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LAND USE CONTROLS

ROBERT M. RHODES*, MITCHELL B. HAIGLER** AND GENE D. BROWN***

The authors† outline and analyze some of the more important developments in land use law having an impact upon Florida practice. The areas considered include: regulation by referendum, impact fees, intergovernmental zoning, federal jurisdiction of "navigable waters," and the wide-spread use of mandatory platting.

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"Making the world safe for the environment is not the same thing as making the environment safe for our world."

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The past year has provided some significant opportunities for the courts to clarify precedents by expanding or contracting traditional doctrines in the area of environmental law and land use. The result has been a number of noteworthy decisions representing useful contributions to the evolution of these areas. The authors will examine the most important cases in detail and analyze their impact.

I. LAND USE REGULATION BY REFERENDUM

A. City of Eastlake v. Forest City Enterprises, Inc.

The question before the United States Supreme Court in City of Eastlake v. Forest City Enterprises, Inc. was whether a city charter provision requiring proposed land use changes to be ratified by fifty-five percent of the voters violates the due process rights of landowners applying for zoning changes.

The City of Eastlake, a suburb of Cleveland, adopted a comprehensive zoning plan which was codified in a municipal ordinance. Forest City applied to the city planning commission for a zoning change to permit construction of a multi-family, high-rise apartment building. The planning commission recommended the proposed change to the city council which, under Eastlake's procedures, could have accepted or rejected the commission's recommendation. In the meantime, the voters of Eastlake amended the city charter to require that any changes in land use agreed to by the council must be approved by a fifty-five percent referendum vote. The city council approved the planning commission's recommendation for rezoning, and Forest City subsequently applied to the planning commission for "parking and yard" approval for the proposed building. The commission rejected the application on the basis that the council's rezoning action had not been submitted to the voters for ratification.

Forest City then filed an action in state court to invalidate the charter provision as an unconstitutional delegation of legislative

3. Article VII, § 3, Charter of the City of Eastlake as amended November 2, 1971. The Charter provision also required assessment of election costs against the affected property owner. This issue was before neither the United States Supreme Court nor the Ohio Supreme Court.
power to the electorate. Pending lower court action, the city council's action was submitted to referendum, and the proposed zoning change was not approved by the requisite fifty-five percent vote. Following the referendum, the lower court and the Ohio Court of Appeals sustained the charter provision.

The Supreme Court of Ohio reversed by concluding that enactment of a rezoning provision is a legislative function. The court held that the referendum requirement lacked sufficient standards to guide the decision of the voters, hence, permitting police power to be exercised in a standardless, arbitrary, and capricious manner. The Supreme Court of Ohio went further and held that the referendum provision itself constituted an unlawful delegation of legislative power.

In turn, Eastlake was reversed by the United States Supreme Court. Central to the Court's action was its recognition that the Ohio court characterized Eastlake's rezoning action as legislative in nature. Such characterization was reinforced by a provision of the Ohio Constitution which specifically reserved the power of referendum to municipal electors "on all questions which such municipality may now or hereafter be authorized by law to control by legislative action ... ". Hence, to be subject to Ohio's referendum procedure, the action must be within the scope of legislative power.

The Supreme Court accepted Ohio's classification of the rezoning action as legislative. The court, however, rejected the proposition that the zoning referendum involved an unconstitutional delegation of legislative power. Borrowing from The Federalist No. 39, the Court noted the power of the electorate to establish legislative bodies and to reserve to themselves authority to deal directly with matters that otherwise might be assigned to the legislature. Referenda, as a means for direct political participation, therefore, allows the people a veto power over enactments of representative bodies on questions of public policy.

5. Ohio Const. art. II, § 1 (f) (emphasis added).
6. "A referendum cannot, however, be characterized as a delegation of power. Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create." 426 U.S. at 672 (1976).
7. Id. See also Hunter v. Erickson, 393 U.S. 385 (1969).
8. 426 U.S. at 678 (1976). The Ohio court concluded that the Eastlake procedure constituted a delegation of power violative of federal constitutional guarantees, since the voters
The Supreme Court, however, did not leave Forest City remediless. The Court stated that if the substantive result of the referendum is arbitrary and capricious the action is open to challenge. The remedy available would be determined as a matter of state law, as well as under fourteenth amendment substantive due process standards. In addition, the Supreme Court suggested that Forest City and similarly situated referendum losers might seek relief from unnecessary hardship through a variance request.

Justice Stevens gave an incisive dissent bottomed on the proposition that the "town meeting process of decision-making" obfuscates the real issues in the case, which are: first, whether the city's rezoning procedure must comply with the due process clause of the fourteenth amendment; and second, if they must comply, whether the city's procedure is fundamentally fair. Recognizing that deprivation caused by zoning customarily is qualified by affording a property owner a right to apply for an amendment to accommodate particular needs, the dissent concluded that such opportunity is an aspect of property ownership protected by the due process clause of the fourteenth amendment. Hence, the property owner has a right to a fair procedure in the consideration of the merits of his application.

The dissent attacked the majority's reliance on the Ohio court's classification of rezoning as legislative as opposed to administrative or quasi-judicial. Prefering to characterize rezoning as
“administrative,” Justice Stevens concluded that “[t]he insistence on fair procedure in this area of the law falls squarely within the purpose of the Due Process Clause of the Fourteenth Amendment.”13 Since procedural due process must apply to municipal rezoning referenda, Justice Stevens offered several reasons why Eastlake’s procedure was an arbitrary and unreasonable method of addressing a local problem, including the intent of the city to obstruct land use changes and specifically to burden those seeking multi-family housing.14

While recognizing that initiatives or referenda may be appropriate methods for deciding questions of community policy, Justice Stevens declared that “the popular vote is not an acceptable method of adjudicating the rights of individual litigants.”15 He added that the city requirement of a mandatory referendum placed a manifestly unreasonable obstacle in the path of every property owner seeking a zoning change, did not provide standards or procedures exempting particular parcels from the referendum requirement, and the case record contained no community justification for the use of the referendum. Justice Stevens therefore concluded that the Supreme Court of Ohio’s appraisal of the fundamental unfairness of the decision making process should be respected.16

B. Eastlake’s Impact on Florida Law

Although the Florida Supreme Court has not confronted the issue of voter approval of governmental land use decisions, two district courts of appeal have addressed the constitutionality of

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14. Id. at 689, citing 41 Ohio St. 2d at 200, 324 N.E.2d at 748-49.
15. Id. at 693.
16. Id.
Eastlake-type referenda and have issued differing opinions. In City of Coral Gables v. Carmichael, the District Court of Appeal, Third District, held that action by the City of Coral Gables in amending its comprehensive zoning ordinance by changing the zoning on particular property was legislative rather than quasi-judicial; therefore, it was subject to the referendum provisions of the city charter. Quoting from its previous holding in City of Miami Beach v. Schauer, the Carmichael court cited Blankenship v. City of Richmond for the proposition that: "It would be flagrantly inconsistent to hold that the adoption of a comprehensive zoning law is legislative in character and that the amendment to such was a quasi-judicial act. If the original act is wholly legislative, an amendment to it partakes the same character."

The Third District further held that submitting the ordinance to referendum would not deprive the opponents or proponents of rezoning of due process or equal protection. The court cited a Supreme Court of California case for the proposition that: "The proponents and opponents are given all the privileges and rights to express themselves in an open election that a democracy or republican form of government can afford to its citizens upon any municipal or public affairs."

In 1976, the rationale of Carmichael was rejected by the District Court of Appeal, First District, Andover Development Corp. v. City of New Smyrna Beach. In Andover, the landowner applied for and obtained rezoning of his property for Planned Unit Development (PUD). Following the rezoning, Andover's predecessor in title obtained final approval from the city of a master plan and contracted with Andover to sell the property conditioned upon financing and continuation of the PUD zoning. Andover culminated the sale and then worked with the city officials to improve the originally approved plan. Prior to approval of the new plan a petition for referendum was filed. The referendum would have repealed the zoning ordinance applicable to Andover's property and adopted an ordi-

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17. 256 So. 2d 404 (Fla. 3d Dist.), cert. discharged, 268 So. 2d 1 (Fla. 1972).
18. 104 So. 2d 129 (Fla. 3d Dist. 1958).
19. 188 Va. 97, 49 S.E.2d 321 (1948).
20. 256 So. 2d at 408, quoting Blankenship v. City of Richmond, 188 Va. at 106, 49 S.E.2d at 325.
22. 256 So. 2d at 409, quoting Dwyer v. City Council, 200 Cal. at 516, 253 P.2 at 936.
23. 328 So. 2d 231 (Fla. 1st Dist. 1976).
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nance severely restricting density of particular uses within the city. Pending the referendum election, the city planning board approved Andover's final development plan. As a result of the referendum, however, Andover's property reverted back to pre-PUD zoning, substantially restricted by density caps approved by the voters.

The First District determined: "Unquestionably the citizens of the City of New Smyrna Beach utilized the process of initiative and referendum to accomplish a rezoning of Andover's tract of land. Such a procedure does not meet the elemental requisites of constitutional due process." The First District concluded that Carmichael relied heavily upon California appellate decisions that had since been rejected. The court concluded that the zoning ordinance initiated by the citizens of New Smyrna Beach was enacted to overrule the fact-finding function of the planning commission and the administrative decision of the city commission. As to Andover's tract, the purported action of the citizens through initiative and referendum violated the basic requisites of constitutional due process and therefore was void.

Eastlake seems to have deferred to the Supreme Court of Ohio's classification of the power to rezone as legislative in order to form the basis of its holding. As such, Eastlake must be read with the perspective that the Supreme Court of Florida has yet to determine whether rezoning is legislative or adjudicative in nature. If determined to be legislative, Eastlake would control. If adjudicative, the

24. Id. at 235.
25. The Court quoted extensively from Taschner v. City Council, 31 Cal. App. 3d, 48, 107 Cal. Rptr. 214 (1973). In Taschner, the court emphatically rejected the proposition that the election process provides equivalent safeguards afforded by state zoning law procedures: The kind of public debate on the merits of a proposed zoning measure afforded by the election process, including the limited opportunity for the submission of written arguments to the voters, cannot be equated with a dispassionate study, evaluation and report upon the proposal by a staff of planning experts (§ 65804), notice and hearing before the planning commission (§ 65854), written recommendation by the planning commission with reason for its recommendation (§ 65855), and notice and hearing before the legislative body (§ 65856).

27. See 426 U.S. at 674 n.9.
edicts of Eastlake may be distinguishable.

Eastlake also left unresolved the question of procedural due process. It would seem possible, therefore, for a state supreme court to follow the majority opinion in Eastlake, but nevertheless find that a particular referendum procedure violated requisite procedural due process guarantees.

Although Eastlake reinforces the United States Supreme Court's respect and encouragement for local government responsibility, the decision reflects a remarkable insensitivity to land management and the land use decision making process. The case, moreover, fails to afford property owners an impartial forum where land use decisions can be made. In Eastlake, public and individual property rights were ultimately considered and determined by popular opinion. Notwithstanding positive recommendations by land use professionals, plaintiffs were denied rezoning solely because they were not able to garner the approval of fifty-five percent of those voting in the referendum. Judicial endorsement of this process ignores the substantial efforts made by state and local governments to professionalize land management. Moreover, it sacrifices costly intensive planning studies and individual property rights to popular whim and parochial neighborhood prejudice. It certainly cannot be contended that the town hall, letters to the editor, and public demonstrations offer the same dispassionate, professional review of a proposed land use change as a qualified planning commission vested with delegated administrative authority. Under Eastlake, individual land use changes may be legislative; and as such, they necessarily affect multiple interests and are not subject to stringent due process procedural protection. They simply become additional issues vying for attention in the public opinion marketplace. Unfortunately, Eastlake, will discourage a healthy trend recognizing that governmental decisions affecting particular parcels are administrative or judicial in nature, since they have significant impact on individual rights. In sum, instead of a hearing, argument, record, specific findings, and application of legislative standards to a proposed land use modification, affected-parties now can look forward to a costly and possibly vituperative public opinion contest. Additionally, in communities implementing Eastlake, the hard land management decisions can be expected to be passed on to the electorate, with planning commissions and elected officials left with little incentive other than to serve as intermediate conveyorbelts. Greater infusion of political bias into land use decision is likely. This
will be coupled with less recognition of expert counsel and their work products.

Florida has enacted the Local Government Comprehensive Planning Act of 1975. A major provision of this legislation requires that zoning and all land development orders and regulations must be consistent with a mandated comprehensive plan. The underlying concept of the comprehensive plan is that all property within a particular community is restricted to a certain degree, but is ultimately benefitted from a rational development scheme reflected in the community plan. \textit{Eastlake} portends ill for the comprehensive plan because land use decisions and the rationale of the plan are undercut by a series of “spot” referenda. The more controversial portions of the plan will be susceptible to referenda, while more mundane decisions will not be challenged. Hence, regulation by referendum could effectively transform a comprehensive plan into a crazyquilt reflection of neighborhood preferences.

As recognized in Florida Statutes section 23.014 (1975), preparation and review of the comprehensive plan is a continuing process based upon evolving community needs and available data. Land use regulations implementing a plan also must offer flexibility in order to provide for orderly and balanced future development. Change is seen as a necessary ingredient of a practical, comprehensive land management program. Unfortunately, the costly, problematical specter of an \textit{Eastlake} referendum will discourage landowner application for requisite change. The effect will be a static and unresponsive planning and regulatory system.

Since land use regulations must be consistent with the comprehensive plan, a particular parcel may be subject to multiple referenda if rezoning, phased PUD approval, and building permits are

\begin{itemize}
\item 29. \textit{Fla. Stat.} \textsect 163.3194(1) (1975) provides: After a comprehensive plan or element or portion thereof has been adopted in conformity with this act, all development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such plan or element shall be consistent with such plan or element as adopted. All land development regulations enacted or amended shall be consistent with the adopted comprehensive plan or element or portion thereof.
\item 30. \textit{Fla. Stat.} \textsect 163.3177(1) (1975) provides: “The comprehensive plan shall consist of materials in such descriptive form, written or graphic, as may be appropriate to the prescription of principles, guidelines, and standards for the orderly and balanced future economic, social, physical, environmental, and fiscal development of area.”
\end{itemize}
required. Hence, a landowner could win a referendum challenge to a granted rezoning, only to be publicly rebuffed on approval of a PUD phase. Res judicata and collateral estoppel are doctrines foreign to the legislative arena. The impact of such potential harassment on developers and financiers of large-scale projects is incalculable.

The Supreme Court's assurance that arbitrary and capricious results of a referendum are subject to judicial rectification provides little comfort to the property owner. In a situation where a proposed rezoning is approved by the city council and then rejected by the electorate in a referendum, it appears that a landowner would have to prove that: (1) the pre-existing zoning classification is arbitrary and unreasonable; or (2) that the electorate acted arbitrarily and capriciously. Traditionally, an owner only had to show that rezoning was desirable and beneficial to the community and generally was consistent with an existing comprehensive plan. The post-Eastlake burden imposed upon a referendum loser will be extremely difficult to carry in view of the judicial deference granted not only to electoral preference, but to legislative decisions which are presumed valid and are generally upheld if "reasonably debatable." Moreover, from a practical viewpoint, Eastland puts the local government in an unenviable position if the landowner sues. Having first publicly approved the proposed land use modification, the government, following popular rejection of the proposal, may then have to defend a lawsuit brought by the property owner who previously had requested and been granted the relief by the government.

In this same vein, the Supreme Court's suggestion that a developer who loses a referendum may seek a variance also appears to provide little assistance. Although variances may be used to provide specific relief to particular property unduly burdened by a zoning classification, a number of courts have been hesitant to recognize the variance as a means to secure a zoning change. As one author has noted, "[a] variance is not to confer special privileges—that is, it is only to relieve hardship, not to confer benefits that are not enjoyed by neighboring property."31 This restriction is reflected in Florida's County and Municipal Planning for Future Development Act,32 which explicitly provides that variances are only authorized

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for height, area, and size of yards, structures and open spaces. Vari-
ances may not be granted to permit an otherwise prohibited use.\textsuperscript{33} Hence, a rezoning disguised as a variance is not acceptable in Flor-
ida, and relief through a variance should be unavailable once a re-
zonin is rejected.

A final disturbing aspect of \textit{Eastlake} is the stimulus the case pro-
vides for local governments to ignore regional responsibilities and to es-
establish or retain exclusionary and no-growth policies. Mr. Justice Stevens agreed with Justice Stern of the Supreme Court of Ohio when the latter noted: “There can be little doubt of the true purpose of \textit{Eastlake}'s charter provision—it is to obstruct change in land use, by rendering such change so burdensome as to be prohibi-
tive. The charter provision was apparently adopted specifically, to prevent multi-family housing. . . .”\textsuperscript{34} Justice Stern recognized re-
ferendum procedure as “simply an attempt to render change difficult and expensive under the guise of popular democracy.”\textsuperscript{35} The availa-
bility of referenda can be expected to provoke aditional individual and neighborhood association challenges to growth-inducing land use decisions. Parochial interests will coalesce and seek allies with the promise that when the growth scourge hits other neighborhoods, the united front will be maintained through the \textit{quid pro quo}. In sum, the referendum potentially may be employed to restrict growth, defeat solutions to pressing urban and regional problems, and to keep out minorities. Moreover, the sale price of housing developments that do survive a referendum will include the cost of the referendum campaign, thereby adding more stress to the fragile low and moderate income housing market.

These effects are particularly devastating in Florida, which has recently enacted several regional land and water management pro-
grms.\textsuperscript{36} For example, Florida Statutes, chapter 380 provides that local government decisions having regional impact\textsuperscript{37} or within an area of critical state concern\textsuperscript{38} may be appealed to the Florida Land

\begin{itemize}
  \item \textsuperscript{33} FLA. STAT. § 163.170(8) (1975); cf. Josephson v. Autrey, 96 So.2d 784 (Fla. 1957). \textit{But see} Clarke v. Morgan, 327 So. 2d 769 (Fla. 1976).
  \item \textsuperscript{34} 426 U.S. at 689, \textit{quoting} 41 Ohio St. 2d at 199, 324 N.E.2d at 748.
  \item \textsuperscript{35} \textit{Id.}
  \item \textsuperscript{36} \textit{See, e.g.}, Florida Water Resources Act of 1972, FLA. STAT. § § 373.012-.1962 (1975); The Florida Environmental Land and Water Management Act of 1972, FLA. STAT. § § 380.012 -.12 (1975).
  \item \textsuperscript{37} FLA. STAT. § 380.06 (1975).
  \item \textsuperscript{38} FLA. STAT. § 380.05 (1975).
\end{itemize}
The legislation attempts to bring a regional or state-wide perspective to bear on local government decisions having greater than local impact. Unfortunately, following *Eastlake*, it would be difficult to imagine the governor and the cabinet, statewide elected officials, overturning even a blatantly exclusionary local government denial of a development of regional impact, if such denial were effected by a popular referendum. Hence, at least in Florida, *Eastlake* could potentially eviscerate the development of regional impact review process, thereby transforming the DRI process into just another no-growth, exclusionary, regulatory tool.

The *Eastlake* majority drew support from the *Federalist* No. 39 in upholding land use regulation by popular referendum. Perhaps the Court should have also considered *The Federalist* No. 51, authored by Madison:

> It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of society against the injustice of the other part. . . .

> Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger. . . .

A similar opinion was shared by De Tocqueville:

> If ever the free institutions of America are destroyed, that event may be attributed to the omnipotence of the majority, which may at some future time urge the minorities to desperation, and oblige them to have recourse to physical force. Anarchy will then be the result, but it will have been brought about by despotism.

A system of law, with concomitant procedures and unbiased review-

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40. Further questions are whether local action effectuating a decision of the Florida Land and Water Adjudicatory Commission could be challenged by referendum or whether the Commission could hear an appeal of a referendum decision affecting a development of regional impact. The "ping-pong" potential of such a process is evident.
42. A. De Tocqueville, *Democracy in America* 121 (1956).
ing bodies, serves to diffuse the will of an oppressive majority and to secure justice for the individual pitted against the community. Recognizing that major growth management decisions are often unpopular, several states have recently introduced basic due process guarantees into land management decisions. Eastlake, unfortunately, will not only discourage further state efforts, it will encourage land use regulation by “an omnipotent majority.”

II. IMPACT FEES AND MANDATORY DEDICATION

The issue of imposed exaction of fees and dedications as conditions to final development approval has been simmering in Florida for a decade. In Contractors and Builders Association v. City of Dunedin, the Supreme Court of Florida affirmed the validity of impact fees and provided guidelines for setting such fees. At issue was the portion of a water and sewer connection charge that would be collected and earmarked for capital improvements to the entire municipal water and sewer system. The Association contended that these earmarked funds constituted taxes which a city is forbidden to impose in the absence of specific enabling legislation. The city responded that the fees were not taxes, but user charges analogous to monies collected by privately owned utilities for services rendered. The court recognized the connection charges as user fees. However, the court invalidated the ordinance because it failed to restrict municipal use of monies generated by the fees. In addition, the court determined that the ordinance did not satisfy the Florida Statutes section 180.13(2) (1975) requirement that municipal fees must be “just and equitable” since the entire burden of financing future capital expenditures for water and sewer needs was imposed on persons connecting to the system after an arbitrarily chosen time. The court encouraged Dunedin to adopt another sewer connection charge ordinance, incorporating appropriate restrictions consistent with its opinion.

The significance of Dunedin lies in the court’s approval of the impact fee concept. “Raising expansion capital by setting connection charges . . . which do not exceed a pro rata share of reasonably anticipated costs of expansion, is permissible where expansion is reasonably required, if use of the money collected is limited to meeting the cost of expansion.” Hence, a local government may charge

43. 329 So. 2d 314 (Fla. 1976).
44. Id. at 320 (emphasis in original).
a connection fee in excess of the actual cost of the connection if:

1. the fee does not exceed a proportionate part of the amount reasonably necessary to finance the expansion;
2. facility expansion is reasonably required based on anticipated growth patterns; and
3. use of collected fees is limited to meeting the costs of expansion.

The Dunedin court declared that: "[W]e see nothing wrong with transferring to the new user of a municipally owned water or sewer system a fair share of the costs new use of the system involves." The Dunedin fee was to be collected prior to issuance of a building permit and, therefore, must be characterized as a conditional exaction.

The conceptual marriage of impact fees and mandatory dedications is readily apparent. Both share a common police power genesis bottomed on the principle that he who generates growth must pay his proportionate share of governmental costs required to service such growth. In Wald Corp. v. Metropolitan Dade County, a challenge was initiated to Dade County's ordinance requiring dedication of canal rights-of-way and maintenance easements as a condition of subdivision plat approval. In upholding the Dade County scheme, the District Court of Appeal, Third District, discussed the two standards generally applied by the various state courts when reviewing mandatory dedications. Both standards—the "reasonably related to the needs of the community" test; and the "specifically and
uniquely attributable” to the activity of the subdivider test50—were rejected by the court. The Third District determined that the “reasonable relation” test places too heavy a burden on a developer to show that the required dedication bears no relation to the general health, safety and welfare.51 The “specifically attributable” test, on the other hand, imposed an undue burden on a municipality to show that the mandated exaction is directly and solely attributable to the proposed subdivision and based upon discerned community needs. The court found that this burden undermines the presumption of validity attaching to police power measures, and affords little deference to the judgment of the local legislative authority.52

The Third District drew support from Eskind v. City of Vero Beach,53 in developing its own standard of review. In Eskind, a case involving regulation of outdoor advertising, the court held that private business could not be subjected to police power restrictions where there was “no reasonably identifiable rational relationship between the demands of the public welfare and the restraint upon private business . . . .”54 Although Eskind involved a business regulation, the Wald court appropriated its standard of review to determine the validity of subdivision exactions on the basis that a subdivider is in essence a land processor, who attempts to maximize profits in much the same manner as a businessman.55 Hence, a subdivider is distinguishable from the ordinary property owner who merely reserves his property for personal use or sale as a single tract.56

The test developed by the Third District for mandatory dedica-
ions, focused on whether there was "a reasonable connection between the required dedication and the anticipated needs of the community." Referring to its test as "the rational nexus approach," the court declared that this approach provides a more feasible basis for testing subdivision dedication by balancing the prospective community needs and individual property rights, and also by treating the business of subdividing as a profit making enterprise.

Wald reflects the first Florida appellate recognition of the "reasonably related to the needs of the community" test. Although claiming that it rejected this broad standard of review, the Third District apparently embraced this liberal test, as qualified by a requisite finding of a "rational nexus" between community needs, based on intelligent planning, and the dedication requirement. The Wald test must therefore be placed beside the Fourth District's recognition of the "specifically and uniquely attributable to the developer's activity" test, thereby setting the stage for future supreme court resolution of disparate appellate standards of review for local government mandatory dedication requirements.

III. EQUITABLE ESTOPPEL AND VESTED RIGHTS

The doctrine of equitable estoppel is available in Florida to prevent arbitrary action by governments exercising land use powers. A property owner may invoke the doctrine when he:

1. in good faith
2. upon some act or omission of the government
3. has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right he acquired.

57. Id. at 868.
58. Id. Although individual property owners ordinarily may not have their property appropriated without eminent domain proceedings, subdividers may be required to dedicate land where the requirement is part of a valid regulatory scheme. Id.
59. Admiral Dev. Corp. v. City of Maitland, 267 So. 2d 860 (Fla. 4th Dist. 1972). In City of Boca Raton v. Talmon, No. 75-4286 (Fla. 15th Cir. 1976), appeal pending, Boca Raton's ordinance requiring developers of subdivisions to obtain a letter of intent covering new school construction from the Palm Beach County School Board was invalidated.
60. See generally Rhodes, These Rights are Mine: Downzoning, Vested Rights and Equitable Estoppel, 50 FLA. B.J. 586 (1976).
62. Hollywood Beach Hotel Co. v. City of Hollywood, 283 So. 2d 867 (Fla. 3d Dist. 1973), rev'd in part, 329 So. 2d 10 (Fla. 1976), citing Sakolsky v. City of Coral Gables, 151 So. 2d 433 (Fla. 1963). Although the Supreme Court of Florida partially reversed the Third District,
In *Hollywood Beach Hotel Co. v. City of Hollywood*, the Supreme Court of Florida reaffirmed the principle that equitable estoppel may be invoked against a municipality and applied the doctrine even though actual physical construction had not been undertaken by the builder. The court held that since a property owner had obtained a building permit from the city and, without actual or constructive knowledge of an impending zoning change, spent almost $200,000 on the site plan, models, architect’s plans and specifications, and building permits in reliance on a rezoning, the city was equitably estopped from changing the zoning and the developer possessed a vested right in continuation of existing zoning.

The import of *Hollywood Beach Hotel*, however, lies in the supreme court’s recognition that citizens may expect to be dealt with fairly by the government with regard to land use decisions. This means that when a property owner acts in good faith, thereby triggering the doctrine of equitable estoppel, a government must deal fairly with an applicant or assume responsibility for any adverse results that stem from invoking equitable estoppel. In *Hollywood Beach Hotel*, the supreme court determined that the deliberate eleven month inaction by a city on a rezoning petition to downzone appellant’s property, coupled with appellant’s reliance on the city’s extension of their building permit, the city’s recission of appellant’s permit without prior notice and the subsequent mandate that appellant proceed with construction within ninety days amounted to “unfair dealing.”

In addition, the court applied the doctrine based on a finding that the city failed to take action within a reasonable period of time after it was apprised of proposed development activity. It is now the law that government deferral, or omission to take action, following notice of proposed development activity, can justify a finding of vested rights: “While a city commission certainly possessed the prerogative of deciding to defer action on [a rezoning request] over a long period of time, it must assume the attendant responsibility for the adverse effect it knows or should know its deliberate inaction will have upon parties with whom it is dealing.”

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63. 329 So. 2d 10 (Fla., 1976).
64. Id. at 18.
65. Id.
IV. INTERGOVERNMENTAL ZONING DISPUTES

"[P]lunghed into the vacuum of power"66 by legislative silence, the courts traditionally have exempted governmental units from zoning.67 The rationale for governmental immunity from zoning stems from the notion that if governmental units were amenable to zoning, the public well-being would suffer.68 It is assumed that public construction and land use would be thwarted through application of zoning measures to governmental units.69 While this is basically true, this assumption misses half the picture: The public well-being likewise is served by zoning regulations.70 Land use regulations preserve the existing character of a geographical area, stabilize land values, and provide a means for orderly development.71 The issue of governmental amenability to zoning, therefore, presents a question of competing public interests.

The issue of intergovernmental zoning was presented to the Supreme Court of Florida in 1976 for the first time in a quarter of a century. The precise issue before the court in Hillsborough Association for Retarded Citizens, Inc. v. City of Temple Terrace,72 was whether a state agency is amenable to municipal zoning. The supreme court adopted the district court's decision and opinion,73 that an agency is amenable.

A. Traditional Tests

Absent a legislative statement either subjecting or exempting a governmental unit,74 various tests have been used to resolve intergovernmental zoning disputes. The first test involves the distinction between whether the intended use serves a governmental or a pro-

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69. Id.
70. 1 R. Anderson, American Law of Zoning, § 2.06 (1968).
72. 332 So. 2d 610, 612 (Fla. 1976), noted in 31 U. Miami L. Rev. 191 (1976).
73. City of Temple Terrace v. Hillsborough Ass’n for Retarded Citizens, 322 So. 2d 571 (Fla. 2d Dist. 1975).
74. 322 So. 2d at 578.
prietary function.\textsuperscript{75} If governmental, the use is exempt from zoning; if proprietary, the use must be consistent with the applicable zoning regulation.\textsuperscript{76} Utilization of this test has led to inconsistent results due to the absence of clear guidelines.\textsuperscript{77}

The second approach, the "superior sovereign" test,\textsuperscript{78} focuses on the status of the governmental land user and its relationship to the zoning authority. Under this theory, a zoning authority may not impose its regulations on a unit with a higher status in the governmental hierarchy. At the top of the hierarchy stands the federal government with the state governments and their agencies below. In Florida, the lowest position in the hierarchy theoretically is held by the municipalities. Municipalities, however, derive their powers directly from the Florida Constitution,\textsuperscript{79} which tends to place them on the same level within the hierarchy as the counties and state agencies, rendering the "superior sovereign" test inapplicable in Florida.

A third approach for resolving intergovernmental zoning disputes depends upon whether the unit has the power of eminent domain.\textsuperscript{80} If so, it is exempt from zoning, even if the property was acquired through purchase, since the test focuses on the existence of eminent domain powers.\textsuperscript{81} Implicit in this test is the questionable assumption that the power of eminent domain is superior to zoning power.

\textsuperscript{75} See, e.g., Nichols Eng'r & Research Corp. v. State ex rel. Knight, 59 So. 2d 874 (Fla. 1952); cf. AIA Mobile Home Park, Inc. v. Brevard County, 246 So. 2d 126 (Fla. 4th Dist. 1971) (amenability of a county to its own zoning restrictions).

\textsuperscript{76} AIA Mobile Home Park, Inc. v. Brevard County, 246 So. 2d 126 (Fla. 4th Dist. 1971). See also 2 R. ANDERSON, supra note 70, § 9.05.

\textsuperscript{77} Compare County of Westchester v. Village of Mamaroneck, 22 App. Div. 2d 143, 255 N.Y.S.2d 290 (1964), aff'd, 16 N.Y. 2d 940, 212 N.E.2d 443, 264 N.Y.S.2d 925 (1965) (sewage disposal as governmental purpose), with Jefferson County v. City of Birmingham, 256 Ala. 436, 441, 55 So. 2d 196, 200 (1951) (sewage disposal is proprietary for zoning purposes but governmental for tort purposes). See generally Seasongood, Municipal Corporations: Objections to the Governmental or Proprietary Test, 22 Va. L. Rev. 910, 938 (1936), where the author states: "no satisfactory basis for solving the problem whether the activity falls into one class or other has been evolved. The rules sought to be established are as logical as those governing French irregular verbs."

\textsuperscript{78} Note, Govermental Immunity From Local Zoning Ordinances, 84 Harv. L. Rev. 869, 877 (1971); 31 U. MIAMI L. Rev. 191 (1976).

\textsuperscript{79} FLA. CONST. art. VIII, § 2(b).

\textsuperscript{80} See, e.g., Orange County v. City of Apopka, 299 So. 2d 652 (Fla. 4th Dist. 1974); O'Conner v. City of Rockford, 3 Ill. App. 3d 548, 279 N.E.2d 356 (App. Ct. 1972); State ex rel. Askew v. Kopp, 330 S.W.2d 882 (Mo. 1960).
B. The Balancing of Competing Public Interests Test

The district court in Temple Terrace, with whom the Florida Supreme Court later agreed, rejected all of the traditional tests. The district court concluded that the traditionally employed single-factor tests simply do not provide sufficient flexibility to insure protection of local interests.

Both the district and supreme courts agreed that greater cooperation between the zoning authority and the governmental land user would occur if the government unit is presumptively bound by the zoning regulation. Under this approach the burden would lie with the governmental unit seeking exemption from the zoning law to demonstrate to zoning authorities that on balance the public interest favors the intended use. The appropriate method of seeking permission to proceed with the development or use is by obtaining a special exception, variance, or amendment in the zoning ordinance, whichever is appropriate.

In administering the balance of competing interests approach, zoning authorities will not have a "precise formula or set of criteria
which will determine every case mechanically and automatically,77 but an initial consideration should always be whether there is statutory guidance that resolves the issue. Absent an explicit statutory directive all factors should be weighed. However, the following factors almost always will require consideration.88

First, the nature and scope of the governmental body seeking to implement a nonconforming use should be examined. This factor allows a determination of the governmental unit’s position in the hierarchy and the existence of eminent domain authority, though neither of these factors alone should be controlling. Also of interest would be whether the governmental user possesses statutory authority to select the exact location of its facilities.

A second factor is the type of land use involved. The use of this factor permits an examination of the collateral effects of the development, such as noise and traffic congestion, and the effects upon other public services. An illustrative case,89 resolved under traditional analysis, concerned the construction of a county jail near a public school. This ingredient also prompts a consideration of the proposed development’s environmental impact.

Also to be weighed is the public interest to be served by the intended use. While this factor ineluctably leads to a determination of whether the function is mandatory or permissive (governmental or proprietary), the need for determining whether the development is critical cannot be discounted. Statewide and regional interests, as well as local interests, may be addressed. Of additional concern is the current level of services being provided to the public.

Another key consideration would be the effect on the governmental unit if denied permission for the development. The burden of demonstrating the lack of alternative methods and locations should rest with the governmental unit seeking permission for a non-conforming use. The existence of suitable alternative locations for the development strongly favors enforcement of the zoning scheme. Conversely, if the zoning regulations make no provision

whatsoever for the intended use, this should weigh in favor of granting the use.

A paramount concern under this balancing of interests test, overlooked under traditional analysis, should be the interests of adjacent and surrounding landowners. Since one purpose of zoning is to stabilize property values, a severe impairment of adjacent property values should militate against the intended use. Similarly, if the intended use would drastically overburden public facilities such as water, sewage, and transportation services in the area, the balance may tip against permitting the use. An important consideration would be whether the governmental unit has made or will make, reasonable attempts to alleviate or minimize the harm to adjoining landowners. Similarly the effect upon the local land use scheme would be important with the relevant considerations varying with each locale.

The balancing of public interests requires review of a complex mix of competing interests and no one factor should be overriding. The critical point is that under this test, governmental units will not be permitted to undertake a nonconforming use without obtaining prior approval by zoning authorities or the courts if the former proves unsuccessful.

C. Legislative Guidance

In Temple Terrace, the supreme court reiterated that the state has the power to exempt itself from zoning ordinances, and further acknowledged that a non-conforming use may be legislatively directed. This implies that a constitutional or express legislative grant of authority to select a particular location, incident to eminent domain power, would immunize a government unit from zoning ordinances.

While it may be thought that the decision in Temple Terrace would prompt efforts by government units to seek legislative exemption from zoning, the opposite may be true. Recent legislation seemingly echoes the philosophy of the Temple Terrace decision and directs that government developments be consistent with local land use schemes. The Local Government Comprehensive Act of 1975

90. Hillsborough Ass'n for Retarded Citizens v. City of Temple Terrace, 332 So. 2d 610, 613 n.5 (Fla. 1976).
91. Id. at 613.
92. Id. at 612 n.2.
LAND USE CONTROLS requires that not later than July 1, 1979, each county and municipality in the state adopt a comprehensive land use plan. Elements of the mandated comprehensive plan include a future land use plan designating future distribution, location, and extent of land uses for public buildings and facilities and for public services and facilities.

Section 163.3161(5) of the Act provides:

It is the intent of this act that adopted comprehensive plans shall have the legal status set out in this act and that no public or private development shall be permitted except in conformity with comprehensive plans, or elements or portions thereof, prepared and adopted in conformity with this act.\textsuperscript{94}

Furthering this intent, section 163.3194(1), provides that after a comprehensive plan or element thereof has been adopted in conformity with the Act, "[a]ll development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such plan or element shall be consistent with such plan or element as adopted."\textsuperscript{95} The term "governmental agency" is given an all-encompassing definition in the Act.\textsuperscript{96} In sum, the local Government Comprehensive Planning Act of 1975 provides clear legislative guidance that governmental agencies shall be amenable to zoning regulations adopted pursuant to the Act.

Thus, the issue concerning governmental amenability to land use regulations was resolved consistently by both the Supreme Court of Florida and the state Legislature. Hopefully the result will be increased cooperation between governmental land developers and zoning authorities in achieving the benefits of effective community planning.

V. STATE AND FEDERAL REGULATORY JURISDICTION

A. Federal Jurisdiction: The Rivers and Harbors Appropriation Act of 1899\textsuperscript{97}

During the survey period, the United States Court of Appeals for the Fifth Circuit construed the extent of the jurisdictional grant of the Army Corps of Engineers under the Rivers and Harbors Appropriation Act of 1899.\textsuperscript{98}

\textsuperscript{94} FLA. STAT. § 163.3161(5) (1975) (emphasis added).

\textsuperscript{95} FLA. STAT. § 163.3194(1) (1975).

\textsuperscript{96} FLA. STAT. § 163.3164(8) (1975).

\textsuperscript{97} See generally 31 U. MIAMI L. REV. ___ (1977), for another discussion of these cases.

\textsuperscript{98} U.S. CONST. art. 1, § 8, cl. 5.
propriation Act of 1899. In United States v. Sexton Cove Estates, Inc.; Weizmann v. District Engineer, U.S. Army Corps of Engineers; and United States v. Joseph G. Moretti, Inc., the court was faced with two basic issues: (1) the Corps' jurisdiction over activity shoreward of the mean high tide line (MHTL), and (2) the authority of district courts to enforce violations by way of restoration orders.

1. MEAN HIGH TIDE LINE AS A JURISDICTIONAL LIMIT

The extent of the Corps' power stems from section 403 of the Rivers and Harbors Act which makes it unlawful to

(1) create an obstruction to the navigable capacity of any of the waters of the United States;

(2) build any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty or other structures in any port, haven, harbor, canal, navigable river or other water of the United States outside of established harbor lines or where no harbor lines have been established; or

(3) excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of any port, haven, harbor, canal, or of the channel of any navigable water of the United States, without approval from the Army Corps of Engineers.

Nowhere in the Act is there any reference to the topographic location of activities that may cause a prohibited obstruction to navigable waters. Prompted by the silence in the Act and the actual prior practice of the Corps, the defendants in all three cases argued that activities conducted above MHTL are not within the Corps' jurisdiction. It should be noted that location of MHTL is, in fact, the litmus paper test for determining both the limit of admiralty jurisdiction over tidal waters and the boundary of tidal water for property law purposes. The petitioners had a further basis for

99. 526 F.2d 1293 (5th Cir. 1976).
100. 526 F.2d 1302 (5th Cir. 1976).
101. 526 F.2d 1306 (5th Cir. 1976).
their argument in dictum from an earlier Fifth Circuit opinion concerning Joseph G. Moretti, Inc.\textsuperscript{107} In Moretti I, the court seemed to say that MHTL was the jurisdictional limit of the Corps. In United States v. Sexton Cove Estates, Inc.,\textsuperscript{108} the court negated Sexton Cove's argument that Moretti I was dispositive. The court pointed out that the unlawful activities under scrutiny in that case had occurred below MHTL.\textsuperscript{109} Furthermore, the Corps' policy of regulating only seaward of the MHTL was not determinative since that jurisdictional limitation was self-imposed.\textsuperscript{110}

The Fifth Circuit reasoned that the mere location or source of the operation is not wholly determinative of section 403 jurisdiction. The court concluded that the section's prohibitions are not assigned to a particular locale;

\begin{quote}
[Section 403] prohibits any obstruction to navigable capacity. There is no suggestion that an obstruction whose source is above MHTL escapes prosecution . . . . It prohibits the alteration or modification of the course, condition, location or capacity of a navigable water. There is not the slightest intimation that an alternation or modification whose source is above MHTL is any less an alteration or modification. There is nothing in the language of the statute nor the logic of its implementation which creates this barrier beyond which the Corps is ubiquitously powerless. Indeed, such a limitation would thwart the design of the statute. We concluded, then, that activities which occur shoreward of MHTL, absent Corps approval, may, within certain limitations, be within the prohibitions of the Act.\textsuperscript{111}
\end{quote}

The court was aided in its broad reading of the act by United States v. Republic Steel Corp.,\textsuperscript{112} where the United States Supreme Court expressly rejected a restrictive reading.

The test established by Sexton Cove focuses upon the effect on navigable waters, a factor the court found at least as significant as location. After reviewing the dredging operations involved,\textsuperscript{113} the

\begin{footnotes}
\item 108. 526 F.2d 1293 (5th Cir. 1976), noted in 31 U. MIAMI L. REV. ____ (1977).
\item 109. 526 F. 2d at 1298.
\item 110. Id. See also Hayer, Corps of Engineers Dredge and Fill Jurisdiction: Butressing a Citadel Under Siege, 26 U. FLA. L. REV. 19, 25 (1973).
\item 111. 526 F.2d at 1298-99 (footnotes omitted).
\item 112. 362 U.S. 482, 491 (1960).
\item 113. Sexton Cove was involved in dredging ten canals, five canals connected with waters which are clearly navigable, while the remaining canals were "landlocked." 526 F.2d at 1295.
\end{footnotes}
court determined that Sexton Cove’s action with respect to the five canals connecting directly to navigable waters was within the Corps’ jurisdiction since those waters “affected” navigable waters. This was due to the alteration of the shoreline and the use of the canal as an access to navigable waters.114

Using similar reasoning, the court held that the five “plugged” canals were not within the jurisdictional grasp of the Corps.115 As to these canals, the “ebb and flow of the tide” test, utilized in determining navigability, was held not to be controlling in the context of section 403 jurisdiction. “If it [were], every hole dug in south Florida would be within the Corps’ jurisdiction . . . .”116

Weiszmann117 involved the dredging of two canals—one "connecting" and one “landlocked.” Based on Sexton Cove, the court reached an identical split decision. It also should be noted that liability in Weiszmann alternatively was founded upon a violation of the Federal Water Pollution Control Act.118 “Dredged spoil” fits within the term “pollutant”119 and the penalties can be quite severe. “The FWPCA provides for penalties of up to $10,000 per day of each violation . . . .”120 Much of the significance of United States v. Joseph G. Moretti121 lies in its concise explanation of the holding in Sexton Cove:

[T]he Corps may under certain circumstances exercise jurisdiction over dredging and filling operations above MHTL under Section 403 of the Rivers and Harbors Act. Prerequisite for such jurisdiction are factual circumstances showing some effect upon navigable waters, some alteration or modification of either course, location, condition or capacity of those waters.122

Perhaps this trilogy’s most significant development is that the Corps’ new attitude may forewarn further jurisdictional revision. At the same time, the Fifth Circuit’s disavowance of its dictum in

114. Id. at 1298-99.
115. Id.
116. Id.
120. Weiszmann v. District Eng’r, U.S. Army Corps of Eng’rs, 526 F.2d 1302, 1304 (5th Cir. 1976).
121. 526 F.2d 1307 (5th Cir. 1976).
122. Id. at 1309.
Moretti I, that no jurisdiction lay over dredge and fill operations shoreward of the MHTL, may foretell a judicial disposition toward recognizing an even larger sphere of Corps jurisdiction.

2. RESTORATION ORDERS

The Sexton Cove Estates trilogy, as noted at the outset, also sets valuable precedent concerning restoration orders as relief for violations under section 403 of the Rivers and Harbors Act. The propriety of such orders was before the Fifth Circuit in all three instances but what was lacking was "a factual record establishing that the court's choice of the specific restoration ordered was based upon a comprehensive evaluation of the environmental factors involved and the practicalities of the situation." The Fifth Circuit, therefore, vacated the restoration orders in all three cases pertaining to activities conducted within the Corps' jurisdiction. While specific relief was in issue, the general authority of district courts to direct restoration under section 406 of the Rivers and Harbors Act was not seriously at issue since that authority had been upheld in Moretti I.

In Sexton Cove, the court explained the need for a hearing on the issue of restoration: "The full effects of any environmental disturbance are difficult to measure. Attempts to reverse such effects and restore the environment to its natural state carry with them no guarantee of success." Since successful environmental rehabilitation is uncertain, the landowners should be permitted adequate opportunity to present their evidence and contentions regarding restoration.

The factors which district courts should consider in fashioning restoration orders are: (1) the nature and extent of the environmental disturbance; (2) the feasibility and likelihood of successful environmental restoration; (3) the maximum obtainable environmental benefits; and (4) equitable considerations that may temper the appropriate relief. While preserving the district court's authority to formulate an order conferring the maximum environmental benefits, the court's decision seemingly would prevent restoration orders

123. Id. at 1504.
124. 526 F.2d at 1301, 1307, 1311.
126. 526 F.2d at 1301.
127. Id.
128. Id.
requiring remedial undertakings unless accompanied by specific environmental benefits.

**B. State Regulation**

1. APPLICABLE STANDARDS

*Sexton Cove Estates, Inc. v. State Pollution Control Board* involved the propriety of the Board's denial of the landowner-petitioner's application for an after-the-fact certification that excavation of its upland canals would not violate the water quality standards of connected navigable waters. The Board's refusal to grant the certification was accompanied by its determination that petitioner also was in violation of another law—section 403.087(1), which prohibits the operation, maintenance, construction, or modification of a stationary installation that reasonably would be expected to be a source of water pollution. The standards established by section 403.087(1), however, became effective after petitioner's application had been filed. The First District Court of Appeal remanded with directions to grant or reject certification on the basis of standards in existence at the time the application was filed.

Pretermitting any issue as to the propriety of the new standards, the court explained why an application should be measured by standards existing at the time of application. "It is well known that many installations, such as those dredged by the petitioner, which have been completed down through the years in the development of waterfront land in Florida would not meet the standards now in existence."

While petitioner acted at its own peril in not obtaining a permit prior to dredging, the peril did not include imposition of standards adopted subsequent to filing an application. The dissent argued that respondent honestly could not grant the requested certification, that no standards had been developed at the date of application and that the issue was potentially moot in view of pending federal proceedings.

129. 325 So. 2d 468 (Fla. 1st Dist. 1976).
130. FLA. STAT. § 403.087(1) (1975).
131. FLA. STAT. § 403.031(8) (1975).
132. 325 So. 2d at 470.
133. *Id.*
134. *Id.* at 470-71.
2. ARTIFICIALLY CREATED NAVIGABLE WATERWAYS

The extent of jurisdiction conferred by chapter 253 of the Florida Statutes over artificially created navigable waterways again was an issue before the District Court of Appeal, Third District, in 1976. In State of Florida Board of Trustees of the Internal Improvement Trust Fund v. Sea-Air Estates, Inc., the Third District had to decide whether a landowner who desired to dredge solely within artificially created waters must obtain a dredging permit pursuant to section 253.123(1) of the Florida Statutes. The case arose when the Board sought an order requiring Sea-Air Estates to replace the materials it had dredged from artificially created canals. By counterclaim, the landowner sought a declaratory judgment on the same issue.

In Jefferson National Bank v. Metropolitan Dade County, the court previously had held that a landowner seeking to fill beyond a duly established bulkline would be subject to the requirements of section 253.124. The court in Jefferson National Bank recognized no jurisdictional distinction under that section between natural and artificially created navigable waterways. The Board, relying on Jefferson National Bank, argued that no distinction should be made with regard to permit requirements for dredging in natural and artificially created navigable waterways. The court disagreed, however, holding Jefferson National Bank distinguishable since that case involved filling in state-owned navigable waters. Such fillings fall within permit requirements of another section which does not expressly exempt artificially created navigable waters from its ambit. Section 253.123, on the other hand, expressly provides that "nothing herein shall relate to artificially created navigable waters."

3. WRONGFUL REFUSAL TO GRANT A PERMIT

In Askew v. Gables-By-the-Sea, Inc., the District Court of Appeal, First District, reviewed a final judgment granting the
landowner a mandatory injunction compelling condemnation of its land by the state. The appellate court affirmed and adopted the trial court’s final judgement.

Earlier proceedings in the litigation resulted in a determination that the owner of bottom lands purchased from the state had been wrongfully deprived of the right to fill the submerged lands. The state’s revocation of a fill permit also had caused the landowner further damage through the loss of a federal permit for the intended operations.

The trial court, in fashioning a “make whole” remedy had ruled that the landowner was entitled to a state dredge and fill permit for a period equivalent to the time remaining under the previously revoked permit. Thereafter, the landowner sought the necessary permits to undertake the filling operations. Meanwhile, an application for a new federal permit was denied. According to the court, a contributing cause of the denial was the negative evaluation by several state agencies charged with ecological responsibilities, including agencies not parties to the litigation.

The court held that the landowner was entitled to a mandatory injunction requiring institution of condemnation proceedings. “[T]he state cannot ‘after selling submerged land to private owners deny such owners the right to use those lands in the only way in which private ownership can be of any value.’”

While the decision may be viewed merely as an inverse condemnation action, perhaps more interesting is the court’s consideration of the actions of non-party state agencies as contributing factors in the denial of the federal permit. Implicit in the court’s analysis is the recognition that an action against a single state agency may effectively bind all state agencies.

VI. MANDATORY PLATING AND THE RIGHT TO SELL

The Florida Environmental Land and Water Management Act of 1972 divided all Florida counties into two basic types: “regulated” and “unregulated.” A regulated county is one which has adopted a zoning ordinance or subdivision regulation, and an unregulated jurisdiction is one which has adopted neither. This

142. Id. at 61.
distinction becomes critical under the Act [chapter 380] because a "development of regional impact" (DRI) is not subject to the burdensome DRI process if (1) the development is in an unregulated county which does not adopt zoning or subdivision regulations within a ninety day period following the developer’s notice to the state land planning agency and local government agency with jurisdiction to adopt zoning regulations; and (2) the area is not declared an “area of critical state concern” within the same ninety day period.

Following the passage of chapter 380, many Florida counties enacted zoning and subdivision regulations, either to gain control and jurisdiction over a specific, pending development or in an overall effort to bring the county within the provisions of chapter 380. While some of these counties undoubtedly acted on their own volition, many others were prompted into action by the regional planning agencies for the various districts. These agencies were established to review pending developments of regional impact and generally to assist and advise local governments regarding planning and development problems. The various regional planning agencies have assumed many specific duties, including the promulgation and promotion of "boiler-plate" subdivision regulations for counties

146. A "development of regional impact" is "any development which, because of its character, magnitude, or location, would have a substantial effect upon the health, safety, or welfare of citizens of more than one county." FLA. STAT. § 380.06(1) (1975).

147. The designation "area of critical state concern" may be found only in the case of:
   (a) An area containing or having a significant impact upon environmental, historical, natural, or archeological resources of regional or statewide importance.
   (b) An area significantly affected by, or having a significant effect upon, an existing or proposed major public facility or other area of major public investment.
   (c) A proposed area of major development potential, which may include a proposed site of a new community, designated in a state land development plan. FLA. STAT. § 380.05(2)(a)-(c) (1975).

148. FLA. STAT. § 380.06(5)(c) (1975).

149. A "regional planning agency" is "the agency designated by the state land planning agency to exercise responsibilities under [Chapter 380] in a particular region of the state." FLA. STAT. § 380.031(13) (1975).

150. As to "areas of critical state concern," the agencies act in an advisory capacity to the state land planning agency and recommend areas that meet the criteria for "critical concern." FLA. STAT. § 380.05(3) (1975). The regional agencies also recommend to the state land planning agency the types of developments for designation as "developments of regional impact." In making the recommendations, the regional planning agency solicits suggestions from local governments within its jurisdiction. FLA. STAT. § 380.06(3) (1975).

The agencies also have the responsibility for preparing reports determining the status of proposed developments in its region. FLA. STAT. § 380.06(8) (1975).
which want to become "regulated" under chapter 380. Although there are variations among the various types of subdivision regulations, all basically set forth detailed procedures and requirements which must be met before a person may plat and sell his land.\textsuperscript{151}

Due partially to the ready assistance and zeal of the staffs of the regional planning agencies, forty-five of the sixty-seven counties had become "regulated" by the end of 1976. Of these, three counties enacted subdivision regulations during 1976, and seven other counties had zoning or subdivision regulations under active consideration at the end of the year, probably to be acted upon during 1977.\textsuperscript{152} Some of these subdivision regulations totally prohibit the sale of any lot of less than five acres until and unless the land has been formally platted.\textsuperscript{153}

\textsuperscript{151} The plat also is subject to the requirements of FLA. STAT. ch. 177, pt. I (1975).

\textsuperscript{152} The author obtained this information from the Division of State Planning and the Office of the Secretary of State, State of Florida.

\textsuperscript{153} Typical of such requirements is the following language taken from the "boiler-plate" edition of a set of subdivision regulations promulgated and promoted by the Northwest Florida Planning and Advisory Council for use by counties in Northwest Florida:

\textit{Subdivision} shall mean the division of a lot, tract, or parcel of land into two or more lots, plats, sites, or other divisions of land, any one of which is less than five acres except when the division results from inheritance or deed of gift. The term includes resubdivision and when appropriate to the context, relates to the process of subdividing or to the land or territory subdivided.

Sale or Transfer of Platted Land. No selling or transferring of land before approval and recording. It is unlawful for anyone being the owner or agent of the owner of any land to transfer, sell, agree to sell, or negotiate to sell such land by reference to, or exhibition of, or by any other use of a plat of subdivision of such land without having submitted a plat of such subdivision to the Planning Commission, obtained the Commission's approval as required by those regulations, and recorded such approved subdivision plat as required. If such unlawful use be made of a plat before it is properly approved and recorded, the owner or agent of the owner of such land shall be deemed guilty of a misdemeanor and shall be punishable as provided by law.

Selling of Land in Violation. Any contract to sell land in violation of this Article shall be voidable at the option of the purchaser and the purchaser may recover from such owner or agent of the owner any damages he may have suffered by reason of the violation of any of these regulations. Suit for such damages may be tried in any court of competent jurisdiction.

Enforcement and Penalties. No person or his agent shall subdivide any land before securing the Planning Commission's approval of a plat designating the areas to be sold or transferred.

All three of the subdivision ordinances enacted in 1976 contain similar restrictions against the sale of land without reference to a properly recorded plat Lake County, Fla., Ordinance
The primary problem with a mandatory platting requirement is that it constitutes an unreasonable and unconstitutional restraint on the right to alienate property. Since the statute of Quia Emptores\textsuperscript{154} gave each freeman the right to dispose of his property at his own pleasure, the right to freely alienate one's property has been recognized as an integral part of the right to own property. If a person cannot freely dispose of his land, he has been deprived of a large part of the value of such land.

The leading Florida case in this area is \textit{Kass v. Lewin}.\textsuperscript{155} In \textit{Kass}, the supreme court considered the validity of the platting statute,\textsuperscript{156} and held that: "the imposition of the burden of preparing and recording a plat on the owner of land as a condition precedent to his conveying same is an unreasonable and unconstitutional re-

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1976-2 (Jan. 28, 1976); Flagler County, Fla., Ordinance 1976-1 (Feb. 18, 1976); Suwannee County, Fla., Ordinance 76-01 (June 4, 1976)

154. 18 Edw. I., c. l. (1290).
155. 104 So. 2d 572 (Fla. 1958).

In pertinent part, this statute provided as follows:

Section 2. Whenever the verb 'to plat,' in whatever tense used, is employed in this Act, the same shall mean to divide or subdivide land into lots, blocks, parcels, tracts or other portions thereof, however the same may be designated.

Section 3. Whenever land comprising one acre or more is platted into lots, blocks, parcels, tracts or other portions, however designated, so as to comprise three or more such to the acre, a plat thereof shall be recorded in the Public Records of the county wherein such land lies.

Section 5. No lands shall be conveyed, leased or mortgaged nor shall any agreement be entered into providing for the conveyance, leasing or mortgaging thereof by reference solely to a plat thereof, unless such plat shall have been approved and recorded as provided by law.

Section 6. No conveyance, lease or mortgage or agreement to convey, lease or mortgage lands in violation of the provisions of this Act shall be recorded in the public records.

Section 20. Any and all such conveyances, leases or mortgages, or agreements to convey, lease or mortgage, or attempts to convey, lease or mortgage lands in violation of the provisions of this Act, made or attempted to be made hereafter, shall be void ab initio.

Section 21. Any sale of or offer to sell or contract to sell any lot, block, parcel, tract or other portion of land, however designated, within the purview of this Act, unless the provisions of this Act shall first have been complied with, shall constitute a misdemeanor, and the person, firm or corporation found guilty thereof shall be punished as provided by law. Each separate sale, offer to sell and contract to sell shall constitute a separate offense.
straint on the right to alienate property." In so holding, the court quoted with approval the following language from one of its prior decisions:

> It is not necessary that a plat or a map of a person's property showing lots and blocks be recorded before it can be sold. It may be more convenient to sell by lots and blocks as was shown by a recorded plat, but he may sell it by the inch, the foot, or the yard, and describe it by metes and bounds. The court further held that the provision under consideration placed "an unreasonable restraint on the right of alienation of property. The word 'property' in the fourteen amendment to the United States Constitution includes the right to acquire, use and dispose of it for lawful purposes, and the constitution protects each of these essentials."

In Prescott v. Charlotte County, the District Court of Appeal, Second District, considered the validity of an ordinance which prohibited the issuance of a permit for erection of a sign advertising the land for sale until the landowner had secured final approval of a plat of the property from the Charlotte County Board of County Commissioners. The trial court held the regulation valid because there was no requirement that the land be platted before it could be sold or offered for sale. In affirming, the Second District drew a clear distinction between the ordinance before it and the ordinance involved in Kass. The court pointed out that the only problem with the ordinance in Kass was that it required platting as condition precedent to the sale of property. Because the Charlotte County case did not contain such a restraint on alienation, the Second District held the ordinance constitutional.

In light of these cases, it is remarkable that the various regional planning agencies would continue to recommend the enactment of subdivision regulations which require platting as a condition precedent to sale. It is even more remarkable that so many counties, and their attorneys, approve and sanction such ordinances. Under Kass, which is still the law of Florida, it is clear that ordinances such as

157. 104 So. 2d at 577.
159. 104 So. 2d at 578, citing Buchanan v. Warley, 245 U.S. 60 (1917).
160. 263 So. 2d 623 (Fla. 2d Dist. 1972).
161. The trial court relied on Garvin v. Baker, 50 So. 2d 360, 365 (Fla. 1952) for its reasoning.
the one promulgated by the Northwest Florida Regional Planning and Advisory Council, as set forth above, could not withstand a constitutional attack. Under that ordinance, there is no way a landowner can sell or offer to sell any tract of land of less than five acres without first going through a costly and time consuming platting approval process. For example, if a person owned ten thousand acres and simply wanted to sell four acres, he would still have to file a formal plat. In view of the many technical requirements of the ordinance, as well as those found in the Florida Plat Law, the cost to an individual landowner to sell one lot could be several thousand dollars. This restraint on alienation clearly appears to be unconstitutional under existing Florida law.

The state planning agency and the various regional planning agencies should make an effort to revise the subdivision regulations currently being promulgated to remove the above-referenced mandatory platting requirements. In so doing, the planning staffs should distinguish between the landowner who is actually making a "material change in the use or appearance of" his land, and the landowner who is simply conveying property by metes and bounds descriptions without the dedication of any roads or easements, and without reference to any plat. Sufficient safeguards in the area of subdivision control law exist to prevent large scale misrepresentation including the failure to provide promised improvements. It is unnecessary to include every conveyance when the primary purpose is to assure the orderly planning and development of normal, residential subdivisions. If such changes are not made, either by the planning agencies or the counties, the time soon will come when the mandatory platting requirements are declared invalid as an unrea-

162. See note 153, supra.
163. If the county ordinance requires platting, the landowner is then subject to the additional platting requirements of Fla. Stat. ch. 177, pt. I (1975).
164. This is part of the definition of "development" in Fla. Stat. § 380.04(1) (1975).

For example, it must be shown that the lands meet or will meet the requirements set by local governing bodies with regard to public roads and streets, drainage, electric utilities, etc. Fla. Stat. § 478.121(d) (1975). Teeth are added to the various requirements since willful violation of any provision of chapter 478 results in commission of a felony of the third degree. Fla. Stat. § 478.211 (1975).
sonable and unconstitutional restraint on the right of alienation. 166

166. While reconsidering the mandatory platting ordinances discussed in this article, the state planning agency should also consider the validity of FLA. ADMIN. CODE § 22F-2.10(2)(a), which defines "residential development" as "the subdivision of any land attributable to common ownership into lots, parcels, units or interests . . . ." The administrative rule is apparently invalid in that it exceeds the statutory definition of "development" in FLA. STAT. § 380.04 (1975), which requires "the dividing of land into three or more parcels" and "the making of any material change in the use or appearance of" the land.