DO SMART GROWTH POLICIES INVITE REGULATORY TAKINGS CHALLENGES? A SURVEY OF SMART GROWTH AND REGULATORY TAKINGS IN THE SOUTHEASTERN UNITED STATES

I. INTRODUCTION

Although cities started to sprawl across the landscape when the population of the United States began its transition from an agrarian to an urbanized society in the early part of the twentieth century,[1] the problem of urban sprawl and the emergent "smart growth" movement did not make its way into our mainstream political discourse until the late 1990s.[2] By the end of that decade, voters were approving hundreds of state ballot initiatives devoted to controlling sprawl, and the majority of the states' governors were incorporating open space protection and growth management agendas in their inaugural or "state of the state" addresses.[3] Even Vice President Gore had joined the critics of sprawl, "complain[ing] that sprawl has left a vacuum in the cities and suburbs which sucks away jobs . . . homes and hope."[4] Today, the issue of sprawl still maintains widespread support as evidenced by continued approval of smart growth legislation and recent public opinion polls that find people ranking suburban sprawl as one of the most important problems facing their communities.[5] Furthermore, the issue of sprawl cuts across the political spectrum with interested supporters of growth management among both pro-business and pro-environmental organizations.[6]

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1. *See* ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING, AND ENVIRONMENTAL SYSTEMS 15-21 (1999).

2. *See* Brian W. Ohm, *Reforming Land Planning Legislation at the Dawn of the 21st Century: The Emerging Influence of Smart Growth and Livable Communities*, 32 URB. LAW. 181, 188-89 (2000). For a summary of the significant amount of literature devoted to the topic of urban sprawl, see Robert W. Burchell & Naveed A. Shad, *The Evolution of the Sprawl Debate in the United States*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 137 (1999).

3. Timothy J. Dowling, *Reflections on Urban Sprawl, Smart Growth, and the Fifth Amendment*, 148 U. PA. L. REV. 873, 877 (2000). In 1998, voters saw over 240 state ballot initiatives that were related to growth management, and they approved over seventy percent of those initiatives.

4. Michael Lewyn, *Suburban Sprawl: Not Just an Environmental Issue*, 84 MARQ. L. REV. 301, 303 (2000) (citations omitted).

5. *See* SMART GROWTH AMERICA, GREETINGS FROM SMART GROWTH AMERICA 1-7 (2000), *at* www.smartgrowthamerica.org. According to one poll commissioned by Smart Growth America, a coalition of public interest groups, seventy-eight percent of Americans support policies to reduce sprawl.

6. *See* Dowling, *supra* note 3, at 875; Ohm, *supra* note 2, at 190. *But see* Clint Bolick, *Subverting the American Dream: Government Dictated "Smart Growth" is Unwise and Unconstitutional*, 148 U. PA. L. REV. 859 (2000) (arguing the "counterpoint" to Dowling's article on "smart growth" and regulatory takings); Lewyn, *supra* note 4, at 303-04 (stating that while "environmentalists are the leading

The solution to the sprawl problem, for most, is embodied in what has become widely known as the "smart growth" movement. Like sprawl, the term "smart growth" is given a variety of meanings by different individuals and groups based on their perspectives. At its core, "[s]mart growth includes a modernization of land use policy that can affect land use, growth management, public infrastructure and facilities, social welfare, natural resources, environment quality, and the quality of life."[7] On one end of the political spectrum, the Sierra Club defines smart growth as "intelligent, well-planned development that channels growth into existing areas, provides public-transportation options, and preserves farm land and open space."[8] On the other hand, the Vice President of the conservative Institute for Justice in Washington, D.C., believes "that the core of any effective smart-growth agenda is coercion—substituting free individual choice with government edicts."[9] Despite strong opinions from the extreme left and right, "[s]mart growth has received a broad base of support from various national organizations," including the National Association of Home Builders ("NAHB"), the American Planning Association ("APA"), and the Smart Growth Network ("SGN").[10] The definitions of smart growth vary among these organizations,[11] but they generally agree that the goal of smart growth "is to reap the benefits of growth and development, such as jobs, tax revenues, and other amenities, while limiting the disasters of growth, such as degradation of the environment, escalation of local taxes, and worsening traffic congestion."[12] Thus, the broad goals of smart growth include economic development, environmental protection, natural resources conservation, planned development, growth management, and improvement of the social welfare of urban communities.[13]

Obviously, these goals will often conflict as the use of land and natural resources for suburban development necessary to meet the community's needs for jobs and housing must be weighed against the need to regulate land use, preserve open space and farmland, and provide for improved social welfare.[14] With competing goals come competing stakeholders and the most direct conflicts will occur between the advocates of smart growth and land developers. Although smart growth strategies include both stick and carrot approaches to land use planning, there is no question that certain

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opponents of sprawl," some far-right conservatives and libertarians deny that it is a problem at all).

7. James E. Holloway & Donald C. Guy, *Smart Growth and Limits on Government Powers: Effecting Nature, Markets, and the Quality of Life Under the Takings Clause and Other Provisions*, 9 DICK. J. ENVTL. L. & POL'Y 421, 435 (2001).

8. SIERRA CLUB, SMART CHOICES OR SPRAWLING GROWTH: A 50-STATE SURVEY OF DEVELOPMENT (Sept. 2000), *at* http://www.sierraclub.org/sprawl/50statesurvey.

9. Bolick, *supra* note 6, at 860.

10. Holloway & Guy, *supra* note 7, at 442; Ohm, *supra* note 2, at 190. The SGN grew out of the Environmental Protection Agency's ("EPA") work on sustainability.

11. *See infra* Part II.

12. FREILICH, *supra* note 1, at 32.

13. Holloway & Guy, *supra* note 7, at 424.

14. *Id.* at 424-25.

smart growth strategies and "regulations will impose public burdens on private land and economic developers."[15] The tools of smart growth most likely to impact the wallets of developers include "use restrictions, environmental requirements, economic incentives, conditional demands, and regulatory mechanisms to secure participation by landowners and developers in combating urban sprawl."[16]

Moreover, whenever individuals bear the costs of policies and programs implemented for the public good, those individuals may seek to challenge those regulations under the Takings Clause of the Fifth Amendment. The Takings Clause provides that "private property [shall not] be taken for public use, without just compensation."[17] Federal courts have interpreted the Takings Clause to not only prohibit physical takings but also "regulatory takings" of private property—cases in which a government regulation severely restricts what an individual can do on his or her property. As smart growth strategies that regulate and restrict the development of property have become more widespread over the last ten or fifteen years, the broader question that has been asked is whether smart growth regulation in its various forms is constitutional under the regulatory takings doctrine. The fundamental issue that arises from this analysis is whether smart growth strategies should focus on more or less governmental regulation of private land. Some would argue, like Justice Black, that the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[18] Others feel that private property rights "are inherently limited to protect the public," and government regulation of private land is an appropriate and necessary function of the government.[19]

These perspectives on the Takings Clause have been applied to the smart growth issue by a number of legal scholars and are the underlying theme of this Comment. However, the purpose of this Comment is not to debate the constitutionality of smart growth legal strategies and policies. Rather, the Comment asks, in light of the Supreme Court's and the states' current acceptance of the regulatory takings doctrine, and given the high potential for conflict between government solutions to sprawl and private development, what lessons can be learned by the policymakers who want to implement smart growth in their states and communities. In other words, regardless of whether a particular smart growth regulation is constitutional, if it is likely to be challenged in court as unconstitutional, it will necessarily be less effective than the regulation that has the support of all interested stakeholders. Therefore, this Comment asks the following: if a state imple-

15. *Id.* at 428.
16. *Id.* at 455-56.
17. U.S. CONST. amend. V.
18. Armstrong v. United States, 364 U.S. 40, 49 (1960).
19. Thomas E. Roberts, *Regulatory Takings: Setting Out the Basics and Unveiling the Differences*, *in* TAKING SIDES ON TAKINGS ISSUES 1, 1-12 (Thomas E. Roberts ed., 2002).

ments extensive smart growth legislation, is the state more likely to have a large number of regulatory takings challenges to the legislation? If the answer is yes, knowing who actually makes claims for regulatory takings in those states will give the authors of smart growth regulation greater incentive to explicitly incorporate the interests of those stakeholders so as to avoid litigation down the road.

To answer these questions, this Comment reviews the smart growth strategies of nine southeastern states and compares the level of support for smart growth in each state to the amount of regulatory takings litigation that has arisen in each state. However, in order to better define the different approaches to smart growth and lay a foundation for the empirical data, the first part of this Comment defines urban sprawl and summarizes the smart growth policies of three national organizations. The Comment then explores the potential constitutional issues presented by those different approaches by briefly summarizing the legal scholarship that addresses the impacts the regulatory takings doctrine may have on the smart growth movement in general. In part two, the Comment describes the level of support for smart growth in and the specific methods to eradicating sprawl adopted by the southeastern states of Alabama, Arkansas, Georgia, Florida, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee. Finally, the Comment surveys the actual regulatory takings cases that made their way into the appellate courts of those states over the last ten years. By documenting the plaintiffs in each of these regulatory taking cases and comparing the number of these cases in each state to the level and type of smart growth policy adopted by the state, this Comment attempts to demonstrate that certain types of growth management regulations are more likely to incur resistance from the population most affected by them—developers. Thus, in order to more effectively and efficiently solve the problem of suburban sprawl in those southeastern states that have not yet implemented any significant smart growth regulations or legislation, this Comment argues that anti-sprawl advocates should work to adopt smart growth strategies that minimize conflicts with developers by using the carrot rather than the stick approach to growth management.

II. SPRAWL, SMART GROWTH, AND REGULATORY TAKINGS

A. The Problem of Sprawl

Despite the widespread support for developing solutions to what is generally perceived to be a problem of modern urban society, suburban (or urban) sprawl "has historically been ill-defined."[20] According to one survey of the literature, suburban sprawl has at least ten elements but can generally be characterized as "low-density residential and nonresidential intrusions into

20. Amy Heiling, *Advocate for a Modern Devil: Can Sprawl be Defended?*, 17 GA. ST. U. L. REV. 1063, 1064 (2001).

rural and undeveloped areas."[21] However, a definition that focuses solely on density of development misses some of the other aspects of sprawl when one considers the fact that even in those parts of the world which have much higher metropolitan densities, such as Japan and Western Europe, suburban densities are lower than that of the urban cores they surround.[22] Rather, sprawl is that particular type of suburban development that "unquestionably has an I-know-it-when-I-see-it quality to it."[23] In its most obvious form, it includes the all too familiar single-family residential subdivisions and strip shopping centers linked "together by connector roads feeding into high-speed highways."[24] A more fundamental working definition incorporates the ambiguity inherent in the concept of sprawl by defining it as "low-density, land-consuming, automobile-dependent, haphazard, non-contiguous (or 'leapfrog') development on the fringe of settled areas, often near a deteriorating central city or town, that intrudes into rural or other undeveloped areas"[25] and is "designed without regard to its surroundings."[26]

Although there is no consistent definition of sprawl, the costs of suburban sprawl have been well documented.[27] The costs of sprawl include "physical, monetary, temporal, and social/psychological" costs[28] that have contributed to at least

> six major crises for America's major metropolitan regions. These crises are: 1. deterioration of existing built-up areas (cities and first- and second-ring suburbs); 2. environmental degradation—loss of wetlands and sensitive lands, poor air and water quality; 3. overconsumption of gasoline energy; 4. fiscal insolvency, transportation congestion, infrastructure deficiencies, and taxpayer revolts; 5. agricultural land conversion; and 6. unaffordable housing.[29]

These six crisis areas have been researched and discussed at length in countless articles and several influential books analyzing the environmental, economic, and social costs of sprawl.[30] Though some would argue that sprawl

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21. ROBERT W. BURCHELL ET AL., NAT'L RES. COUNCIL, THE COSTS OF SPRAWL-REVISITED 7-8 (1998).
22. Burchell & Shad, *supra* note 2, at 140-41.
23. Dowling, *supra* note 3, at 874.
24. Mark S. Davies, *Understanding Sprawl: Lessons from Architecture for Legal Scholars*, 99 MICH. L. REV. 1520, 1521 (2001) (reviewing ANDREW DUANY ET AL., SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM (2000)).
25. Dowling, *supra* note 3, at 874.
26. *See* FREILICH, *supra* note 1, at 16.
27. Burchell & Shad, *supra* note 2 (summarizing a number of studies that assess the costs of sprawl).
28. *Id.* at 142.
29. FREILICH, *supra* note 1, at 16.
30. Two influential books in the anti-sprawl movement include DAVID RUSK, CITIES WITHOUT SUBURBS (1993), and JAMES HOWARD KUNSTLER, THE GEOGRAPHY OF NOWHERE (1993).

is in fact beneficial because it reduces travel times, lowers housing costs, and reflects market preferences,[31] most would agree that

> [i]t is too late in the day . . . to argue that urban sprawl is a non-issue, or worse yet that it somehow reflects the American Dream . . . . Unless we protect our remaining open spaces and remake our urban centers into desirable places to live, we can look forward to increased pollution, longer commutes, worsening road rage, more economic depression in our central cities, higher infrastructure costs and taxes, and further loss of our cultural heritage and sense of community.[32]

Thus, sprawl is a problem in need of a solution.[33]

B. Key Stakeholders and Their Policies on Smart Growth

Many propose "smart growth" as the solution to sprawl. While there are numerous definitions of "smart growth," this Comment focuses on the smart growth policies of three major national organizations: the SGN, APA, and NAHB. Each of these groups more or less represent each of the major stakeholders involved in the smart growth movement—citizens, government, and developers. Each group has also issued a well-defined policy on smart growth.

The SGN evolved from the work done on sustainability by the Office of Urban and Economic Development in the EPA and advocates for smart growth with its partners from a variety of different citizen and grassroots advocacy organizations.[34] The network focuses on grassroots efforts within individual communities by seeking to raise awareness and encourage voluntary implementation of smart growth practices.[35] The SGN lists ten general principles that articulate its vision of the goals of smart growth, including (1) creating a range of housing opportunities and choices, (2) creating walkable neighborhoods, (3) fostering distinctive, attractive places with a strong sense of place, (4) encouraging community and stakeholder collaboration, (5) making development decisions predictable, fair, and cost effective, (6) mixing land uses, (7) preserving open space, farmland, natural beauty, and critical environmental areas, (8) providing a variety of transportation

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31. *See* Heiling, *supra* note 20 (describing possible benefits of sprawl from the perspective of an anti-sprawl advocate); *see also* Bolick, *supra* note 6, at 861 (2000) (arguing that the problem of sprawl is "hysteria . . . without foundation").

32. Dowling, *supra* note 3, at 887.

33. Because it is beyond the scope of this Comment to further define sprawl and its environmental, economic, and social costs, this Comment assumes the truth of Dowling's observations.

34. *See* Ohm, *supra* note 2, at 190. For more information about the organization, see the organization's website at http://www.smartgrowth.org.

35. *Id.* at 191.

choices, (9) strengthening and directing development towards existing communities, and (10) taking advantage of compact building design.[36]

The APA, the organization that represents professionals involved in land-use planning (the majority of whom work for state and local government agencies), is one of the major proponents of smart growth. The organization launched its "Growing Smart" project in 1994, "an effort to draft the next generation of model planning and zoning legislation for the U.S."[37] It reached this goal in 2001, when the organization issued a legislative guidebook designed to provide a variety of options for statutory reform of the two model planning and zoning enabling acts drafted in the 1920s which served as the basis for most planning enabling legislation in the country.[38] The APA defines smart growth as

> comprehensive planning to guide, design, develop, revitalize and build communities for all that: have a unique sense of community and place; preserve and enhance valuable natural and cultural resources; equitably distribute the costs and benefits of development; expand the range of transportation, employment and housing choices in a fiscally responsible manner; value long-range, regional considerations of sustainability over short term incremental geographically isolated actions; and promotes public health and healthy communities.[39]

Based on this definition, the APA has developed thirteen core principles of smart growth, which include (1) recognizing that stakeholders at all levels must play a role in implementing smart growth policies; (2) encouraging changes in the federal and state policies that have contributed to sprawl; (3) equitable and diverse planning processes; (4) citizen participation in planning processes; (5) choice in transportation; (6) regional planning; (7) diverse approaches to smart growth; (8) efficient use of land and infrastructure; (9) central city vitality; (10) recognizing the importance of small towns and rural areas; (11) encouraging mixed land uses and providing choice in housing; (12) conserving and enhancing environmental and cultural resources; and (13) creating and preserving "sense of place."[40]

The NAHB, an organization that represents land developers and the building industry, has developed its own definition and principles of smart growth. In addition, it has been directly critical of many aspects of the

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36. SMART GROWTH NETWORK, SMART GROWTH PRINCIPLES, *at* http://www.smartgrowth.org/sgn/whatissgn.pdf (last visited Feb. 4, 2004).

37. *See* AM. PLANNING ASS'N, GROWING SMART, *at* http://www.planning.org/growingsmart (last visited Feb. 4, 2004).

38. AM. PLANNING ASS'N, GROWING SMART LEGISLATIVE GUIDEBOOK (2001) [hereinafter APA LEGISLATIVE GUIDEBOOK].

39. AM. PLANNING ASS'N, POLICY GUIDE ON SMART GROWTH (2002), *at* http://www.planning.org/policyguides/smartgrowth.htm (last visited Feb. 4, 2004).

40. *Id.*

APA's legislative guide containing new model planning regulations developed in accordance with the APA's smart growth principles.[41] The NAHB defines smart growth in part as "meeting the underlying demand for housing created by . . . building political consensus and employing market-sensitive and innovative land use planning concepts."[42] The NAHB's core principles of smart growth include "[m]eeting the nation's housing needs with a broad range of housing choices; [a] comprehensive process for planning growth; [p]lanning and funding for infrastructure improvements; [i]nnovative land-use techniques that use land more efficiently; [and] [r]evitalizing older suburban and inner-city markets."[43]

On the surface, the smart growth principles advocated by these three organizations give the appearance that they largely agree on the basic goals of the smart growth agenda. All three organizations support efficient use of land and infrastructure, central city redevelopment, choice in housing, comprehensive growth planning, and managing the density of development. While only the SGN and APA incorporate environmental values and "sense of place" as two important smart growth principles, the NAHB probably would not disagree with these values in the abstract.[44] The disagreements appear not over the broad goals of smart growth, but over the regulations that are adopted to implement these goals, particularly when the authors of smart growth regulations adopt development restrictions using the "stick" rather than the "carrot" approach to regulation.

The stick approach to smart growth regulation involves the use of mandatory regulations to impose development restrictions, environmental compliance requirements, urban growth boundaries, impact fees, moratoria, and mandatory land dedications.[45] There is some agreement in this area. The APA cautions on the use of urban growth boundaries and impact fees, suggesting that the former should be adopted only as part of a regional growth management system and implemented in a way that assures an adequate supply of developable land within the growth boundary and that the latter should "meet proportionality and rational nexus requirements."[46] On the other hand, the NAHB opposes the use of urban growth boundaries and cautions on the use of impact fees. It also disagrees with the APA's position that moratoria may be used to restrict development while the local govern-

41. *See* NAT'L ASS'N OF HOME BUILDERS, THE BUILDERS' GUIDE TO THE APA GROWING SMART LEGISLATIVE GUIDEBOOK (2002) [hereinafter NAHB BUILDERS' GUIDE]. Another organization representing the development side of smart growth is the National Association of Industrial and Office Properties. They take an even more conservative approach to smart growth than does the NAHB. *See* NAT'L ASS'N OF INDUS. & OFFICE PROPS., SMART GROWTH OVERVIEW, *at* http://www.naiop.org/governmentaffairs/growth/gmoverview.cfm (last visited Feb. 4, 2004).

42. NAT'L ASS'N OF HOME BUILDERS, SMART GROWTH, SMART CHOICES 2 (2002) [hereinafter NAHB SMART CHOICES] *at* http://www.nahb.org/publication_details.aspx?publicationID=15&sectionID=154.

43. *Id.*

44. *See generally* NAHB SMART CHOICES, *supra* note 42.

45. *See* Holloway & Guy, *supra* note 7, 426 n.5.

46. *See* NAHB BUILDERS' GUIDE, *supra* note 41, at 5. *See also infra* note 70.

ment conducts comprehensive planning and believes that the APA should be less broad in its development restrictions on environmentally critical and sensitive areas.[47]

The carrot approach involves voluntary regulations that use incentives and benefits "to induce landowners to comply."[48] While the NAHB does not advocate any particular incentive-based smart growth regulations, it believes that restrictions on development through the use of urban growth boundaries have contributed to spikes in the costs of housing. Furthermore, the higher density developments required by urban growth boundaries do not reflect market realities—people invariably want to live in low-density housing developments.[49] Therefore, incentive-based smart growth regulations and policies as suggested by the SGN may be more effective. These include: (1) local government offering credit assurance, equity investment, or soft second loans to developers involved in mixed-use land developments; (2) providing smart growth grants to communities to locate housing in close proximity to jobs; (3) allowing developers to increase the size of buildings beyond that allowed by current zoning law in exchange for providing public amenities housing, retail space, or open space in what would otherwise be solely office space (i.e., incentive zoning); (4) tax credits for adaptive reuse of historic or architecturally significant buildings; (5) transferable development rights (TDRs) that give marketable development credits to landowners with property on which development is restricted; (6) purchase of development rights (PDRs) to preserve open space or other environmentally sensitive areas; and (7) diminish the tax consequences of making improvements to underutilized land or blighted properties.[50]

C. Is Smart Growth Constitutional under the Regulatory Takings Doctrine?

1. A Brief History of the Regulatory Takings Doctrine

The Takings Clause prohibits the government from taking "private property" for "public use" without paying the property owner "just compensation."[51] Generally, courts have interpreted the Takings Clause to require compensation to property owners when the government either physically takes possession of private property or regulates private property "to the extent that the government has constructively possessed the property."[52] Originally, the federal courts' "understanding of the scope of the Takings

47. *See id.*
48. Holloway & Guy, *supra* note 7, 426 n.6.
49. *See* NAHB SMART CHOICES, *supra* note 42.
50. *See* SMART GROWTH NETWORK, GETTING TO SMART GROWTH: 100 POLICIES FOR IMPLEMENTATION (2002), *at* http://www.smartgrowth.org/pdf/gettosg.pdf.
51. U.S. CONST. amend. V.
52. Susan M. Stedfast, *Regulatory Takings: A Historical Overview and Legal Analysis for Natural Resource Management*, 29 ENVTL. L. 881, 884 (1999).

Clause [was] more limited" to physical takings. [53] However, since the Supreme Court's 1978 decision in *Penn Central Transportation Co. v. City of New York*,[54] the federal courts have also regularly applied the Takings Clause to those situations in which government regulations severely affect private property—what has otherwise come to be known as a "regulatory taking."

The regulatory takings doctrine has its roots in the early twentieth century when government began to shed its laissez-faire economic policies and take on more of a role as arbiter in the growing number of land-use conflicts that were emerging alongside a larger and increasingly more urbanized and industrialized population.[55] The government's approach to dealing with "competition between incompatible land uses" was to impose more and more basic land-use regulations, such as building codes and construction requirements that eventually led to the development of municipal zoning codes.[56] In those cases heard by the Supreme Court during the late nineteenth century and early twentieth century, challenges to such regulations under the Takings Clause were held to be valid exercises of the state police power and were neither unconstitutional nor required compensation by the government to private landowners.[57] However, the Supreme Court in *Pennsylvania Coal v. Mahon*, the first regulatory takings decision, stated that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[58] The court went on to hold that a statute protecting residential structures from subsidence caused by coal mining constituted a regulatory taking and was unconstitutional.[59]

Having set forth the concept that a regulation may go so far as to create an unconstitutional taking of private property in *Pennsylvania Coal*, neither the Supreme Court nor the federal court system as a whole returned to the area of regulatory takings until the 1970s.[60]

As local governments began enacting more regulations to deal with land-use issues that were outside the realm of common law nuisances, including dealing with the problem of suburban sprawl, and as the Supreme Court began to move more to the political right, the stage was set for a return to the regulatory takings doctrine.[61] In 1978, the Supreme Court decided *Penn Central* and paved the way for a rebirth of the regulatory takings doctrine that the Court espoused fifty years earlier in *Pennsylvania Coal.* In

53. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 780-81 (2000).
54. 438 U.S. 104 (1978)
55. *See* ROBERT MELTZ ET AL., THE TAKINGS ISSUE 4-7 (1999).
56. *Id.* at 5.
57. *Id.*; *see also* Stedfast, *supra* note 52, at 886-92.
58. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
59. *Id.* at 416.
60. *See* MELTZ ET AL., *supra* note 55, at 35 (stating that the "vast majority of regulatory takings cases" between the 1920s and 1970s were decided by state courts).
61. *Id.* at 7.

Penn Central Transportation Co. v. City of New York,[62] the owner of Grand Central Terminal in New York City challenged the city's historic preservation law because the owner had been denied a permit to build a fifty-story tower over the train terminal.[63] In its opinion, the Court laid some of the basic ground rules for plaintiffs who seek compensation from the government for a regulatory taking. The court discussed when such a claim becomes ripe, what factors are used in the balancing test to determine whether the government must pay the landowner, when the balancing test can be discarded in favor of a "bright line" test, and to what remedy the regulatory takings plaintiff is constitutionally entitled.[64] The court further held that based on three factors—the "economic impact of the regulation," the "distinct investment-backed expectations" of the landowner, and the "character of the governmental action"—no taking had occurred.[65]

Although *Penn Central* set the ground rules, the status and application of the regulatory takings doctrine have by no means been well settled. Even Justice Brennan recognized in the *Penn Central* opinion that the "Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated."[66] Subsequent takings cases handed down by the Court have borne out deep uncertainty surrounding the regulatory takings doctrine, prompting Justice Stevens to state that "[e]ven the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence."[67]

Ultimately, the cases leave us with a doctrine in which courts usually make their decisions on a case-by-case basis. In a nutshell, when assessing a regulatory takings case, a reviewing court will use one of two economic tests. Whenever the regulatory action diminishes the economic value of a landowner's property, the court will utilize the three *Penn Central* factors to determine whether a regulatory taking has occurred. However, if the case presents one of the rarer situations in which the regulation at issue has "deprived [a landowner] of all 'economically viable use,'"[68] the landowner will benefit from the creation of a presumption that a regulatory taking has occurred.[69] In addition to the two economic tests, the Supreme Court has held that the regulation at issue must substantially advance a legitimate state interest. In two separate cases in which development was conditioned on the landowners' agreement to dedicate part of their land to public use, the Court further elucidated the legitimate state interest test by holding that there must

62. 438 U.S. 104 (1978).
63. *Id.* at 107.
64. *See* MELTZ ET AL., *supra* note 55, at 8.
65. *Penn Central*, 438 U.S. at 135-38. This is the famous *Penn Central* three-factor balancing test established by the court for use in those cases in which the government regulation does not completely eliminate economic use or value of the relevant parcel.
66. *Id.* at 124.
67. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 866 (1987) (Stevens, J., dissenting).
68. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1003 (1992).
69. *See* MELTZ ET AL., *supra* note 55, at 141.

be both an "essential nexus" and "rough proportionality" between the purpose of the regulation or land dedication and the regulation or land dedication itself.[70]

While the doctrine is infinitely more complex than discussed here, with nuances and additional issues that have not been completely settled by the courts, this summary is a sufficient foundation for an understanding of the following summary of the legal scholarship devoted to smart growth regulation and the regulatory takings doctrine.

2. *When Does Smart Growth Constitute a Regulatory Taking?*

In the two opposing essays in the *University of Pennsylvania Law Review*, smart growth advocate Dowling and property-rights advocate Bolick argue over whether smart growth regulation on the whole is constitutional under the Fifth Amendment and the regulatory takings doctrine.[71] Bolick argues that in all regulatory cases:

> [T]he question . . . is this: when government seeks to fulfill a broad public objective, who should bear the costs—individual property owners or the general public? If the government can pass off the costs, it will exhibit little restraint in imposing them. If taxpayers must foot the costs, however, the government may think twice about how much it values the particular goal. That is precisely the type of calculation the Constitution requires.[72]

From there, Bolick argues that growth-control restrictions, such as urban growth boundaries and development conditions, will not likely pass constitutional muster.[73] On the other hand, Dowling argues that "[b]ecause smart growth initiatives rarely (if ever) constitute the functional equivalent of an expropriation of property, courts consistently have rejected takings challenges to efforts to control sprawl."[74] He then cites the one U.S. Supreme Court decision that mentions sprawl and rejected a landowner's regulatory takings claim[75] in support of his conclusion that "[n]othing in our Constitution or traditions prevents us from making thoughtful choices about how and where to grow."[76]

The actual constitutional framework of the regulatory takings doctrine can be applied to smart growth legislation by considering two types of constitutional challenges: "facial" and "as-applied" challenges.[77] Under the

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70. *See* Dolan v. City of Tigard, 512 U.S. 374 (1994); *Nollan*, 483 U.S. 825.
71. *See* Bolick, *supra* note 6; Dowling, *supra* note 3.
72. Bolick, *supra* note 6, at 868.
73. *Id.* at 870-71.
74. Dowling, *supra* note 3, at 883.
75. Agins v. City of Tiburon, 447 U.S. 255 (1980).
76. Dowling, *supra* note 3, at 887.
77. Jerold S. Kayden, *The Constitution Neither Prohibits Nor Requires Smart Growth*, *in* SMART

Supreme Court's regulatory takings jurisprudence, it is "enormously difficult to win" a facial challenge to a regulation by asserting that the regulation denies all owners within its scope all economically viable use of their property; or that it implicates any of the three *Penn Central* factors for all owners within its scope; or that it fails to substantially advance a legitimate state interest.[78] More specifically, courts are not likely to find most smart growth regulations to be facially invalid because "smart growth's constellation of concerns easily qualifies as a grouping of legitimate state interests for which government power may be exercised."[79] The concerns of smart growth include "individual goals that have been pursued by governments and approved by courts for decades, including preserving open space, saving environmentally sensitive land, protecting landmark buildings and community character, promoting affordable housing, and reducing traffic congestion."[80] Moreover, the three factors of the *Penn Central* analysis, by definition, prevent facial challenges because they require a case-by-case approach to regulatory takings.[81] Finally, while it is possible that a draconian urban growth boundary or other development restriction could limit all development over a wide area and allow a facial challenge for total economic deprivation to multiple landowners, these laws are not likely to be enacted without incorporating avenues for variances and appeal procedures to prevent facial challenges.[82]

On the other hand, whether smart growth legislation is a significant target for constitutional challenges as it applies to particular properties is largely an open question. It of course depends on the type of regulation and the property interest involved. Those smart growth regulations that are particularly vulnerable to as-applied challenges include the "stick" as opposed to the "carrot" forms of smart growth regulations.[83] In several cases in which a landowner made an as-applied challenge to these types of regulations, the U.S. Supreme Court found a regulatory taking.[84] For example, in *Lucas*, the Court concluded that an absolute prohibition on development on a specific tract of coastal land denied "all economically beneficial uses" of the land and therefore constituted a regulatory taking requiring compensation.[85]

GROWTH: FORM AND CONSEQUENCES 158, 172 (Terry S. Szold & Armando Caronell eds., 2002).

78. *Id.*

79. *Id.* at 173.

80. *Id.* (citations omitted).

81. *Id.* at 174.

82. *Id.* at 175.

83. *See generally* Brian W. Blaesser, *Smart Growth: Legal Assumptions and Market Realities, in* SMART GROWTH: FORM AND CONSEQUENCES 158, 172 (Terry S. Szold & Armando Caronell, eds., 2002).

84. City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999) (impact fees); Dolan v. City of Tigard, 512 U.S. 374 (1994) (land dedications); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (environmental regulation); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

85. *Lucas*, 505 U.S. at 1019.

III. SMART GROWTH AND REGULATORY TAKINGS IN THE SOUTHEASTERN UNITED STATES

A. A Survey of Urban Sprawl and Smart Growth in the Southeast

Based on the legal scholarship describing the types of smart growth regulation that may be more susceptible to constitutional challenges, the empirical data on the types of smart growth regulations and policies implemented by nine southeastern states suggests the possibility that some of those states may have a regulatory environment more prone to regulatory takings challenges than others.

In 2002, the APA issued a report detailing the planning reform efforts of all fifty states and divided them into four categories based on the level of activity in each state towards enacting effective smart growth regulations and policies.[86] The report also highlighted those reforms that were already in place prior to the study. The states were divided into groups that were (1) implementing moderate to substantial statewide reforms, (2) pursuing additional statewide, regional, or local reforms, (3) pursuing their first major statewide reforms, and (4) not pursuing statewide reforms.[87] The nine southeastern states reviewed in this Comment fell into these categories as detailed below.[88]

1. Moderate to Substantial Statewide Reforms: Florida, Georgia, and Tennesssee

While Florida and Georgia are considered "growth management states"[89] and have had statewide growth management laws since at least the 1980s, Tennessee just recently enacted a new Growth Policy Law.[90] These three states now all require comprehensive planning at the local government level.[91] Florida has had comprehensive planning requirements since the 1970s with components that have encouraged the use of urban growth boundaries and mandates that plans include elements of traffic management,

86. AM. PLANNING ASS'N, PLANNING FOR SMART GROWTH: 2002 STATE OF THE STATES (2002) [hereinafter APA STATES]. *See also* Ed Bolen et al., *Smart Growth: A Review of Programs State by State*, HASTINGS W.-NW. J. ENVTL. L. & POL'Y 145 (2002).

87. APA STATES, *supra* note 86, at 15.

88. No southeastern states fell into the second category of pursuing additional statewide, regional, or local reforms.

89. James C. Nicholas, *The Ups and Downs of Growth Management in Florida,* 12 U. FLA. J.L. & PUB. POL'Y 213, 214 (2001).

90. *See* APA STATES, *supra* note 86, at 49-52, 118-19.

91. The lack of comprehensive planning required of local governments through state planning and zoning enabling legislation is considered one of the core contributors to urban sprawl. Therefore, reform of state enabling acts to require comprehensive planning at the local level is one of the central components of the APA's model statutes proposed in the APA LEGISLATIVE GUIDEBOOK. However, the link between zoning and planning enabling acts, sprawl, and smart growth is beyond the scope of this Comment.

open space preservation, and plans for providing housing.[92] Florida's growth management techniques include "concurrency management[93] for adequate public facilities provision, impact analysis for development with regional impact, and projects proposed in critical concern areas."[94] Georgia enacted its comprehensive planning legislation in the late 1980s, but unlike Florida, its reforms are "characterized by its reliance on incentives to motivate planning and is implemented by a bottom-up planning approach."[95] Georgia encourages local governments to prepare comprehensive plans, and most of the growth management techniques in the state are centered around "environmental and fiscal impact analysis and fiscal incentives."[96] Tennessee passed its growth management legislation in 1998 which required all local governments to prepare a growth plan by July 1, 2000.[97] Tennessee's new growth plans "identify urban growth boundaries for each municipality as well as planned growth areas and rural areas within each county in an attempt to minimize and control urban sprawl."[98]

2. *Pursuing First Major Statewide Reforms: Arkansas, Mississippi, North Carolina, and South Carolina*

These four states have not developed major statewide smart growth planning regulations and policies but are, to varying degrees, seeking to do so in the near future. South Carolina requires local governments to develop a comprehensive plan based on state legislation passed in 1994;[99] however, a 2000 proposal in the legislature to update the legislation was defeated. Like South Carolina, North Carolina has continued to propose other smart growth proposals and planning reform, but these proposals "have been stymied by development interests and local control groups."[100] The planning statutes in Arkansas and Mississippi are still largely based on 1920s model planning statutes; however, increased discussion in the legislature and within the governors' offices of these states have put smart growth agendas higher on the priority list.[101]

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92. *See* FREILICH, *supra* note 1, at 235.
93. *Id.* at 235 ("'Concurrency' means that the public facilities and services needed to maintain level of service standards adopted in a local comprehensive plan are available simultaneous to, or within a reasonable period of time after, development approval or construction.").
94. *Id.* at 236.
95. *Id.* at 226.
96. *Id.* at 228.
97. *See id.* at 239.
98. *Id.*
99. *Id.* at 233.
100. *See* APA STATES, *supra* note 86, at 96.
101. *Id.* at 37, 77.

3. *Not Pursuing Statewide Reforms: Alabama and Louisiana*

Both Alabama and Louisiana's comprehensive planning statutes are based on 1920s legislation and have not been significantly updated. While Alabama has recommended the development of a smart growth commission, and Louisiana has had some success with local planning reforms, no statewide efforts are being directed towards updating the states' planning laws and enacting smart growth legislation.

B. A Survey of Regulatory Takings Cases in the Southeast

1. Methods

I used Westlaw to locate all the federal and state regulatory takings cases that originated in any of the nine southeastern states and were reported for the years 1993 to 2002. Before developing a search string to use in Westlaw, I first read through the main Supreme Court cases and several Circuit Courts of Appeals cases dealing with regulatory takings during the past ten years. After gathering search terms from these cases, I developed a string of search terms that would pull from the [STATE]-CS-ALL databases[102] all federal and state *regulatory* takings cases in which the primary property interest was in land.[103] The search string was designed to be broad so that it would pull any cases that contained the words "regulatory taking(s)" or citations to *Nollan, Lucas, Dolan,* or *Williamson County*,[104] or that mentioned a Fifth Amendment taking in the Westlaw edited synopsis. Although this search string returned several cases that did not meet the criteria (i.e., regulatory takings of land) of this survey, it also returned all the cases that did meet the criteria.[105]

I skimmed each of the cases returned by my Westlaw search and discarded those cases in which the plaintiff did not make any regulatory takings claims with respect to some ownership interest in real property. If the underlying case at issue was reported in more than one appellate decision, I used the most recent case at the highest appellate level and discarded the others. The remaining cases were divided into groups according to the specific ownership interests of the plaintiffs as follows:

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102. The databases included AL-CS-ALL, AR-CS-ALL, LA-CS-ALL, FL-CS-ALL, GA-CS-ALL, TN-CS-ALL, MS-CS-ALL, SC-CS-ALL, and NC-CS-ALL.

103. The following search term was used for each of the years reviewed in this survey: "DA (AFT 01/01/1993 & BEF 01/01/2003) & "REGULATORY TAKING" OR (TAKING /P NOLLAN OR DOLAN OR LUCAS OR "WILLIAMSON COUNTY REGIONAL PLANNING") OR SY ("FIFTH AMENDMENT" /10 TAKING)."

104. Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1980).

105. Selected early cases were Shepardized to determine whether they were cited in any subsequent decisions that were not returned by the search string used in this survey. All the later cases that cited to these earlier cases were returned by the search string.

1. Developers: consists mostly of traditional real estate developers and development firms whose primary interest is real estate development. It also includes individuals who may not be regular real estate developers, but who invest in specific parcels of real estate in anticipation of selling it to a developer. It also includes property owners who only wish to develop one particular parcel of real estate with their specific business.

2. Existing businesses: consists of any business that existed on the property prior to the regulation or decision at issue in the regulatory takings case.

3. Individuals: includes individual homeowners or property owners who own real estate for primary or secondary residential purposes.

4. Landlords: consists primarily of owners of apartment buildings or other rental property.

5. Natural Resource Extraction: consists of mining interests, farmers, and other natural resource based businesses.

6. Not-Specified: includes the plaintiffs of those cases in which the court did not specify the particular interests of the landowner sufficiently to place them in any of the other categories.

The final pool of cases were then broken down by state and charted to determine the number of regulatory takings claims brought by the different groups and litigated in the federal and state courts.[106]

2. Findings

Out of a total 322 cases reviewed within the search parameters, ninety-eight separate cases were identified as regulatory takings cases where the property interest at issue was land. In most of those cases, the plaintiff made an explicit regulatory takings claim, but in a few cases the plaintiff made a general takings claim that the court designated as a regulatory takings claim in its opinion. Of the total ninety-eight regulatory takings cases, forty-seven were brought by developers, twenty-six by existing businesses, eight by individuals, four by natural resource extraction interests, and four by landlords. Nine of the cases did not specify the specific interests of the landowner regarding the real property at issue. This translates into percentages as follows: forty-eight percent developers, twenty-seven percent individuals,

106. *See infra* Table 2 and Chart 1.

nine percent not specified, eight percent individuals, four percent natural resource extraction interests, and four percent landlords.

Additionally, of the total ninety-eight regulatory takings cases, forty-five originated in Florida, thirteen in Louisiana, ten in South Carolina, nine in North Carolina, seven in Georgia, five in Tennessee, four in Mississippi, three in Arkansas, and two in Alabama.[107] Like the breakdown of plaintiffs above, these numbers roughly easily translate into percentages because the total number of cases is nearly a hundred.

3. Discussion

The results speak for themselves. The overwhelming number of regulatory takings cases were brought by developers in Florida. That is not surprising given that Florida is the only southeastern state that has had comprehensive growth management planning for more than fifteen years. Georgia enacted some growth management legislation in the late 1980s, but by not incorporating urban growth boundaries and instead using incentive-based approaches, it is less restrictive than Florida's growth management regulations. Tennessee has recently developed some growth management legislation that is likely to have significant impacts on the development community, quite possibly leading to regulatory takings challenges in the court, but Tennessee's laws have not been in place long enough for such cases to make their way into the appellate courts. The other states have made little changes to their planning laws to incorporate smart growth regulations and policies and, not surprisingly, have experienced fewer regulatory takings cases.

One caveat: this Comment by no means suggests that there is a direct correlation between the number of regulatory takings cases and the level of smart growth legislation in the state. There are probably a number of other factors that are involved in whether and where regulatory takings challenges are brought into the courts and make their way up to the appellate level. The fact that Florida is one of the most populous states in the country suggests that development is occurring at a much more rapid pace there than in any other state in the Southeast. High growth rates means competition for valuable land, especially in a state bordered three sides by water, such that land use decisions probably are challenged under a variety of theories more often than in other states.

Despite this caveat, however, it is at least worthwhile to note that what may seem obvious to most is empirically true: developers are the plaintiffs in most regulatory takings cases. The fact that they are likely to bring those cases in states that have more restrictions on development at least suggests that those states and other states that are implementing new growth management policies must incorporate their concerns in growth management

107 *See infra* Chart 2.

regulations and policies. Because smart growth does not mean "no growth," the interests of developers will likely be best served by avoiding the mandatory, highly-restrictive forms of smart growth regulation that include urban growth boundaries and development moratoria and choosing regulations that create incentives for the kind of development that will meet the goals of smart growth and avoid sprawl. Moreover, nonregulatory, incentive-based approaches of the carrot variety "are less likely than regulatory controls to provoke landowners and property rights activists [because,] [c]orrectly or not, [they] see traditional regulation as eviscerating the institution of property . . . ."[108]

IV. CONCLUSION

There seems to be no question that smart growth regulation can "impose unreasonable public burdens on landowners and developers through limiting the use and development of land while providing for public needs . . . [thereby] rais[ing] constitutional concerns regarding fundamental fairness to landowners . . . and the exercise of authority by communities to regulate growth."[109] Furthermore, "the burden imposed on landowners under mandatory or voluntary regulation is at the heart of the takings issue under the nature of government action."[110] Therefore, as is suggested by the empirical research in this Comment, states and local governments will probably have the most success in implementing smart growth regulations and policies that reduce the problems associated with urban sprawl through the use of voluntary and incentive-based legislation rather than imposing mandatory requirements on developers. By adopting such smart growth strategies, those southeastern and other states that seek to mitigate sprawl through legislative and policy reforms will improve their chances of avoiding messy and costly questions over whether or not their reforms can be constitutionally challenged under the regulatory takings doctrine.

Chris J. Williams

108. MELTZ ET AL., *supra* note 55, at 513-14.
109. *See* Holloway & Guy, *supra* note 7, at 430.
110. *Id.* at 448.

TABLE 1: COMMONALITY OF SMART GROWTH PRINCIPLES

Smart Growth Network	American Planning Association	National Association of Home Builders
Choice in housing	Choice in housing and mixed land use	Broad range of housing choices
Mixed land use		
Development in existing communities	Central city vitality	Revitalizing older suburban and inner-city markets
Compact building design	Efficient use of land and infrastructure	Efficient use of land
		Planning and funding for infrastructure improvements
	Diverse approaches to smart growth	Comprehensive growth planning
Stakeholder collaboration	Multi-level government approach	
	State and federal policies that support cost effective, incentive-based investment	
	Increased citizen participation	
Sense of place	Sense of place	
Predictable and fair development decisions	Equitable planning processes and regulations	
Preserve open space, farmland, and environment	Conservation & enhancement of environmental and cultural resources	
Choice in transportation	Choice in transportation	
Walkable neighborhoods	*Regional view of community*	
	Diverse approaches to smart growth	

Principles fairly unique to a particular organization are in italics.

TABLE 2: REGULATORY TAKINGS CASES IN EIGHT SOUTHEASTERN STATES—1993-2002

Case/State	Citation	Plaintiff
Alabama		
J&B Soc. Club No. 1, Inc. v. City of Mobile	966 F. Supp. 1131 (S.D. Ala. 1996)	Adult entertainment club
Sammy's of Mobile, Ltd. v. City of Mobile	928 F. Supp. 1116 (S.D. Ala. 1996)	Adult entertainment club
Arkansas		
Goss v. City of Little Rock	151 F.3d 861 (8th Cir. 1998)	Developer
McKenzie v. City of White Hall	112 F.3d 313 (8th Cir. 1997)	Developer
Roy v. City of Little Rock	902 F. Supp. 871 (E.D. Ark. 1995)	Owner
Florida		
Neumont v. Monroe County	242 F. Supp. 2d 1265 (S.D. Fla. 2002)	Owners of vacation rentals
A.A. Profiles, Inc. v. City of Fort Lauderdale	253 F.3d 576 (11th Cir. 2001)	Owner of proposed business
Ross v. City of Orlando	141 F. Supp. 2d 1360 (M.D. Fla. 2001)	Homeowner
Seminole County v. Pinter Enters., Inc.	184 F. Supp. 2d 1203 (M.D. Fla. 2000)	Adult entertainment club
Saboff v. St. John's River Water Mgmt. Dist.	200 F.3d 1356 (11th Cir. 2000)	Homeowner
Agripost, Inc. v. Miami-Dade County *ex rel.* Manager	195 F.3d 1225 (11th Cir. 1999)	Waste disposal facility
Lamar Adver. of Mobile, Inc. v. City of Lakeland	980 F. Supp. 1455 (M.D. Fla. 1997)	Billboard business
Villas of Lake Jackson, Ltd. v. Leon County	121 F.3d 610 (11th Cir. 1997)	Developer
Centerfold Club, Inc. v. City of St. Petersburg	969 F. Supp. 1288 (M.D. Fla. 1997)	Adult entertainment club
Bensch v. Metro. Dade County	952 F. Supp. 790 (S.D. Fla. 1996)	Developer
New Port Largo, Inc. v. Monroe County	95 F.3d 1084 (11th Cir. 1996)	Developer
Corn v. City of Lauderdale Lakes	95 F.3d 1066 (11th Cir. 1996)	Developer
Tari v. Collier County	56 F.3d 1533 (11th Cir. 1995)	Plant nursery

Daugherty v. Sarasota County	157 F.R.D. 542 (M.D. Fla. 1994)	Borrow pit
Reahard v. Lee County	30 F.3d 1412 (11th Cir. 1994)	Developer
Resolution Trust Corp. v. Town of Highland Beach	18 F.3d 1536 (11th Cir. 1994)	Developer
Restigouche, Inc. v. Town of Jupiter	845 F. Supp. 1540 (S.D. Fla. 1993)	Developer
Patrick Media Group, Inc. v. City of Clearwater	836 F. Supp. 833 (M.D. Fla. 1993)	Billboard business
Lost Tree Vill. Corp. v. City of Vero Beach	838 So. 2d 561 (Fla. Dist. Ct. App. 2002)	Developer
Leto v. State Dep't of Envtl. Prot.	824 So. 2d 283 (Fla. Dist. Ct. App. 2002)	Developer
Taylor v. City of Riviera Beach	801 So. 2d 259 (Fla. Dist. Ct. App. 2001)	Individual
Bradfordville Phipps, Ltd. P'ship v. Leon County	804 So. 2d 464 (Fla. Dist. Ct. App. 2001)	Developer
Keshbro, Inc. v. City of Miami	801 So. 2d 864 (Fla. 2001)	Motel owner
State Dep't of Envtl. Prot. v. Burgess	772 So. 2d 540 (Fla. Dist. Ct. App. 2000)	Developer
Windward Marina, L.L.C. v. City of Destin	743 So. 2d 635 (Fla. Dist. Ct. App. 1999)	Developer
Burnham v. Monroe County	738 So. 2d 471 (Fla. Dist. Ct. App. 1999)	Owner
Koontz v. St. Johns River Water Mgmt. Dist.	720 So. 2d 560 (Fla. Dist. Ct. App. 1998)	Developer
Golf Club of Plantation, Inc. v. City of Plantation	717 So. 2d 166 (Fla. Dist. Ct. App. 1998)	Developer
Town of Jupiter v. Alexander	747 So. 2d 395 (Fla. Dist. Ct. App. 1998)	Developer
Paedae v. Escambia County	709 So. 2d 575 (Fla. Dist. Ct. App. 1998)	Developer
Gardens Country Club, Inc. v. Palm Beach County	712 So. 2d 398 (Fla. Dist. Ct. App. 1998)	Developer
Martin County v. Section Twenty-Eight P'ship, Ltd.	676 So. 2d 532 (Fla. Dist. Ct. App. 1996)	Developer
City of St. Petersburg v. Bowen	675 So. 2d 626 (Fla. Dist. Ct. App. 1996)	Developer
Taylor v. Vill. of N. Palm Beach	659 So. 2d 1167 (Fla. Dist. Ct. App. 1995)	Developer
City of Jacksonville Beach v. Prom	656 So. 2d 581 (Fla. Dist. Ct. App. 1995)	Developer

City of Key West v. Berg	655 So. 2d 196 (Fla. Dist. Ct. App. 1995)	Developer
City of Jacksonville v. Wynn	650 So. 2d 182 (Fla. Dist. Ct. App. 1995)	Residential homeowners
Estate of Tippett v. City of Miami	645 So. 2d 533 (Fla. Dist. Ct. App. 1994)	Landowners
City of Pompano Beach v. Yardarm Rest., Inc.	641 So. 2d 1377 (Fla. Dist. Ct. App. 1994)	Developer
Tinnerman v. Palm Beach County	641 So. 2d 523 (Fla. Dist. Ct. App. 1994)	Developer
Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.	640 So. 2d 54 (Fla. 1994)	Landowners
Fla. Game & Fresh Water Fish Comm'n v. Flotilla, Inc.	636 So. 2d 761 (Fla. Dist. Ct. App. 1994)	Developer
Aspen-Tarpon Springs, Ltd. P'ship v. Stuart	635 So. 2d 61 (Fla. Dist. Ct. App. 1994)	Mobile home park owners
Lee County v. Sunbelt Equities, II, Ltd. P'ship	619 So. 2d 996 (Fla. Dist. Ct. App. 1993)	Developer
Dep't of Transp. v. Weisenfeld	617 So. 2d 1071 (Fla. Dist. Ct. App. 1993)	Property Owner
Georgia		
GSW, Inc. v. Dep't of Natural Res.	562 S.E.2d 253 (Ga. Ct. App. 2002)	Developer
Outdoor Sys., Inc. v. Cobb County	555 S.E.2d 689 (Ga. 2001)	Billboard company
Dover v. City of Jackson	541 S.E.2d 92 (Ga. Ct. App. 2000)	Developer
Bickerstaff Clay Prods. Co. v. Harris County *ex rel.* Bd. of Comm'rs	89 F.3d 1481 (11th Cir. 1996)	Mining interest
Parking Ass'n of Ga., Inc. v. City of Atlanta	450 S.E. 2d 200 (Ga. 1994) (cert. denied)	Parking lot owners
James Emory, Inc. v. Twiggs County	883 F. Supp. 1546 (M.D. Ga. 1995)	Developer
Forsyth County v. Greer	439 S.E. 2d 679 (Ga. Ct. App. 1993)	Developer
Louisiana		
United States v. Land	213 F.3d 830 (5th Cir. 2000)	Developer
LaSalle v. Iberia Parish Council	741 So. 2d 812 (La. Ct. App. 1999)	Unspecified lot owner

Sakla v. City of New Orleans	No. CIV.A. 98-2026, 1998 WL 830652 (E.D. La. Nov. 30, 1998)	Restaurant owner
Brian B. Brown Constr. Co. v. St. Tammany Parish	17 F. Supp. 2d 586 (E.D. La. 1998)	Developer
Standard Materials, Inc. v. City of Slidell	700 So. 2d 975 (La. Ct. App. 1997)	Concrete manufacturer
Venture v. Parish of Jefferson	No. CIV.A. 96-4070, 1997 WL 433493 (E.D. La. July 31, 1997)	Developer
Summerchase Ltd. P'ship I v. City of Gonzales	970 F. Supp. 522 (M.D. La. 1997)	Developer
Lambert v. State	683 So. 2d 839 (La. Ct. App. 1996)	Property owner
Wallace C. Drennan Inc. v. Parish of Jefferson	No. CIV.A. 96-0365, 1996 WL 495156 (E.D. La. Aug. 30, 1996)	Construction yard
Sharp Land Co. v. United States	956 F. Supp. 691 (M.D. La. 1996)	Logging company
State Dep't of Soc. Servs. v. City of New Orleans	676 So. 2d 149 (La. Ct. App. 1996)	Developer
Rivet v. State Dep't of Transp. & Dev.	635 So. 2d 295 (La. Ct. App. 1994)	Developer
Layne v. City of Mandeville	633 So. 2d 608 (La. Ct. App. 1993)	Developer
Mississippi		
Bryan v. City of Madison	130 F. Supp. 2d 798 (S.D. Miss. 1999)	Developer
American Federated Gen. Agency, Inc. v. City of Ridgeland	72 F. Supp. 2d 695 (S.D. Miss. 1999)	Existing business
Houck v. Tate County	No. 2:98-CV-77-B-B, 1999 WL 33537173 (N.D. Miss. June 16, 1999)	Developer
Herrington v. City of Pearl	908 F. Supp. 418 (S.D. Miss. 1995)	Existing business

North Carolina		
Barefoot v. City of Wilmington	306 F.3d 113 (4th Cir. 2002)	Unspecified group
Piedmont Triad Reg'l Water Auth. v. Unger	572 S.E.2d 832 (N.C. Ct. App. 2002)	Unspecified
Shell Island Homeowners Ass'n v. Tomlinson	517 S.E.2d 401 (N.C. Ct. App. 1999)	Condominium owners
Bryant v. Hogarth	488 S.E.2d 269 (N.C. Ct. App. 1997)	Shellfish harvester
King *ex rel.* Warren v. State	481 S.E.2d 330 (N.C. Ct. App. 1997)	Developer
Messer v. Town of Chapel Hill	479 S.E.2d 221 (N.C. Ct. App. 1997)	Developer
Naegele Outdoor Adver., Inc. v. City of Winston-Salem	457 S.E.2d 874 (N.C. 1995)	Billboard owner
Capital Outdoor Adver., Inc. v. City of Raleigh	446 S.E.2d 289 (N.C. 1994)	Billboard owner
Guilford County Dep't of Emergency Servs. v. Seaboard Chem. Corp.	441 S.E.2d 177 (N.C. Ct. App. 1994)	Hazardous waste facility
South Carolina		
Sea Cabins on the Ocean IV Homeowners Ass'n v. City of N. Myrtle Beach	548 S.E.2d 595 (S.C. 2001)	Homeowner's association
Main v. Thomason	535 S.E.2d 918 (S.C. 2000)	Homeowner
McQueen v. S.C. Coastal Council	530 S.E.2d 628 (S.C. 2000)	Developer
Worsley Cos., Inc. v. Town of Mount Pleasant	528 S.E.2d 657 (S.C. 2000)	Lessees of property for business
Whaley v. Dorchester County Zoning Bd. of Appeals	524 S.E.2d 404 (S.C. 1999)	Homeowner
Wooten v. S.C. Coastal Council	510 S.E.2d 716 (S.C. 1999)	Landowner
Barnhill v. City of N. Myrtle Beach	511 S.E.2d 361 (S.C. 1999)	Jet ski rental business
Staubes v. City of Folly Beach	500 S.E.2d 160 (S.C. Ct. App. 1998)	Owner of rental property
Grant v. S.C. Coastal Council	461 S.E.2d 388 (S.C. 1995)	Homeowner
Long Cove Club Assocs., L.P. v. Town of Hilton Head Island	458 S.E.2d 757 (S.C. 1995)	Developer

Tennessee		
Gabhart v. City of Newport	No. 98-6181, 2000 WL 282874 (6th Cir. Mar. 10, 2000)	Developer
Waste Mgmt., Inc. of Tenn. v. Metro. Gov't of Nashville & Davidson County	130 F.3d 731 (6th Cir. 1997)	Waste disposal facilities
Rainey Bros. Constr. Co. v. Memphis & Shelby County Bd. of Adjustment	967 F. Supp. 998 (W.D. Tenn. 1997)	Developer
Millington Homes Investors, Ltd. v. City of Millington	No. 94-5482, 1995 WL 394143 (6th Cir. 1995)	Developer
Parker v. Hamblen County Planning Comm'n	1995 WL 311322 (Tenn. Ct. App. May 23, 1995)	Mobile home park owner

Chart 1: Regulatory Takings Cases 1993 - 2002
Southeastern United States

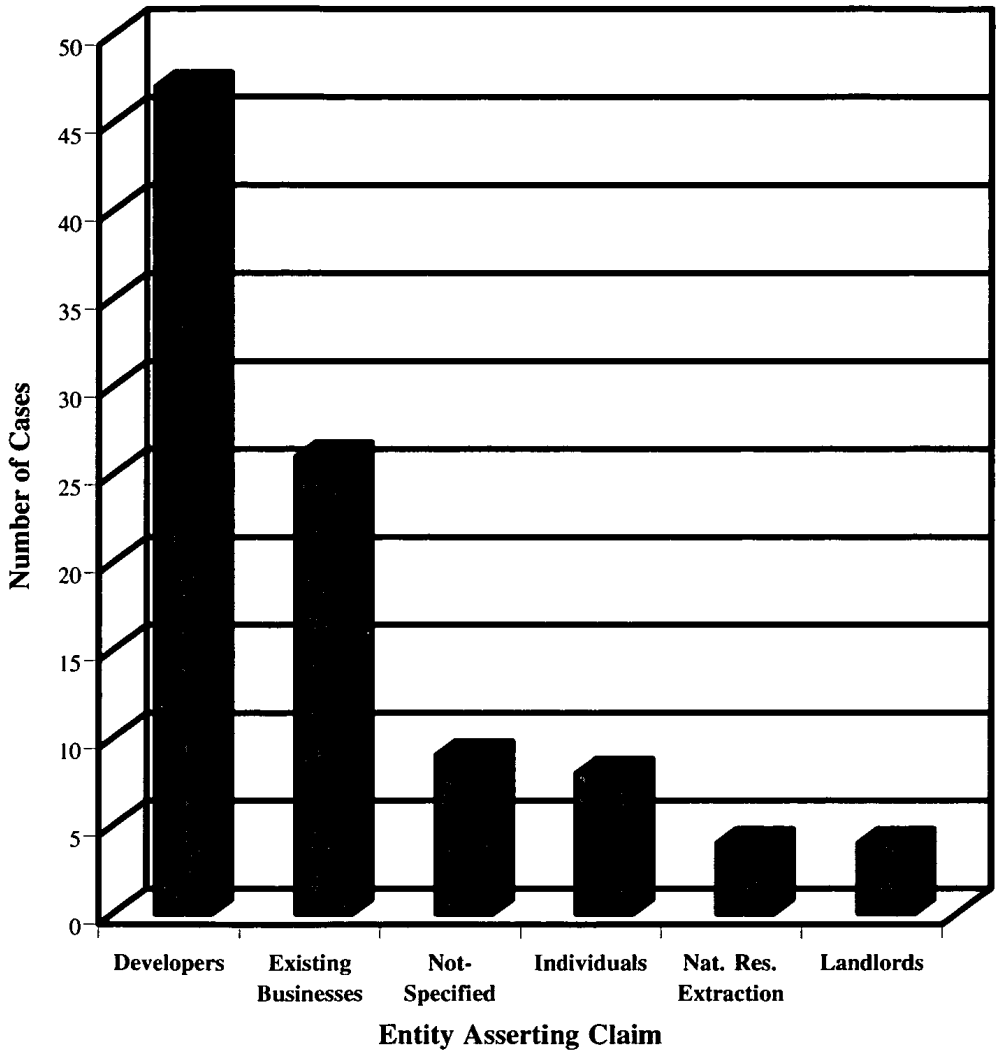

Chart 2: Southeastern Regulatory Takings Cases by State