



**UNIVERSITY OF
FLORIDA**

Fredric G. Levin College of Law
Center for Governmental Responsibility
Conservation Clinic

Spessard L. Holland Law Center
230 Bruton-Geer
PO Box 117629
Gainesville FL 32611-7629
Telephone: (352) 392-2237
Fax: (352) 392-1457
<http://conservation.law.ufl.edu>

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

**Conservation Clinic
University of Florida College of Law**

**Thomas T. Ankersen, Director
Richard Hamann, Associate in Law**

**Matthew Brewer, J.D.
Matthew Clark, J.D.
Jason Evans, Ph.D. Candidate
Christine Francescani, J.D. Candidate
Thomas Ruppert, J.D.**

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- Preface..... 2
- Summary..... 3
- I. Local Government Authority..... 9
 - A. General Authority 9
 - B. Preemption by the State 9
- II. Florida Growth Management..... 11
 - A. Growth Management Framework..... 11
 - 1. Areas of Critical State Concern 12
 - B. Local Government Comprehensive Planning and Land Development Regulation Act 16
 - C. The Content of Local Government Comprehensive Plans 16
 - D. Adoption, Amendment and Update of Plans 21
 - E. Adoption of Land Development Regulations 23
 - F. Consistency of Development Orders 23
 - G. Joint Planning and Intergovernmental Coordination 24
- III. State Preemption..... 26
 - A. Agriculture 26
 - B. Pollution Control Programs 27
 - C. Consumptive Use of Water..... 30
 - 1. Overview of Water Management District Authority 30
 - 2. Preemption of Local Government Authority 36
 - 3. Coordination of local and regional planning 36
 - D. Environmental Resource Permitting..... 37
 - 1. Overview of ERP Program 37
 - 2. Preemption of Local Government Authority 40
 - 3. Onsite Treatment and Disposal Systems (Septic Tanks) 41
- IV. Constitutional Limits on Land Use Regulation 44
 - A. Due Process..... 44
 - B. Substantive Due Process 45
 - C. Equal Protection..... 45
 - D. Expropriation 46
- V. Bert J. Harris, Jr. Private Property Rights Protection Act 50
 - A. Overview..... 50
 - B. Settlement Procedure 52
 - C. Inordinate Burden 54
 - D. Existing Use 56
 - E. Vested Rights 58
- VI. Transfer of Development Rights..... 60
 - A. Overview..... 60
 - 1. Mandatory TDRs 60
 - 2. Voluntary TDRs..... 61
 - 3. Universal TDR System 61
 - B. Use in Florida..... 62
 - 1. Case law 62
 - 2. Transferable Rural Land Use Credits (TRLUCs)..... 63
 - C. Recommendations..... 64

PREFACE

The Model Land Development Code for Florida Springs Protection (Model Code) is primarily intended for implementation by local governments, although some of the provisions could also be used by state or regional agencies to improve springs protection. The Model Code cannot simply be adopted in its entirety by a local government as the solution to protecting local springs. The concepts and language in the Model Code must instead be adapted to the requirements and the financial and technical capabilities for springs protection of a specific local community. The local government should carefully review available information regarding the vulnerability of springs to land use and land development activities within that jurisdiction. It should assess the need to amend the comprehensive plan to enhance the protection of springs and should evaluate the adequacy of existing land development regulations. It should consider joining with other local governments and agencies in cooperative regional approaches. Based on that analysis, provisions of the Model Code may be incorporated into the system of land development regulations. The ability of staff to implement the resulting land development regulations must be carefully considered.

The Model Code provides methods and techniques recommended by both environmental and planning professionals. The purpose of the analysis below is to provide background information on the legal authority of local governments to plan for and regulate development to protect Florida springs. The sources of local authority are examined, as well as the potential for conflict with state legislation. The extent to which an exercise of local authority may be limited by state or federal protection of property rights is also explored. For many of these issues, there are no conclusive answers. Local planners and officials must work with their own legal counsel to develop programs that are both legally defensible and effective at protecting and restoring our Florida springs.

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.

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 regulate agricultural activities already regulated by or subject to best management practices promulgated by DEP, the Department of Agriculture and Consumer Services (DACCS), 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 little authority to regulate 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 governments must consider these plans when developing their own local water supply plans.

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 also include regulation of land use in some instances. A regulatory taking 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 it 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 is much more likely.

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 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.

Provisions of the Model Land Development Code for Springs Protection, if adopted by a local government, 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. 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.

Published case law has not yet interpreted many of the key terms in the Act. 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 substantial possible cost in legal and settlement expenses for local governments even for those cases that never reach the courtroom.

The Model Land Development Code for Springs Protection contains provisions that may give rise to both takings claims and claims under the Bert J. Harris Act. Provisions that may give rise to such claims include open space requirements, prohibitions on development in some sensitive areas, and mandatory transfer of development right programs. 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.

The Model Land Development Code for Springs Protection focuses on 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

- Local governments have extensive authority to protect groundwater and springs.

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 DCA 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

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 (2003).

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

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 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 the state’s regulation.

⁶ *Id.*

⁷ *Id.*

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

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

- Local governments in Florida have the responsibility to consider many factors relevant to water quality and quantity for springs in the amendment and updating of their comprehensive plans. These include future water supply sources, drainage, recharge, and natural resource protection.
- Local governments must implement their comprehensive plans through land development regulations, development orders and capital facilities development.
- Designation as an Area of Critical State Concern could serve as a tool to protect a limited number of springsheds.

A. 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 Plan¹ and requires the state's eleven regional planning councils² to adopt Strategic Regional Policy Plans.³ For land use regulation in a few areas, primarily in designated Areas of Critical State Concern,⁴ 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).⁵ For most purposes, however, the duty of growth management falls on local governments.

Florida's State Comprehensive Plan⁶ establishes broad goals and policies which are supposed to provide guidance for state agencies,⁷ Strategic Regional Policy Plans,⁸ and local

¹ FLA. STAT. ch. 187 (2003).

² FLA. STAT. § 186.504 (2003).

³ FLA. STAT. §§ 186.507-186.511(2003).

⁴ FLA. STAT. § 380.05 (2003).

⁵ FLA. STAT. § 380.06 (2003).

⁶ FLA. STAT. ch. 187 (2003).

government comprehensive plans.⁹ 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,¹⁰ Natural Systems and Recreational Lands,¹¹ and Land Use.¹²

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),¹³ the Department of Community Affairs (DCA), serving as the state land planning agency,¹⁴ may from time to time recommend to the Administration Commission¹⁵ that specific geographic areas be designated areas of critical state concern.¹⁶ The purpose of designating areas of critical state concern is to:

⁷ FLA. STAT. § 186.008(4)(5). Interpretation of the plan is limited by the terms of the adopting statute. FLA. STAT. § 187.101 (2003). 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.*

⁸ FLA. STAT. § 186.508(1) (2003).

⁹ 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. FLA. STAT. § 163.3177(10)(b) (2003).

¹⁰ FLA. STAT. § 187.201(7) (2003).

¹¹ FLA. STAT. § 187.201(9) (2003).

¹² FLA. STAT. § 187.201(15) (2003).

¹³ FLA. STAT. § 380.05 (2003).

¹⁴ FLA. STAT. § 380.03(18) (2003).

¹⁵ The Administration Commission is composed of the Governor and independently elected cabinet officers, with the Governor as chairperson. They also sit as the Florida Land and Water Adjudicatory Commission (FLWAC). 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.

¹⁶ FLA. STAT. § 380.05(1)(a) (2003). In addition, under Chapter 380.05(3), regional planning agencies designated by the state land planning agency and local governments in

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.¹⁷

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 .”¹⁸ 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.¹⁹ These actions may include revisions of the local comprehensive plan and adoption of land development regulations, density requirements, and special permitting requirements.²⁰ 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.²¹ As in the DCA’s recommendation, any rule promulgated by the Administration Commission so designating an area of critical state concern must contain statutorily specified information, including principles for guiding development,²² and a precise checklist of actions which, when implemented, will result in repeal of the designation by the Administration

an area without a regional planning agency may make suggestions to the Administration Commission as to areas to be recommended.

¹⁷ FLA. STAT. § 380.021 (2003).

¹⁸ FLA. STAT. § 380.05(1)(a) (2003).

¹⁹ *Id.*

²⁰ *Id.*

²¹ FLA. STAT. § 380.05(1)(b) (2003).

²² FLA. STAT. § 380.05(1)(b)2 (2003).

Commission.²³ Hence, inherent in the designation of an area of critical state concern is the ultimate goal of implementing development-guiding principles sufficient to eventually compel the removal the designation.²⁴

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.²⁵ The Legislature may then reject, modify, or take no action relative to the adopted rule.²⁶ 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.²⁷

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.²⁸ There are currently five designated areas of critical state concern: Big Cypress, Green Swamp, Florida Keys, Apalachicola Bay, and Area Key West

²³ FLA. STAT. § 380.05(2)(a) (2003).

²⁴ 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) (2003).

²⁵ FLA. STAT. § 380.05(1)(c) (2003).

²⁶ *Id.*

²⁷ FLA. STAT. § 380.05(2)(a) (2003).

²⁸ FLA. STAT. § 380.05(20) (2003).

Areas.²⁹ Regardless of the extent of existing areas of critical state concern, the combined area of just first magnitude springsheds exceeds 4.6 million acres,³⁰ over eight percent of Florida's land area. 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 to preclude use of FELWMA to protect springs. Though FELWMA was originally ruled an unconstitutional delegation of legislative authority,³¹ subsequent amendments have repaired this constitutional defect.³² In addition, FELWMA has recently withstood a claim that its provisions constitute an unconstitutional special law.³³ 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

²⁹ Florida encompasses approximately 37,478,400 acres, five percent of which is about 1,873,920 acres. Florida Division of Historical Resources, at http://dhr.dos.state.fl.us/flafacts/fla_facts.html.

³⁰ Communication with Harley Means, Geologist II, Geological Investigations Section, Florida Geological Survey (Feb. 16, 2004).

³¹ *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.

³² 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).

³³ *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.

owner has, in good faith reliance upon section 380.05(18), F.S.,³⁴ made such a substantial change in position that it would make it highly inequitable to interfere with the acquired right.³⁵ 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.

B. Local Government Comprehensive Planning and Land Development Regulation Act

Florida's Local Government Comprehensive Planning and Land Development Regulation Act³⁶ (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"³⁷ with the goals, objectives and policies of the State Comprehensive Plan³⁸ 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.³⁹ 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.⁴⁰ It also requires that land development be consistent with the adopted plan.⁴¹ Equally or more importantly, capital facilities must be provided concurrently with development.

C. The Content of Local Government Comprehensive Plans

The Growth Management Act requires local governments to prepare or amend

³⁴ 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."

³⁵ *Monroe County v. Ambrose*, 2003 WL 22900537 (Fla. 3rd DCA 2003).

³⁶ FLA. STAT. ch. 163, Pt. II (2003).

³⁷ 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) (2003).

³⁸ FLA. STAT. ch. 187 (2003).

³⁹ FLA. ADMIN. CODE r. 9J-5.

⁴⁰ FLA. STAT. § 163.3202 (2003).

⁴¹ FLA. STAT. §§ 163.3161, 163.3194(1)(a) (2003).

comprehensive plans, which include a number of required and optional elements related to the orderly growth of the local jurisdiction.⁴² 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 regulations⁴³ that include provision for protection of potable water wellfields⁴⁴ and for protection of environmentally sensitive lands.⁴⁵

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.⁴⁶ Data must be “the best available existing data” from “professionally accepted existing sources” or collected through studies that meet “professionally accepted standards.”⁴⁷ DCA cannot determine that one methodology is better than another and cannot require original data collection.⁴⁸ 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.⁴⁹ 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.⁵⁰

⁴² FLA. STAT. § 163.3177 (2003).

⁴³ FLA. STAT. § 163.3202(1) (2003).

⁴⁴ FLA. STAT. § 163.3202(2)(c) (2003).

⁴⁵ FLA. STAT. § 163.3202(2)(e) (2003).

⁴⁶ FLA. STAT. §§ 163.3177(8), 163.3177(10)(e) (2003); FLA. ADMIN. CODE r. 9J5-.005(2).

⁴⁷ *Id.*

⁴⁸ FLA. STAT. § 163.3177(10)(e) (2003).

⁴⁹ FLA. ADMIN. CODE r. 9J-5.001(5).

⁵⁰ FLA. ADMIN. CODE r. 9J-5.002(2)(c).

The required elements of a local comprehensive plan⁵¹ 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*⁵²

The future land use element allows designation of future land use patterns.⁵³ The existing land use map must show existing and planned public potable water wells and wellhead protection areas.⁵⁴ 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.⁵⁵ The future land use element must contain objectives that ensure the protection of natural resources.⁵⁶ 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, are not adequately protected.⁵⁷

- *Sanitary Sewer, Solid Waste, Drainage, Potable Water and Natural Groundwater Aquifer Recharge Element*⁵⁸

This planning element must contain objectives addressing conservation of potable water resources⁵⁹ 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

⁵¹ FLA. STAT. § 163.3177 (2003).

⁵² FLA. STAT. § 163.3177(6)(a) (2003). FLA. ADMIN. CODE r. 9J-5.006.

⁵³ FLA. ADMIN. CODE r. 9J-5.006.

⁵⁴ FLA. ADMIN. CODE r. 9J-5.006(1)(b)1.

⁵⁵ FLA. ADMIN. CODE r. 9J-5.006(3)(c)6.

⁵⁶ FLA. ADMIN. CODE r. 9J-5.006(3)(b)4.

⁵⁷ FLA. ADMIN. CODE r. 9J-5.006(5)(g)4.

⁵⁸ FLA. STAT. § 163.3177(6)(c) (2003). FLA. ADMIN. CODE r. 9J-5.011.

⁵⁹ FLA. ADMIN. CODE r. 9J-5.011(2)(b)4.

commensurate with their significance to natural systems or status as current or future sources of potable water.⁶⁰ 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.⁶¹

This element is also intended to provide for necessary public facilities and services correlated to future land use projections.⁶² The data and analysis requirements most relevant to springs protection include:

- Identification of major natural drainage features and natural groundwater aquifer recharge areas⁶³
- Identification and assessment of existing regulations and programs that govern land use and development of natural drainage features and groundwater recharge areas⁶⁴
- Identification of potable water facilities,⁶⁵ including the operational entity responsible, the service area, the design capacity, current demand on capacity, and level of service currently provided by the facility.⁶⁶

Statutory amendments enacted in 2002 strengthen the requirements to plan for potable water supply. Local governments are required to consider 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.⁶⁷ Maps showing existing and planned waterwells and cones of influence from such wells must also be included.⁶⁸

⁶⁰ FLA. ADMIN. CODE r. 9J-5.011(2)(b)5.

⁶¹ FLA. ADMIN. CODE r. 9J-5.011(2)(c)4.

⁶² *Id.*

⁶³ FLA. ADMIN. CODE r. 9J-5.011(1)(g).

⁶⁴ FLA. ADMIN. CODE r. 9J-5.011(1)(h).

⁶⁵ FLA. ADMIN. CODE r. 9J-5.011(1)(d).

⁶⁶ FLA. ADMIN. CODE r. 9J-5.011(1)(e)1-5.

⁶⁷ FLA. STAT. §§163.3177(6)(c), .3191(2)(1) (2003).

⁶⁸ FLA. STAT. § 163.3177(6)(d)1 (2003).

- *Conservation Element*⁶⁹

This element seeks to promote conservation, use and protection of natural resources.⁷⁰ The local government must identify and analyze natural resources including groundwaters.⁷¹ 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.⁷² The element must contain objectives that address conservation, appropriate use and protection of the quality and quantity of current and projected water sources.⁷³ 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).⁷⁴

- *Intergovernmental Coordination Element*⁷⁵

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.⁷⁶ 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.⁷⁷ The element must have an analysis of existing coordination mechanisms, including intergovernmental agreements,⁷⁸ and proposed growth and development in the area of concern.⁷⁹ The element must also have a

⁶⁹ FLA. STAT. § 163.3177(6)(d) (2003). FLA. ADMIN. CODE r. 9J-5.013.

⁷⁰ FLA. ADMIN. CODE r. 9J-5.013.

⁷¹ FLA. ADMIN. CODE r. 9J-5.013(1)(a)1.

⁷² FLA. ADMIN. CODE r. 9J-5.013(1)(c).

⁷³ FLA. ADMIN. CODE r. 9J-5.013(2)(b)2.

⁷⁴ FLA. ADMIN. CODE r. 9J-5.013(2)(c)1.

⁷⁵ FLA. STAT. § 163.3177(6)(h) (2003). FLA. ADMIN. CODE r. 9J-5.015.

⁷⁶ FLA. ADMIN. CODE r. 9J-5.015.

⁷⁷ FLA. ADMIN. CODE r. 9J-5.015(1).

⁷⁸ FLA. ADMIN. CODE r. 9J-5.015(2)(a).

⁷⁹ FLA. ADMIN. CODE r. 9J-5.015(2)(c).

goal statement establishing one or more specific objectives⁸⁰ of the intergovernmental coordination activities.⁸¹ 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.⁸² In addition, the element must contain one or more policies for each objective addressing 1) the coordination of planning activities with other local governments,⁸³ 2) review of the relationship of proposed development of the area to the existing comprehensive plans of adjacent local governments⁸⁴ and, 3) review of development proposed in the comprehensive plan.⁸⁵

D. 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.

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.⁸⁶ 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.⁸⁷ 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 ensuring that the potable water element includes a work plan

⁸⁰ FLA. ADMIN. CODE r. 9J-5.015(3)(b).

⁸¹ FLA. ADMIN. CODE r. 9J-5.015(3)(a).

⁸² FLA. ADMIN. CODE r. 9J-5.015(3)(b)2.

⁸³ FLA. ADMIN. CODE r. 9J-5.015(3)(c)1.

⁸⁴ FLA. ADMIN. CODE r. 9J-5.015(3)(c)5.

⁸⁵ FLA. ADMIN. CODE r. 9J-5.015(3)(c)7.

⁸⁶ FLA. STAT. § 163.3191 (2003).

⁸⁷ FLA. STAT. § 163.3191(1)(c) (2003).

extending for at least ten years to provide necessary potable water facilities.⁸⁸ 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.⁸⁹ Plan amendments are also prohibited beginning one year after a determination by DCA that a submitted EAR is insufficient.⁹⁰ The plan must be revised within 18 months of submitting a sufficient EAR.

Local governments first submit plan amendments to the DCA for review.⁹¹ 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.⁹² 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 compliance.⁹³ 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.⁹⁴

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.

⁸⁸ FLA. STAT. § 163.3191(1)(l) (2003).

⁸⁹ FLA. STAT. § 163.3187(6)(a) (2003). There are exceptions for Developments of Regional Impact and ports. *Id.*

⁹⁰ FLA. STAT. § 163.3187(6)(b) (2003).

⁹¹ FLA. STAT. § 163.3184(15)(a). Small scale plan amendments are exempt from review by DCA, FLA. STAT. § 163.3187(1)(c), but may be challenged by affected persons. FLA. STAT. § 163.3187(3)(a). 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).

⁹² FLA. STAT. § 163.3184(16) (2003).

⁹³ FLA. STAT. § 163.3184(10)(a) (2003).

⁹⁴ FLA. STAT. § 163.3184(9)(a) (2003).

E. 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.⁹⁵ The Act encourages “the use of innovative LDRs which include provisions such as transfer of development rights and performance zoning.”⁹⁶ 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.⁹⁷

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.⁹⁸ DCA and the local government then enter into a review and consultation process.⁹⁹ 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.¹⁰⁰

F. Consistency of Development Orders

Development orders¹⁰¹ must also be consistent with the adopted plan. Citizens who are “aggrieved or adversely affected” can challenge development orders in circuit court as

⁹⁵ FLA. STAT. §163.3194, .3202 (2003).

⁹⁶ FLA. STAT. § 163.3202(3) (2003); FLA. ADMIN. CODE r. 9J-5.022 (1) and 9J-5.006(5)(1)(clustering and open space provisions encouraged to discourage urban sprawl).

⁹⁷ FLA. STAT. § 163.3213 (2003).

⁹⁸ FLA. STAT. § 163.3202(4) (2003). 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.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ 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

inconsistent with the adopted plan.¹⁰² Development orders themselves can only be issued through a quasi-judicial process that provides procedural due process.¹⁰³ Courts strictly scrutinize development orders for consistency with the plan.¹⁰⁴ 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.”¹⁰⁵

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.¹⁰⁶ 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.¹⁰⁷

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

permitting the development of land.” FLA. STAT. § 163.3164(7) (2003). Seven development permits include building or zoning permits, rezonings, subdivision approvals, special exceptions, variances and certifications. FLA. STAT. § 163.3164(8) (2003).

¹⁰² FLA. STAT. §163.3215 (2003).

¹⁰³ *Snyder v. Brevard Cty.*, 627 So.2d 469 (Fla. 1993).

¹⁰⁴ *Id.*

¹⁰⁵ FLA. STAT. § 163.3194(3)(a) (2003). *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).

¹⁰⁶ 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).

¹⁰⁷ 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).

discouraging the development of vulnerable areas or development that is not served by adequate water supply, stormwater and wastewater treatment facilities.

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.¹⁰⁸ Municipalities and counties may jointly plan for development and growth,¹⁰⁹ adopt and amend comprehensive plans¹¹⁰ and implement comprehensive plans.¹¹¹ Neighboring communities, particularly those sharing natural resources, are encouraged to create collective visions for greater-than-local areas.¹¹² Municipalities within a county or counties may also jointly exercise power.¹¹³ In addition, the Department and a local government may enter into agreements with each other.¹¹⁴

¹⁰⁸ FLA. STAT. § 163.01 (2003).

¹⁰⁹ FLA. STAT. § 163.3167(1)(a) (2003).

¹¹⁰ FLA. STAT. § 163.3167(1)(b) (2003).

¹¹¹ FLA. STAT. § 163.3167(1)(c) (2003).

¹¹² FLA. STAT. § 163.3167(11) (2003).

¹¹³ FLA. STAT. § 163.3171(3) (2003). The same authority extends to any contribution of counties and municipalities.

¹¹⁴ FLA. STAT. § 163.3171(4) (2003).

III. State Preemption

- Local governments have been virtually prohibited from regulating agricultural practices.
- Current law does not clearly indicate the extent to which local governments may regulate to protect water quality without having a local pollution control program approved by DEP. This authority probably remains quite broad.
- Local governments may not directly regulate the consumptive use of water as DEP and the water management districts have exclusive jurisdiction over consumptive use of water.
- Local governments may, however, exercise concurrent authority to regulate stormwater, wetlands and other water issues that are addressed by DEP and the districts in the Environmental Resource Permit program..

Local governments may not authorize septic tanks and drainfields that do not meet the minimum standards of the Department of Health (DOH), , but may adopt stricter standards.

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.”¹ 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 Act² prohibits counties from regulating “an activity of a bona fide farm operation on land classified as agricultural land” for ad valorem tax

¹ FLA. STAT. § 380.04 (2003), referred to by FLA. STAT. §163.3164(6) (2003).

² Ch. 2003-162, Laws of Florida, codified as FLA. STAT. §163.3162 (2003).

purposes³ 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,⁴ wellfield protection,⁵ land application of sewage sludge,⁶ farm operations adjacent to homesteads or businesses established as of 1982,⁷ and for certain counties.⁸ Most agricultural activities that might potentially impact the quality or quantity of groundwater are thus probably exempt from regulation by counties. Regulation of agricultural activities by municipalities is similarly preempted by a duplicative section of the Florida Right to Farm Act.⁹

B. Pollution Control Programs

Under the Florida Air and Water Pollution Control Act (PCA),¹⁰ the Department of Environmental Protection (DEP) is charged with “the power and the duty to control and prohibit pollution of air and water.”¹¹ Under the PCA, 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.”¹² Under this definition, depending on the effects, “pollution” could be interpreted to include the addition of excess nutrients to groundwater, and consequently to the water that recharges springs.

³ FLA. STAT. §163.3162(4) (2003).

⁴ FLA. STAT. §163.3162(4)(a) (2003).

⁵ *Id.*

⁶ FLA. STAT. §163.3162 (4)(d) (2003).

⁷ FLA. STAT. §163.3162 (4)(b) (2003).

⁸ FLA. STAT. §163.3162 (4)(c) (2003).

⁹ FLA. STAT. § 823.14(6) (2003). 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) (2003).

¹⁰ FLA. STAT. § 403 (2003).

¹¹ FLA. STAT. § 403.061 (2003). 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) (2003).

¹² FLA. STAT. § 403.061(7) (2003).

As part of its pollution control duties, the DEP is required to adopt rules to implement the provisions of the PCA,¹³ and to “[e]xercise general supervision of the administration and enforcement of the laws, rules, and regulations pertaining to air and water pollution.”¹⁴ In addition, each county and municipality, or combination thereof, may establish and administer a local pollution control program if it complies with the PCA.¹⁵ To comply with the PCA, all local pollution control programs must, among other things, provide for requirements compatible with, or stricter or more extensive than those imposed by the PCA,¹⁶ and, more important to the question of preemption, be approved by the DEP as adequate to meet the requirements of the PCA.¹⁷ Thus, though not entirely preempted by DEP authority, local pollution control programs are subject to DEP approval.

However, 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.¹⁸ 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.¹⁹ 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.²⁰ 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

¹³ FLA. STAT. § 403.061(7) (2003).

¹⁴ FLA. STAT. § 403.061(6) (2003).

¹⁵ FLA. STAT. § 403.182 (2003).

¹⁶ FLA. STAT. § 403.182(1)(b) (2003).

¹⁷ FLA. STAT. § 403.182(1)(a) (2003).

¹⁸ FLA. STAT. § 403.182(2) (2003).

¹⁹ 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).

²⁰ *Id.*

local government and DEP, and whether the DEP considers the regulations constitute a local pollution control program.²¹

Florida courts, however, may not hold the same view of Chapter 403.182 as DEP. Contrary to DEP's interpretation, 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.²² In *Florida Rock*, Alachua County had proposed a Clean Air Ordinance that created requirements stricter than those required by state law.²³ 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.²⁴ 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.²⁵ 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."²⁶ 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 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.

²¹ *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.

²² *See Florida Rock Industries v. Alachua County*, 721 So.2d 741, 743 (Fla. 1st DCA, 1998).

²³ *Id.* at 742.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 743.

C. Consumptive Use of Water

1. Overview of Water Management District Authority

Consumptive use of water is managed under authority of the Florida Water Resources Act of 1972.²⁷ 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.²⁸ The districts and DEP share authority for regulating surface water management facilities and construction activities in wetlands through the Environmental Resource Permitting (ERP) program.²⁹ 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.³⁰ 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.³¹ A Water Resources Implementation Rule (WRIR), adopted by DEP, establishes the policy framework for District programs.³² District budgets are reviewed by the Executive

²⁷ Ch. 72-299, Laws of Florida, codified at FLA. STAT. §373 (2003). 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).

²⁸ FLA. ADMIN. CODE r. 62-113.200(12); FLA. STAT. § 373.103 (2003). Delegation is statutorily encouraged. FLA. STAT. § 373.016(5) (2003) (“to the greatest extent practicable . . . power should be delegated to the governing board of a water management district”).

²⁹ FLA. ADMIN. CODE r. 62-113.200(12). *See e.g.* FLA. ADMIN. CODE r. 40C-4.

³⁰ Governing board members are subject to geographic restrictions and confirmation by the Senate.

³¹ FLA. STAT. § 373.114 (2003).

³² FLA. ADMIN. CODE r. 62-40. DEP has the exclusive authority to review rules for consistency with the WRIR. FLA. STAT. § 373.114(2) (2003).

Office of the Governor and, although the Districts can levy ad valorem taxes, there are constitutional and statutory millage caps.³³

a) Planning

Planning was an integral part of the Florida Water Resources Act of 1972.³⁴ 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.”³⁵ In 1996, Governor Chiles directed the Districts to develop regional water supply plans for each area with inadequate water supplies.³⁶ In 1997, the Florida Legislature codified and significantly expanded the mandate for the Districts to develop regional water supply plans.³⁷ 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.”³⁸

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.”³⁹ It

³³ Fla. Const. art. 7, §9; FLA. STAT. §373.503 (2003).

³⁴ 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).

³⁵ FLA. ADMIN. CODE r. 17-40.090. Effective 12-5-88, 14 F.A.W. 46/4637.

³⁶ Executive Order 96-297, §3. Planning was to be initiated by October 1, 1998, completed within 18 months and updated every five years.

³⁷ Ch. 97-160, Florida Statutes, sometimes referred to as HB 715. See FLA. STAT. §§ 373.036, .0361, .042, .0421 (2003).

³⁸ FLA. STAT. § 373.0361(1) (2003).

³⁹ FLA. STAT. § 373.019(19) (2003).

includes data collection and analysis, technical assistance and “structural and nonstructural programs to protect and manage water resources.”⁴⁰

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.”⁴¹ Water supply development is generally the responsibility of local governments, regional water supply authorities and utilities.⁴² The water supply development 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.⁴³ 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.”⁴⁴ 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 region⁴⁵ and the associated recovery and prevention strategy.⁴⁶

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.⁴⁷ In addition, permit applicants

⁴⁰ *Id.*

⁴¹ FLA. STAT. § 373.019(21) (2003).

⁴² FLA. STAT. § 373.0831(2)(c) (2003).

⁴³ FLA. STAT. § 373.0361(2)(b) (2003).

⁴⁴ FLA. STAT. § 373.0361(2)(d) (2003).

⁴⁵ FLA. STAT. § 373.0831(2)(g) (2003).

⁴⁶ FLA. STAT. § 373.0831(2)(c) (2003).

⁴⁷ FLA. STAT. § 373.219(1) (2003).

must demonstrate compliance with three conditions. The proposed use cannot interfere with any presently existing legal use of water; it must be “reasonable-beneficial”⁴⁸; and it must be consistent with the public interest.⁴⁹ 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.”⁵⁰

DEP has adopted a Water Resource Implementation Rule interpreting these criteria.⁵¹ This rule was formerly known as the State Water Policy.⁵² The water management districts have adopted consumptive use permitting criteria⁵³ 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.⁵⁴ 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.⁵⁵

c) Minimum Flows and Levels and Reservations

District water supply plans must include the minimum flows and levels (MFL) established for the area.⁵⁶ Under the 1972 Florida Water Resources Act, the Districts were required to

⁴⁸ FLA. STAT. § 373.019(4) (2003).

⁴⁹ FLA. STAT. § 373.223(1) (2003).

⁵⁰ FLA. STAT. §373.236(1) (2003).

⁵¹ FLA. ADMIN. CODE r. 62-40.410.

⁵² FLA. STAT. § 373.019 (20), .036 (2003).

⁵³ *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.

⁵⁴ FLA. STAT. § 373.246(1) (2003).

⁵⁵ FLA. STAT. §§ 373.175, .246 (2003).

⁵⁶ FLA. STAT. § 373.0361(1)(g)(2003).

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.”⁵⁷ 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.⁵⁸ The protection of nonconsumptive uses must be considered and may be protected through the establishment of MFLs.⁵⁹ MFLs may reflect seasonal variations and must be based on the “best information available.”⁶⁰ Any substantially affected person may request independent scientific peer review of the data, methodologies, models and assumptions used to establish an MFL.⁶¹

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.⁶² 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.⁶³

⁵⁷ FLA. STAT. § 373.042(1)(a) (2003).

⁵⁸ FLA. STAT. § 373.042(1)(b) (2003).

⁵⁹ FLA. STAT. § 373.042(1)(b) (2003).

⁶⁰ *Id.*

⁶¹ FLA. STAT. § 373.042(4) (2003).

⁶² 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.

⁶³ FLA. STAT. § 373.0421 (2003).

The Legislature also authorized the districts to establish MFLs below historic levels under certain circumstances.⁶⁴

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. 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.⁶⁵

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.”⁶⁶ “Existing legal uses of water” are protected from the reservation “so long as such use is not contrary to the public interest.”⁶⁷ 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.

⁶⁴ FLA. STAT. § 373.0421(1) (2003). 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) (2003). 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) (2003).

⁶⁵ FLA. STAT. § 373.042(2) (2003). An exception is provided for the Suwannee River Water Management District.

⁶⁶ FLA. STAT. § 373.223(4) (2003).

⁶⁷ *Id.*

2. Preemption of Local Government Authority

The Water Resources Act provides for regional management of water as a state resource.⁶⁸ 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.⁶⁹ 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.”⁷⁰ It declared that other laws, ordinances, rules and regulations “shall be deemed superseded for the purpose of regulating the consumptive use of water.”⁷¹ Making the same point yet again, it said that Part II “preempts the regulation of the consumptive use of water.”⁷²

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.⁷³ These were intended to include hydro-geologic studies of groundwater basins and associated recharge areas.⁷⁴ In 1985, the districts were required to determine “prime groundwater recharge areas” for the Floridan and Biscayne aquifers.⁷⁵ 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.⁷⁶

⁶⁸ *Osceola Cty v. St. Johns River Water Management District*, 504 So. 2d 385 (Fla. 1987).

⁶⁹ FLA. STAT. §§ 373.223(2), (3), .2295 (2003).

⁷⁰ FLA. STAT. § 373.217(2) (2003).

⁷¹ FLA. STAT. § 373.217 (3) (2003).

⁷² FLA. STAT. § 373.217 (4) (2003).

⁷³ FLA. STAT. § 373.0395 (2003).

⁷⁴ FLA. STAT. § 373.0395 (1) (2003).

⁷⁵ FLA. STAT. § 373.0395 (2003).

⁷⁶ FLA. STAT. § 373.0391 (2003).

Regional water supply plans, mandated in 1997, were clearly intended to assist local governments in planning for water supply development.⁷⁷ Until recently, however, there was no requirement for local governments to consider the availability of water resources for water supply.⁷⁸ This “missing link” was addressed by the Legislature in 2002.⁷⁹ 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.⁸⁰ The regional water supply plan must be considered by the local government in developing the plan⁸¹ and addressed in the intergovernmental coordination element.⁸² To the extent that a regional water supply plan incorporates minimum flows and levels or other measures to protect springs discharge, 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. 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.⁸³ The ERP program

⁷⁷ FLA. STAT. §§ 373.0361, .0831 (2003).

⁷⁸ 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.

⁷⁹ CS for SB’s 1906 & 550, 2d engrossed, 2002 Legislature.

⁸⁰ FLA. STAT. § 163.3177(6)(c) (2003).

⁸¹ *Id.*

⁸² FLA. STAT. § 163.3177(6)(h)1 (2003).

⁸³ FLA. STAT. § 373.403 (2003). The ERP program is not currently being implemented in the Northwest Florida Water Management District due to refusal by the Legislature to fund the program. Each of the other water management districts has adopted consistent implementing regulations. *See generally* ENVTL. AND LAND USE SECTION OF THE

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.⁸⁴ The conditions-for-issuance rules used by SJRWMD are typical 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.;
- . . .

FLORIDA BAR, TREATISE ON FLORIDA ENVIRONMENTAL AND LAND USE LAW, Vol. 1, 9.6--9.22 (Feb. 2004).

⁸⁴ 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 permitting program. It was the Legislative intent not to change the criteria, but to merge the programs. FLA. STAT. § 373.414(9) (2003).

- k. Will comply with any applicable special basin or geographic area criteria established in chapter 40C-41, F.A.C.⁸⁵

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;

. . .

⁸⁵ FLA. ADMIN. CODE r. 40C-4.301 (2003); *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, wetlands, and wildlife species caused by the systems regulated under Chapter 373, Part IV of the Florida Statutes. Those special basin criteria have been 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).

- i.v. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;
 - ...
 - 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.⁸⁶

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.⁸⁷ Second, local governments cannot deny the use of mitigation banks due to the location being outside of its jurisdiction.⁸⁸

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

⁸⁶ FLA. ADMIN. CODE r. 40C-4.302(1); FLA. STAT. § 373.414 (2003); ENVTL. AND LAND USE SECTION OF THE FLORIDA BAR, TREATISE ON FLORIDA ENVIRONMENTAL AND LAND USE LAW, Vol. 1, 13-7 (Feb. 2004).

⁸⁷ FLA. STAT. § 373.4136(8) (2003). They can, however, regulate construction activities associated with mitigation banks. *Id.*

⁸⁸ FLA. STAT. § 373.4135(2) (2003).

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.⁸⁹ Moreover, when activities for a 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.⁹⁰ Finally, Uniform Mitigation Assessment Method (UMAN) for wetlands and other surface waters had been adopted as a rule that binds local governments.⁹¹

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.⁹² 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.⁹³ 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.⁹⁴ Furthermore, DOH is charged with developing a comprehensive program to ensure that onsite sewage treatment

⁸⁹ FLA. STAT. § 373.414(1)(b)(4) (2003).

⁹⁰ FLA. STAT. § 373.414(1)(c) (2003).

⁹¹ FLA. STAT. § 373.414(18) (2003).

⁹² FLA. STAT. § 381.0065(3) (2003).

⁹³ FLA. STAT. § 381.0065(3)(b) (2003). Larger systems may be regulated by DEP.

⁹⁴ FLA. STAT. §§ 381.0065(3)(a, h) (2003).

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.”⁹⁵

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 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.⁹⁶

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.⁹⁷ 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.⁹⁸

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.⁹⁹ 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.¹⁰⁰ Finally, no local government may approve any change in occupancy or tenancy of a building that uses an onsite sewage

⁹⁵ FLA. STAT. § 381.0065(3)(c) (2003).

⁹⁶ FLA. STAT. § 381.0065(4)(e) (2003).

⁹⁷ FLA. STAT. § 381.0065(4)(e) (2003).

⁹⁸ *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).

⁹⁹ FLA. STAT. § 381.0065(4) (2003).

¹⁰⁰ FLA. STAT. § 381.0065(4) (2003).

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.¹⁰¹

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 preempt local governments from further restricting the type and uses of septic tanks within their jurisdictions to enhance the protection of Florida's springs. Furthermore, DOH regulation of septic systems in no way 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.

¹⁰¹ FLA. STAT. § 381.0065(4) (2003).

IV. Constitutional Limits on Land Use Regulation

- Regulation of land use may result in a “taking” according to the Fifth Amendment of the U.S. Constitution and thus require compensation.
- Courts usually find a taking has occurred if there is any physical intrusion on property or the regulation eliminates all economic value of the property.
- A taking can also occur when a regulation goes “too far” as determined by a case-by-case analysis of the character of the government action, the diminishment in property value caused by the regulation, and the amount of interference with the owner’s reasonable investment-backed expectations for the property.

A. Due Process

The U.S. Constitution forbids state action¹ that deprives property owners of property “without due process of law.”² 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.³ 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.⁴ The formality of the hearing procedures must be proportional to the severity of the possible deprivation of property interest.⁵

¹ Local government action is “state action.” *Edmondson v. Jordon*, 415 U.S. 651 (1974).

² U.S. Const. amends. V, XIV.

³ In local land use matters, “procedural due process” is not required for legislative action such as the adoption of policies or ordinances that affect a large group of citizens. *Bi-Metallic Inv. Co. v. Board of Equalization*, 239 U.S. 441 (1915).

⁴ *Irvine v. Duval County Planning Comm’n*, 504 So. 2d 1265 (Fla. 1st DCA 1986)

⁵ *Little v. Streater*, 452 U.S. 1 (1981).

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.⁶ The determination of whether a regulation unduly oppresses an individual generally occurs in the context of a takings analysis.

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.

C. Equal Protection

Both the U.S. Constitution and the Florida Constitution have similar requirements regarding equal protection under the laws for all citizens.⁷ 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.⁸ The remedy for a facial challenge is an injunction on the enforcement of the regulation.⁹

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 there exists a rational relationship between the classification within the law or regulation and a legitimate state interest.¹⁰

⁶ 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)).

⁷ U.S. Const. amend. XIV; Fla. Const. art. I, §2, (“All natural persons are equal before the law.”)

⁸ *Eide v. Sarasota County*, 908 F. 2d 716, 722 (11th Cir. 1990).

⁹ *Id.*

¹⁰ *Id.*

D. Expropriation

The U.S. Constitution forbids the taking of private land for a public purpose without “just compensation.”¹¹ 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.” Inverse condemnation occurs when government physically occupies land or imposes regulations amounting to a permanent physical invasion of land.¹²

Takings jurisprudence has evolved to recognize two types of categorical takings within inverse condemnation: 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.”¹³ The second type of categorical taking is “where regulation denies all economically beneficial or productive use of land.”¹⁴ 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.¹⁵ The U.S. Supreme Court noted that most cases do not result in a loss of all economic viability.¹⁶

Most takings cases involve regulations that affect a property owner’s exercise of certain sticks in the “bundle of rights” that comprise property ownership. 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.”¹⁷ 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*.¹⁸

¹¹ U.S. Const. amend. V.

¹² *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).

¹³ *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).

¹⁴ *Lucas*, 505 U.S. at 1015.

¹⁵ *Id.* at 1029-31.

¹⁶ *Id.* at 1017.

¹⁷ 260 U.S. 393, 415 (1922).

¹⁸ 438 U.S. 14, 124 (1978).

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.¹⁹

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.²⁰ 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.²¹

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.²² 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 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.²³

In analyzing whether a regulation effects a taking, courts will also consider the impact of the action on the property owner's reasonable investment-backed expectations.²⁴ Reasonable investment-backed expectation analysis looks at what property rights, both economic and non-economic, the regulation takes away. In *Penn Central*²⁵ 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.²⁶ The decision also noted that the regulation's stated rationale would benefit the owners of the parcel in that it “benefit[s] all

¹⁹ *Id.*

²⁰ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

²¹ *Loveladies Harbor, Inc. v. United States*, 15 Cl.Ct. 381, 391 (1988).

²² *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987).

²³ *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).

²⁴ *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

²⁵ *Id.*

²⁶ *Id.* at 136.

New York citizens and all structures, both economically and by improving the quality of life in the city as a whole.”²⁷

Thus, 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.²⁸ Furthermore, 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.²⁹

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.

The Model Springs Protection Land Development Code's frequent emphasis on open space requirements (OSR) 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 avoid the claim that all value has been taken from the land.³⁰

Under certain provisions proposed in Model Code, OSR will interact with lot size to determine the possibility of allowing even one single-family dwelling on a lot. For example, under the TDR program, even some sensitive lands would be permitted to transfer credits and still have a single-family home on lots zoned for one house per forty-acre lot. However, a requirement of 100% open space on a small lot may not leave any way to meaningfully utilize the property. In such a case, the only way to avoid a taking might be to grant the landowner transferable development credits that impart to the property some value in place of what might have been lost due to the OSR requirements.

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.³¹ Therefore, OSRs that both retain some economic value for the land and some development potential, however small, will virtually never qualify as a taking. At the opposite end of the spectrum, if an OSR applied to a

²⁷ *Id.* at 134-35.

²⁸ *Graham v. Estuary Properties*, 399 So. 2d 1374 (Fla. 1981).

²⁹ *Id.* at 1381-82.

³⁰ *Palazzolo v. Rhode Island*, 533 U.S. 606, 621 (2001).

³¹ *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1248-49 (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).

specific property leaves neither development potential nor value in the form of viable TDR (transfer of development rights) credits, a taking may very likely 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.³² This is known as the denominator problem; the total value of the property is considered the denominator and the remaining value of the land after the complained-of regulation constitutes the numerator. Thus, in most instances, 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.

³² *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*, 113 St. 2264, 2290 (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 Regional Planning Council*, 442 So. 2d 221, 226 (1st DCA 1983)). *But cf.* *Loveladies Harbor, Inc. v. U.S.* 15 Fed. Cl. 381, 392 (1988) (noting that the entire property that an owner held at the time of the alleged taking is the *maximum* property interest that can be used as the "denominator" in a takings analysis, but that a court is not obliged to consider all the property held by a claimant at the time of the alleged taking).

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

- The Bert Harris Act creates a cause of action for an “inordinate burden” on property caused by regulation even if the regulation may not rise to the level of a constitutional regulatory taking.
- /The local government or state agency imposing the regulation may be liable to pay the loss of property value due to the regulation.
- The Bert Harris Act contains extensive procedural rules requiring a property owner to file notice before filing suit and requiring the agency or local government to respond to the notice. Claims can thus be settled before reaching the courts.
- Local governments that adopt provisions of the Model Code may be faced with Bert Harris claims, but it is difficult to predict how courts would treat them as many key terms of the Act have not yet been interpreted through case law.

A. Overview

In 1995, the Florida legislature adopted the Bert J. Harris, Jr., Private Property Rights Protection Act (Act),¹ 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.²

¹ FLA. STAT. § 370.001 (2003).

² FLA. STAT. § 70.001(4)(a) (2003). 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).

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”³ and to provide “for relief, or payment of compensation, when a new law, rule, regulation, or ordinance . . . , as applied, unfairly affects real property.”⁴

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.⁵

The Act does not provide a cause of action for the application of a law adopted before May 11, 1995, at the adjournment of the legislative session.⁶ It does not apply to an ordinance, rule or regulation adopted, or formally noticed for adoption before May 11, 1995.⁷ 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.”⁸ Thus, adoption of the Model Land Development Code for Florida Springs Protection could be reviewed under the provisions of the Act.

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”⁹ caused by the government’s action. The Act requires that a jury determine the fair market value of the property. 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

³ FLA. STAT. § 70.001(1) (2003).

⁴ *Id.*

⁵ FLA. STAT. § 70.001(3)(c), (2003). 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) (2003), 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).

⁶ FLA. STAT. § 70.001(12) (2003).

⁷ *Id.*

⁸ *Id.* The Act excludes actions by the federal government, or actions by state or local governments “when exercising the powers of the United States or any of its agencies through a formal delegation of Federal authority.” FLA. STAT. § 70.001(12) (2003).

⁹ *Id.*

the governmental action, including the government's settlement offer and ripeness decision.¹⁰ This compensation does not include business damages for development or uses which are prohibited.¹¹

B. Settlement Procedure

The Act establishes a mandatory settlement procedure. 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.¹² During the 180-day period, the governmental entity must make a written settlement offer which would resolve the claim,¹³ along with a written “ripeness decision”¹⁴ detailing permitted uses of the property.¹⁵ 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.¹⁶

The 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
- 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

¹⁰ FLA. STAT. § 70.001(6)(b) (2003).

¹¹ *Id.*

¹² FLA. STAT. § 70.001(4)(a) (2003). 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) (2003). This one-year period does not begin to run until after any administrative appeals have been completed. *Id.*

¹³ FLA. STAT. § 70.001(4)(c) (2003).

¹⁴ “Ripeness decision” in this context constitutes the “last prerequisite to judicial review.” FLA. STAT. § 70.001(5)(a) (2003).

¹⁵ FLA. STAT. § 70.001(5)(a) (2003).

¹⁶ *Id.*

- Issuance of the development order, a variance, special exception, or other extraordinary relief
- No changes to the action of the governmental entity¹⁷

Creative use of these mitigating features in the Model Land Development Code for Florida Springs Protection 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 property¹⁸ and determine whether the owner has an additional vested right to a specific use of the property.¹⁹ Then, considering the proposed settlement offer and ripeness decision, the judge will decide whether the “action of the governmental entity”²⁰ 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.²¹ 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.”²² Similarly, if a 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 the circuit court can ensure that the public interest protected by

¹⁷ FLA. STAT. § 70.001(4)(c) (2003).

¹⁸ "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) (2003).

¹⁹ "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) (2003).

²⁰ "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) (2003).

²¹ FLA. STAT. § 70.001(4)(c), (d)1, (d)2 (2003).

²² FLA. STAT. § 70.001(4)(d)1 (2003).

the statute is still served by the settlement agreement.²³ No Florida case has yet 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.²⁴

C. Inordinate Burden

Relative to the adoption and implementation of the Model Land Development Code for Florida Springs Protection, the most significant issue raised by the Act is 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.²⁵ 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.”²⁶ 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.”²⁷

The primary question is what degree of regulation or what diminution of value will constitute an “inordinate burden” under the statute. No reported cases have interpreted inordinate

²³ FLA. STAT. § 70.001(4)(d)2 (2003).

²⁴ 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).

²⁵ FLA. STAT. § 70.001(3)(e) (2003).

²⁶ *Id.*

²⁷ *Id.*

burden.²⁸ While there has been a finding of inordinate burden in unreported 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,²⁹ it is unlikely that courts will be able to 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.³⁰ “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*.³¹ 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 further 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 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.”³² 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.

²⁸ 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.

²⁹ FLA. STAT. §70.001(1) (2003) (“...[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 . . .”).

³⁰ FLA. STAT. § 70.001(3)(e) (2003).

³¹ 438 U.S. 104, 124 (1978).

³² *Preseault v. United States*, 27 Cl. Ct. 69, 88 (1992), rev’d by *Preseault v. U.S.* 100 F. 3d 1525 (1996).

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.³³ Speculators who have purchased land with knowledge of existing land use restrictions should have much less success arguing 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.³⁴ However, this argument is opposed to the traditional state court evaluation of whether government action has resulted in a regulatory taking.³⁵

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."³⁶ This includes "periods of inactivity which are normally associated with, or are incidental to, the nature or type of use or activity."³⁷ 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.³⁸

The second type of "existing use" defined above will likely be more contentious with regard to the Model Land Use Development Code for Florida Springs Protection assuming that most challenges will arise from refusals to grant permits for activities due to statutory or regulatory changes associated with adoptions of provisions from the Model Code.

³³ FLA. STAT. § 70.001(3)(b) (2003).

³⁴ See Robert C. Downie, II, *Property Rights: Will Exceptions Become the Rule?*, 69 FLA. B. J., Nov. 1995, at 71.

³⁵ *Id.*

³⁶ FLA. STAT. § 70.001(3)(b) (2003).

³⁷ *Id.*

³⁸ *Id.*

Under this scenario, a claimant under the Act might argue that refusal to grant a permit due to changes resulting from adoption of provisions from the Model Code fit 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.”³⁹ 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.⁴⁰ 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.

The Act’s definitions of “reasonably foreseeable” and “nonspeculative” uses were intended to incorporate concepts from eminent domain valuation law.⁴¹ 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 land uses included in the future land use element of the local comprehensive plan may be sufficient to demonstrate that a proposed development is reasonably foreseeable and not speculative, if the zoning could be expected to follow the plan. Thus, in certain cases, regardless of the inclusion of an area in a spring shed overlay district, if the future land use classification for that area is not compatible with the purposes of the spring shed overlay district, a proposed use which matches the future land use classification may be found to be “reasonably foreseeable.”⁴² In these cases, the tests of “suitability” and “compatibility” from the previous paragraph will take on additional importance.

³⁹ FLA. STAT. § 70.001(3)b (2003).

⁴⁰ FLA. STAT. § 70.001(3)b (2003).

⁴¹ See, David L. Powell, et al., *Florida's New Law to Protect Private Property Rights*, 69 FLA. B.J., Oct. 1995, at 12.

⁴² 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)).

E. Vested Rights

The Act protects “vested rights” to a specific land use.⁴³ Under a vested rights approach, a landowner's expectations are considered to be reasonable when, in reliance on government assurances, the landowner makes a substantial change in his position relative to a development.⁴⁴ The action in reliance upon a government assurance or approval works to “vest” the landowner's rights to the development. Rights that have “vested” can create expectations that are protected by the takings clause.⁴⁵ In order for an owner's rights to vest, Florida courts have required that three conditions be met: (1) a property owner's good faith reliance (2) on some act or omission of the government and (3) a substantial change in position or the incurring of excessive obligations and expenses so that it would be highly inequitable and unjust to destroy the right acquired.⁴⁶

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.⁴⁷ Where property had long been zoned for residential use, and that use appeared on the county comprehensive plan, and where residential usage predominated over agricultural usage, landowners had a vested right in the continuation of residential usage.⁴⁸ However, courts have also held that the mere existence of a present right to a certain land use based upon a 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.⁴⁹ Furthermore, a subsequent purchaser does not automatically inherit vested rights merely by purchasing the land, but instead must be able to demonstrate his own entitlement to the vested rights or the benefit of estoppel.⁵⁰

⁴³ See *Compass Lake Hills Development Corp. v. Florida Dept. of Community Affairs*, 379 So.2d 376 (Fla. 1st DCA 1979); *City of Ft. Lauderdale v. Division of Local Resource Management*, 424 So. 2d 102 (Fla. 1st DCA 1982).

⁴⁴ *Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536 (11th Cir. 1994).

⁴⁵ *Id.*

⁴⁶ *Franklin County v. Leisure Property, Ltd. by Brown*, 430 So. 2d 475, 479 (Fla. 1st DCA 1983).

⁴⁷ *Metropolitan Dade County v. Brisker*, 485 So. 2d 1349, 1351 (Fla. 3d DCA 1986).

⁴⁸ *Pasco County v. Tampa Dev. Corp.*, 364 So. 2d 850, 853 (Fla. 2d DCA 1978).

⁴⁹ *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).

⁵⁰ 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).

In conclusion, the Model Springs Protection Land Development Code's provisions which suggest downzoning of property, high open space requirements, and mandatory TDR thus potentially causing loss of value for the property, will likely give rise to claims under the Bert J.Harris, Jr. Property Rights Protection Act. Whether or not the cases ever would make it to trial, such claims could nevertheless prove costly for local governments even if they settle.

VI. Transfer of Development Rights

- TDR programs are innovative growth management tools that may help avoid both Bert Harris Act and takings claims.
- Very few TDR programs have been successful due to the difficulty of designing a program in which the credits have sufficient market value.

A. Overview

Transfer of development rights, know as TDR, involves the movement of a portion of an owner's property rights from one piece of land to another; in other words, if property ownership is viewed as possession of a bundle of sticks, TDR separates out the stick that represents the ability to develop the property and transfers all or part of that right to another piece of property. TDRs resemble cluster developments, except that in TDR's, the transfer of development density goes to a separate parcel of land.¹ 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 often met with very limited success. Many programs failed due to a lack of sufficient value for the development rights that could be sold. 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.

Three types of TDR programs have been outlined as possibilities in the Model Code: 1) Mandatory TDRs, 2) Voluntary TDRs, and 3) a Universal TDR system.

1. Mandatory TDRs

These programs, which require parcels in sending areas to transfer their development credits, often lead to takings claims for two reasons: 1) Mandatory programs do not allow any development of properties in the sending area to any level of underlying zoning. This results in the only value of the land residing in the value of the TDR credits assigned to the land. 2) 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

¹ 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).

abrogated by the mandatory TDR program.² Due to the higher likelihood of a successful takings claim arising from mandatory TDR programs, such mandatory programs should be avoided whenever possible; if environmental goals require a mandatory TDR program, great care must be exercised to pay close attention to the market analysis recommendations of the Model Code 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

² Fla. Rock Indus. v. U.S., 45 Fed. Cl. 21, 33 (1999) (diminution in value only one element to consider in a takings claim).

by property owners through purchase of TDR credits. Appropriate provisions to permit this would have to be written into 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. Such a challenge might not be overcome by arguing that the value of the TDR credits would increase as more receiving areas were established.³

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 interlocal agreements.⁴

B. Use in Florida

1. Case law

The Florida legislature encourages the use of TDRs in creative growth management strategies.⁵ The first Florida case to address TDRs and takings was *Hollywood v. Hollywood, Inc.*⁶ The court in *Hollywood* refused to find a taking even when part of a claimant's land was downzoned, 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. The court found this acceptable because the downzoning was reasonably related to a valid public purpose.⁷

³ As noted in *Penn Central*, 438 U.S. 104 (1978), a possibility of selling development rights is clearly valuable and counts to mitigate any financial burden that a zoning change creates for a property owner. 438 U.S. at 137 ("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.").

⁴ See *supra* section II.G.

⁵ For a statutory reference to TDRs as "innovative land development regulations" of local government, see section 163.3202(3), Florida Statutes (2003).

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

⁷ *Id.*

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.⁸ The regulations in question were passed under the authority of the Local Government Comprehensive Planning and Land Development Regulation Act.⁹ *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.”¹⁰

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.

2. Transferable Rural Land Use Credits (TRLUCs)¹¹

The statutory regime for TRLUCs may present a good model for how to implement TDRs in springshed overlay districts.

In 2002 the Florida Legislature amended 163.3177 Florida Statutes by adding subsection (11)(d). The amendment allows for the Department of Consumer Affairs, in conjunction with the Department of Agriculture and Consumer Services, to authorize up to five local governments to create rural land stewardship areas (RLSAs) as a means to “encourage implementation of innovative and flexible planning and development strategies and creative land use planning techniques.”¹² As of yet, no RLSAs have been created.

TRLUCs may only exist in a RLSA¹³ and only result from an ordinance passed by local government establishing the number of credits associated with a RLSA.¹⁴ While assigning

⁸ *Glisson v. Alachua Cty.*, 558 So. 2d 1030 (Fla. 1st DCA 1990), review denied, 570 So. 2d 1304 (Fla. 1990).

⁹ FLA. STAT. ch. 163, Pt. II (2003).

¹⁰ *Monroe County Chowder and Marching Society, Inc., et. al. v. DCA*, 1994 WL 1027567, *380 (Fla.Div.Admin.Hrgs.1994).

¹¹ FLA. STAT. §163.3177(11)(d) (2003). Passed as part of the 2002 Fla. Ses. Law Serv. Ch. 2002-1(S.B.1336), approved by the Governor March 12, 2002. Section 163.3246(9)(b), Florida Statutes notes that plan amendments adopted pursuant to § 163.177(11)(d) shall be reviewed in accordance with §§163.3184 and 163.3187.

¹² FLA. STAT. § 163.3177(11)(d)1 (2003).

¹³ FLA. STAT. § 163.3177(11)(d)8a (2003).

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.¹⁵ If the underlying zoning on a parcel of land assigned TRLUCs is utilized, this also extinguishes the TRLUCs assigned to the parcel.¹⁶ No increase of density is permitted on any parcel within a designated receiving area for TRLUCs except by transfer of TRLUCs.¹⁷ Such transfer and change of density for the receiving area does not require a plan amendment¹⁸ but must be specified as part of a land development order.¹⁹

The most germane part of the legislation on TRLUCs for the Model Land Development Code for Florida Springs Protection involves the portion which notes that TRLUCs “may be assigned at different ratios of credits per acre according to the land use remaining following the transfer of credits, with the highest number of credits per acre assigned to preserve environmentally valuable land and a lesser number of credits to be assigned to open space and agricultural land.”²⁰ A similar approach should guide the use of TDRs under the Model Land Development Code for Florida Springs Protection.

C. Recommendations

Due to possible issues with takings law, local governments seeking to adopt portions of the Model Land Development Code for Florida Springs Protection need to avoid regulations that eliminate all economically viable use of land whenever possible. TDRs can contribute to this by first imposing an extremely low underlying density as planned in the various levels of protection offered to spring sheds by the Model Code; these underlying densities are unlikely to result in a Fifth Amendment takings claim as long as they are rationally related to the public purpose of protecting the aquifer, groundwater, and springs. 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 value through TDR bonus credits should, according to language in *Penn Central*,²¹ help diffuse Fifth Amendment takings claims.

¹⁴ FLA. STAT. § 163.3177(11)(d)8 (2003).

¹⁵ FLA. STAT. § 163.3177(11)(d)8d (2003).

¹⁶ FLA. STAT. §163.3177(11)(d)8f (2003).

¹⁷ FLA. STAT. §163.3177(11)(d)8g (2003).

¹⁸ FLA. STAT. §163.3177(11)(d)8g (2003).

¹⁹ FLA. STAT. §163.3177(11)(d)8h (2003).

²⁰ FLA. STAT. §163.3177(11)(d)8j (2003).


²¹ A possibility of selling development rights is clearly valuable and counts to mitigate any financial burden that a zoning change creates for a property owner. 438 U.S. at 137

Due to a lack of clarity in and case law on the Bert J. Harris Jr., Private Property Rights Protection Act, prediction of how it might view such an approach is difficult. Courts or administrative law judges would most likely focus on the fact that the environmental sensitivity of land already made such land unsuitable²² for anything other than the extremely low zoning that the Model Land Development Code for Florida Springs Protection envisions for such areas.

Next, as an incentive of landowners affected by such low densities to transfer their development credits instead of developing, 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.

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.

TDR programs are less likely to involve takings disputes if the programs do not downzone property in a receiving area as an incentive for developers to purchase development rights. Such action might run afoul of rulings by the Supreme Court in *Nollan*²³ and *Dolan*.²⁴ *Nollan* established that the basis for refusal of a permit must have an “essential nexus” with

(“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.”). While some commentators have asserted that TDRs should only be counted as part of the compensation for a taking that has occurred rather than as part of the measure as to whether a taking did in fact occur, the language in *Penn Central* clearly does not support such an assertion. 

²² See, e.g. FLA. STAT. § 70.001(3)(b) (2003) (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).

²³ *Nollan v. Calif. Coastal Comm’n*, 483 U.S. 825 (1987).

²⁴ *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

any exaction required as a condition of the permit. *Dolan* requires that any exaction have some “rough proportionality” with the harm that denial of the permit is intended to avoid. If a local government, in order to create an incentive to purchase TDR credits, downzones an area which is slated for higher development because of the area’s relative environmental resilience, a property owner in the downzoned area could argue that the downzoning lacks an “essential nexus” with the proposed “exaction” (i.e.—the need to purchase development rights does not relate to the environmental sensitivity of the challenger’s property). Similarly a landowner could claim that the small amount of environmental impact of increased development on his or her environmentally resilient land fails the “rough proportionality” test of *Dolan*. Furthermore, any actual downzoning of property could result in claims under the Bert J. Harris, Jr. Property Rights Protection Act.

In contrast to receiving areas, it appears both feasible and desirable to downzone the most sensitive portions of springsheds even as they are given TDRs. Under the rule of the *Hollywood*²⁵ case discussed above, this should not result in a takings case under the Fifth Amendment provided that not all development potential on the property is destroyed. Unfortunately the effect of this action under the Harris Act is less predictable.

²⁵ City of Hollywood v. Hollywood, Inc. 432 So.2d 1332 (Fla. 4th DCA 1983).