

# State Property Rights Laws: Recent Impacts and Future Implications

By Stacey S. White

During the 1990s, the frenzied pace at which state legislatures considered and adopted property rights laws prompted a great deal of scrutiny. Early analyses of these takings laws anticipated a range of impacts. Their proponents suggested that such laws were a necessary step to protect the average landowner, the “little guy,” from the excesses of government regulation.<sup>1</sup> Critics, however, including many planners, warned of negative impacts such as huge fiscal and administrative burdens on state agencies and a “chilling effect” on local land-use planning activities.<sup>2</sup>

Now that these property rights laws have been in place for several years, it is appropriate to examine their impacts. This paper focuses on impacts in Florida and Texas, because these states have among the most substantive and well-known of such takings laws. They also represent the most common types of property rights laws that states have enacted.<sup>3</sup> Following a brief overview of these laws in both states, this article examines their use, economic impacts, and discernible “chilling effects.” The conclusion evaluates the effectiveness of state property rights laws as a whole, and considers possible scenarios for their future use.

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1. See N.G. Marzulla, *State Property Rights Initiatives as a Response to 'Environmental Takings'*, 46 S.C. L. REV. 613, no. 4 (1995); K. Dodd, *And Justice for All: The State Experience with Property Rights Legislation* (1998) (Competitive Enterprise Institute); and H. Lund, *Property Rights Legislation in the States: A Review* (1994) (Political Economy Research Center).

2. See H. Jacobs, *The Impact of State Property Rights Laws: Those Laws and My Land*, 50 LAND USE L. & ZONING DIG. no. 3, at 3 (1998); R. Freilich and R. Doyle, *Takings Legislation: Misguided and Dangerous*, 46 LAND USE L. & ZONING DIG. no. 10, at 3 (1994). Jacobs suggests that Florida's law has already had a chilling effect on the regulatory climate there. Freilich and Doyle argue that potential fiscal impacts of takings laws are the most compelling argument against them.

3. See K. Emerson and C. Wise, *Statutory Approaches to Regulatory Takings: State Property Rights Legislation Issues and Implications for Public Administration*, 57 PUB. ADMIN. REV. 411, no. 5 (1997); and R. Meltz, *'Property Rights' Laws in the States* (1996) (Congressional Research Service Report for Congress).

### FLORIDA'S PROPERTY RIGHTS LAWS

The Florida State Legislature enacted the Bert J. Harris, Jr. Private Property Rights Protection Act (FLA. STAT. ANN. § 70.001 et seq.) and the Florida Land Use and Environmental Dispute Resolution Act (FLA. STAT. ANN. § 70.51 et seq.) in 1995. As parts of the same statutory chapter, these acts represent two distinct types of takings legislation: compensation laws and conflict resolution laws. As such, they differ significantly, although they are frequently referred to as “Part I” and “Part II” of the Harris Act.

TABLE 1. USE OF FLORIDA HARRIS ACT

Year	Claims Initiated	Claims Closed
1996	5	1
1997	9	0
1998	13	0
1999	25	2
Total	52	3

“Part I” of the Harris Act took effect on May 11, 1995. It creates a cause of action for landowners who feel that government regulation enacted after that date has placed an “inordinate burden” on their property, without actually leading to a taking under the state or U.S. constitutions. Unlike other compensation-based laws, this law does not stipulate a specific reduction in property value as a “trigger” for compensation. Instead, it defines an “inordinate burden” as an action that either denies a property owner his or her reasonable, investment-backed expectations or vested rights, or that forces the property owner to bear a disproportionate share of the public good. FLA. STAT. ANN. § 70.01 (3)(e).

Under this law, a government entity has 180 days from a property owner's claim for relief to make a settlement offer and to issue a ripeness decision that identifies the uses to which the property in question may be put. If the owner accepts the settlement, the claim is closed. See FLA. STAT. ANN. § 70.01 (4)(a). If the owner rejects the settlement, he or she can take the claim to circuit court. The courts must then determine the validity of the claim. In addition to monetary compensation, possible remedies under the act include land exchanges, issuance of the requested permit, and increased

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allowable densities on other parts of a claimant's property. See FLA. STAT. ANN. § 70.01 (4)(c).

The Dispute Resolution Act, in contrast, establishes a mediation process for property rights disputes. This act provides a separate, optional process through which property owners may attempt to resolve their grievances. It took effect on October 1, 1995, and applies to any governmental development order or enforcement action authorized after that date. In what is a more relaxed standard than that of "inordinate burden," a landowner need only feel a government action to be "unfair" or "unreasonable" before pursuing this option. FLA. STAT. ANN. § 70.51 (3).

TABLE 2.  
USE OF FLORIDA DISPUTE RESOLUTION ACT

Year	Claims Initiated	Claims Closed
1996	21	9
1997	15	11
1998	10	4
1999	19	6
<b>Total</b>	<b>65</b>	<b>30</b>

To utilize this act, aggrieved property owners must first exhaust all non-judicial local government appeals. After that, they may request relief from a special master who is selected based on agreement by both property owners and government entities. This special master is charged with holding a hearing and attempting to facilitate an agreement between the two parties.

All special master hearings are open to the public. If the disputing parties agree to a settlement at that time (pending approval by the appropriate government entities), the case is closed. If the special master is unable to mediate an agreement between the parties, he or she is required to make a written recommendation as to whether the development order or enforcement action is acceptable or requires modification. These recommendations, however, are non-binding.

With these two laws in place, Florida has what is likely the most extensive legal framework of any state for addressing property rights concerns. Although few states have passed compensation-based laws like the Harris Act, the potential impacts of such laws have provoked the most alarm among critics of state-based property rights legislation. Dispute resolution laws, while even more uncommon, raise additional questions about the appropriate methods through which property rights conflicts might be resolved. In fact,

4. See H. Jacobs, *State Property Rights Laws: The Impacts of Those Laws on My Land* (1999) (Lincoln Institute of Land Policy). Jacobs predicts that one of the major trends to emerge with respect to private property rights in the states will be a "shift away from compensation and assessment laws and towards Florida's model of 'inordinate burden' and conflict resolution" (p. 27). He suggests that a dispute resolution approach will seem more reasonable as the costs and implementation concerns of the other types of laws become clear.

one commentator predicts that this type of law is likely to become more common in the near future.<sup>4</sup>

## TEXAS PROPERTY RIGHTS LAW

The Private Real Property Preservation Act, TEX. GOV'T CODE ANN. § 2007.001 et seq., took effect on January 1, 1996. Like Florida's Harris Act, this law allows property owners to pursue compensation in instances where they feel government action has adversely affected their property values. Unlike Florida, however, Texas established a specific "trigger" of 25 percent reduction in property value. See TEX. GOV'T CODE ANN. §§ 2007.002 (5)(i) and (ii). In other words, property owners may seek compensation only in instances where the market value of their property has dropped by at least 25 percent. If it is determined that a taking has occurred, the government entity in question must either rescind the offending regulation or compensate the property owner for their loss.

In addition to these compensation provisions, this law requires governmental entities to prepare written Takings Impact Assessments (TIAs) for certain actions. Such actions include any measures that result in a physical invasion, dedication, or exaction of private property. The purpose of such assessments is to examine both the benefits of the proposed action and their anticipated effects on private property. The state attorney general's office was required to facilitate this process by establishing guidelines for compliance with the law as well as guidelines for preparing the TIAs.

The Texas law does have some noteworthy exemptions, including eminent domain actions and nuisance abatement actions. Most significantly, the law does not apply to the actions of municipalities, except in any non-annexation actions that unevenly affect a city's extraterritorial jurisdiction. Because municipalities are not covered by this law, its scope is much more narrow than that of Florida's Harris Act. As discussed below, however, this act has had some significant implications for the land planning activities of state agencies, in particular, the Texas Natural Resource Conservation Commission.

Like Florida, the state of Texas has taken a two-pronged approach to addressing private property rights. Through a single law, Texas has established both compensation and assessment provisions for responding to property owner displeasure with state-level regulations. Despite having a more narrow scope than the Florida laws, the potential impacts of this law are thus considerable.

## USE OF THE PROPERTY RIGHTS LAWS

As noted above, one of the early fears expressed by critics of takings laws was that such laws would quickly overwhelm local governments and state agencies with a deluge of litigation. Proponents of the laws, on the other hand, suggested that these laws were more preventive in design, and would be used only if government regulation unfairly burdened property owners. An important question, then, concerns how extensively the laws in Florida and Texas have been used so far.

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### In Florida

The five years since the passage of the Harris Act have produced an interesting trend. Initially, the number of claims brought under the dispute resolution portion of the act far exceeded the number of compensation claims. Over time, the relative frequency of these two types of claims has reversed. The total number of claims, however, has not been extreme.

Quantifying the exact number of claims under the Harris Act and Dispute Resolution Act proves to be somewhat difficult. Both acts require government entities involved in property rights claims to file information on these claims with the Florida Office of the Attorney General (OAG). The Harris Act requires these government entities to send notification of all Requests for Relief filed under that act. They then must send copies of executed Settlement Agreements or Judgments within 15 days of either action.

The Dispute Resolution Act, however, does not require any information to be filed with the OAG until after the Special Master has issued his or her recommendation. The OAG receives the recommendation from the Special Mas-

cess, and responses to specific regulatory changes. While a single explanation is probably insufficient (and beyond the scope of this paper), it appears that each of these factors may be partially responsible for the increase of compensation claims and decrease in dispute resolution claims. Continued analysis of the use of Florida's laws could help to elucidate these patterns further.

One already discernible pattern in the claims concerns the influence of location. Of the 65 total dispute resolution claims filed to date, 46 have arisen in Lake County. As noted above, this county has been more forthcoming than others in providing the Office of the Attorney General with information about its pending claims. In addition, the county's high percentage of total dispute resolution claims appears closely tied to the fact that land-use attorneys there have encouraged aggrieved property owners to pursue the Special Master process. Moreover, Lake County informs all persons who are affected by a development order (such as a building permit application, a lot of record determination, or a vested rights decision) of this possible option for relief in the event

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ter and later receives written notification of the government action taken in response to that recommendation. Staff in the OAG report that only Lake County has been consistent in providing information on all *pending* dispute resolution claims. Telephone Interview with Mindy Ayer, Cabinet Assistant, Florida Office of the Attorney General (April 4, 2000). Actual numbers of claims may thus differ from those presented here.

According to records maintained by the Office of the Attorney General, between 1995, when the Harris Act was passed, and March 16, 2000, 52 compensation claims and 65 dispute resolution claims were filed throughout the state. Tables One and Two show the number of these claims initiated in each year between 1996 and 1999, as well as the number of claims still pending. It should be noted, however, that some pending claims may actually be unofficially closed. For example, some individuals who file a Harris Act claim never respond to the government's letter answering that claim. Cases thus linger in OAG files as open when the claimants may in fact have no intention of proceeding with their claim. Telephone Interview with Debora J. Turner, First Assistant City Attorney, City of Miami Beach (April 13, 2000).

Likely explanations for the shift in numbers of claims under the two acts include changing levels of awareness of each process, changing levels of satisfaction with each pro-

cess, and responses to specific regulatory changes. While a single explanation is probably insufficient (and beyond the scope of this paper), it appears that each of these factors may be partially responsible for the increase of compensation claims and decrease in dispute resolution claims. Continued analysis of the use of Florida's laws could help to elucidate these patterns further.

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that their request is denied. In other words, persons who are unhappy with the outcome of a development order need not investigate this possible remedy; the information is already provided to them. Telephone Interview, Sanford A. Minkoff, County Attorney, Lake County Attorney's Office (April 5, 2000). Lake County makes information about the special master process readily available, whereas most other Florida counties report that they do not do so. See F. S. Berry and S. Sheffield, *An Assessment of the Implementation of the Florida Special Master Law (Section 70.51 F.S.): 1995-1997* (April 23, 1998) (draft report prepared for the Florida Conflict Resolution Consortium).

Location is also significant in the Harris Act compensation claims. Of these claims, 26 of 52 were initiated in Dade County. Many of the claims here stem from recent ordinances that the City of Miami Beach passed concerning floor area ratios and bonus densities. Given the preexisting development pressures and restrictions in this city, it is not surprising that a more restrictive ordinance would provoke such compensation claims. For a municipality or county that has adopted new development restrictions, then, a cluster of Harris Act claims may occur. Interestingly, the amounts of these claims in Dade County and the City of Miami Beach have risen dramatically in recent years; several current claims are for damages in excess of \$1 million.

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## In Texas

Unlike Florida's experience, the past five years have produced virtually no compensation claims in Texas. The property rights law there has primarily affected a single agency, the Texas Natural Resources Conservation Commission (TNRCC). Even so, it appears that there have been no lawsuits filed based exclusively on this law. TNRCC staff report that only a "handful" of claims have cited the law as part of a larger suit against the agency. Telephone Interview with Robin Smith, Staff Attorney, Environmental Law Division, TNRCC (April 12, 2000). Predictions and fears that this law would trigger an avalanche of lawsuits have not come to pass.

The bulk of activity under the Texas property rights law has occurred with respect to the provisions for Takings Impact Assessments. In other words, although property owners in Texas have done little to seek out protection from the act, state agencies have had to comply with new administrative requirements it established. As noted above, TIAs are required for new regulations (other than municipal actions) that affect private real property.

The total number of TIAs does not appear to be excessive, although precise information from affected agencies is somewhat difficult to obtain. Staff at the TNRCC, for example, were unable to provide the exact numbers of these assessments that the agency has completed in the last two years. Estimates, however, can be drawn from the results of a 1997 report issued by the State Comptroller's Office. These estimates, along with the economic impacts of compliance with the TIA requirement, are discussed further in the next section.

## ECONOMIC IMPACTS

Another possible impact of property rights laws such as those enacted in Florida and Texas concerns the costs associated with their implementation. Such expenses include administrative costs borne by government agencies as well as actual payments made in successful compensation claims. In both Florida and Texas, it appears that the laws have not provoked excessive fiscal impacts.

In Florida to date, no money has been paid to a property owner as a result of a compensation claim under the Harris Act or a request for relief under the Dispute Resolution Act. Of course, with respect to the compensation claims, since only three of 52 claims are officially closed, that situation could change. As some commentators have pointed out, a number of these pending claims are for millions of dollars, an amount that would clearly paralyze local governments. *See e.g.*, Fishkind and Associates, *The Economic Impacts of the Bert J. Harris, Jr., Private Property Rights Protection Act and the Proposed Property Rights Amendment* (May 17, 1999) (prepared for the Florida Chapter of the American Planning Association).

Importantly, however, local governments have recently argued that under Florida Law, no agency of the state is liable for tort claims that exceed \$100,000 for an individual, or \$200,000 for claims arising from the same incidence or occurrence. *See* Title XLV, Chapter 768.28 F.S. While the implications of this situation remain unresolved, it appears

at this writing that even the potential economic impacts of the compensation law are much less than initially feared.

Obviously both dispute resolution and compensation claims involve costs to government entities beyond cash payments to property owners. Although it is difficult to quantify them, it is important to recognize that there are certain administrative costs associated with both sets of claims. The Lake County Attorney's Office, for example, estimates that each Dispute Resolution Act claim requires the county to spend between \$300 and \$400. This figure includes the Special Master fee, as well as costs needed to distribute notices of requests for relief to surrounding property owners (as required by the act). Telephone Interview with Sanford A. Minkoff (April 5, 2000). These costs are not exorbitant, even when accrued over multiple claims per year. They are, however, costs that can be directly associated with the Dispute Resolution Act.

The City of Miami Beach appears to have faced more substantial costs associated with responding to the compensation-based claims. Again, however, these costs are difficult to quantify. This difficulty occurs in part because some claims involve additional, non-Harris Act legal challenges, and in part because the city has not determined the precise costs of dealing with Harris Act claims. In general, the city characterizes the costs involved in its research and preparation for Harris Act claims as "significant." These costs include appraisers' fees and, in limited cases, litigation expenses. Telephone interview with Debora J. Turner (April 13, 2000). Thus, while Florida's property rights laws have not burdened government entities with huge cash settlements, they have at times required significant administrative expenses.

As in Florida, there has been no money paid to date on a compensation claim in Texas. Telephone Interview with Robin Smith (April 12, 2000). The fear of excessive cost burdens for agencies faced with these claims is thus unrealized. Again similar to Florida, though, is the fact that the Texas law inevitably involves a host of other administrative costs. Helpful to the analysis of such costs, this law required the State Comptroller's Office to evaluate agency compliance and the costs associated with that compliance. In its review, completed in 1997, the comptroller surveyed all executive branch agencies in the state to determine whether the new property rights law applies to any actions they take. *See* J. Sharp, *Report on the Private Real Property Preservation Act*, Texas Office of the Comptroller (January 1997). The survey also asked for present and anticipated future costs associated with preparing Takings Impact Assessments.

The results of the comptroller's study suggest that TIA requirements have not been particularly onerous for state agencies. Of the 119 agencies that responded (131 were surveyed), 25 indicated that they take actions covered by the property rights law. Only four of those 25 indicated that they had prepared TIAs through the end of the 1996 fiscal year. The Texas Natural Resources Conservation Commission (TNRCC) was responsible for the vast majority (116 of 139) of these assessments.

The comptroller also found that costs of agency compliance with the law were moderate. Reported costs for devel-

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oping specific agency compliance procedures ranged from zero to roughly \$11,000. Those agencies that completed TIAs in 1996 reported that they spent between \$500 and \$1,250 per assessment to do so, although these agencies anticipated increased costs (\$500 to \$5,000) for 1997.

The comptroller has not completed any follow-up study of compliance with this law, nor does the law require the office to do so. Telephone Interview with Dan Wilson, Executive Assistant, Property Tax Division, Texas Office of the Comptroller (April 5, 2000). According to TNRCC, the agency that is responsible for almost all TIAs, staff time required to complete the assessments ranges from two days to two months, depending on their complexity. Costs associated with each assessment thus vary according to the time each requires. The agency, however, does not keep records of total annual expenditures associated with the TIA process. Personal communication with Susan S. Ferguson, Manager, Policy and Standards Section, Policy and Regulations Division, TNRCC (December 1999 and April 2000).

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Other state agencies appear to be virtually unaffected by the TIA requirement, contrary to even the modest expectations expressed in the comptroller's report. The Texas Parks and Wildlife Department, for example, so far has found that its statutory authority is so narrow as to render the TIA requirement unnecessary. Every regulation the agency has promulgated since passage of the act simply contains a statement saying that the action will not affect private real property. Telephone Interview with Robert Macdonald, Wildlife Division Regulations Coordinator, Texas Parks and Wildlife Department (April 7, 2000). Similarly, the Texas Department of Transportation has found that its activities do not trigger the TIA requirement outlined in the law. The agency has yet to complete one of these assessments. Personal communication with Bob Jackson, Deputy General Counsel, Texas Department of Transportation (May 1, 2000). The state General Lands Office has only eight TIAs on file, five of which are from 1996. Telephone Interview with Jim Davis, Staff Attorney, Texas General Lands Office (April 7, 2000). Thus, for most state agencies, the impacts, economic or otherwise, of the Texas Private Real Property Preservation Act appear to be minimal.

#### **CHILLING EFFECTS**

From a planning perspective, perhaps the most worrisome potential impact of state takings laws concerns the possibility of chilling effects on local regulation. A number of analysts of these laws have warned that they are apt to retard

new and necessary ordinances if government entities fear reprisals from property owners and the subsequent consequences. See e.g., R.G. RuBino, *The Chilling Effect of Florida's Private Property Rights Protection Acts on Growth Management and Environmental Regulation* (1997) (Prepared for the North American Program of the University of Wisconsin-Madison Land Tenure Center). Such chilling effects, though, are probably the most difficult impact to measure. While there are anecdotal accounts of fear on the part of government, actual evidence of a chill is much harder to confirm.

In Florida, several commentators have investigated the question of chilling effects of the compensation provisions of the Harris Act. Opinions on the extent of such an effect vary widely. For example, while RuBino, *supra*, suggests that a chill has occurred, Fishkind, *supra*, feels that there is not sufficient evidence to support such a claim. In his survey of Florida counties and larger municipalities, Fishkind found that most government entities were proceeding with the same types of regulatory activities as were conducted prior to 1995.

Even municipalities that have been involved in claims under the Harris Act suggest that they are not feeling a chill in their activities. The City of Delray Beach, for example, was the respondent in one of the three Harris Act compensation claims that has been resolved. See *William and Grace Hegstrom v. City of Delray Beach*, Bert Harris Act Claim Number BH-99-50-11. According to the city's planning director, planning activities following passage of the Harris Act may have been more "cautious," particularly with respect to downzonings. The city ultimately realized, however, that "we could not allow the threat of legal action under this law to prevent us from enacting new regulations that would ultimately improve our city." Personal communication with Diane Dominguez, Planning Director, City of Delray Beach, Florida (February 25, 2000). Initial trepidation thus apparently gave way to recognition that planners must continue to try to serve the public interest without fear of reprisal.

Officials in Martin County, Florida tell a similar story. Passage of the Harris Act in 1995 prompted concern that the county's strict growth management regulations would make it a target for compensation claims. In fact, the county is currently involved in such a claim: *Halvorsen/Ezon Trust v. Martin County*, Bert Harris Act Claim Number BH-98-43-12. Although much discussion has occurred concerning the potential ramifications of the Harris Act on county activities, officials there feel the law has not chilled planning. As the director of the county's Growth Management Department

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comments: While the Harris Act has “made everybody look more carefully at the impacts of regulation on property rights,” the result is “better ordinances,” rather than fewer or weaker ordinances. Telephone interview with Nicki Van Vonno, Growth Management Department Director, Martin County, Florida (May 3, 2000).

Interestingly, then, it may be possible to characterize both the compensation and dispute resolution acts in Florida as promoting compromise. Instead of a chill, the Florida laws may be promoting the need for more cooperative relationships between property owners and regulatory entities. For example, in the Delray Beach claim mentioned above, the city worked to resolve the landowners’ irritation that a change in zoning regulations had reduced the development potential of their property. The parties agreed to a compromise in which the zoning was changed to allow an intermediate level of development.

Less surprisingly, many of the closed dispute resolution cases reveal a similar tendency to reach middle ground solutions, arguably the intention of that statute. A fairly typical example of this sort of middle ground can be seen in the 1997 case of *William L. Hendry v. Lake County*, Dispute Resolution Act Case Number DR-97-35-08. Here, the petitioner sought relief from the county’s denial of vested rights for his plans to construct a four-unit residence. The eventual settlement agreement, which a special master facilitated, allowed him to build a three-unit residence on the property.

In Texas, the nearly complete exemption of municipalities from the requirements of that state’s property rights law means that any potential chilling effect would be much more limited. Should it occur at all, a chill might limit the willingness of agencies such as the TNRCC to develop new regulations that might lead to compensation claims. The fact that the compensation portion of this law has produced virtually no such claims suggests that this sort of a chill is unlikely to occur in the near future. State agencies seem to have little reason to curtail their regulatory activities.

This is not to say, however, that Texas agencies act in a way that jeopardizes private property rights. On the contrary, these agencies report that they have always been sensitive to potential impacts on private property. This law may cause them to consider such impacts even more carefully, but it has not changed their operations. This intensified focus on the effects of regulation is likely one of the more significant impacts of the Texas law.

### SUBSTANCE OR SYMBOLISM?

From this analysis, it seems clear that the impacts of state takings laws in Florida and Texas are less drastic than many critics had feared. The courts have not been bogged down with excessive numbers of claims. Government entities have not gone bankrupt compensating property owners. And although these government entities report taking a closer look at the impacts of their actions on private property, evidence that the laws have chilled their regulatory actions is scant at best.

The Texas law, in particular, has not burdened state agencies with excessive claims or costs. While the state’s main

natural resource agency (TNRCC) continues to prepare TIAs, this requirement apparently has not hindered the agency’s activities. Other agencies are aware of the law, but have concluded that it largely does not apply to their actions. For these reasons, it appears that the Texas Private Real Property Preservation Act will not lead to a significant restructuring of that state’s regulatory climate.

The two property rights laws enacted in Florida have had more of an impact. Even so, it would be inappropriate to describe these impacts as extreme. The number of claims brought about under each law, for example, is noteworthy, but not excessive. These claims, moreover, have not resulted in monetary compensation for aggrieved property owners (although they do require administrative expenses that appear to be significant in some cases). While those municipalities and counties involved in claims acknowledge that they are more cognizant of private property rights when developing or modifying their regulations, they reject the assertion that they are experiencing a chilling effect.

Granted, impacts in both states could intensify. In Florida especially, fluctuating numbers of compensation and dispute resolution claims suggest that property owners and government entities continue to work out the ramifications of the laws there. The next five years could therefore bring about substantial changes in their implementation and thus their impacts.

Amendments to the Texas and Florida laws could strengthen their impacts. While no amendments to the Texas law were proposed this year, the Florida legislature considered an amendment to the Harris Act that arguably would have expanded its influence. House Bill 659 and Senate Bill 2476 proposed a more specific definition of “inordinate burden.” Had these amendments passed, an “inordinate burden” to property owners would have included any government action that decreased development density to a level below one residence per five acres.<sup>5</sup> Since the Harris Act currently does not specify what sorts of government actions qualify as inordinate burdens, this sort of amendment could potentially result in higher numbers of claims by property owners. It could also increase the fiscal impact of the Harris Act by making compensation for this sort of downzoning action more likely. Neither amendment passed in the 2000 legislative session, however.

Without such amendments, it seems that the property rights laws in Florida and Texas are likely to continue on a path similar to that recently observed. From the analysis above, it could be argued that the Bert J. Harris Act, The Florida Land Use and Environmental Dispute Resolution Act, and the Texas Private Real Property Preservation Act have been more symbolic than substantive. Neither state has witnessed the demise of land-use planning or other regulatory activities. Whether these observations hold true for state-based property rights legislation in general, however, remains to be seen.

5. The full texts and histories of these amendments and the legislative analysis of their potential impacts are available on the Florida Legislature’s “On-Line Sunshine” web site: [www.leg.state.fl.us](http://www.leg.state.fl.us).

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## CONCLUSION

Is it appropriate to conclude that all state property rights laws have been largely ineffective? After all, Florida and Texas are only two of the 26 states that have enacted laws designed to strengthen private property rights.<sup>6</sup> Perhaps laws in other states are producing more obvious consequences. As noted earlier, however, Florida and Texas have what are widely considered to be the most comprehensive such laws. One would thus expect the consequences in those states to be greater. The fact that these laws have not produced dramatic impacts, though, does not guarantee that this will be the case in the future, or that other states will be equally unaffected by the property rights issue.

It is important to point out that while state property rights laws do not appear to have resulted in the drastic impacts their critics feared, they also have failed to produce the great benefits their proponents promised. Although property owners do have additional legal mechanisms for challenging government regulations that impact private property, these regulations continue to be developed and implemented. Persons who wish to pursue claims under these laws are not guaranteed the relief they seek. Instead, they must navigate the appropriate legal channels. Property rights laws are thus by no means cost-free for property owners. Whether property owners actually experience more security of ownership under these sorts of laws is debatable, but unlikely.

Proponents of stronger protections for private property rights have not abandoned their cause. Even though the number of property rights bills considered in state legislatures has dropped off sharply in recent years, this is not to say that the issue is dead. It may instead be evolving. From the analysis presented above, three potential scenarios for the future of state-based property rights laws seem plausible.

The first such scenario is one of little change. In other words, state property rights laws could continue on the books, as written. This would presumably lead to similar numbers of claims and a similar tendency for agencies, counties and municipalities to seek middle ground solutions to potential and actual property rights conflicts. As seen above, compromises, rather than chilling effects, seem to be one outcome of the current laws in Florida and Texas.

An interesting question concerns the long-term impacts of these sorts of compromises. Government entities may attempt to avoid the potential ramifications of property rights laws by granting limited exceptions to regulations or by otherwise modifying or tempering their land use planning efforts. Over time, these decisions could bring about changes in environmental quality and other land-use patterns. While cumulative environmental impacts of this sort would be very difficult to measure, they are important to consider.

A second potential scenario for state property rights laws involves the emergence of an important "test case" under one of the existing laws. A strong, clear judicial interpreta-

tion of the law in question could quickly render it either more appealing or less appealing to property owners. In Florida, for example, should a court determine that a particular government action constituted an "inordinate burden" for which a property owner was entitled to compensation, the Harris Act would likely see a large increase in claims filed with respect to that action. Conversely, should a court decide that a property owner was *not* inordinately burdened by government action, claims would likely decrease.<sup>7</sup> Thus far, none of the states with property rights laws have produced this sort of precedent-setting court decision, but it remains a possibility.

Finally, as discussed above, existing laws could be amended or even replaced with new, stronger measures for protecting private property rights. Amendments such as those recently considered in the Florida legislature could increase the scope or applicability of property rights laws such that their impacts would also increase. So far these sorts of amendments have not affected existing laws, but the fact that they have been considered suggests that this is a likely scenario for the future. As proponents of stronger property rights protections evaluate the outcomes of these existing laws, they may determine ways to render them more potent.

States may also incorporate the lessons of this first generation of property rights laws by proposing new forms of such laws. The Arizona legislature, for example, enacted a statute in 1998 that prohibited counties from changing zoning regulations without "the express written consent of the property owner" (ARIZ. REV. STAT. § 11-829(F)). By providing such specific stipulations for land-use regulation, this law clearly assumes a new and more extreme form (so extreme, in fact that it already faces challenges as to its constitutionality). Other states could craft similarly forceful statutes.

With the exception of this more recent Arizona law, approximately five years have passed since the greatest flurry of state legislative activity concerning private property rights. In five more years, it will be possible to evaluate the impacts of existing state property rights laws with much more authority. For now, it appears that although the property rights movement has succeeded in pushing its agenda into state legislatures, the results of this success are fairly limited.

This should come as good news to persons interested in land-use planning. As most planners would argue, planning activities have always recognized the importance of private property rights. These activities have therefore sought to balance property rights carefully with the need to protect the public interest. If nothing else, state property rights laws have renewed this focus on the relationships between property rights and planning. Whether this will lead to better decision making is a lingering and important question.

7. As discussed above, the Florida law limiting the amount of state agency liability in tort claims would obviously have an impact on a strong court decision in that state. For now, it appears that the courts would invalidate a single property rights claim in excess of \$100,000. There is certainly the possibility, however, that this liability limit be subject to amendment, as per the next scenario.

6. See Emerson and Wise, *supra*, and Meltz, *supra*, for descriptions of the types of laws passed in the various states.