but may have lost value due to regulations on other property. Op. Att’y Gen. Fla. 95-78 (1995).

²⁸⁰ FLA. STAT. § 70.001(1) (2006).

²⁸¹ *Id.*

²⁸² FLA. STAT. § 70.001(2) and (3)(c), (2006). Despite wording in the Bert Harris Act noting that “[t]his section does not affect the sovereign immunity of the government,” Florida Statute Section 70.001(13) (2006), Florida’s Third District Court of Appeals has held that the Act does waive sovereign immunity of the government with respect to a person whose property has been inordinately burdened. *Royal World Metropolitan, Inc. v. City of Miami Beach*, 863 So. 2d 320, 321-23 (2003).

²⁸³ FLA. STAT. § 70.001(12) (2006).

²⁸⁴ *Id.*

If a court determines that an inordinate burden has been imposed on the landowner, the remedy “may include compensation for the actual loss to the fair market value of the real property” caused by the government’s action.²⁸⁵ The Act requires that a jury determine the amount of compensation due if an inordinate burden is found.²⁸⁶ The amount of compensation due is equal to the difference between the fair market value of the property prior to the governmental action, including the owner’s reasonable investment-backed expectations, and the current fair market value after the governmental action, including the government’s settlement offer and ripeness decision.²⁸⁷ This compensation does not include business damages for development or uses which are prohibited.²⁸⁸

B. Settlement Procedure

The Act establishes a mandatory settlement procedure for disputes arising under the Act. At least 180 days before filing suit in circuit court under the Act, a landowner must give the governmental entity notice, including a valid appraisal supporting the claim of an “inordinate burden,” and demonstrating the loss in fair market value to the property.²⁸⁹ During the 180-day period, the governmental entity must make a written settlement offer which would resolve the claim,²⁹⁰ along with a written “ripeness decision”²⁹¹ detailing permitted uses of the property.²⁹² The landowner may file suit in circuit court after the ripeness decision has been issued or upon the expiration of the 180-day notice period.

A settlement offer may include the following changes:

- An adjustment of land development or permit standards or other provisions controlling the development or use of land
- Increases or modifications in the density, intensity, or use of areas of development
- The transfer of developmental rights
- Land swaps or exchanges

²⁸⁵ FLA. STAT. § 70.001(2) (2006).

²⁸⁶ FLA. STAT. § 70.001(6)(b) (2006).

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ FLA. STAT. § 70.001(4)(a) (2006). Landowners affected by government action which falls within the scope of the Act have one year in which to file suit. FLA. STAT. §70.001(11) (2006). This one-year period does not begin to run until after any administrative appeals have been completed. *Id.*

²⁹⁰ FLA. STAT. § 70.001(4)(c) (2006).

²⁹¹ “Ripeness decision” in this context constitutes the “last prerequisite to judicial review.” FLA. STAT. § 70.001(5)(a) (2006).

²⁹² FLA. STAT. § 70.001(5)(a) (2006).

- Mitigation, including payments in lieu of onsite mitigation
- Location on the least sensitive portion of the property
- Conditioning the amount of development or use permitted
- A requirement that issues be addressed on a more comprehensive basis than a single proposed use or development
- Issuance of the development order, a variance, special exception, or other extraordinary relief
- No changes to the action of the governmental entity²⁹³

Creative use of these mitigating features in efforts to protect Florida springs will reduce the likelihood of successful claims that the ordinance “inordinately burdens” a particular property. If the property owner rejects the government’s settlement offer and ripeness decision and files suit, the circuit court judge must examine the existing use of the property²⁹⁴ and determine whether the owner has an additional vested right to a specific use of the property.²⁹⁵ Then, considering the proposed settlement offer and ripeness decision, the judge will decide whether the “action of the governmental entity”²⁹⁶ has inordinately burdened the real property.

If the landowner accepts a settlement offer, this does not necessarily end the process. The governmental entity may implement the offer subject to certain conditions.²⁹⁷ If the settlement offer “would have the effect of a modification, variance, or a special exception to the application of a rule, regulation, or ordinance as it would otherwise apply to the subject real property, the relief granted shall protect the public interest served by the regulations at issue and be the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property.”²⁹⁸ If a proposed settlement agreement might contravene a relevant statute, the governmental entity and the property owner must file a joint action for circuit court approval of the settlement so that

²⁹³ FLA. STAT. § 70.001(4)(c) (2006).

²⁹⁴ "Existing use" means an actual, present use or activity on the real property, including periods of inactivity which are normally associated with, or are incidental to, the nature or type of use or activity or such reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property. FLA. STAT. §70.001(3)(b) (2006).

²⁹⁵ "The existence of a 'vested right' is to be determined by applying the principles of equitable estoppel or substantive due process under the common law or by applying the statutory law of this state." FLA. STAT. §70.001(3)(a) (2006).

²⁹⁶ "Action of a governmental entity" is a "specific action...which affects real property, including action on an application or permit." FLA. STAT. §70.001(3)(d) (2006).

²⁹⁷ FLA. STAT. § 70.001(4)(c), (d)1, (d)2 (2006).

²⁹⁸ FLA. STAT. § 70.001(4)(d)1 (2006).

the circuit court can ensure that the public interest protected by the statute is still served by the settlement agreement.²⁹⁹ Florida cases have not addressed a settlement in which a court concluded that the settlement did not comply with state statutes, such as would occur should a court find a settlement agreement inconsistent with other planning requirements under the Growth Management Act.³⁰⁰

C. Inordinate Burden

The most significant issue raised by the Act is often determination of what constitutes an “inordinate burden.” The statutory definition describes two types of “inordinate burdens.” The first is an action that directly restricts or limits the use of real property to the extent that the owner is permanently unable to attain “reasonable investment-backed expectations” for an existing use or a vested right to a specific use of the property as a whole.³⁰¹ The second inordinate burden is one in which the owner is left with “unreasonable existing or vested uses such that he bears permanently a disproportionate share of the burden imposed for the good of the public.”³⁰² Temporary impacts and governmental actions to remediate a “public nuisance at common law or a noxious use of private property” are not included in the definition of “inordinate burden.”³⁰³

The primary question is what degree of regulation or what diminution of value will constitute an “inordinate burden” under the statute. Reported cases have not interpreted inordinate burden.³⁰⁴ While there has been a finding of inordinate burden in unreported

²⁹⁹ FLA. STAT. § 70.001(4)(d)2 (2006).

³⁰⁰ Two administrative cases have addressed claims of inconsistency with the Growth Management Act, but in both instances, the administrative law judge found that the proposed settlements did not violate Growth Management Act requirements. *1000 Friends of Florida, Inc. v. Dept. of Community Affairs*, WL 1174557 (Fla.Div.Admin.Hrgs.), *12 (2001); *Parker v. St. Johns County*, 2002 WL 31846456 (Fla.Div.Admin.Hrgs.), *5+ (2002). In *Parker v. St. Johns County* the administrative law judge held that the petitioner had failed to carry her burden to demonstrate that a change to the St. Johns County Future Land Use Map, which was made pursuant to a settlement agreement under the Bert Harris Act, was contrary to the relevant provisions of the Local Government Comprehensive Planning and Land Development Regulation Act, Chapter 163, Part, II, Florida Statutes. A similar result emerged in *1000 Friends of Florida, Inc. v. Dept. of Community Affairs*, WL 1174557, *12 (Fla.Div.Admin.Hrgs.) (2001).

³⁰¹ FLA. STAT. § 70.001(3)(e) (2006).

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ Further research needs to address the hundreds of claims that have been brought under the Bert J. Harris, Jr. Private Property Protection Act since its passage. These cases have not been published because the majority of them settle before ever reaching a courtroom.

cases, the test for inordinate burden is still not clear under the Act. Though the Act is intended to provide a separate cause of action from present takings jurisprudence,³⁰⁵ it is unlikely that courts will be able to easily draw a bright line between this new cause of action and takings jurisprudence. Given the history and logic of traditional takings analysis, courts hearing cases under the Act will find it difficult to ignore such precedents when determining whether property has been “inordinately burdened” by government regulations.

As an example of the difficulty in separating traditional takings analysis from the Act’s language, one need only look to the Act’s description of “inordinate burden.” According to the Act, an “inordinate burden” is placed on private property whenever the owner is “permanently unable to attain the reasonable, investment-backed expectations” for the use of the property.³⁰⁶ “Investment-backed expectations” were first introduced as a factor in takings jurisprudence by the United States Supreme Court in *Penn Central Transportation Co. v. New York City*.³⁰⁷ However, the role this factor should play, and its relative importance, was never made clear. The use of terminology from traditional takings analysis in the Act confuses how courts should interpret the Act. Still more confusion arises from Florida Statute Section 70.001(9), which notes that “[t]his section may not necessarily be construed under the case law regarding takings if the governmental action does not rise to the level of a taking.”

A second question involves determining when “reasonable, investment-backed expectations” as to the use of land arise. One Federal Claims Court decision applying the standards of traditional takings analysis held that “the relevant date for determining plaintiff’s historically rooted expectancies . . . [should be] the dates on which the plaintiffs themselves acquired title to their properties.”³⁰⁸ Where land is already subject to government regulation, a buyer’s expectations concerning the property should account for this existing regulation of the property. Interpretation of reasonable investment-backed expectations should not allow recovery by land speculators who gamble against both the market and existing regulations.

The Act supports this interpretation by providing that “existing use” should mean actual present use of the land and “reasonably foreseeable, nonspeculative land uses” appropriate to the property and its surroundings.³⁰⁹ Speculators who have purchased land with knowledge of existing land use restrictions should have much less success arguing

³⁰⁵ FLA. STAT. §70.001(1) (2006) (“...[S]ome laws, regulations, and ordinances of the state and political entities in the state, as applied, may inordinately burden, restrict, or limit private property rights without amounting to a taking . . .”).

³⁰⁶ FLA. STAT. § 70.001(3)(e) (2006).

³⁰⁷ 438 U.S. 104, 124 (1978).

³⁰⁸ *Preseault v. United States*, 27 Cl. Ct. 69, 88 (1992), rev’d by *Preseault v. U.S.* 100 F. 3d 1525 (1996).

³⁰⁹ FLA. STAT. § 70.001(3)(b) (2006).

that developing the land in a manner that exceeds those restrictions is a “reasonable” expectation or that land already restricted for certain uses due to environmental concerns is “appropriate” for development that is prohibited for the property and its surroundings.

At this point in the interpretation of the Act it is impossible to predict whether every diminution in value of a property as a result of future government regulation will meet this test of inordinately burdening the use of property, or whether it will be possible for some regulation to “burden” the property without that burden becoming inordinate. Those advocating increased protection of property rights interpret the Act to provide relief beginning with the loss of the first dollar of fair market value.³¹⁰ However, this argument is opposed to the traditional state court evaluation of whether government action has resulted in a regulatory taking.³¹¹

D. Existing Use

There are two types of “existing use” defined in the Act. The first is “an actual, present use or activity on the real property.”³¹² This includes “periods of inactivity which are normally associated with, or are incidental to, the nature or type of use or activity.”³¹³ The second includes land uses which are reasonably foreseeable and nonspeculative, suitable for the subject real property, compatible with adjacent land uses, and which have created an existing fair market value in the property greater than the fair market value of the actual present use or activity.³¹⁴ This second type of “existing use” lends itself to more dispute about its interpretation.

A claimant under the Act may argue that any use permitted before a new, challenged regulation fits the definition of an inordinate burden of “reasonably foreseeable and nonspeculative [uses] which have created an existing fair market value in the property greater than the fair market value of the actual present use or activity.”³¹⁵ Such an argument, however, fails to address statutory language that requires an “existing use” also must meet tests for compatibility with adjacent land uses and for suitability.³¹⁶ The test for suitability is not further defined in the statute. The best approach would be to focus on the issue of suitability of the subject property and argue that land development that would contribute to degradation of springs or the aquifer is not “suitable” development for the subject land. Such a reading properly gives the suitability test a meaning independent of the “reasonably foreseeable” requirement outlined below.

³¹⁰ See Robert C. Downie, II, *Property Rights: Will Exceptions Become the Rule?*, 69 FLA. B. J., Nov. 1995, at 71.

³¹¹ *Id.*

³¹² FLA. STAT. § 70.001(3)(b) (2006).

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ FLA. STAT. § 70.001(3)b (2006).

³¹⁶ *Id.*

The Act's definitions of "reasonably foreseeable" and "nonspeculative" uses were intended to incorporate concepts from eminent domain valuation law.³¹⁷ In this area of law, courts will sometimes accept appraisal testimony regarding highest and best use based in part on the appraiser's determination of whether zoning changes or other land use changes were reasonably foreseeable. It is possible that a proposed land use that tracks the land's classification in the future land use element of the local comprehensive plan may be sufficient to demonstrate that the proposed development is reasonably foreseeable and not speculative. Thus, in certain cases, regardless of the inclusion of an area in an environmental protection area, if the future land use classification for that area is not compatible with springs or aquifer protection, a proposed use which matches the future land use classification may be found to be "reasonably foreseeable."³¹⁸ In these cases, the tests of "suitability" and "compatibility" from the previous paragraph will take on additional importance.

E. Vested Rights

The Act protects "vested rights" to a specific land use.³¹⁹ In order for an owner's rights to vest, Florida courts have required that four conditions be met: (1) a property owner's good faith reliance (2) on some act or omission of the government resulting in (3) a substantial change in position or the incurring of extensive obligations and expenses so that (4) that it would make it highly inequitable to interfere with the acquired right.³²⁰

For example, where a landowner spent substantial amounts to install water service to his land in reliance upon the existing plan that allowed multi-family housing, a county was estopped from denying building permits for the development.³²¹ However, courts have also held that the mere existence of a present right to a certain land use based upon a

³¹⁷ See, David L. Powell, et al., *Florida's New Law to Protect Private Property Rights*, 69 FLA. B.J., Oct. 1995, at 12.

³¹⁸ A property owner will have a vested right to development—and thus an excellent takings claim—if a county planning commission makes representations to a landowner and the landowner then expends substantial money in reliance on such representations. However, cases clearly state that merely purchasing property without more does not give one the right to rely on existing zoning. *Monroe County v. Ambrose*, 2003 WL 22900537, *2 (2003) (citing *City of Miami Beach v. 8701 Collins Ave., Inc.*, 77 So. 2d 428 (Fla. 1955)).

³¹⁹ FLA. STAT. § 70.001(2) (2006).

³²⁰ *Monroe County v. Ambrose*, 866 So.2d 707, 710 (Fla. 3d DCA, 2003).

³²¹ *Metropolitan Dade County v. Brisker*, 485 So. 2d 1349, 1351 (Fla. 3d DCA 1986).

zoning ordinance is not a sufficient “act” of the government to base a vested right or equitable estoppel claim to prevent enforcement of later zoning restrictions.³²²

F. Recent Cases Under the Act³²³

Brevard County v. Stack, 932 So.2d 1258 (Fla. 5th DCA 2006)

Brevard County appealed a judgment that a county wetlands regulation had resulted in an “inordinate burden” on Stack’s property. In the appeal, Brevard County challenged the constitutionality of the Act. First, the county asserted that the Act forced the county to contract away its inherent police power authority and then buy it back through compensation, thus violating due process.³²⁴ The appeals court rejected this argument, noting that the Act aimed to provide relief to property owners from inordinate burdens on their property; the county may still exercise its police powers to regulate, but if an inordinate burden results, the county must “*inter alia*, waive, modify, transfer, purchase or financially compensate the property owner by entering into a settlement agreement providing relief, as enumerated in section 70.001(4)(c).”³²⁵

Next, the county argued the unconstitutionality of the Act because it violated the separation of powers by providing insufficient standards, conditions, or criteria to guide the judiciary in its application.³²⁶ The court rejected this argument as well by noting that the Act contains “definitions, time periods, settlement options, and other requirements and guidance for the judiciary.”³²⁷ While the appeals court rejected all claims of the Act’s unconstitutionality, the court did find merit in claims that the trial court had failed to make certain findings required by the act. The appellate court remanded the case to the trial court to offer the trial court the opportunity to make the requisite findings.³²⁸

Palm Beach Polo, Inc. v. The Village of Wellington, 918 So. 2d 988 (Fla. 4th DCA 2006)

In *Palm Beach Polo* the plaintiff claimed that designation of an area in its already-constructed development as “conservation” in the comprehensive plan of the newly-minted town of Wellington effected a taking as well as grounds for a Bert Harris claim.

³²² *Monroe County v. Ambrose*, 866 So.2d 707, 711 (Fla. 3d DCA 2003) (“A subjective expectation that land can be developed is no more than an expectancy and does not translate into a vested right to develop the property”); *Franklin County v. Leisure Property, Ltd. by Brown*, 430 So. 2d 475, 480 (Fla. 1st DCA 1983); *Jones v. First Virginia Mortgage & Real Estate Inv. Trust*, 399 So. 2d 1068, 1074 (Fla. 2d DCA 1981).

³²³ Some of the following information was informed by Ronald L. Weaver, 2006 Update on Bert Harris Property Rights Law.

³²⁴ *Brevard County v. Stack*, 932 So.2d 1258, 1261 (Fla. 5th DCA 2006).

³²⁵ *Id.*

³²⁶ *Id.* at 1262.

³²⁷ *Id.*

³²⁸ *Id.*

The land in question was known as “Big Blue” and was designated as “preserve” land in the original PUD plan of 1971. As part of the PUD, the development density from Big Blue Preserve had been transferred to other parts of the PUD. Thus, the court emphasized that the plaintiff lacked any reasonable expectation of ever developing Big Blue and that the Bert Harris claim was thus frivolous.

Osceola County v. Best Diversified, Inc., 936 So.2d 55 (Fla. 5th DCA 2006), rev. denied 945 So.2d 1289 (Fla. 2006)

Osceola represents the final chapter in the saga of a landfill. The owner of the landfill had attempted to secure an extension of a conditional use permit to operate the landfill. The county rejected the permit. The landfill’s owner claimed that this permit denial and the county’s supposed denial of owner’s ability to properly close the landfill resulted in a taking as well as a claim under the Bert Harris Act. The district court observed that the takings claim was barred because the use of the land as a landfill constituted a public nuisance. This, said the court, also foreclosed the Bert Harris Act claim. In addition, the court noted that the owner had not submitted a bona fide appraisal of the land as required by the Act.

Royal World Metropolitan, Inc. v. City of Miami Beach, 862 So. 2d 320 (Fla. 3d DCA 2004)

Plaintiff Royal World claimed that new height and density restrictions affecting land owned by the plaintiff violated the Act. The trial court concluded that the city enjoyed sovereign immunity for any legislative acts leading to an inordinate burden on property based on section 13 of the Act.³²⁹ The appeals court noted that a literal reading of section 13 would contradict the purpose of the Act. Thus, the court read section 13 in context and stated that section 13 merely maintains sovereign immunity as otherwise enjoyed by governmental entities.

G. Conclusion

In conclusion, downzoning of property, high open space requirements, mandatory TDRs, or any other law, regulation, or ordinance that may diminish property values may also give rise to claims under the Bert J.Harris, Jr. Property Rights Protection Act. Even if such claims settle, they can impose administrative and financial costs on the regulating authority. Thus, local governments protecting springs and springsheds should strive to use strategies that maintain as much value for the land as possible while furthering environmental goals.

³²⁹ Section 13 states that the Act “does not affect the sovereign immunity of government.” FLA. STAT. § 70.001(13) (2006).

VI. Transfer of Development Rights

A. Overview

Land development regulations may allow for the transfer of development rights. Transfer of development rights, known as TDR, involves the movement of a portion of an owner's property rights—the right to develop the property—from one piece of land to another. TDRs resemble cluster developments, except that in TDR's, the transfer of development density goes to a separate parcel of land.³³⁰ The desire to both protect environmental resources and respect the rights of private property owners contributed to great interest in TDRs in the 1970s. The great promise of TDRs and the many programs to implement them have historically met with limited success. Programs often failed because no market existed for the development rights that could be transferred, thus rendering the TDR credits worth very little. Additionally, TDRs embroiled many districts in litigation involving claims that the government effected a taking through the TDR restrictions, especially in mandatory programs if they were poorly designed and thus did not create sufficient value for the credits held by landowners who needed to sell. After decades of interest in TDRs, it appears they may finally be gaining traction in Florida through the Transferable Rural Land Use Credit program established by statute. This statute will be discussed after the following sections on statutory references to TDR in Florida and Florida case law on TDRs.

B. Use of TDRs in Florida

1. Florida Statute References to TDRs

Florida Statutes encourage the use of TDRs in creative growth management strategies.³³¹ The Florida Department of Community Affairs provides technical assistance “to promote the transfer of development rights within urban areas for high-density infill and redevelopment projects.”³³² Florida comprehensive planning law encourages consideration of TDRs as one of the methods for complying with the requirement that local governments discuss strategies for protection of environmentally-sensitive lands during public meetings for the community visioning process.³³³ TDRs also qualify as an innovative strategy for programs that the Florida Communities Trust helps establish and fund³³⁴ as well as being a method government entities can use in a settlement offer for a

³³⁰ Patrick W. Maraist, *Introduction and General Overview of Transferable Development Rights*, in *Treatise on Florida Environmental & Land Use Law* 29.1-4 (Environmental and Land Use Law Section The Florida Bar) (2003).

³³¹ FLA. STAT. 163.3202(3) (2006).

³³² FLA. STAT. 163.3177(11)(f) (2006).

³³³ *Id.* at 163.3177(13)(c)1 (2006).

Bert Harris claim.³³⁵ In 2006 the Florida Legislature added a requirement that any application by a rural enclave for a comprehensive plan amendment affecting more than 640 acres must include appropriate new urbanism concepts, of which TDR is listed as one.³³⁶

2. Case law

U.S. Constitutional takings law forms the background for case law on the implementation of TDR programs in Florida. As early as 1978, the U.S. Supreme Court in its foundational takings case of *Penn Central*³³⁷ mentioned TDRs. The Court observed that a possibility of transferring and selling development rights is clearly valuable and counts to mitigate any financial burden that a zoning change creates for a property owner.³³⁸ In the Court's words: "While [transferable development] rights may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation." The Court's statement that TDRs in this case mitigated the financial impact of permit denials in *Penn Central* would seem to clearly indicate that the value of TDRs goes to determine whether or not a taking occurred and not to whether or not just compensation has been paid. In light of this 1978 statement in *Penn Central*, the value of TDR credits should offset value lost due to prohibitions in a TDR program. Surprisingly, in the 1997 of *Suitum v. Tahoe Regional Planning Agency*,³³⁹ the Court may have cast doubt on this by stating in that case that the Court was not asked to rule upon, nor would it rule upon, whether any value that may inhere in TDR credits counts towards determination of whether a taking has occurred or whether a taking that was found to have occurred has been compensated via the TDR credit's value.³⁴⁰ Despite the 1997 statement in *Suitum*, the value of TDR credits arguably still mitigates the economic impact of any restrictions forming part of a TDR program.

The first Florida case to address TDRs and takings was *Hollywood v. Hollywood, Inc.*³⁴¹ The court in *Hollywood* upheld a drastic downzoning of part of the claimant's land while

³³⁴ FLA. STAT. 380.503(6), 380.508(4)(e), 380.511(2) (2006).

³³⁵ FLA. STAT. 70.001(4)(c) (2006).

³³⁶ 2006 Laws of Florida, Chapter 255 § 2, codified at FLA. STAT. § 163.3162(5) (2006).

³³⁷ 438 U.S. 104 (1978).

³³⁸ *Id.* at 137.

³³⁹ 520 U.S. 725 (1997).

³⁴⁰ *Suitum v. Tahoe Reg'l. Planning Council*, 520 U.S. 725, 728 (1997).

³⁴¹ 432 So. 2d 1332 (Fla. 4th DCA 1983), review denied 442 So. 2d 632 (Fla. 1983).

another was upzoned, and a TDR was offered as a *quid pro quo* for dedication to the city of the downzoned portion of claimant's property.³⁴²

In the next major Florida case addressing TDRs, *Glisson*, the court found that regulations allowing existing uses, limiting density, restricting specific areas, and providing for TDRs did not effect a facial taking.³⁴³ The regulations in question were passed under the authority of the Local Government Comprehensive Planning and Land Development Regulation Act.³⁴⁴ *Glisson* has been cited in an administrative case in Florida for the proposition that inclusion of TDRs, among other things, in a comprehensive plan in an effort to avoid "as applied" takings challenges does not render the plan "confiscatory."³⁴⁵

Together *Hollywood* and *Glisson* clearly indicate that a TDR program which does not remove all value from property will not fail under a facial takings challenge. These cases also make unlikely that a TDR program which leaves a reasonable amount of value or return on the affected property would fail in an as-applied challenge.

3. Transferable Rural Land Use Credits (TRLUCs)³⁴⁶

The statutory regime for Transferable Rural Land Use Credits (TRLUCs) may present a good model for how to implement TDRs to protect springs and other resources.

Section 163.3177(11)(d) Florida Statutes seeks to "encourage implementation of innovative and flexible planning and development strategies and creative land use planning techniques."³⁴⁷ TRLUCs may only exist in a Rural Land Stewardship Area (RLSA)³⁴⁸ and only result from an ordinance passed by local government establishing the number of credits associated with a RLSA.³⁴⁹ While assigning TRLUCs to a parcel of land within a RLSA does not increase the underlying zoning density of the parcel, if TRLUCs are transferred from the parcel to a designated receiving area, the underlying zoning density of the transferring land is extinguished.³⁵⁰ If the underlying zoning on a

³⁴² *Id.* at 1338.

³⁴³ *Glisson v. Alachua Cty.*, 558 So. 2d 1030 (Fla. 1st DCA 1990), review denied, 570 So. 2d 1304 (Fla. 1990).

³⁴⁴ FLA. STAT. ch. 163, Pt. II (2006).

³⁴⁵ *Monroe County Chowder and Marching Society, Inc., et. al. v. DCA*, 1994 WL 1027567, *380 (Fla.Div.Admin.Hrgs.1994).

³⁴⁶ FLA. STAT. § 163.3177(11)(d)1 (2006).

³⁴⁷ FLA. STAT. § 163.3177(11)(d)1 (2006).

³⁴⁸ FLA. STAT. § 163.3177(11)(d)6.a (2006).

³⁴⁹ FLA. STAT. § 163.3177(11)(d)6 (2006).

³⁵⁰ FLA. STAT. § 163.3177(11)(d)6.d (2006).

parcel of land assigned TRLUCs is utilized, this also extinguishes the TRLUCs assigned to the parcel.³⁵¹ No increase of density is permitted on any parcel within a designated receiving area for TRLUCs except by transfer of TRLUCs.³⁵² Such transfer and change of density for the receiving area does not require a plan amendment³⁵³ but must be specified as part of a land development order.³⁵⁴

The legislation notes that TRLUCs “may be assigned at different ratios of credits per acre according to the natural resource or other beneficial use characteristics of the land and according to the land use remaining following the transfer of credits, with the highest number of credits per acre assigned to the most environmentally valuable land or, in locations where the retention of open space and agricultural land is a priority, to such lands.”³⁵⁵ Use or conveyance of TRLUCs must be recorded in the public records as a covenant or restrictive easement running with the land.³⁵⁶ A similar approach should guide the use of TDRs to protect springs in Florida.

C. Types of TDR Programs

Three general types of TDR programs generally present themselves: 1) Mandatory TDRs, 2) Voluntary TDRs, and 3) a Universal TDR system.

1. Mandatory TDRs

Mandatory TDR programs prohibit all development in the sending area and require that all parcels in the sending area transfer their development rights to a designated receiving area. From a local government’s perspective, a mandatory TDR presents the most powerful TDR tool for protecting environmentally-sensitive areas as it prohibits development. At the same time, the outright prohibition on development means these programs are more likely to provoke takings claims.

Mandatory TDR programs may provoke takings claims because the prohibition on development means that most of the value of parcels in the mandatory sending area is in the form of the TDR credit that can be transferred. If, as has often been the case in the past, the TDR credits prove to have little value, initiation of a mandatory TDR program

³⁵¹ FLA. STAT. §163.3177(11)(d)6.f (2006).

³⁵² FLA. STAT. §163.3177(11)(d)6.g (2006).

³⁵³ FLA. STAT. §163.3177(11)(d)6.g (2006).

³⁵⁴ FLA. STAT. §163.3177(11)(d)6.h (2006).

³⁵⁵ FLA. STAT. §163.3177(11)(d)6.j (2006).

³⁵⁶ FLA. STAT. §163.3177(11)(d)6.k (2006).

will have essentially diminished greatly the value of parcels. It is also important to note that if pre-existing legal constraints on developing a property—such as wetland setbacks or prohibitions on dredge and fill permits—already prohibited development to the underlying zoning, a TDR program will not create a new cause of action for a takings claim. Rather, a properly structured and functioning TDR program could actually add value to properties limited by pre-existing limitations on development.

The credits in mandatory programs often lack value due to insufficient market demand in the receiving area. Courts might also look unfavorably on the fact that a very significant stick in the bundle of rights—the right to develop the land in at least some form—has been entirely abrogated by the mandatory TDR program. Due to the increased likelihood of a successful takings claim arising from mandatory TDR programs, such programs should be utilized only when environmental protection goals cannot be met by other means. When environmental goals require a mandatory TDR program, great care must be exercised in implementation to pay close attention to market analysis and administration to ensure the commercial/economic viability of the TDR program.

2. Voluntary TDRs

Voluntary TDRs differ from mandatory schemes by allowing development in the sending area. Property owners in the sending area may decide between developing their property to the underlying zoning capacity or transferring developing rights to a receiving area. If a transfer takes place, one question to address is whether any development can remain on the transferring land. The advantage of the voluntary system is that it runs much less risk of challenge on Fifth Amendment takings grounds since landowners still have the choice to develop the land to the underlying zoning potential.

Choice also, however, forms the weakness in voluntary systems since this choice requires incentives to convince landowners in the sending area (i.e.—the area sought to be preserved from most development) to transfer development rights to a receiving area instead of developing the underlying zoning capacity. Such incentives in TDR programs typically involve a bonus whereby a landowner with a right to develop, for example, up to ten dwelling units on a parcel may receive more than ten dwelling units in TDR credits if those credits are transferred to a receiving area. The undesired effect of such bonuses is that they make more credits available for transfer. Since the market for TDRs in the receiving area determines the value of credits, more credits available means more receiving area demand is required to preserve the value of the increased number of credits. Thus, while a voluntary system may work over very large areas, it will not prevent all development; it will, rather, only cause some landowners to forgo development to underlying zoning in favor of selling TDR credits while other property owners in the sending area will likely choose to develop on their parcels.

3. Universal TDR System

A universal TDR system is less a distinct TDR system than it is a modification that can be applied to a mandatory system. A universal system, like the mandatory system, creates a mandatory sending zone. In the case of springs protection, this might include the most sensitive springshed areas requiring protection. The difference is that the receiving area would consist of any area newly rezoned for a higher density. When an area is newly rezoned to a higher density, however, only a part of the increased density would be as of right for property holders; the rest of the potential increased density would need to be secured through purchase of TDR credits. Appropriate provisions to permit this must appear in the local government's comprehensive plan and development regulations. While such a system could help create value for TDR credits on an on-going basis, the system would need to be structured with constant oversight and revision taking account of the value of TDR credits as determined by the availability and demand for the credits. Establishment of too large a sending zone coupled with insufficient price and demand for the credits available could lead to Fifth Amendment takings challenges just as readily as could a poorly designed mandatory system could. It is unclear whether such a challenge might be overcome by arguing that the value of the TDR credits would increase as more receiving areas were established.

The universal system concept of creating new receiving zones each time a piece of land is granted a higher zoning density could also be applied to voluntary TDR programs. Such a program could involve agencies, regional authorities, municipalities, and counties utilizing their authority to enter into inter-local agreements.

D. Recommendations

Properly structured and administered, precedent indicates that TDR programs should seldom result in a judgment of a taking against a local government. Nonetheless, local governments seeking to protect Florida springs and springsheds should avoid regulations that eliminate all economically viable use of land whenever possible. This means that local governments imposing a mandatory TDR program should carefully craft the program to ensure value for the credits.

TDRs may play a significant role in springs protection. Local governments wanting to avail themselves of TDR benefits should first impose low underlying density; Florida case law indicates that even substantial down-zoning will be upheld as long as bears a rational relationship with the public purpose of protecting the aquifer, groundwater, and springs.³⁵⁷ Furthermore, inclusion of bonuses for transfer of the TDR based on the environmental sensitivity and importance of the transferring property could help increase the value of such land despite the low underlying zoning capacity. Such support of land

³⁵⁷ See, e.g. discussion of *Hollywood v. Hollywood, Inc.*, *supra* notes 341-42 and accompanying text.

value through TDR bonus credits should, according to language in *Penn Central*, help diffuse Fifth Amendment takings claims.³⁵⁸

Due to a lack of clarity and case law on the Bert J. Harris Jr., Private Property Rights Protection Act, prediction of how it might treat various springs protection strategies is difficult. Courts or administrative law judges should be encouraged to focus on the environmental sensitivity of springsheds and land around springs already makes such land unsuitable³⁵⁹ for anything other than conservation or extremely low zoning density.

Next, a jurisdiction should identify less environmentally-significant land that can, from an environmental standpoint, support higher densities. From among such lands, market analysis should be conducted to select the land most desirable by the market for increased development. These lands would then be designated receiving areas for the TDRs originating from the most environmentally-sensitive lands with the lowest underlying zoning density. The designated receiving areas would also have only modest underlying zoning densities that could be increased only by the transfer of credits from areas assigned TDRs.³⁶⁰

Clearly such a program would require detailed evaluation and amendment of the local comprehensive plan to both permit and promote the successful implementation of TDRs. The comprehensive plan would have to be amended not only to promote the transfer of development rights from sending areas but to allow the transfer of development rights into suitable receiving areas. The effect of increased density or intensity of development in those areas would have to be considered. Market analysis would be necessary to ensure the viability of the TDR program.

³⁵⁸ See *supra* notes 339-40 and accompanying text (discussing *Penn Central* and *Suitum* Supreme Court cases and their statements on TDRs).

³⁵⁹ See, e.g. FLA. STAT. § 70.001(3)(b) (2006) (the second type of “existing use” discussed above which requires that land be “suitable” for the use on which its value was claimed to reside).

³⁶⁰ This mimics the dynamic established by the Transferable Rural Land Use Credits discussed above.