PLATTED LANDS: A STATEWIDE PROBLEM

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I.

INTRODUCTION

One of the most difficult and complex problems facing growth management in Florida is the existence of millions of platted, but vacant lots located in "paper subdivisions", on environmentally sensitive lands, in subdivisions remote from available public facilities, or in obsolete subdivisions with small lots and no amenities or with lot and block patterns that are not aligned with market demands.

No one has undertaken the laborious task of compiling a list of these lots statewide. (Florida State University's FREAC is presently conducting a study of the problem, beginning with Alachua, Lee, Collier, Monroe and Hernando counties but the data is not yet complete.) It is possible, however, to estimate the enormity of the challenge of "platted lands" from records compiled in a couple of counties. Those records indicate that the number of platted but vacant lots in the State of Florida is probably in the range of 2 to 4 million lots, with perhaps as many as 50% of those lots being "substandard" for one reason or another.

A detailed study of platted lots carried out in 1985 as a part of the Florida Keys Area of Critical State Concern planning program revealed that there were three vacant platted lots for

every lot on which a home had been constructed in Monroe County and that more than 75% of the vacant lots were substandard under the County's land development regulations in place at the time. Similar circumstances exist throughout the State; in many areas, such as Lehigh Acres, Port Charlotte and Cape Coral, the number of vacant platted lots is beyond comprehension.

II.

THE PLATTED LANDS "PROBLEM"

A.

OVERVIEW

The platted lands "problem" arises because even though many, if not most, of the vacant platted lots in the State of Florida are unsuitable for development under contemporary standards, ~~yet~~ lot owners generally expect that the platting of a lot creates an irrevocable right to develop a home on the lot. This belief is not consistent with well-accepted principles of law and often conflicts with established public policy.

The platted lands "problem" is really a complex set of problems that depends on the character of the lots, the character of the subdivisions in which they are located, the nature of the land that has been platted, and the land's relationship to available public facilities. Some platted lands are a problem because the lots in the subdivision are too small to meet minimum lot size requirements for on-site wastewater treatment facilities. Others are a problem because the land on which they are located is underwater for all or much of the year. Still

other lots are a problem because the subdivisions in which they are located have no improvements and are subdivisions in name only -- or "paper subdivisions." Whatever the reason, the platted lands "problem" involves literally millions of platted vacant lots, the development of which is inconsistent with the orderly growth and development of the State.

In order to understand the nature of the platted lands problem in Florida, it is necessary to review the origins of the problem and how there came to be millions of vacant platted lots. Around the turn of the century, Florida was "discovered" by entrepreneurs like Henry Flagler who recognized the potential of the State as a tourist "mecca" and opened it to tourists and tourist development. One of the earliest aspects of the opening up of the State was the platting of lands as a means of creating a saleable commodity that could be sold to visitors. In Florida, the notion of land as a commodity was elevated to near apostolic status and literally hundreds of thousands of acres of land were divided into individual lots for sale to unwitting tourists.

> *West of the field the road passes (L) a large boom-time subdivision that did not progress beyond the blueprint stage, the entrances to its boulevards-to-be still marked by large stucco gate posts. Such subdivisions are typical of many so-called 'bus' developments, to which people were brought in buses from all parts of the State to be fed, entertained, and 'high pressured' into buying small tracts of raw prairie land, represented as ideal for truck farms.*

The WPA Guide to Flordia, intro by John I. McCollum (New York: Pantheon Books, 1984).

In the introduction to their model subdivision regulations Freilich and Levi describe another aspect of the "land sales" mentality that bequeathed to the State of Florida hundreds of thousands of vacant platted lots:

> *[L]and speculation brought to the American scene orators of unusual distinction. One of the most exotic stories is about El Camino Real, a street two hundred and nineteen feet wide to accommodate twenty lanes, yet only one-half mile long, leading to the storied city of Boca Raton, Florida. High pressure sales (by orators no less famous than William Jennings Bryan) resulted in skyrocketing prices of the lots until the bottom dropped out during the infamous Florida bust of the 1920s.*

Freilich and Levi, Model Subdivision Regulations, (ASPO 1975). The WPA Guide to Florida recounts: "Lots in the outskirts originally priced at $250 sold for $1000, and then soared to $50,000." The trouble is, that when the bust came, the property was improvidently parcelized and, in many cases, still is today. Not all of the lands divided into lots in the reat real estate division in the 1920's remain vacant and unused, however, and indeed development in many parts of the State continues to adhere to patterns established many years ago.

Not all of the platted lands problems of the State were created during the Florida land boom of the 1920s. When measured in sheer numbers, the bulk of the vacant platted lands that make up the "problem" came into being during the 1950s and 1960s as a result of lot sales programs undertaken on a scale that is very hard to appreciate. One need only fly from Naples to Tampa, where vacant platted subdivisions stretch to the horizon in

almost every direction, to understand the enormous success land sales operations had in the State during this period. Typical of the results of these land sales operations is Lehigh Acres in Lee County. The subdivision, if subdivision is an appropriate term for 80 square miles of lots, contains 132,000 lots of which more than 116,000 have been sold to individual purchasers. However, only 7000 homes have been constructed in Lehigh Acres during its 30 year existence. In Collier County, the developr of Cape Coral platted more than 122,000 acres into Golden Gate Estates. Port Charlotte, Cape Coral, and other major subdivisions in Charlotte, Lee, and Sarasota Counties cover more than 373 square miles of land platted into more than 885,000 lots.

There is no way to define precisely the scope of the improvidently parcelized land problem in Florida except to survey each of Florida's 67 counties. It is nevertheless possible to state confidently that the problem is widespread and probably exists in every county in the State. While not every county will have a Cape Coral; indications are that vacant, unimproved or obsolete subdivisions are found in every corner of the State.

B.

THE "PROBLEMS"

1.

EXCESS DENSITY

One of the most common problems with vacant platted lands arises when the municipality or county in which the lands are

located discovers that it cannot provide essential public facilities to all of the lots. The level and density of development in a community should be related to the ability of public facilities to serve that development. "Excess" density occurs when the level of development outstrips the capacity of public facilities and the natural environment.

The issue of excess density is illustrated by the experience of Sanibel Island. In 1974, after decades of benign neglect by Lee County, the island was incorporated as the City of Sanibel and the City's charter required the preparation of a comprehensive plan to guide the future of the City. A careful study of the island's built and natural resources revealed that the island, connected to the mainland by a low-lying two-lane causeway, had a discrete carrying capacity and that the continued development of vacant lands at densities typical of Lee County, including previously platted subdivisions, would easily exceed the island's capacity for hurricane evacuation and potable water and would threaten the delicate freshwater lens on which the native environment depended. In response, the City of Sanibel substantially reduced permitted densities throughout the island, particularly in subdivisions that were remote from public facilities and had relatively few developed homes.

A similar situation arose in Monroe County when the planning effort for the Florida Keys Area of Critical State Concern revealed that the capacity of existing and planned facilities could only serve approximately 20,000 to 24,000 dwelling units.

Unfortunately, existing zoning would have permitted some 75,000 dwelling units on vacant, unplatted lands; there were more than 30,000 vacant platted lands in the County. Because it would not be responsible to allow growth and development to exceed the service capacity of public and private facilities, more than one half of the vacant lots were treated as acreage for density calculations in the resulting comprehensive plan and implementing regulations. This was only two-thirds of the number of vacant platted lots then existing in the County.

In Lee County, the home of Cape Coral and Lehigh Acres, there are some 350,000 vacant platted lots. According to a study by Lee County, only 37,000 of the lots had "reasonable access to existing water and sewer facilities" and only one half of the population that would be generated by the lots could be served by known sources of potable water.

Looking to the future, it is virtually certain that "excess density" will continue to be an issue for growth management in Florida. The sheer number of lots and the new statutory mandate for adequate public facilities guarantee that the capacity to serve vacant platted lands will be the subject of substantial concern and will be ripe for public and private intervention.

2.

ENVIRONMENTALLY SENSITIVE LANDS

Another problem with vacant platted lands is that when the lands were parcelized, there was little or no sensitivity as to

whether development of the land would disrupt sensitive and important features of the natural environment. The developers of many of the large-scale subdivisions platted during the 1920s, 1950s and 1960s were more concerned with creating investment opportunities than creating actual building sites. It should come as no surprise, therefore, that substantial numbers of vacant platted lots turned out to be unsuitable for development because the lands are not appropriate for residential development.

One notable subdivision in Monroe County, Buccaneer Beach Estates on Middle Torch Key, was platted and listed in the County's strip maps as a subdivision of 867 lots, but is in reality a 214-acre offshore mangrove island.

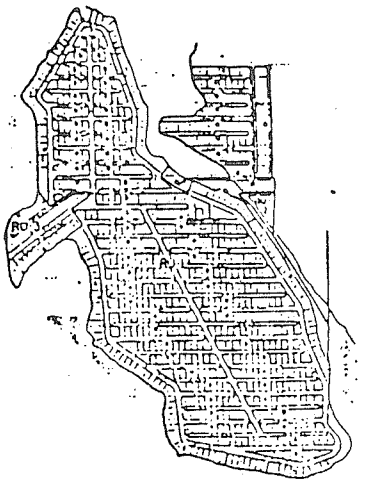

FIGURE 1

Figure 1 shows the plat of Buccaneer Beach Estates as the subdivision appears in the official records of Monroe County.

Figure 2 is an aerial photograph of the actual subdivision.

FIGURE 2

Indeed of the 30,000 vacant platted lots in Monroe County, more than 7000 of the lots were underwater or lands defined as wetlands by the State of Florida. Another 5000 lots consisted of lands that remained in their natural or native state and that were designated as environmentally sensitive in the Principles for Guiding Development in the Florida Keys Area of Critical State Concern.

In the East Everglades in Metropolitan Dade County, a substantial portion of a 244-square-mile wetland lying between Miami and the Everglades National Park has been split into 5 and 10 acre lots which were sold to investors as "just minutes from Dadeland," a slogan that was, while generally misleading, was nevertheless true for the owner of a helicopter. The carrying capacity of the East Everglades was, on the basis of a

comprehensive analysis of the environmental and hydrological character of the area, unable to support suburban or urban growth. There were nevertheless thousands of landowners who expected that they too would become rich when their lots became developable.

The Monroe County statistics recited above indicate that subdividers, at least historically, have paid little attention to the environmental sensitivity of land in laying out their subdivisions. And indeed, it was the practice in Florida for many, many years that the appropriate way of dealing with environmentally sensitive lands was to drain them, clear them or dredge and fill them, depending on the character of the resource and the steps needed to obliterate that character. As a result the State of Florida is littered with subdivision plats that purport to indicate lots where in fact there are wetlands, lakes or in some circumstances critical habitats. Obviously the use of these platted lots as actual homesites would be inconsistent with contemporary environmental ethics and in violation of many laws. Unlike the days when these lands were split into small parcels, public policy today recognizes the sensitivity and value of Florida's natural systems. Taking this value and sensitivity into account, development at the level envisioned by past divisions of land would hinder the state's ability to maintain a high-quality, viable natural environment.

3.

SUBSTANDARD LOTS

A familiar problem with improvidently parcelized lands is the existence of small lots which might be suitable for urban row houses or mobile homes but which establish an undesirable land use pattern in "suburban" Florida. More than 7,000 lots in Monroe County, 25% of the total vacant platted lands in the County, had lot sizes smaller than 5,000 square feet -- a typical 50 x 100 foot lot -- when the County's minimum lot size was 8,500 square feet and the Department of Health and Rehabilitative Services was recommending a minimum lot size of 10,000 square feet for the installation of a septic tank. Put plainly, the typical lot sales subdivision offered a small slice of the Florida real estate boom -- a very small slice and one that was often too small under contemporary market standards. Hundreds of thousands of lots have been platted in lot sizes of 5000 or fewer square feet. This lot size, typical of an urban lot, produces a land use pattern that is undesirable in sub-tropical, suburban Florida and is generally incapable of effective on-site wastewater treatment. Moreover these small lot subdivisions were typically designed for lot sales rather than lot use and therefore omit such normative subdivision elements as recreational facilities, access easements, and public facility sites. The developer of Cape Coral, presumably as a sales or promotional device, divided the land into 5000 square foot lots but entered deed restrictions limiting the number of homesites to

one home for every two lots.

4.

INADEQUATE FACILITIES

As suggested above in the description of Monroe County's platted lands problem, one of the major problems associated with improvidently parcelized land is the lack of adequate public facilities. The original subdivider often made no attempt to improve the land in any way. In other cases, roads were "cut" through the vegetation with a piece of heavy equipment and, in the larger subdivisions, roads were actually constructed. Unfortunately, those roads have not been maintained and what appears on an aerial photograph to be an improved road turns out to be weathered asphalt with four-foot-high scrub growing in the middle of the right-of-way. There is no compiled data source that indicates the magnitude of this situation. Nevertheless, it can be stated confidently that the mileage of such roads is nothing short of incredible.

LeHigh Acres and Cape Coral are classic examples of this situation. In Cape Coral, there are over 1,200 miles of roads that are now the responsibility of local government and more than 350 miles of canals. An INFORM study indicates that of the 505,977 platted lots in nine subdivisions (including Cape Coral and Port Charlotte), only 42,226 of the lots were "assured of being improved with paved roads, central water and central sewage disposal." Leslie Allan, Beryl Kuder, and Sarah L. Oaks, "Cape Coral," Promised Lands, Vol. 2: Subdivisions in Florida's

Wetlands (New York, Inform, Inc., 1977). As indicated above, Lee County has determined that its future potable water supplies will be sufficient to serve only about one half of the vacant lots in the County's subdivisions.

Inadequate facilities is not simply a problem of roads; these subdivisions have inadequate or no provision for water, sewer, police, fire, schools, and other facilities and services. Section after section of platted lands lie in remote areas where sewer and water are not available and where schools, police and fire are "available" only in the most liberal meaning of the word -- with 25- mile school bus rides and police and fire call response times measured in hours instead of minutes.

5.

OBSOLETE LAYOUTS

Another troubling aspect of improvidently parcelized lands is that the pattern of lots is often inconsistent with contemporary standards for community design. In other words, the tropical paradise that the tourist bought as a retirement dream is anything but paradise when homes are built on 5,000-square-foot lots that are arranged in a classic cookie cutter grid. Row after row of homes distributed in monotonous repetition are not conducive to the quality of life that immigrants to Florida desire. Such a pattern represents a time bomb that will explode in local government's face when the construction of homes on lots in these subdivisions reaches a level where the incompetence of a grid layout becomes apparent and real estate values plummet. How

can a local government invest millions of dollars in the capital infrastructure needed to provide adequate public facilities to these subdivisions, when the probable result of buildout is a land use pattern that is undesirable and likely to become an instant slum? Hyperbole aside, there are examples of this phenomenon in the State of Florida and elsewhere; the impact of such events can not be ignored in planning for Florida's future.

Obsolescence is not only a matter of lot size and layout. Modern subdivisions respond to the need for a sense of community and carefully tailor lots, road layouts and amenities to ensure that the development is attractive and desirable, not only to first-time purchasers and investors, but also to future generations of residents. In contrast, the typical lots sales subdivision, designed for lot sales, leaves much to be desired in terms of contemporary design and character. The grid pattern of Cape Coral is an exaggerated illustration of the undesirable land use pattern that is foretold by the platted lands "problem."

III.

LEGAL ISSUES

At the heart of the platted lands "problem" is the lot owner's expectation that the mere platting of a lot "vests" a right to build a home on the lot. The law does not always support that expectation and the question of whether the platting of a lot vests a right in the owner to use that lot as a home site

varies according to a variety of factual matters. The question is, in fact, in most cases more political than legal, and it can be stated as a general proposition that the status of a lot as "platted" carries no established right to develop, a circumstance that is underscored by the following passage from the Florida Statutes concerning the contents of the tax assessor's manual:

> .... Such [property appraiser] manual shall instruct that the mere recordation of a plat on previously unplatted acreage shall not be construed as evidence of sufficient change in the character of the land to require reassessment until such time as development is begun on the platted acreage.

§195.062(2) Fla. Stat. (1985). The general legal status of a platted lot is also a matter of oridnary constitutional law. After all a lot is nothing more than property and it is axiomatic that all property is held subject to valid exercises of the police power. It may therefore be presumed that a platted lot, being property which is held subject to the police power is amenable to changes in regulations like any other interest in property, a presumption that is borne out in the case law.

> This Court has never gone so far as to hold that a City will be estopped to enforce an amendment to a zoning ordinance merely because a party detrimentally alters his position upon the chance and in the faith that no change in the zoning regulations will occur. It is in our view an unwise restraint upon the police power of the government. All that one who plans to use his property in accordance with existing zoning regulations is entitled to assume is that such regulations will not be altered to his detriment, unless the change bears a substantial relation to the health, morals,

welfare or safety of the public.

City of Miami Beach v. 8701 Collins Ave., 77 So. 2d 428, 430 (Fla. 1954).

The legal status of a platted lot may also involve particular statutory protections (e.g. Chapter 380 Fla. Stat. 1985) and common law definitions of "vested rights" under the doctrine of equitable estoppel.

A.

CONSTITUTIONAL LIMITATIONS

Under contemporary jurisprudence, a land use regulation is presumed valid by the courts, and one who undertakes to challenge such an exercise of the police power has an "extraordinary" burden of proof. Assuming that an exercise of the police power satisfies the requirements of the Local Government Comprehensive Planning and Land Development Regulations Act and any other pertinent state law, there are three general measures of the validity of an exercise of the police power over the use of land: substantive due process of law, equal protection and just compensation.

1.

SUBSTANTIVE DUE PROCESS

Although the heyday of substantive due process is long gone, it is well-settled that the Due Process Clauses of the Fifth and Fourteenth Amendments of the U. S. Constitution require that an exercise of the police power bear some substantial relationship to the public health, safety and welfare. See e.g., Nectow v.

Cambridge, 277 U.S. 183 (1928) and City of St. Petersburg v. Aikin, 217 So. 2d 315 (Fla. 1968). In determining whether a regulation does in fact bear "some substantial relationship" to the public health, safety and welfare the courts are bound by the "fairly debatable" rule established in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926):

> If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.
>
> * * * *
>
> If the municipal council deemed any of the reasons which have been suggested, or any other substantial reason, a sufficient reason for adopting the ordinance in question, it is not the province of the courts to take issue with the council. We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot -- not to the courts.

272 U.S. at 388 and 393. Regulations violate substantive due process if they are "arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Euclid, 262 U.S. at 395.

Although the Court in Euclid stated that the Due Process Clause requires a "substantial" relationship to health, safety, and general welfare, the Supreme Court has since required something less than a "substantial" relationship. The current standard for substantive due process analysis is whether there is any conceivable rational basis reasonably related to promoting a legitimate public purpose. See, e.g., Williamson v. Lee Optical

of Oklahoma, 348 U.S. 483 (1955). This means that there are two steps of analysis involved in a substantive due process challenge to land development regulations: (1) finding a legitimate public purpose and (2) finding a plausible rational relationship between the regulation and that purpose.

In regulating platted lands, the state and local governments clearly have in mind a legitimate public purpose -- the protection of the public health, safety, and welfare. Land development regulations, including controls over the subdivision of land, are designed to control congestion, water pollution, the destruction of natural resources, and other problems that development can cause. These are legitimate purposes for regulation. See, e.g., Trachsel v. City of Tamarac, 311 So.2d 137 (Fla. 4th DCA 1975); Town of Indialantic v. McNulty, 400 So.2d 1227 (Fla. 5th DCA 1981); Moviematic Industries Corp. v. Board of County Commissioners, 349 So.2d 667 (Fla. 3d DCA 1977).

It would not be difficult to show that regulations increasing the minimum lot size and imposing other more stringent controls over the development of platted lands bear a reasonable relationship to these purposes. "There is a rebuttable presumption that exercises of the police power are reasonable related to the public health, safety, and welfare." City of Boca Raton v. Boca Villas Corp., 371 So.2d 154, 159 (Fla. 4th DCA 1979). While "this presumption can be overcome by substantial competent evidence," id., the reasonable relation test will be met to the extent that the government is able to establish that

the development of platted lands under the old regulations will have a negative effect on the public health, safety, and welfare. A challenge to the enactment of stricter development regulations for platted lands would have a difficult burden of proof.

2.

EQUAL PROTECTION

A challenge to stricter regulation of platted land based on the Equal Protection Clause of the Fourteenth Amendment of the U. S. Constitution is likely to meet a similarly difficulty. The Equal Protection Clause provides a check on the government's discrimination among different groups of persons in imposing regulations on their activities or in conferring benefits on them. As long as regulations do not discriminate on the basis of a "suspect classification," such as race, gender, or national origin, and do not impair a "fundamental right," such as the freedom of citizens of one state to move to another state, courts apply a deferential test similar to the test under the Due Process Clause. The differentiation between different groups of persons must bear a "rational relationship" to a "legitimate public purpose."

As under a due process challenge, controlling congestion, water pollution, the destruction of natural resources, and other problems that development can cause are legitimate purposes for differentiating among different groups of persons. See Arlington County v. Richards, 434 U. S. 5 (1977); Village of Belle Terre v.

Boraas, 416 U. S. 1 (1974). As under a due process challenge, the bases for distinction or line-drawing among different groups of persons need only be reasonably related to these purposes. See U.S. Railroad Retirement Comm. v. Fritz, 449 U. S. 173 (1980). "If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality.'" Dandridge v. Williams, 397 U.S. 471, 485 (1970), quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911). If the government is able to establish a plausible rationale for differentiating among different groups of persons in establishing a new scheme for regulating platted lands, such as the size of subdivisions subject to new development regulations or how long the owner must hold a subdivision plat approval before rights to develop under prior regulations "vest," an equal protection challenge will probably fail.

3.

JUST COMPENSATION

Few legal principles have been the subject of as much debate and disagreement as has the Just Compensation Clause of the Fifth Amendment of the U. S. Constitution: "... nor shall private property be taken for public use without payment of just compensation." What seems on its face a simple statement of rights in fact has been a nightmare for land use jurisprudence.

The U. S. Supreme Court admitted in Penn Central Transportation Co. v. City of New York, 438 U. S. 104, 124 (1978), that it has been unable to develop any "set formula" for deciding whether a "taking" has occurred when government regulates the use of land.

The key factors in the "taking" calculus have been defined by both the U. S. and Florida Supreme Courts in order to determine whether a land use regulation amounts to a "taking." In Penn Central, the U.S. Supreme Court identified three factors at the core of the analysis: (1) the character of the government action (i.e., whether the government action accomplishes a physical invasion of property), (2) the extent to which the regulation interferes with "reasonable investment-backed expectations," and (3) the economic impact of the regulation on the property owner. In Graham v. Estuary Properties, Inc., 399 So.2d 1374 (Fla. 1981), the Florida Supreme Court identified six factors at the core of the analysis, several of which coincide with the factors defined by Penn Central: (1) whether there is a physical invasion of the land, (2) whether the regulation precludes any reasonable economic use of the property, (3) whether the regulation confers a public benefit or prevents a public harm, (4) whether the regulation interferes with reasonable investment-backed expectations, (5) whether the regulation promotes the public health, safety, and welfare, and (6) whether the regulation is applied arbitrarily and capriciously.

The last two factors identified in Estuary Properties coincide with the test described above for violations of the Due Process and Equal Protection Clauses. Any government regulation that satisfies this test should as well satisfy these factors in a "takings" challenge.

Neither the U. S. Supreme Court nor the Florida Supreme Court has defined what amounts to a "reasonable investment-backed expectation," the interference with which constitutes a "taking." The cases indicate that at some point the owner's expectation that she will be able to develop or use the property in a certain way ripens into a constitutionally protected property interest. See, e.g., Ruckelshaus v. Monsanto Corp., 104 S.Ct. 2862 (1984). The determination of whether a "reasonable investment-backed expectation" exists may coincide with the determination of whether the property owner has a "vested right" to develop the property. See discussion infra regarding vested rights. If the owner has a "vested right," then she may also have a "reasonable investment-backed expectation." A regulation that prohibits the exercise of the "vested right" therefore may constitute a "taking" of property. Owners of platted lands that have "vested rights" to continue development of their property under the old zoning and building regulations therefore may be able to succeed in a "takings" challenge to new regulations that limit their ability to proceed with development.

In addressing the economic impact of a land use regulation on the property owner, it is clear that a diminution in property

value, standing alone, does not constitute a "taking." Penn Central, 438 U.S. 104; Euclid, 262 U.S. 365 (75% diminution in value because of regulation); Gilbert v. Haas, 605 F.2d 1117 (9th Cir. 1979), cert. denied, 445 U.S. 928 (1980); Moviematic Industries Corp. v. Board of County Commissioners, 349 So.2d 667 (Fla. 3d DCA 1977). The courts focus not on what is taken away by the regulation but on what is left. There is no "taking" as long as the owner is left with a "reasonable beneficial use" of the property. See Penn Central, 438 U.S. 104; Agins v. City of Tiburon, 447 U.S. 255 (1980). Accord HFH Ltd. v. Superior Court of Los Angeles, 15 Cal.3d 598 (Cal. 1975).

Just as the courts have not clearly defined what constitutes a "reasonable investment-backed expectation," they have not clearly defined what constitutes a "reasonable beneficial use." Several decisions by the U. S. Supreme Court and the supreme courts of other states indicate that a regulation need not leave the owner with the ability to sell or develop the property at all. In Andrus v. Allard, 444 U.S. 51 (1979), the U.S. Supreme Court held that no "taking" occurred where federal legislation prohibited the sale of articles made from the parts of endangered birds. The challengers in that case were dealers in Native American artifacts who were prohibited from selling articles made and purchased before the legislation took effect. Because the challengers retained the rights to possess, donate, and transport their property, the Supreme Court held that there was no "taking." 444 U.S. at 66. In Sibson v. State, 336 A.2d 239

(N.H. 1975), the New Hampshire Supreme Court held that no "taking" occurred where the state denied a permit to fill a salt marsh; the owners were left with the traditional uses of marshlands for wildlife observation, hunting, haying, and aesthetic enjoyment even though they were denied the ability to make a speculative profit from the property. Similarly, in Just v. Marinette County, 201 N.W.2d 761 (Wisc. 1972), the Wisconsin Supreme Court held that no "taking" occurred when a local ordinance limited the uses of shorelands to those that did not alter the natural state of the shorelands. The Florida Supreme Court cited Just with approval in Estuary Properties, 399 So.2d at 1382.

The owners of platted lands may claim that new regulations which keep them from developing their property any further, such as by prohibiting development on wetlands or by requiring them to sell their land to another person if any development is to occur, deprive them of a "reasonable beneficial use," The above cases demonstrate that the requirement that government regulation of land use leave the owner with a "reasonable beneficial use" does not mean that the owner must be able to profit from the property or to develop the property. If the owner is prohibited from building, she may be able to put the land to other uses, including selling the land to someone else.

Finally, if government regulation amounts to a direct physical invasion of the property, then a "taking" has occurred. See Kaiser Aetna v. United States, 444 U.S. 164 (1979); Loretto

v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). When the regulation accomplishes an actual physical invasion of the property, the legitimacy of the public purpose and the cost to the owner are irrelevant. The regulation therefore is invalid unless the government compensates the owner for the invasion. The owners of platted lands could claim that any government regulation requiring them to sell their land to someone else, such as to merge or combine lots to reach a new minimum lot size requirement, amounts to a "physical invasion" of the property. While such a forced sale may be a "taking" in some circumstances, the owner would receive "just compensation" in the fair market value paid by the buyer.

Another prong of the "takings" analysis concerns the use to which the property is put if there is in fact a "taking." The Fifth Amendment calls for any "taking" of property to be for a "public use." This has created controversy where governmental means have been used to transfer property to the hands of private parties other than the original owner. In these cases, the U. S. Supreme Court has determined that there is a "taking" for "public use" as long as the taking is a rational means to meet a legitimate public purpose, despite the fact that the government may simply be forcing a transfer of property interests from one private party to another. See Berman v. Parker, 318 U.S. 28 (1954) (land acquired by eminent domain then leased to redevelopers); Hawaii Housing Authority v. Midkiff, 104 S.Ct. 2321 (1984) (land condemned and sold in fee simple to tenants).

Accord Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981) (land condemned and conveyed to General Motors for construction of plant). If owners of platted lands face legislation that forces them to sell their lots to other owners, then the owners could claim that the regulation is a "taking" and that the "taking" is not for a "public use." The cases above, however, indicate that such a claim would fail as long as the regulation was reasonably related to the achievement of a legitimate public purpose. See discussion supra regarding due process challenges.

B.

VESTED RIGHTS

The State of Florida has not addressed the general issue of whether platted lots should be immune by statute from the effects of changing regulations. There is, however, the possibility that the owner of a lot or subdivision which has been platted and approved may be insulated from the effect of changes in land development regulations by the judicial doctrine of "vested rights" or "estoppel".

There is an important provision in Chapter 380, The Florida Land and Water Mangement Act, that provides vested status for previously approved subdivisions under particular conditions. The legal import of the statutory language has not been construed though Monroe County interpreted the portion of statute applicable to areas of critical state concern to mean that a lot

owner must meet the following standard, in addition to securing plat approval and registration of a subdivision, in order to have a vested right:

> *If a developer has by his actions in reliance on prior regulations obtained vested or other legal rights that in law would have prevented a local government from changing those regulations in a way adverse to his interests, nothing in this chapter authorizes any governmental agency to abridge those rights.*

In addition to the same language which applies to areas of critical state concern the statute also includes the following language that is pertinent to developments of regional impact:

> *For the purpose of determining the vesting of rights under this subsection, approval pursuant to local subdivision plat law, ordinances, or regulations of a subdivision plat by formal vote of a county or municipal governmental body having jurisdiction after August 1, 1967 and prior to July 1, 1973, is sufficient to vest all property rights for the purposes of this subsection; and no action in reliance on, or change of position concerning such local governmental approval is required for vesting to take place.*

Several other states have adopted statutes that bar, for a period of time, the application of new zoning and building regulations to platted subdivisions and grant the owner the right to continue development according to the zoning and building regulations that applied when the final plat was approved or recorded. N.J.S.A. 40:55D-52 (1985) (two year freeze, with possible extensions for final plat; three year freeze for preliminary approval with possible extensions);

Wash. Rev. Code 58.17.170 (1981) (five years from date of filing for record and three years after approval, unless a change in conditions creates a serious threat to the public health or safety in the subdivision); Mass. Gen. Laws Ann. ch. 40A § 6 (West 1985) (five years); 53 Penn. Cons. Stat. § 10508 (1982) (five years after plat approved and indefinitely once all required improvements are completed); Conn. Gen. Stat. § 8-26a (1984) (indefinite freeze; but if not completed work on an approved subdivision within five years after the approval of the subdivision plan, then the approval automatically expires and no further lots may be sold). At least one state has imposed a fixed term of expiration on the approval of a plat where the owner has failed to complete all work called for by the approval. Conn. Gen. Stat. § 8-26c (1978) (five years).

In Florida, where dramatic growth has resulted in substantial changes in land use regulations, the issue of vested rights has received frequent judicial consideration. The Florida courts have evolved a definition of those situations where a developer should be insulated from changes in police power regulations:

> *[T]he doctrine of equitable estoppel will preclude a municipality from exercising its zoning power where "... [A] property owner (1) in <u>good faith reliance</u> (2) upon some <u>act or omission of government</u> (3) has made such a <u>substantial change in position</u> or has incurred such extensive obligations and expenses that it would*

be highly inequitable and unjust to destroy the right he acquired. Sakolsky v. City of Coral Gables, 151 So.2d 433 (Fla. 1963)."

Hollywood Beach Hotel Company v. City of Hollywood, 329 So.2d 10, 15-16 (Fla. 1976) (emphasis added). Each element of this definition must be satisfied to demonstrate that a property owner's rights have vested.

1.

GOVERNMENTAL ACT

If a landowner claims a vested right to complete a development, he must be able to point to an affirmative act of the government in relation to his development proposal. The landowner could, for example, point to a building permit as creating a vested right to complete construction according to the regulations in existence when the permit was issued. See, e.g., City of Gainesville v. Bishop, 174 So.2d 100 (Fla. 1st DCA 1965); City of Hollywood v. Hollywood Beach Hotel Co., 283 So.2d 10 (Fla. 1976). Placing the property in a zoning district usually is not a sufficient governmental act to vest a right to develop the uses allowed in that district. See, e.g., City of Miami Beach v. 8701 Collins Avenue, Inc. 77 So.2d 428 (Fla. 1954); Franklin County v. Leisure Properties, Ltd., 430 So.2d 475 (Fla. 1st DCA 1983). Site-specific rezonings, however, have in some circumstances been considered sufficient if coupled with compliance with the other elements of the vested rights standard. See, e.g., Town of Largo v. Imperial Homes Corp., 309 So.2d 571 (Fla. 2d DCA 1975); Dade County v. Lutz, 314 So.2d 815 (Fla. 3d

DCA 1975).

In addition, the governmental act must be lawful in order for the landowner to be justified in relying on the act. An applicant for a permit is presumed to know the law and may not assert reliance on the misinterpretations or unauthorized representations of municipal employees in order to vest her rights. See, e.g., Miami Shores Village v. Wm. N. Brockway Post, 24 So. 33 (Fla. 1945); Corona Properties of Florida v. Monroe County, 485 So.2d 1314 (Fla. 3d DCA 1986).

2.

GOOD FAITH

"Good faith" is a difficult concept to describe and the courts have been reluctant to discuss what are essentially the inner motives of a developer. Instead, a court will often merely state without elaboration that a landowner has relied in "good faith" on a government act. This element is usually significant only in a case where a landowner or developer, aware of a pending ordinance that will further restrict his use of his property, proceeds in spite of the pending change. See, e.g., Sharrow v. Dania, 83 So.2d 274 (Fla. 1955); Franklin County v. Leisure Properties, Ltd., 430 So.2d 475 (Fla. 1st DCA 1983). Some courts in such a situation have characterized action taken with knowledge of pending changes in regulations to be in "bad faith".

3.

DETRIMENTAL RELIANCE

Not only must a developer rely in good faith on a

governmental act, but his reliance must be to his detriment if the new law is applied to the property. The courts generally interpret detrimental reliance as the expenditure of funds or incurring of obligations of such a substantial nature that the developer would suffer real injury if he were denied the right to proceed with the development. Expenditures considered by the courts include costs or obligations incurred during preliminary stages of development or costs of actual construction. Expenses in connection with preparations for development, such as preliminary design work or the purchase price of the land, usually are not sufficient to establish vested rights, even when such expenditures are in reliance on a government act. But see Town of Largo v. Imperial Homes Corp., 309 So.2d 571 (Fla. 2d DCA 1975). Most courts look to the "hard costs" for construction, see, e.g., City of Lauderdale Lakes v. Corn, 427 So.2d 239 (Fla. 4th DCA 1983), and require that the expenditures be related to the subject parcels, see, e.g., Franklin County v. Leisure Properties, Ltd., 430 So.2d 475 (Fla. 1st DCA 1983).

In any event, the mere expenditure of funds does not constitute detrimental reliance. If the developer's investment is reasonably recoverable through development permitted under the new regulations, then the expenditures do not constitute an injury. For example, a subdivider's investment in water mains, sewer lines, streets, and other improvements might not amount to an injury if new regulations require larger lot sizes; the improvements could be necessary and useful elements to any

subdivision. A different result might occur if the new regulations were to prohibit development altogether, with the developer forfeiting all investment.

4.

EQUITIES

The final issue in determining whether vested rights exist is whether it would be highly inequitable to deny a developer the right to complete the project. The question for a court is whether the government action to be barred is clearly and convincingly directed to achieve a demonstrable and compelling public interest. The alleged "detrimental reliance" is frequently weighed by the courts against the public interest; an estoppel or a "vested right" is not recognized unless the private hardship outweighs the public hardship. See e.g. Killearn Properties, Inc. v. City of Tallahassee, *366 So. 2d 172 (Fla. 1st DCA 1979)*

5.

APPLICATION OF THE VESTED RIGHTS STANDARD TO PLATTED LOTS

Only in a few cases have the Florida courts addressed the issue of what stage in the subdivision approval process the developer's or landowner's rights to develop the land vest. The judicial decisions from Florida and other states reveal that the vested rights doctrine does not imposed significant restraints on changes in regulations applying to vacant lands, especially where the property has not been improved with facilities.

In The Florida Companies v. Orange County, Florida, 411

So.2d 1008 (Fla. 5th DCA 1982), the plaintiff's predecessor-in-interest obtained preliminary plat approval and completed a substantial amount of work on site improvements that were required by the preliminary approval in order to receive final approval. This work included seventy-percent completion of the development's sewage treatment plant and the installation of lines to approximately one half of the lots. Before the plaintiff submitted the plat for final approval, the County passed a "growth management policy" which prohibited central sewage treatment systems within an area that included the plaintiff's subdivision. Based on this policy, the County denied final approval of the plat. The court held that the County was estopped from denying final approval of the plat because the County gave preliminary approval to the plat, which included the use of a central treatment system, and the plaintiff relied in good faith on that approval in incurring substantial expenditures to construct the sewage plant and lines. 411 So.2d at 1010-11.

It is important to note that the Florida Companies decision does not address the situation where the landowner has only received plat approval and has received no other affirmative governmental approval upon which he is entitled to rely. This contrasts with the decision in Compass Lake Hills Development v. State, 379 So.2d 376 (Fla. 1st DCA 1980), where the court held that the landowner did not have a vested right to complete the final two phases of a project without complying with the review procedures for Developments of Regional Impact (DRIs). The

statute instituting the DRI review process provided an exemption to developers who could show authorization to commence the development upon which there had been a reliance and change of position prior to July 1, 1973. The plaintiff's predecessor-in-interest received final subdivision plat approval before July 1, 1973 for the first four "units" of the project, but final subdivision plat approval for the final two "units" did not occur until after that date.

The plaintiff in Compass Lake argued that there had been "conceptual approval" of the entire project and that this approval vested its right to develop the final two "units" outside the DRI process. To show this "conceptual approval," the plaintiff relied on the plat approval for the first four "units," the County's agreement to accept all roads in the subdivision, the developer's agreement to pave a section of County road running through the property, the expenditure of $135,500 before July 1, 1973 and approximately $660,000 after July 1, 1973 for planning, platting, and surveying, and other expenditures in excess of $3,500,000 after July 1, 1973. The plaintiff could show no "master plan" which disclosed the manner in which the individual "units" of the subdivision were to be developed and which had received formal approval by the County. The court held that the plaintiff's evidence was insufficient to show a vested right under the exemption provisions of the DRI statute. 379 So.2d at 379.

While there may have been reliance and a change of position

on the alleged "conceptual approval" of the entire project, the court in Compass Lakes found no sufficient governmental act on which to justifiably base that reliance. The plaintiff had not received final plat approval for the last two "units" before July 1, 1983, nor had the plaintiff received County approval of a "master plan" showing what the developer intended to do with the land, and once the development was approved, what he was permitted to do. This emphasizes the importance of identifying the appropriate affirmative governmental act of a binding character which commits the government to apprcve full development of the property according to the owner's plans.

Similarly, the court in Pasco County v. Tampa Development Corp., 364 So. 2d 850 (Fla. 2nd DCA 1978) refused to estop the County from applying a zoning ordinance with more restrictive regulations adopted after the commencement of development and lot sales in a subdivision. The subdivision in question had not been approved by Pasco County because the county had no subdivision regulations when the land was subdivided; however, the master plot plan for the project was registered with the Division of Florida Land Sales. Over half of the lots in the subdivision that were affected by the new zoning ordinance provisions had been sold and substantial money had been spent on road construction and other costs. The court, however, stated:

> The mere existence of a present right to a particular use of land, whether derived from a less restrictive zoning ordinance or no zoning ordinance at all, is not a sufficient "act" of government upon

which to base equitable estoppel.

364 So. 2d at 853. Almost as an aside, the court noted that the order of registration with the State expressly stated that questions of zoning were the province of Pasco County.

The law of other states travels along a similar vein. Courts outside of Florida have consistently held that the approval and recording of a subdivision plat alone do not give the developer or landowner a vested right to complete the development without regard to subsequent zoning and building regulations and subsequent stages of permit approval. See, e.g., In re Appeal by Mark-Garner Associates, Inc., 413 A.2d 1142 (Pa. Commw. 1980); York Township Zoning Board of Adjustment v. Brown, 182 A.2d 706 (Pa. 1962). In Columbia Hills Development Company v. Land Conservation & Development Commission, 624 P.2d 157 (Or. App. 1981), the Oregon Court of Appeals held that the recording of a subdivision plat did not entitle the landowner to use the land "for what was obviously the intended purpose, given the lot sizes, at the time the plat was recorded, viz., for residential purposes." 624 P.2d at 160. The comprehensive plan and zoning ordinances adopted by the County after the recording of the plat therefore were effective to determine and regulate the permitted uses of the property.

In Avco Community Developers, Inc. v. South Coast Regional Commission, 22 Cal.3d 785, 553 P.2d 546 (Cal. 1976), the California Supreme Court held that the property owner had no vested right to complete development where it had received final

plat approval and a grading permit and had undertaken large expenditures for grading and other improvements. The court referred to:

> *the general rule that a builder must comply with the laws which are in effect at the time a building permit is issued, including the laws which were enacted after application for the permit.... A landowner which has not even applied for a permit cannot be in a better position merely because it had previously received permission to subdivide its property and made certain improvements on the land.*

22 Cal.3d at 795. But see Telimar Homes, Inc. v. Miller, *218 N.Y.S.2d 175 (App. Div. 1961) (developer who installed water system, roads, drainage system, and model homes acquired vested right against subsequent zoning ordinance which increased lot size requirements);* Gruber v. Mayor of Raritan Township, *186 A.2d 489 (N.J. 1962) (township estopped from rezoning property where it approved subdivision plans and developer detrimentally relied thereon). In* Blue Chip Properties v. Permanent Rent Control Board, *170 Cal. App.3d 648, 216 Cal. Rep. 492 (1985), the California Court of Appeals recognized that subsequent land use approvals are regulations independent of subdivision plat approval. Approval of a subdivision map therefore "does* not *guarantee that a building permit, if required, will be issued, as the building permit has an independent reason for existence." 216 Cal. Rep. at 499.* See also Simac Design, Inc. v. Alciati, *92 Cal. App.3d 146 (1979);* Hazon-Iny Development, Inc. v. City of Santa Monica, *128 Cal. App.3d 1 (1982). The court in* Blue Chip *framed this issue by asking: "assuming such a promise and*

reasonable reliance by a developer ... the developer has acquired a vested right, but a vested right to do what?" 216 Cal. Rep. at 498.

Some courts have even held that new subdivision regulations will be effective against property for which a plat is already approved and recorded. Florida courts have not addressed this issue. In Dawe v. City of Scottsdale, 581 P.2d 1136 (Ariz. 1978), the Arizona Supreme Court held, that where the platted lands remained vacant and unimproved, the owner had to develop the land in accordance with subdivision regulations adopted after the recording of the plat. Other courts have repeatedly held that a subdivision ordinance applies to lots on prior recorded maps which were unsold at the time of the ordinance's enactment. See Ziman v. Village of Glencoe, 275 N.E.2d 168 (Ill. App. 1971); Sherman-Colonial Realty Corp. v. Goldsmith, 230 A.2d 568 (Conn. 1967); Blevens v. City of Manchester, 170 A.2d 121 (N.H. 1961); State ex rel. Mar-Well, Inc. v. Dodge, 177 N.E.2d 515 (Ohio App. 1960); Caruthers v. Board of Adjustment, 290 S.W.2d 340 (Tex. Civ. App. 1956.

Of particular note for the platted lands problem is an increasingly prevalent theme in vested rights cases in general--the situation of the subsequent purchaser who argues that he is entitled to approval because of events which occurred prior to his purchase. Zoning is not a personal license of a landowner; rather, zoning by itself "runs with the land." Halifax Area Council on Alcoholism v. City of Daytona Beach, 385 So.2d 184

(Fla. 5th DCA 1980). Accordingly, one could argue that once vested rights have been established with respect to any given property, such rights inure to the benefit of successors-in-interest to title of such property. The fact that the successor took back the property from the original owner through foreclosure proceedings or by purchase should, according to proponents of this theory, in no way destroy the vested rights applicable to the land.

In Florida Companies v. Orange County, Florida, 411 So.2d 1008 (Fla. 5th DCA 1982), for example, the Florida Appellate Court ruled that even though the party asserting the equitable estoppel doctrine was not he developer of the real estate, but rather was a lender who obtained the project though foreclosure, such party may still invoke the doctrine of equitable estoppel against a governmental body. The lender had disbursed approximately $250,000 to the developer, in reliance upon a preliminary subdivision plat approval by the County, so as to allow for the construction of a sewage treatment plant and service lines. Subsequent to such disbursement, the County passed a "growth management policy" which prohibited the construction of private central water and sewer systems in certain areas. Based on this policy, the County Commission reversed its earlier ruling and denied approval of the developer's subdivision plans. The court ruled against the County, finding that it was equitably estopped to deny approval of the subdivision plan since the developer, as well as the

lender, had made substantial expenditures in reliance upon the county's preliminary approval of the project. See also, Jones v. U.S. Steel Credit Corp., 382 So.2d 48 (Fla. 2d DCA 1980) (Lender "stood in the shoes of the developer" after foreclosure and was therefore entitled to assert equitable estoppel doctrine).

However, the Florida courts have appeared to be willing to draw the line when the facts clearly show that the successor-in-interest made no reliance of its own on the actions of the government. See, e.g., Jones v. First Virginia Mortgage and Real Estate Investment Trust, 399 So.2d 1068 (Fla.2d DCA 1981); City of Parklane v. Septimus, 428 So.2d 681 (Fla.4th DCA 1983). And in Franklin County v. Leisure Properties, Ltd., 430 So.2d at 480, the court stated:

> We have neither been directed to nor found a case in which a successor in interest to the party claiming equitable estoppel has not independently in his own right incurred obligations or expenses in reliance on a representation of government in order to assert a Successful equitable estoppel claim. A successor in interest must show his own entitlement to the benefit of an estoppel and may not make such a showing by merely purchasing property.

An analysis of the law of Florida and other states allow some conclusions regarding the nature of the "vested rights" possessed by the owners of platted lands:

> 1. Where the owner has received a building permit or some other approval constituting a separate government act regarding the use of the property, providing all other elements of estoppel exist (good faith reliance leading to a substantial change in position that is not counterbalanced by the public interest), the government may be bound by those other approvals;

2. Where the owner has received final plat approval and has improved the property based on the plat approval, the government may be bound to recognize the continued validity of those improvements and the pattern of development or configuration of lots that they accommodate;

3. Where the owner has received final plat approval but has not improved the property, the government is not necessarily bound to recognize the division of property in the configuration identified in the plat; and

4. Where a subsequent purchaser can show no independent reliance and governmental act, the government will probably not be estopped from enforcing new regulations.

C.

STATUTORY FRAMEWORK FOR SUBDIVISION PLATTING

The platting of land in Florida is generally controlled by two statutes, the Local Government Comprehensive Planning and Land Development Regulations Act ("LGCPLDRA"), §§ 163.3161 et seq. and Chapter 177, Part I -- Platting.

1.

THE "LGCPLDRA"

Prior to 1985 the regulation of the subdivision of land in the State of Florida was controlled by a traditional subdivision enabling act, §§ 163.260 et seq.(repealed). Those provisions were repealed as a part of the Growth Management Act of 1985 and replaced with a very general authorization for the implementation of comprehensive plans. Indeed the only mention of the subdivision of land is found in the definitions of land

development regulations and permits:

> *"Development permit" includes any building permit, zoning permit, subdivision approval, rezoning, certification ... having the effect of permitting the development of land. §163.3164(7).*
>
> * * * *
>
> *"Land development regulations" means ordinances enacted by governing bodies for the regulation of any aspect of development and includes any local governmental zoning, rezoning, subdivision, building construction or sign regulations .... § 163.3164(22)*
>
> * * * *
>
> *Local land development regulations shall contain specific and detailed provisions necessary or desirable to implement the adopted comprehensive plan and shall as a minimum:*
>
> *(a) Regulate the subdivision of land;*
> *(b) Regulate the use of land and water .... § 163.3202(2)*

In other words the State's statutory framework for the "regulation" of the subdivision of land is limited in guidance to a mandatory requirement that the subdivision of land be regulated and that the regulation be consistent with the adopted comprehensive plan.

2.

CHAPTER 177

Chapter 177 is, in substance, a "Plat Act", that is an act which relates to the technical preparation of plat instruments -- monument locations etc. -- and is entirely unrelated to the character, location and magnitude of development. Chapter 177 of the Florida Statutes establishes

consistent minimum requirements for the platting of land. The statute establishes minimum standards for the consideration of plats, the minimum requirements for plats and the legal statuts of plats upon approval and recordation.

Under the statute, the recording of a plat establishes, as a matter of law, the identity of a piece of property. That identity will then be used whenever the land is subsequently conveyed. Every plat scheme submitted to an approving agency must show that title is in the name of the developer or the person who is dedicating land for streets or other public uses to the public. The current mortgage obligations have to be listed on the plat as well.

Every subdivision is required to have a unique legal name stated on the plat, a legal name that can not be the same or in any way confusingly similar to any name apprearing on any other recorded plat in the same county, unless the subdivision is an addition to an existing subdivision that is being developed by the same developer.

Before a plat is offered for recording, it must be approved by the appropriate governing body. A plat located solely within a municipality is approved by the municipal governing body; a plat located wholely within unincorporated areas is approved by the county governing body; and when a plat is located within more than one jurisdiction each governing body has exclusive jurisdictions to approve the plat as far as it is located within its boundaries, unless they have agreed to abide by one mutually

acceptable plat design.

Each local governing body must adopt its own subdivison regulations to further the general purpose of the statute. Chapter 177 states that every subdivision plat must be certified by a licensed land surveyor who represents that the land survey was made under his responsible direction, that the plat is accurate, and that the survey data is then verified by another land surveyor who is employed by the local governing body.

After approval of the subdivision plat by the designated local governing body, the plat must be filed for recording. All developers and mortgagees who have an interest in the land to be subdivided must execute a official dedication or ratify the dedication.

In a properly recorded plat all the streets and public areas shown on the plat will be deemed to be dedicated for the purposes and uses listed on the plat. This does not oblige the governing body to construct or maintain any dedicated land, except if it voluntarily assumes such a task.

When a land dedication states that the reversionary interest is reserved by the person who dedicated it and the owner thereafter conveys abutting land, the conveyance must show who has the reversionary interest unless the owner otherwise clearly provides identification. Reversionary interest in streets which are not held by the owners of abutting lots are unenforceable unless suit was instituted before July 1, 1973 to enforce the right.

To get a plat recorded, the plat should be submitted to the circuit court clerk of the county where the land is located. The clerk will maintain the originals in a vault and provide copies for the use of the public. Any maps and surveying monuments are protected from molestation or destruction by the law.

These plat filing instructions do not apply to Deparment of Transportation right-of-way maps or any other maps prepared and adopted by governmental entities. Such maps must be approved by the appropriate governmental authority and then they are recorded by the circuit court clerk of the appropriate county. The clerk puts them in special plat books, to be kept with the other plat books, and makes copies of the maps available to the public.

Plat maps must conform to detailed requirements, including those concerning production, labeling, scle, size, permanent reference monument placement, permanent control points, location description, title description, dedications, approvals, seals, survey data, contiguous property identification, and the purposes of all dedicated areas.

Unrecorded plats and maps may be kept by the clerk of the circuit court of a county in a separate book or other filing system. These unrecorded maps, describing the boundaries and subdivision of land, can be used for informational purposes only. It is not necessary that they comply with the recording requirements or indicate proper notes and bounds. They can not be construed as actual or constructive notice nor be used in conveyancing or in attempts to circumvent the lawful regulation

of land subdividing. The receipt and copying of such maps will not affect or impair the title to the property.

The land surveyor who was responsible for the survey and preparation of the plat may file an affidavit confirming the existence of any appreciable error or omission of data which may be discovered subsequent to recordation of the plat. The affidavit must indicate that he has resurveyed the property and found no evidence on the gound to conflict with the corrections as descirbed in the affidavit. The affidavit must describe the nature and extent of the error and what corrections should be substituted. It is the duty of the county clerk to record the affidavit and note it on the recorded plat. It will have no effect upon the validity of the plat.

In Florida, reference to any subdivision, line, or conrner of U.S. public land survey prevails over any description of land based on the Florida Coordinate System. Use of the Florida Coordinate System must be indicated on any map or other document and shall comply with the technical requirements contained in Chapter 177.

IV.

SOLUTIONS TO PLATTED LANDS "PROBLEMS"

There are a wide variety of solutions to platted lands "problems" that may be appropriate depending on the nature of the

problem and the extent to which the public and private parties involved wish to undertake bold and imaginative initiatives. The following matrix indicates the general usefulness of each solution with out regard to the financial and political aspects of each solution in a particular setting.

MATRIX OF PROBLEMS AND SOLUTIONS

	VACATION	REPLATTING	LOT CONSOLIDATION	TDRS	MANDATORY POOLING	ACQUISITION	SPECIAL ASSESSMENTS
EXCESS DENSITY	X	-	X	X	X	X	-
ENVIRONMENTALLY SENSITIVE LANDS	X	X	-	X	X	X	-
SUBSTANDARD LOTS	X	X	X	X	X	X	-
INADEQUATE FACILITIES	X	-	-	X	-	X	X
OBSOLETE LAYOUT	X	X	X	-	X	X	-

A.

VACATION OF PLATS

The vacation of plats that have been recorded according to the requirements of Chapter 177 is controlled by section 177.101 Fla. Stat. (1985).

Section 177.101 of the Statutes addressed two common situations when owners of subdivided land want to vacate a plat of their land: when a recorded plat conflicts with a perviously filed (but not recorded) plat of the same land under which no

lots were sold, and when a plat which has been filed but not recorded conflicts with another filed but unrecorded plat of the same property. In each case the earlier plat is vacated and annulled.

Until 1985, Section 163.280 provided that the owners of any subdivided land might file for a vacation and no survey would be required unless the governing body required a survey of the exterior boundaries of the land because the last survey was faulty or inadequate, or unless insufficient monuments were in position along the boundaries. The property owner would be required to make improvements, as a condition to approval of the vaction, in order to avoid depriving any owner of equivalent access to his property or to facilities to which he previously had access. In an owner-initiated vacation proceeding, no findings were required as to the suitability of the land or as to the provision of public services to it. There was no requirement that owner initiated vacations and reversions must conform to the comprehensive plan, but if the land was subject to zoning regulations, the governing body had to amend the zoning regulations according to the conditions which would exist after the vacation. Those provisions were repealed in 1985 and no comparable provisions have been enacted.

The following paragraphs summarize Section 177.101, which deals only with owner or developer initiated vacations, not those intitiated by the governing body. According to the Chapter 177

definitions, a developer means any person or legal entity who applies for approval of a plat under the provisions of the chapter. Only those with record title to the land are permitted to submit a plat.

When a subdivision plat has already been recorded and it is then discovered that the developer differently subdivided but did not convey, the same land under an earlier plat which was filed after the first plat was filed, the governing body of the county shall vacate and annul the earlier plat, or b) the owners of all the lots shown in the later plat scheme must agree to and approve the later scheme. The county clerk is required to note the annulment of the annulled plat.

When a subdivision plat of land located in the county is only filed, and then it is discovered that the developer has filed a second, more recent subdivision plat of the same land, the approving governing body must detemrine whether the filing and recording of the second more recent plat would materially affect the right of convenient access to lots previously conveyed under the earlier plat. If the owners and the developer of the land conveyed under the first plat so apply, and there is no material change to their right of convenient access, the governing body of the county is authorized to vacate and annul as much of the first plat as is included in the second plat.

The governing bodies of counties may vacate an entire plat ar any part thereof if it has been shown that the persons making application for the vacation are the fee simple owners and also

that the vacation will not affect the ownership or right of convenient access of persons owning other parts of the subdivision. Persons applying for vacations of plats must give notice of their intentions by publishing legal notice and attach proof of notice to the petition for vacation with certificates which show that all state and county taxes have been paid. A certified copy of a cash bond, together with a copy of the tax assessor's approval and the circuit court's order fixing the bond amount, may be substituted for the tax certificates. If the property is within corporate limits of a town or city, the appropriate council or commission must vacate the property as a condition to county approval. The prior section 163.280 also described the procedures whereby a governing body could order a vacation on its own motion. The plat had to be recorded at least 5 years before, and not more than 10% of the subdivision could have been sold. The governing body had to hold a public hearing and make findings that the proposed vacation would further the public welfare and would also conform to the comprehensive plan for the area. However, again section 163.280 was repealed in 1985 by the Growth Management Act. See generally, Masselli v. Orange County, 488 So.2d 904 (Fla. 5th DCA 1986).

A vacating resolution is not effective until a copy is filed in the circuit court and recorded in the county records. Resolutions to vacate have the effect of vacating all streets and alleys which have not become highways necessary for public use.

REPLATTING

One obvious way of overcoming the problems of an obsolete or antiquated subdivision is to replat the subdivision if all of the property in the existing plat is owned in fee simple absolute by a common owner or an agreement can be reached between disparate owners. This was the approach that was employed in the "Ocala" simulation project where the owner of an obsolete subdivision that was grandfathered under the provisions of section 380.06 Fla. Stat. reformatted the property into a contemporary development design. The issue for the developer was, of course, that the grandfathered status of the plat, particularly under the development of regional impact sections of Chapter 380 of the Florida Statutes, was an important asset and the loss of that status by replatting was too high a cost to pay for reformatting the property. The simulation, carried out as a cooperative, demonstration effort by the landowner, the Department of Community Affairs, the local government and the Joint Center for Urban and Environmental Problems of Florida Atlantic University and Florida International University, was legally accommodated by the Department of Community Affairs' statutory authority to enter into such agreements as are necessary to carry out the purposes of Chapter 380. The exercise provides a reasonable model for the design of a replatting solution to the problem of an antiquated or obsolete subdivision. The first step in the process was the assembly of the information necessary to definitively assess the facilities' needs of the existing subdivision and to assay the

opportunity for an alternative design. The next step was to formulate an alternative design that responded to the natural character of the land, the capacity of available facilities and contemporary land development design standards and market realities. When the resulting design was deemed acceptable by all interests, the necessary legal agreements were prepared and executed that provided for the protection of the existing development rights and expectations but allowed the developer to express those rights through the alternative, more desirable design. See generally, The Platted Lands Press, for a series of articles chronicling the simulation. (Volume I, Number 2 through Volume 1, Number 12)

The Ocala simulation is a somewhat unique example because of the involvement of the development of regional impact statute, though there are many platted lands problems that involve development of regional impact threshold developments. Nevertheless, the model is easily adapted to the local level. The elements of a successful replatting program, assuming unified ownership of the platted lands in issue, include:

- *a mechanism for protecting legally secure development rights in the existing plat;*
- *a structure for ensuring that the proposed replatting is responsive to whatever platted lands problems are created by the existing plat; and*
- *a legal vehicle for securing approval of the replatting.*

The recently enacted "development agreement" statute provides one structure for the efficient replatting of land. For

example, the owner or owners of a subdivision that involves one or more platted lands problems could approach a local government and propose to enter into a development agreement for the replatting of the problem plat. The agreement would recite the development rights of the owner or owners of the existing plat and specify the steps to be taken to effect a replatting. Importantly the agreement would provide for the possibility that a satisfying replatting can not be achieved and clearly set out the legal rights of the owner or owners in that eventuality. Otherwise the owner or owners of the subdivision are going to be very wary of entering into the replatting process, a disincentive that may be too much to overcome given the problematic nature of solving platted lands problems. The second element of the local replatting process would involve an adequate facilities analysis. Under the Local Government Comprehensive Planning and Land Development Regulation Act adequate facilities must be available to serve permitted development and there is no reason to go through the replatting exercise unless there are adequate facilities to serve the replatted subdivision. Third, the process should provide for an assessment of the proposed replat and the extent to which the proposed replat addresses the platted lands problems. And finally the process should provide for the approval of the proposed replat.

While it is not essential that the local replatting process involve the development agreement concept, though it is probably desirable given the skitterishness of the private sector when a

program involves risking what are otherwise protected or "grandfathered" development rights. It is also possible to simply include in a local government's platting or subdivision regulations a provision controlling the replatting of "problem" subdivisions. For example, an ordinance could provide for the designation of "problem" subdivisions and then establish a distinct review process for replatting of designated subdivisions. Whatever the technique, and local governments in Florida have substantial power over the use and development of land, the procedure must be simple enough not to be an obstacle to participation in the process and attractiveness to constitute an economically feasible alternative to the existing plat.

C.

STATUTORY SOLUTIONS

A few states have addressed by statute the problem of platted lands that are inappropriate under current development standards.

For land that has already been subdivided, it is not unusual for state statutes to allow the owner or owners to vacate the subdivision plat before a lot is sold, see, e.g., Va. Code § 15.1-481 (1964); Tex. Stat. Ann. art. 974a § 5 (1983), or after lots are sold, Va. Code 15.1-482 (1975) (can be done on motion of the governing body or on application of any interested person; issue on appeal would be whether irreparable damage would be caused by such vacation to any lot owner); N.M. Stat. Ann. § 47-

6-7 (1973); Tex. Stat. Ann. art. 974a § 5 (1983) (before or after sale vacation would require consent of all owners of lots); Wash. Rev. Code § 58.12.010 (1961) (on petition of a minimum of 3/4 in number and area of all owners). In Oregon, each agency or body that may approve subdivisions may review nonconforming undeveloped and unsold subdivisions (if approved prior to 1963 or, if approved after 1973, ten years after approval) in accordance with particular procedures. Or. Rev. Stat. §§ 92.205 - .245 (1973). The results of this review may include vacation of the subdivision if revision could not bring the subdivision into compliance with the comprehensive plan and land development regulations. In California, a local agency may require the vacation of a platted nonconforming subdivision if all owners consent or if there have been no improvements or if no lots have been sold. Cal. Gov't Code §§ 66499.11 - .18 (West 1975). A local agency may also require the merger of contiguous parcels held by the same owner in a platted nonconforming subdivision. Cal. Gov't Code §§ 66451.11 - .21 (West 1984).

Until 1985 Florida had a statutory provision permitting the vacation of subdivision when the plat had been recorded for at least 5 years and no more than 10% of the subdivision area had been sold as lots. Orange County's attempt to vacate a subdivision under this provision was thwarted by sales which occurred after notice of intent to vacate had been given. Masselli v. Orange County, 488 So.2d 904 (Fla.5th DCA 1986).

One of the ways the State could play a more direct role in

addressing the platted lands problem, while still allowing local government to devise there own techniques for dealing with the problem would be to amend the Local Government Comprehensive Plann and Land Development Regulation Act to require a platted lands element for all comprehensive plans. This element would be based on a detailed survey of subidivisions in each jurisdiction including an inventory of undeveloped, platted lands; a component that describes the availability of public facilities and the condition of on-site improvements; a characterization of the nature of the platted lands in terms of environmental sensitivity and soil conditions; a policy element establishing the local governments goals, policies and objectives in regard to platted lands and a strategy for implementing platted lands solutions.

D.

LOT CONSOLIDATION

One of the simplest ways to deal with a platted lands problem involving substandard lots or excess density is to simply require that lots be assembled or consolidated in order to meet minimum lot sizes. For example, notwithstanding the existence of 4,000-square-foot lots in a community, the community could adopt a minimum lot size requirement of 8,000 square feet; this would require a landowner to own the equivalent of two lots in order to get a building permit. This approach was successfully employed in remote subdivisions by the City of Sanibel's Comprehensive Land Use Plan and withstood a legal challenge to the

consolidation requirement. There are in fact innumerable examples of lot consolidation requirements from around the country and the concept should be viewed as common and accepted.

Nevertheless, there are a number of considerations that must be kept in mind in designing a lot consolidation program. The most important of these involves the lot owner who is unable to acquire additional land to meet the minimum lot size. For example, consider the owner of a 5,000-square-foot lot that is surrounded on three sides by lots on which homes already exist. A consolidation requirement or minimum lot size of greater than 5,000 square feet will prevent the lot owner from building a home on his lot. However, the fact that the owner cannot build a home on the lot does not necessarily mean that the regulations deprive the landowner of all beneficial use of his property. The lot may have substantial value to the adjacent homes as additional yard space; it is a common practice to acquire an additional lot to provide extra yard. The lot may also have value as a pocket park, communal pool, tennis court, or some other amenity. Consolidation or minimum lot size regulations often provide that a surrounded lot is not buildable as a matter of right. They also provide that if the landowner can demonstrate that he has made a bona fide offer to sell the property at a specified value, generally linked to assessed valuation, and has been unable to sell the lot, then the governing body may grant permission to develop a home if the body determines that there will be no adverse impact on surrounding properties or the community.

Another common concern encountered in lot consolidation efforts is the issue of common ownership by related persons. It is not uncommon for a governing body to "grandfather" or "save" individually-owned lots from lot consolidation requirements. The difficulty that arises involves adjacent lots that are owned by closely-related persons. What happens is that the owner of a number of contiguous lots purchased as an investment realizes that he will be required to consolidate his lots because they are not individually owned. In an attempt to avoid this result, the lot owner transfers one lot to his wife and one to a minor child. The purpose of excluding individually owned lots from new minimum lot size requirements is to avoid imposing an unnecessary hardship of having to acquire additional land in order to meet a minimum lot size. This hardship does not exist for the multiple lot owner by definition, an investor rather that a future homeowner) because the multiple lot owner already owns sufficient area to meet the new minimum lot size requirements. Ideally, such evasive tactics will be avoided by selecting a common ownership date (the date that common ownership subjects adjacent lots to consolidation or new minimum lot size requirements) that is very early in the regulatory amendment process so that there is no incentive to carry out sham transactions. However, if a later date, such as the effective date of the new regulations is selected, governing bodies often include in the definition of common ownership, ownership of adjacent lots by members of the same immediate family. The ideal definition should create a

rebuttable presumption where adjacent lots are owned by members of the same family; an owner could rebut this presumption by evidence that the acquisition and ownership of the lots is separate and distinct -- an "arms length" transaction.

Another practical aspect of lot consolidation regulations is the existence of Lots of many different sizes. Lot sizes in the Monroe County Area of Critical State Concern ranged, even within single zoning districts, from 4,000 square feet to more than an acre. If the purpose of lot consolidation is to eliminate excess density, a uniform new minimum lot size could impose substantially different hardships on owners of lots of different sizes. For example, a minimum lot size of 12,500 square feet would require the owner of a 4,000-square-foot lot to acquire two and one-half additional lots in order to build a single home. In contrast, the owner of a one-acre lot would be entitled to build 3 homes on his lot. In the Monroe County Land Development Regulations, the potential inequity of this situation was avoided or ameliorated by a provision that allocated one dwelling unit per two lots or 12,500 square feet of land, whichever area is smaller, provided that no lot would be entitled to more than one dwelling unit as originally platted.

Allocating density to previously platted lands is a complex issue where there is a substantial reduction in overall density as a result of a comprehensive reform to a community's land development regulations. Consider the substantial reduction in overall densities that resulted from the Monroe County

Comprehensive Plan. Overall densities on vacant acreage were reduced from approximately six dwelling units per acre to one unit per two acres, a substantial potential diminution in value. Contrast the owner of a one-acre lot, in many cases located directly across a street from raw acreage, who experienced no reduction in development expectations. The initial response to this question of equity, a response which the Board of County Commissioners eventually decided not to adopt, illustrates the issues and the opportunities inherent in a lot consolidation regulation. The allocation formula for distributing a share of the available carrying capacity of the Keys indicated that approximately 7,500 dwelling units could be allocated to the 30,000 vacant platted lots. Determining how to allocate those units in an equitable fashion involved consideration of the fact that platted lots of comparable size ranged in value from $5,000 to $250,000, that some lots were located in subdivisions that were largely built out while others were located in unimproved subdivisions, and that lot sizes varied from 2,500 square feet to ten acres. It was assumed that it would be appropriate for the Board of County Commissioners to allocate shares of the limited amount of density on the basis of lot owners' reasonable investment-backed expectations and that lot area, the percentage of build-out of the subdivision, and the level of installed improvements were indicative of realistic development expectations. In other words, a small lot in an unimproved subdivision and remote from other development had far less

realistic expectations than did a lot located in a fully improved, predominantly built-out subdivision.

Taking all of these factors into account, it was suggested that a formula should be derived based on a series of weighted factors that would be skewed toward larger lots in fully-improved, predominantly built-out subdivisions. For example, if a subdivision was built out only 25%, then the subdivision had a relative value that was one-third of a lot in a subdivision that was built-out more than 75%. Similarly, a lot of 4,000 square feet had a relative value of one fifth of a 40,000 square foot lot. Working with the total number of lots, the percentage build-out of existing subdivisions, and the size of lots, it was possible to establish a relatively equitable distribution of the limited development rights available for allocation, keyed to the relative reasonableness of a lot owner's development expectations.

E.

PROVISION OF PUBLIC FACILITIES

An obvious way of dealing with the inadequacy of facilities to serve a subdivision is to install the facilities. The problem, of course , is how to finance the required construction activity. One method would be to finance the needed improvements out of general revenues, although it is unlikely that such a course would be acceptable to other citizens and taxpayers who would pose the politically volatile question of why should the general

public subsidize those developments that did not provide the necessary improvements? In some cases impact fees will provide an adequate vehicle for the provision of needed improvements such as situatios where all that is required is additional treatment capacity or the extension of service mains to the subdivision. In most cases, however, impact fees will not be a sufficient financing vehicle because many of the facility deficiencies involve on-site improvements. Indeed the inadequacy of on-site facilities is generally a more common and serious problem than is the larger off-site question.

Perhaps the most equitable means of overcoming facilities deficiencies for a discrete area like a platted subdivision is through the levy of a special assessment. The concept of a special assessment is that the properties benefitted by an improvement receive a benefit that is particular and special to the property, as contrasted with an improvement of general benefit and that it is reasonable and fair to assess the benefitted properties for a pro-rata share of the cost of the improvements. For example the provision of a sewer main to serve a subdivision will benefit the owners of lots in the subdivision by making the lots developable and more valuable and therefore the owners of the lots should bear the cost of installing the improvements. By levying the costs in the form of multi-year assessments, the facilities can be provided by bond proceeds secured by the future assessments, a far less burdensome impact on the lot owner.

Under Florida law both counties and municipalities are authorized to levy special assessments for the installation of a wide variety of improvements. Although the vast majority of platted lands problems are found in unincorporated areas the granddaddy of the platted lands problems, Cape Coral, is an incorporated municipality.

1.

MUNICIPALITIES

The use of special assessments to pay for capital facilities in municipalities is controlled by Chapter 170 of the Florida Statutes. Section 170.01 provides:

> (1) Any municipality of this state may, by its governing authority:
>
> * * * *
>
> (g) Provide for the payment of all or any part of the costs of any such improvements [improvements are listed in §§(a) through (f)] by levying and collecting special assessments on the abutting, adjoining, contiguous, or other specially benefitted property.

The improvements which may be financed through special assessments include: roads, storm and sanitary sewers, drainage, potable water, off-street parking and mass transit, the kind of improvements that problem subdivisions generally need.

In order to levy a special assessment under Chapter 170 the governing authority must declare by resolution the improvements that are to be installed, including the location of the improvements and the allocation of costs to the general fund, if any, and to special assessments. The resolution must also include

a declaration of the properties that are to be subjected to a special assessment, a declaration that may be in the form of an assessment plat attached to and incorporated in the resolution. The resolution is also required to set out the total cost of the improvements, including financing costs.

Thereafter the governing body is required to publish notice of the proposed special assessment and to then prepare an assessment role that identifies each property to be assessed and the benefit and assessment against each property and, if the assessment is to be paid in installments, the number of annual assessments. Upon completion of the assessment role the governing body is required to fix a time at which the owners of property proposed to be assessed may be heard in regard to the proposed assessment. Eventually, after disposition of objecions and appeals, the assessments are levied and may be bonded up to the amount of the liens that are assessed for the cost of the improvements.

An important aspect of the special assessment concept is that the property assessed must receive a special, as distinguished from a general benefit, from the programmed improvement and the amount of the assessment can not exceed the value of the assessment. Traditionally, and § 170.02 specifies that special assessments are to be levied on the basis of some relative quantitative value such as front footage for roads:

> *Special assessments against property deemed to be benefitted by local improvements ... shall be assessed upon the property specially benefitted by the improvement in proportion*

> *to the benefits to be derived therefrom, said special benefits to be determined and prorated according to the front footage of the respective properties specially benefitted by said improvement, or by such other method as the governing body of the municipality may prescribe.*

In other words any equitable, quantifiable method of apportionment is likely to be acceptable provided there is some reason to the apportionment methodology. In Rinker Materials Corporation v. Town of Lake Park, 494 So. 2d 1123 (Fla. 1986) the Town of Lake Park adopted a resolution authorizing the levy of a special assessment to finance "roadway, drainage, water, and sewer improvements in an area of the Town described as special assessment Improvement District 1." The assessments were prorated, not on a front footage basis as originally planned, but on a square footage basis that was apparently not satisfying to a landowner whose assessment was $402,736 versus $44,110 under the two methods of proration. The appellate court rejected the property owner's challenge.

> *Finally, we find that the assessment of Rinker's property was not arbitrary. At the trial, the project engineer testified that in his opinion the benefits to be derived by the property owners from this project would be access to their property, access to utilities and use of utilities. He found that since these benefits depended upon the size of the property instead of its footage, the more appropriate method of assessing the owner's properties would be the square-footage basis instead of the front-footage basis. The square-footage basis apportions the total amount of the assessments among the owners on the basis of the total acreage or size of their properties. The front-footage basis apportions the assessment on the basis of the length of the owner's properties fronting the*

> rights of way. The witness stated that he recommended to the Town Council that it approve the square-footage basis with the modification reducing the assessment on Rinker's property by $50,000 to reflect that three acres of its property might be developed as a right of way. Viewed in the light most favorable to the Town Council, we find this testimony dispels any notion that the Council acted in an arbitrary manner.

494 So. 2d at 1126 (emphasis added).

In the context of a platted lands problem, the apportionment of improvement costs on the basis of lots would seem to relatively obvious in light of the liberal standard applied by the Rinker court.

2.

COUNTIES

The authority of counties to employ special assessments is not as precisely controlled as is the authority of municipalities, nevertheless it is clear that the counties of the state have the requisite authority. Section 125.01 of the Florida Statutes, Powers and duties provides that:

> The legislative and governing body of a county shall have the power to carry on county government. To the extent not inconsistent with general or special law, this power includes, but is not restricted to:
>
> * * * *
>
> (r) Levy and collect taxes, both for county purposes and for the providing of municipal services within any municipal service taxing unit, and special assessments ....

(Section 125.01 (q) provides that counties may create municipal service taxing units and finance improvments with "funds derived

from service charges, special assessments ....") Examination of the case law controlling special assessments levied by counties are subject to the same general limitations that are contained in Chapter 170.

3.

SPECIAL ASSSESSMENTS FOR PLATTED LANDS PROBLEMS

The use of special assessments to overcome platted lands problems is practically self-evident. The concept is simple. The improvements needed are identified and designed. The cost of the improvements, including the study and design costs are calculated and then apportioned among the property owners in the area benefitted -- the lot owners. In practice the local governing body would identify a platted lands problem and design an improvements program that would solve the problem. Consider for example a large lots sales subdivision with 20 year-old roads that were inappropriately constructed. From the air the subdivision looks like any other subdivision with fully paved roads stretching for miles between vacant lots; however, closer inspection reveals that the pavement is broken and eroded and plants have established themselves by sending roots down through the cracking and decomposing pavement. Needless to say the roads have to be improved (often the roads have been dedicated to and accepted by the local government). The cost of the road is apportioned among all of the benefitted lots, on a square foot or per lot or front foot basis, and an assessment is levied in sufficient annual installments to support the necessary bonds.

F.

ELIMINATION OF HOLDOUTS

The elimination of platted lands problems is a subject of substantial private sector interest; however, private initiatives are not effective where individual lots have been sold. That is so because the reassembly of the property usually encounters the "holdout", a lot owner who refuses to sell because he or she perceives that his or her lot will be ransomed by the private sector interest carrying out the reassembly. Land assembly activities in the redevelopment context have regularly encountered the holdout. The holdout's existence is a powerful disincentive to private solutions to platted lands problems. Even where "straw men" are used successfully to complete an assembly without creating a holdout situation, private assembly may be frustrated because the additional cost of a covert acquisition program defeats the economic viability of the assembly effort.

There are relatively few ways of dealing with the holdout outside of exercising the power of eminent domain. There is no doubt after Midkiff v. Hawaii Housing Authority, 104 S. Ct. 232 (1985), that the assembly of land for reparcelization is a legitimate purpose for exercising the police power, including the power of eminent domain. Use of the power of eminent domain to facilitate land assembly by local governments in Florida is obscured, however, by the existence of the Community Redevelopment Act. The Act, replete with a politically pejorative definition of "slum and blighted" areas, describes the procedural

and substantive requirements for the condemnation of land in order to eliminate "obsolete lot patterns and layouts."

Part III of Chapter 163 of the Florida Statutes provides that a municipality or county may create a community redevelopment agency (CRA). The prerequisite to establishing such an agency is a finding by the governing body that the area over which the agency has jurisdiction has one or more slum or blighted areas (or there is a shortage of affordable elderly housing) and that the rehabilitation, conservation, or redevelopment of such areas is necessary for the public health, safety, or welfare of the community. A CRA, once created, must prepare a redevelopment plan and the statutes set forth the procedures and contents for such plans. After a plan has been developed, the CRA may exercise broad powers to implement the plan, including the acquisition of property, by purchase and eminent domain.

While the problems of obsolete or substandard subdivisions may not have been the original focus of the legislature when this chapter was adopted, subsequent amendments to the definition of "blighted area" arguably render the provisions potentially useful in addressing the "platted lands problem." "Blighted area" means:

> An area in which there are a substantial number of slum, deteriorated, or deteriorating structures and conditions which endanger life or property or other causes or one or more of the following factors which substantially impairs or arrests the sound growth of a county or municipality and is a menace to the public health, safety, morals, or welfare in its present condition and use:

> *1. Predominance of defective or inadequate street layout;*
>
> *2. Faulty lot layout in relation to size, adequacy, accessibility, or usefulness;*
>
> * * * *
>
> *6. Diversity of ownership or defective or unusual conditions of title which prevent the free alienability of land within the deteriorated or hazardous area.*

Section 163.340 F.S. While this definition could be construed to cover the platted lands situation, the historical use of this device and the somewhat prejorative character of the Community Redevelopment Act, may well limit its usefulness.

G.

MANDATORY LOT POOLING

One of the more interesting potential methods of dealing with the platted lands problem is "mandatory pooling" based on the concept used for the unitized production of well fields. Under unitization, a single producer is designated as producer by a regulatory agency and the production of the entire well-field is carried out by the designated producer even though there may be many owners of interests in the field. Mandatory unitization statutes normally provide for a detailed designation process and strict controls on production activities to ensure that all owners of interests in the well-field receive a pro-rata share of the income from the unitized field. The following is a model statute that could be considered by the Legislature of the State

of Florida or by individual counties in the event the Legislature does not act to pre-empt the field.

LAND ASSEMBLY AND REPARCELIZATON ACT

Section 1. TITLE.

This Act is hereby entitled and shall be known as " The Land Assembly and Reparcelization Act."

Section 2. INTENT AND PURPOSE.

The purpose and intent of this Act is to provide a comprehensive process to deal with the problem of obsolete or substandard subdivisions and other improvidently parcelized land in order to facilitate orderly and responsible growth and development and in order to better achieve the purposes of the Local Government Comprehensive Planning and Land Development Regulation Act, s. 163.3161 et seq. The Legislature expressly finds and determines that obsolete and substandard subdivisions and other improvidently parcelized lands constitute a substantial obstacle to orderly and rational growth and that the provision of essential public facilities to such areas is inconsistent with sound planning and beyond the fiscal capability of the State of Florida and its citizens.

Section 3. DEFINITIONS.

"Administration Commission" means the body defined in Chapter 163.3164, F. S.

"Assembly" means the combination of one or more lots.

"Designating Authority" means any local government or the Administration Commission.

"Governing body" the body defined in Chapter 163.3164, F.S.

"Improvidently Parcelized" means land that has been divided into parcels, lots or blocks which conflict with current comprehensive plans, public policy,

development standards, and market trends.

"Local Government" means any county or municipality.

"Parcelization" means the division of land into one or more parcels of land, lots, blocks, or tracts.

"Person" means an individual, corporation, partnership or other legal entity, local government, regional planning council or the state land land planning agency.

"Qualified Developer" means any person with an ownership interest in a designated Land Assembly Area who has successful experience in real estate development and the financial resources to carry out a pooling program.

"Special or General Purpose Land Assembly Area" means an area designated for the purpose set forth in this act in accordance with the procedures set forth in Section 6 hereof.

"Substandard or Obsolete Subdivision" means a subdivision where the size, configuration, and standards of development of the lots do not conform to existing development regulations adopted by the local government with jurisdiction over the subdivision.

Section 4. LAND ASSEMBLY AREA DESIGNATIONS AUTHORIZED.

Any local government and the Administration Commission under the circumstances set out in Section 6D of this Act, are hereby authorized to designate any area of the State within their respective jurisdiction, either a Special Purpose or a General Purpose Land Assembly Area, provided that the designating body finds that:

A. The designated area is divided into parcels which prevent the orderly growth and development of the area; or

B. The designated area or a significant part thereof is a wetland or other natural resource of significance under the local comprehensive plan; or

C. The designated area is inappropriate for growth and development because it is remote from developed areas or is not adequately served by existing or planned public facilities; and

D. Reparcelization or assembly of the designated area is consistent with the comprehensive plan of the jurisdiction in which the area is located.

Section 5. EFFECT OF A LAND ASSEMBLY AREA DESIGNATION.

Two types of Land Assembly Area designations may be created, a Special Purpose Land Assembly Area and a General Purpose Land Assembly Area and the governing body designating the area shall have the following powers to carry out the purposes of this Act:

A. A Special Purpose Land Assembly Area Designation shall authorize and empower the designating authority to acquire any interest in any parcel of land in the Special Purpose Land Assembly Area by purchase, gift or through an exercise of the power of eminent domain in order to facilitate the reassembly of parcels for the purpose of reconfiguring the parcelization of the area in order to provide for the orderly and rational growth and development of the area. The designating authority for a Special Purpose Land Assembly Area is expressly authorized to enter into a contract to sell any parcel of land acquired by the authority to the person requesting the designation of the Land

Assembly Area.

B. A General Purpose Land Assembly Area Designation shall authorize and empower the designating authority to do all things necessary to carry out the purpose of the designation, including but not limited to:

1. The preparation of a plan of reparcelization for the Land Assembly Area;

2. The acquisition of any interest in any parcel of land in the Land Assembly Area by purchase, gift or through an exercise of eminent domain;

3. The platting or replatting of the Land Assembly Area or any part thereof;

4. The development of public facilities or amenities necessary to achieve the purposes of the Land Assembly Area designation; and

5. The financing of the land assembly process including any of the activities authorized herein through a special assessment or ad valorem tax levied against the lands within the designated Land Assembly Area, provided that the total annual levy does not exceed 2 percent of the assessed valuation of the parcels in the Land Assembly Area. The designating authority is hereby authorized to bond such levies subject to the constitutional and statutory limitations on the bonding of special assessments and ad valorem taxes otherwise applicable to the designating authority.

Section 6. LAND ASSEMBLY AREA DESIGNATION

A. The following persons may initiate a request for the designation of an area as a Land Assembly Area:

1. Any local government with jurisdiction over the area proposed to be designated as a Land Assembly Area, including counties where the proposed designation is located within an incorporated municipality;

2. The owner or owners of at least twenty percent of the privately owned lands proposed to be designated as a Land Assembly Area

3. The regional planning council with jurisdiction over the area proposed to be designated as a Land Assembly Area; or

4. The state land planning agency.

B. Except for a proposal initiated by the local government with land use regulatory authority over the area proposed to be designated as a Land Assembly Area, a request for the designation of an area as a Land Assembly Area shall be submitted to the local government with land use regulatory authority over the area. The request shall contain, at a minimum, the following information:

1. A legal description of the area proposed to be designated as a Land Assembly Area;

2. An aerial photograph or series of photographs of the area proposed to be designated as a Land Assembly Area at a scale of not greater than 1 inch equals 600 feet with the boundaries of the proposed area clearly marked;

3. A line drawing of the area proposed to be designated as a Land Assembly Area at a scale not greater than 1 inch equals 600 feet showing the property lines for all parcels of land within the area together with the name of any subdivision within the area;

4. A line drawing of the area proposed to be

designated as a Land Assembly Area at a scale not greater than 1 inch equals 600 feet showing the location of all public facilities including roads, water, sewer, electricity, gas and telephone;

5. If the proposed designation is based on the existence of a wetland or other natural resource of significance, a survey at a scale not greater than 1 inch equals 600 feet showing the areal extent of the wetland or other natural resource;

6. A list of the owners of all parcels of land within the area proposed to be designated as a Land Assembly Area as shown on the most recent records of the county tax assessor;

7. A narrative statement describing the manner in which the existing parcelization of the area proposed to be designated as a Land Assembly Area frustrates the orderly growth and development of the area or the manner in which a wetland or other natural resource of significance will be adversely affected by the continued development of the area according to existing parcelization or the manner in which the area is remote from other development or is inadequately served by existing or planned public facilities;

8. A narrative statement describing how the proposed designation of the area as a Land Assembly Area is consistent with the comprehensive plan of the local government and will further the goals, policies and objectives of the comprehensive plan; and

9. A narrative statement describing the requestor's interest and intentions in regard to the proposed designation of the area as a Land Assembly Area.

C. If the local government in which the area proposed to be designated as a Land Assembly Area initiates the request, the information required in subsection B of this section shall not be required in order to initiate the designation process; however the information shall be made available to the public prior to the actual designation of an area as a Land Assembly Area.

D. The Administration Commission is authorized to designate an area as a Land Assembly Area only where the local government with land use jurisdiction has rejected a request to designate an area as a Land

Assembly Area. The designation of a Land Assembly Area by the Administration Commission shall be undertaken as a rule making action of the Commission.

E. Within forty five days of the filing of a request for designation of an area as a Land Assembly Area, the local government shall hold a public hearing on the request. Notice of the public hearing shall be given in accordance with the requirements for an amendment to a comprehensive plan.

F. Within thirty days after the public hearing, the governing body shall approve or reject the designation of an area as a Land Assembly Area and if approved shall determine whether the area should be a Special Purpose Land Assembly Area or a General Purpose Land Assembly Area.

Section 7. MANDATORY POOLING.

The designating authority of a Land Assembly Area may, in addition to each and every other power authorized by this Act, designate all or a part of a Land Assembly Area as a Mandatory Lot Pooling Area subject to the following:

A. The area proposed to be designated as a Mandatory Lot Pooling Area must be designated as an obsolete, substandard or inappropriate subdivision in the comprehensive plan of the local government with land use jurisdiction over the proposed Mandatory Pooling Area; and

B. The designating authority must determine that a qualified developer proposes to replat and develop the area proposed to be designated as a Mandatory Lot Pooling Area and that the plan of replatting and development will serve the public health, safety and welfare of the local government with jurisdiction over the area proposed to be designated as a Mandatory Lot Pooling Area and will conserve, improve or enhance the value of the majority of lots or parcels of land in the in the area proposed for designation; and

C. The order of designation shall set forth a method of allocating among the separately owned lots a unit of interest in the pooled area.

D. The qualified developer shall bear all the costs associated with replatting and development of

an appendix to this report.

H.

TRANSFERABLE DEVELOPMENT RIGHTS

One technique that may be appropriate for dealing with the expectations of the owners of lots that are not suitable for development is the concept of transferable development rights ("TDRs"). TDRs were first conceived of as a means of protecting identified resources from on-site development by allowing the owner of the resource to move his development rights to another, more suitable, parcel of land. In this way the resource is protected and the landowner is able to make economic use of his property. The technique has been used to protect historic landmarks (City of New York), prime agricultural lands (Montgomery County, Maryland and the New Jersey Pinelands) and environmentally sensitive lands (Collier and Monroe County, Florida and Santa Monica, California) and has been considered by the United States Supreme Court in Penn Central Trans Co. v. City of New York, 438 U. S. 104 (1978) and by the Fourth District Court of Appeal in City of Hollywood v. Hollywood, Inc., 432 So. 2d 1332 (Fla. 4th DCA 1983).

The potential application of the TDR concept to the platted lands problem is relatively straightforward. The owner of a designated "problem lot" would be provided a regulatory opportunity to transfer the right to build a home from their lot to another more suitable site.

In this way the lot owner has an opportunity to secure a return on his investment without the adverse impacts of on-site development. In order for a TDR program to be successful, a TDR program must be simple in description and administration and should involve as limited a public role as possible. A number of unsuccessful TDR programs involved a direct public role in the transfer of development rights, a factor that turned out to be a substantial disincentive for participation in the program. In the ideal situation the sale and transfer of development rights should be a matter of private enterprise with the government's interest in the transaction limited to ensuring that development rights are not used fraudulently. Another critical element of a successful TDR program is the availability of user or receiver sites for the use of the transferred rights. If there are more TDRs than opportunities to use the rights, it is inevitable that the program will be of limited utility. Indeed many of the more successful programs have provided a substantial bonus for the transfer of units to appropriate receiver sites. In the New Jersey Pinelands, the Pinelands Development Credit program provides a 4 for 1 bonus for development rights that are transferee from designated preservation areas to regional growth districts. It is not always necessary to give a bonus, depending on market conditions. In Monroe County the opportunity to transfer development rights to lots in platted subdivisions where the allocated density is only 1 dwelling unit per 2 lots creates a powerful incentive for transfer in subdivisions with ocean or

gulf front exposure.

It must be emphasized, however, that a key to the success of a TDR program is a realistic program that is aligned with market demand for dwelling units. If the owner of a parcel of land that could be more efficiently used with more density than is allocated to the parcel can simply go to the governing body and get a gratuitous rezoning, then there will be no incentive to acquire and use transferable development rights. This was the fate of the Severable Use Rights (SURs) program that was developed by Metropolitan Dade County to deal with the development expectations of the owners of wetland lots in the East Everglades. Under the SUR program the owner of a transferable development right could use his right, up to specified limits (generally greater than allowed in the underlying zoning district) in each of the County's zoning districts. Unfortunately the owners of candidate receiver sites had no incentive to acquire SURs because it was much simpler, and less expensive, to go to the Board of County Commissioners and get a rezoning to a more intensive classification. The Miami Herald critically reviewed Dade County's SUR program as follows:

> *So SURs and TDRs, used successfully elsewhere, have been introduced here to provide a way out. On that tract of land ... the current owner could be compensated with SURs or TDRs equal to the number of houses that he thought he had a right to build on his property when he bought it.*
>
> *The SURs or TDRs, in turn could be sold to the owners of land that's more appropriate for residential development. With the county's consent, they could use the SURs to increase the density, say, 10 percent above*

the levels otherwise allowable.

A neat solution, right? Except for one thing: Who wants to buy something that's being given away free? Property owners who have received them in exchange for forfeiting some of their developmental rights are finding that SURs and TDRs are practically worthless.

WHY? Because any Dade developer who wants to increase densities on his property merely has to hire the right lawyers and public relations men to lobby local officials. They're pushovers. They never say, "Why don't you go buy some SURs if you want higher densities?" Instead, they say "Yes, of course, and is there anything else we can do for you while you're here?"

Thus these new tools for rectifying old mistakes and ensuring sensible planning are being wasted. Worse yet, some of the East Everglades landowners who were given SURs after their land was downzoned are taking their case to Federal court. They claim they've been cheated. Although I deplore development in that region, I would be hard-pressed to disagree with the landowners about that. Unless local officials change their ways, SURs and TDRs are about as useful and valuable as Confederate dollars.

Editorial by Robert F. Sanchez, Miami Herald, October 6, 1984.

Simply put a system that depends upon market forces to drive it will not work where there is no market, either because of the local economy or because of the way in which a local government treats its land use resources.

In order to deal with a platted lands problem a TDR ordinance should include the following elements:

- *a provision authorizing the transfer of development rights;*
- *a provision specifying the procedure for the transfer of development rights;*
- *a provision establishing the criteria for receiver sites;*

+ a provision establishing bonuses for development transfers;

+ a provision specifying the legal documentation required for a transfer of development rights.

TDRs are not a panacea and they should not be considered as such; however, they are a viable technique of ameliorating the otherwise harsh and inequitable impacts of strict limitations and regulations. Given the difficulties inherent in bringing together a group of individual lot owners, each with their own individual ownership objectives and expectations, TDRs is a means of providing each individual lot owner with a practical alternative to undesirable on-site development -- a facile solution to many platted lands problems.

There is one issue that is always raised in regard to TDRs, the ownership of the transferor site after the development right has been transferred to a transferee or receiver site. In the absence of any particular provision or action to the contrary, it is a general proposition that the original lot owner retains title to the lot. In many cases, particularly where the lot is located on environmentally sensitive land, the lot owner will dedicate the lot to a qualified charitable organization or to a governmental agency. In other circumstances, such as a subdivision in an area that has an excess density or substandard lot problem, the remainder interest may be of value to other lot owners as additional yard, particularly those lot owners who have previously constructed homes on their lots or are "grandfathered"

in. Whatever the solution, it is necessary that this question be answered and the formation of a non-profit corporation to serve as a recipient of offers to contribute the underlying fee may be a desirable thing for a community entering into a TDR program to do.

H.

LAND ACQUISITION

Another method of solving a platted lands problem is the outright acquisition of lots that are inappropriate for development. This technique, however, has limited application because of its high cost. In the Lake Tahoe Basin, the State of California is spending more than $80,000,000 to eliminate problem subdivisions, a sum that is unlikely to be available to eliminate platted lands problems in Florida, though the cost of acquisition may be less than the cost of providing public facilities to problem subdivisions. A study completed for a suburban township in the Chicago area concluded that it would cost the taxpayers of the township less to acquire land slated for residential development than to provide services to the property if it were to be developed.

There are a number of sources of funds that could be considered if a community wished to employ acquisition as a solution to identified platted lands problems. General obligation funds are the obvious first source, although it can be anticipated that the infrastructure needs of most local

jurisdictions will have a priority call on such funds. Placement of the problem subdivision on the C.A.R.L. list is another means of achieving acquisition if the property otherwise qualifies for acquisition under C.A.R.L. A third financing source could be a special assessment area set up to improve the quality of life of the area by removing the problem lots and thereby benefitting the remaining land. This technique may have particular application where there is a capital facilities deficit and insufficient funds to meet the deficit. Consider for example a large platted subdivision at the end of a neighborhood road that is inadequate for substantial through traffic but provides an acceptable or tolerable level of service to the existing neighborhoods. The subdivision was platted years ago and the owners of the lots are now demanding that the road be upgraded so that the lots will be eligible for development permits. Impact fees will provide for a share of the cost of the needed roadway improvements; however, a significant part of the cost of the needed improvements must be financed by existing residents or out of general revenues. The residents may prefer to have the subdivision eliminated and replaced with low density development that will not require major roadway improvements and may not object to a special levy or assessment to finance the acquisition. At least in theory it is possible that the acquisition scenario will ultimately turn out to be the preferable route in a financial sense because of the enhancement of value flowing from the elimination of the threatening

subdivision and the required improvements, particularly in light of the cost the existing residents would have to carry for their share of the needed improvements.

A variant on the acquisition technique is the acquisition and resale of improvidently parcelized lands. The idea is simple. A subdivision is improperly laid out so that an important environmental resource, a freshwater wetland that serves as a critical habitat for an endangered species, is chopped up into a grid of lots that are inefficient to develop and hard to market. One solution to the problem is for the lots to be acquired by a governmental or quasi-governmental agency and the subdivision reformulated to preserve the freshwater wetlands and to cluster the homesites in the non-sensitive parts of the subdivision. In theory the cost of assembling and reconfiguring the lots could be recouped from the resale of what will undoubtedly be a more efficient and marketable product. Indeed it is possible to develop an economic model that indicates that lot consolidation and resale can be carried out at no cost to the public.

Consider the following hypothetical subdivision containing 250 acres of land and 350 platted but vacant lots. 100 acres of the subdivision, containing 140 lots, is a freshwater wetland that is vital to the survival of the Florida Key Deer. The governing body undertakes to reconsolidate the land in the subdivision in order to promote the rational growth and development of the area, a concept that has been recently endorsed as a valid public purpose by the United States Supreme

Court in a Hawaiian land reconfiguration case. The 350 lots in the subdivision, less those dry lots with homes already constructed, are acquired by the governing body by negotiation or by eminent domain. The average cost of the acquired lots, including the wet lots that are far less expensive is $12,500. One half of the lots are purchased subject to the option of the seller to buy back the lot after the reconfiguration is completed at the original sales price plus a pro-rata share of the cost of acquisition and reconfiguration. The total cost of acquisition is $4,000,000 for the 325 lots that are acquired. The cost to reconfigure the lots around the 25 existing homes is $500,000 and another $500,000 is expended to install underground utilities. The carrying costs for the program are estimated at another $1,000,000 for a total cost of $6,000,000. One half of the carrying costs and the reconfiguration and improvement costs are assessed as a special assessment at $35 per lot for ten years. The option-sellers exercise their options at $15,000 per lot generating approximately $2,500,000. The balance of the lots are placed back on the market and sold at a net average of $20,000 per lot, a figure that makes sense because none of the lots are wet and underground improvements have been installed. It is true that the lots are now only 15,000 square feet in size as distinguished from the 23,000 square foot lots that were originally platted; however, more than one-half of the lots abut the wetlands preserve and the general character of the subdivision has been substantially upgraded with curvilinear

roads and other modern amenities. The total revenues from the effort including the proceeds from the special assessment exceed the cost of the reconfiguration including the carrying costs.

Not every reconfiguration can achieve a no-net-cost result but the prospects are very good in a number of areas. In the example just described the number of lots could have been reduced by 60 lots and the project would have still succeeded if the average price of the larger lots was $25,000, a figure that is not too difficult to achieve if the average lot price including 140 wetland lots was $12,500 per lot in a grid pattern subdivision with limited facilities and amenities.

In the 1986 legislative session a bill was enacted that authorizes the Boards of County Commissioners in designated areas of critical concern to create "land authorities" empowered to acquire and dispose of real estate as a means of implementing comprehensive plans prepared for the area of critical state concern. The Act contains a variety of provisions that link the authority to the area of critical state concern process, nevertheless, the concept of an "authority", makes sense and may be within a local government's authority if the legislature has not preempted such action with the adoption of the area of critical state concern program. The probabilities are that the Legislature has not preempted the area and that local governments may create and finance land acquisition and disposition so long as the reassembly is consistent with and a means for the implementation of an adopted comprehensive plan under the Local

Government Comprehensive Planning and Land Development Regulations Act.

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