CONDEMNATION BLIGHT AS A *PER SE* TAKING: CLARIFYING THE LIMITS OF THE GOVERNMENT'S POWER OF EMINENT DOMAIN UNDER FLORIDA LAW

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After all a policeman must know the Constitution then why not a planner?[1]
—Justice Brennan

I. INTRODUCTION

Condemnation blight, as a consequence of government planning, is the physical and economic deterioration suffered by private property subject to the government's announcement of condemnation.[2] This deterioration is, in general terms, attributable to the "cloud of condemnation" imposed on the property by the announcement,[3] or the unreasonable passing of time between the announcement and the acquisition of the

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1. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 661 n.26 (1981) (Brennan, J., with Stewart, Marshall & Powell, JJ., dissenting).

2. *See generally* Gideon Kanner, *Condemnation Blight: Just How Just Is Just Compensation*, 48 NOTRE DAME L. REV. 765, 767–68 (1973) (describing the physical and economic impact of condemnation blight on private property); Teitelbaum v. S. Fla. Water Mgmt. Dist., 176 So. 3d 998, 1004 (Fla. 3d Dist. Ct. App. 2015) (describing condemnation blight as "the depreciation of property value that occurs when the government announces its intentions to condemn . . . property").

3. In general, a property owner bringing an inverse condemnation claim against the government, based on a theory of condemnation blight, will argue that the government has intentionally avoided going ahead with the *de jure* condemnation of the property (meaning the formal exercise of the power of eminent domain), and instead, "has placed a cloud of condemnation over the property in order to acquire [p]laintiffs' land at less than its fair market value." Suess Builders Co. v. City of Beaverton, 656 P.2d 306, 310 (Or. 1982) (internal quotation marks omitted).

property.[4] During this time, property owners may suffer damages—such as the depreciation in the market value of the property; its loss of use; and the loss of rental income, business profits, and moving expenses, among others.[5]

Florida, along with most jurisdictions, follows the rule that the government's planning activities undertaken in anticipation of condemnation "does not constitute a taking."[6] In other words, property owners dealing with the negative effects of an announcement of condemnation are unable to resort to "inverse condemnation" to claim precondemnation damages.[7] Instead, the owners must wait until the government exercises its power of eminent domain to receive "just compensation" for what they have lost. Accordingly, the concept of condemnation blight is more commonly understood as a property valuation concept rather than as an independent cause of action. Interestingly enough, the concept of "just compensation" may not necessarily include compensation for damages other than the depreciation in market value of the property.[8] Moreover, property owners may end up with no compensation in cases that the government is unable or

4. Robert Alfert, Jr., *Condemnation Blight Under Florida Law: A Rule of Appropriation or the Scope of the Project Rule in Disguise*, 72 FLA. B.J. 69, 69 (Aug. 1998).

5. *See, e.g.*, City of Buffalo v. J.W. Clements Co., 269 N.E.2d 895, 900 (N.Y. 1971) (describing some of the damages suffered by property owners whose property is subject to an announcement of condemnation). It is important to note that private property subject to an announcement of condemnation may increase in value, instead of decrease in value. In this case, the term condemnation blight does not apply. *See, e.g.*, United States v. Miller, 317 U.S. 369, 377 (1942) (establishing that enhancement in property value that is the result of a decree of condemnation is not taken into account when determining "what the Government would be compelled to pay as compensation").

6. Alfert, *supra* note 4, at 69 (citing Danforth v. United States, 308 U.S. 271, 286 (1939); City of Chicago v. Loitz, 329 N.E.2d 208, 210–11 (Ill. 1975)).

7. *See* City of Chicago v. Loitz, 295 N.E.2d 478, 480 (Ill. App. Ct. 1973) (stating that "mere planning by a governmental body in anticipation of the taking of land for public use and preliminary steps taken to accomplish this, without the filing of proceedings and without physical taking or actual invasion of the real estate, is not actionable by the owner of the land"). *But see* Clay Cnty. Realty Co. v. City of Gladstone, 254 S.W.3d 859, 869 (Mo. 2008) (recognizing that "actions for condemnation blight are inverse condemnation claims that property owners may advance in order to recover consequential precondemnation damages"). An "inverse condemnation" action "has been defined as . . . a cause of action against a governmental defendant to recover the value of property which has been taken . . . even though no formal exercise of the power of eminent domain has been attempted by the taking agency." City of Jacksonville v. Schumann, 167 So. 2d 95, 98 (Fla. 1st Dist. Ct. App. 1964).

8. Kanner, *supra* note 2, at 778.

unwilling to exercise its power of eminent domain because of its lack of public funding or political will.[9]

Property owners dealing with an announcement or decree of condemnation on their property suffer with government interference of their property, and more importantly, suffer economic burdens that "'in all fairness and justice, should be borne by the public as a whole.'"[10] But, should the landowners in Florida be bound to absorb the losses caused by the government's planning activities? And more importantly, under what legal theory or theories is a property owner—who has suffered losses due to the government's planning activities—entitled to compensation under Florida law?

This Article proposes that government actions that limit the use and value of property during a precondemnation period should constitute a *per se* taking. However, to balance the use of precondemnation planning as a tool to achieve public goals, and the right of landowners to be compensated for the unreasonable interference with their property, the elements of an inverse condemnation claim based on "condemnation blight" should be well defined and structured as a prima facie case. The proposed elements of this inverse condemnation action include: (1) a qualified government action (e.g., announcement or decree of condemnation); (2) an intentional element (e.g., unreasonable delay or bad faith); and (3) the existence of damages (e.g., loss of use or value of the property). Moreover, and similar to the structure in employment discrimination cases, this inverse condemnation action should allow for burden shifting—from

9. It is important to note that a takings claim is not the only constitutional cause of action use by property owners to bring suit against the government for interference with their property rights. Other options include the Substantive Due Process Clause, the Equal Protection Clause, and the Fourth Amendment of the Constitution. *Id.* at 784–85. Furthermore, state statutory schemes—better known as property right statutes, tort actions, and breach of contract claims—are used and have been used to bring suit against the government. Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 ECOLOGY L.Q. 307, 313–17 (2007); *see also* Chmielewski v. City of St. Pete Beach, No. 8:13-CV-3170-T-27MAP, 2016 WL 761032, at *2–3 (M.D. Fla. Feb. 27, 2016) (establishing that constant physical occupation of private property by the public that can be attributed to the conduct of the government may constitute both an unreasonable interference with a private owner's possessory rights under the Fourth Amendment, and an unlawful taking subject to just compensation under the Florida Constitution). For the purpose of this Article, however, we will focus on the analysis of the takings claim as the most common way to bring an action against the government.

10. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 139–40 (1978) (Rehnquist, J., dissenting) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

plaintiffs (landowners) to defendants (municipalities, cities, etc.)—to prove the case. This approach will help to clarify the limits of the government's power of eminent domain and the rights and burdens that accompany the ownership of property.

To support this proposal, this Article will first delve into the concept of condemnation blight—its origins and multiple definitions. Second, it will review the use of the concept of condemnation blight as a cause of action in the Florida courts and other relevant states. Finally, this Article will explain the elements of the proposed prima facie *per se* takings action and its practical application.

II. UNDERSTANDING CONDEMNATION BLIGHT: DEFINITION AND ORIGIN

A. Definition

As described by a Florida law commentator, condemnation blight is "one of the more erratically applied, confused notions in eminent domain jurisprudence. Judicial decisions from the various states apply the concept differently, and differences of opinion can even be found among decisions in the same state."[11] The different application mainly depends on whether a jurisdiction sees condemnation blight as a property valuation concept—"rule of evidence"—or as a cause of action for a de facto taking—"rule of appropriation."[12] That said, the meaning of condemnation blight as an urban development by-product is at least commonly understood among all jurisdictions and a good starting point to understand this figure.

1. Condemnation Blight as an Urban Development By-Product

Condemnation blight as an urban phenomenon is understood by describing the typical circumstances in which "urban blight"—the existence of "physical, social, and economic conditions" that transform certain urban areas into "incipient slums"[13]—becomes a problem for property owners subject to an announcement or decree

11. Alfert, *supra* note 4, at 69.

12. *Id.*

13. Martin E. Gold & Lynne B. Sagalyn, *The Use and Abuse of Blight in Eminent Domain*, 37 FORDHAM URB. L.J. 1119, 1121–22 (2011) (internal quotation marks omitted).

of condemnation. These circumstances have been described in the following terms:

> [B]efore ponderous bureaucratic machinery can translate public project planning into land acquisition, time passes. During that time notice that a taking is imminent becomes widespread, which in turn promotes a wholesale departure of tenants, reluctance on the part of owners in the affected area to invest in improvements and maintenance, and distortion of the real estate market.
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> . . .
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> Market activity within the affected area decreases, and such sales of real property as do occur are disproportionately composed of distress sales. . . . The buyers of such properties understandably pay less than actual market value. Since the affected area is "on borrowed time," economic activity within it . . . tends to become dominated by persons who are able and willing to devote real property to short-term uses. Often, there are not enough such people to utilize existing improvements, with the result that vacancies increase, thereby encouraging vandalism and causing business to decline. These events in turn provide the remaining inhabitants of the area with additional incentive to relocate. In some instances such events combine to form a vicious cycle leading ultimately to abandonment of entire city blocks.[14]

Condemnation blight, therefore, is directly related to the undertaking of urban development projects by governments that ultimately result in the depreciation of property value under specific circumstances.[15] "Blight," as a product of condemnation, is an issue frequently seen in countries that have undergone

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14. Kanner, *supra* note 2, at 767–69 (internal footnotes omitted).

15. *See* Robert H. Freilich, *Planning Blight: The Anglo-American Experience*, 29 URB. LAW. vii, vii (1997) (internal citation omitted), stating:

> "Condemnation blight" . . . is integrally related to the late twentieth century trend towards major public-private development projects—toll freeways, arenas, industrial parks, redevelopment of downtowns, waterfront approvals, high speed rail links, university research centers, hospital office complexes, and many others. The long delays in the planning, announcement, public acceptance, adoption, and implementation of the complex projects often cause substantial injury to landowners whose property may be affected.

economic downturns and in which governments, opting for a Keynesian-New Deal approach to economic reactivation,[16] incur massive spending on public infrastructure to maintain their economies away from stagnation.[17] In these countries, however, inadequate funding and a lack of political commitment to see these projects through have transformed condemnation planning from a tool to create harmonious communities into the actual cause of "urban blight."[18]

Condemnation blight as an urban development by-product, therefore, is the transformation of urban areas into "incipient slums" due to the lack of adequate condemnation planning.[19]

2. Condemnation Blight as a Property Valuation Concept—"Rule of Evidence"

From a stricter legal point of view, scholars have wrestled with the question of whether condemnation blight should be understood as a tool to determine the fair market value of property during eminent domain proceedings—"rule of evidence"[20]—or as a de facto taking—"rule of appropriation."[21]

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16. *See generally* Sarwat Jahan, et al., *What Is Keynesian Economics?: The Central Tenet of This School of Thought Is That Government Intervention Can Stabilize the Economy*, 51 FIN. & DEV. 53 (Sept. 2014).

> Rather than seeing unbalanced government budgets as wrong, Keynes advocated so-called *countercyclical fiscal policies*. . . . For example, Keynesian economists would advocate deficit spending on labor-intensive infrastructure projects to stimulate employment and stabilize wages during economic downturns.

Id. at 54 (emphasis in original).

17. A very recent example of such governmental impulse to invest in infrastructure can be seen in England. Right after the Brexit vote, the then Prime Minister-elect, Theresa May, repeatedly insisted that the way Britain would overcome the negative economic downturn, of cutting ties with the European Union, would be investing in massive new infrastructure projects. *Planning Blight*, THE TIMES (Aug. 15, 2016, 12:01AM), http://www.thetimes.co.uk/article/planning-blight-8l75b6g83. Many have criticized this position pointing to England's long history with planning blight (another term referring to condemnation blight) as a result of the government lack of political will and funds to complete promised infrastructure projects. *Id.*

18. *Id.*

19. *See* Kanner, *supra* note 2, at 769–70 (quoting City of Cleveland v. Hurwitz, 249 N.E.2d 562, 567 (Ohio Prob. Ct. 1969)) (describing condemnation blight as "the cumulative result of many things, each in itself that might not have been totally harmful, but when impacted all together have the full force of destruction of the property").

20. Alfert, *supra* note 4, at 69.

21. *Id.*

Understanding condemnation blight as a rule of evidence implies that property owners will be able to present the diminution in value of their property as evidence of damages caused by the process of condemnation and request that such damages be included in the valuation scheme for "just compensation."[22] Nowadays, many jurisdictions, including Florida, automatically recognize within the concept of "just compensation" the market value of the property at the time of the announcement of condemnation, not thereafter.[23] For example, in *State Road Department v. Chicone*,[24] the first case in Florida to deal with condemnation blight as a "rule of evidence," the Florida Supreme Court "created a strong policy . . . in favor of including condemnation blight damages" in the valuation scheme for just compensation.[25]

Although the purpose of this approach is to recognize that "it would be manifestly unjust to permit a public authority to depreciate property values" and take advantage of such depreciation by purchasing the property at a lower price,[26] this approach does not give property owners a cause of action to recover incidental damages. Incidental damages may "interest on the award from the time that the blight began,"[27] loss of rental income, or those special damages associated with criminal activities within blighted urban areas.[28]

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22. Freilich, *supra* note 15, at ix. In jurisdictions that follow this approach, the most contended issue questions when the taking of property occurs. The timing is important because if a jurisdiction considers that a taking occurs at the moment of the transfer of title of the property (at the end of the de jure proceeding), a property owner will be entitled to receive the fair market value of the property at the time of the transfer. Therefore, the property's depreciation in value between the announcement of condemnation and the exercise of the government's eminent domain power will simply be considered as a necessary "'incident to the ownership of property . . . for which the law does not and never has afforded relief.'" William F. Greer, Jr., *Housing and Land Use—Condemnation Blight, De Facto Taking and Abandonment in Reliance—Compensation of Losses in Urban Development*, 1973 URB. L. ANN. 343, 345 (1973) (quoting Eckhoff v. Forest Preserve, 36 N.E.2d 245, 247 (1941)); *see also* Freilich, *supra* note 15, at xiii–xiv, xvii.

23. State Rd. Dep't v. Chicone, 158 So. 2d 753, 758 (Fla. 1963).

24. *Id.*

25. Megan S. Peterson, Comment, *Condemnation Blight: The Need for Adoption in Louisiana*, 57 LOY. L. REV. 299, 312 (2011).

26. United States v. Va. Elec. Power Co., 365 U.S. 624, 636 (1961) (citation and internal quotation marks omitted).

27. Greer, *supra* note 22, at 346–47, 346 n.26 (discussing how interest in an award for takings may substantially affect the decision of a court not to find a de facto taking in condemnation blight cases).

28. *See, e.g.*, State *ex rel.* Wash. Univ. Med. Ctr. Redevelopment Corp. v. Gaertner, 626 S.W.2d 373, 374–75 (Mo. 1982), *abrogated by* Clay Cnty. Realty Co. v. City of Gladstone,

3. Condemnation Blight as a De Facto Taking—"Rule of Appropriation"

Understanding condemnation blight as a "rule of appropriation" implies that a property owner may be entitled to compensation for any damage caused by the condemnation planning process because such process constitutes a de facto taking of his property. Thus, the government's physical invasion of the property, or "the imposition of some direct legal restrain,"[29] is not necessary to establish a taking. Here, the scope of the inquiry is limited to whether the government's announcement of condemnation resulted in losses for those property owners subject to the announcement.

Jurisdictions are divided on this topic, and the focus of the division is whether "mere plotting or planning in anticipation of public improvement" could constitute a de facto taking.[30] The majority of jurisdictions, which includes Florida, answer this question in the negative.[31] However, in a minority of jurisdictions, courts have granted property owners a de facto taking based on a

254 S.W.3d 859 (Mo. 2008). In this case a landowner brought a counterclaim against a Missouri's redevelopment corporation for damages arising out of the condemnation of a track of land. *Id.* at 374. The Landowner partially claimed that the actions of the corporation "discouraged market activity in the area . . . encouraged vandalism (thereby diminishing property values); and . . . left the landowner's property and the surrounding neighborhood physically and environmentally uninhabitable thereby making it impossible for landowner to rent his property." *Id.* at 374–75. In addition, the landowner claimed, that "[a]s a result of this 'cloud of condemnation' . . . [he] suffered 'an unlawful taking and damage[] of his property in violation of Article I, [Section] 26 of the Constitution of Missouri and the Fifth and Fourteenth Amendments of the United States Constitution.'" *Id.* at 375. As measure of damages, the Landowner requested "damages equal to the reasonable rental value of his property for the period between the date [the corporation] submitted its redevelopment plan and the date of the condemnation trial." *Id.* The Missouri Supreme Court held that the landowner's counterclaim for damages—which equaled "the amount of rent he allegedly has been losing by reason of the pendency of the condemnation proceedings"—was "a personal action sounding in tort" because it did "not involve damage to the property itself," and was "beyond the amount of compensation to be paid to the condemnee for taking his property." *Id.* at 377–78. Later on, the Missouri Supreme Court would change its mind on this issue, and with its decision in *Clay County Realty Co. v. City of Gladstone*, it joined those jurisdictions recognizing precondemnation damages under an inverse condemnation claim. 254 S.W.3d at 863; *see also infra* Part III(C) (discussing the Missouri Supreme Court's changes).

29. Alfert, *supra* note 4, at 69.

30. *Id.*

31. *See generally* J. R. Kemper, *Plotting or Planning in Anticipation of Improvement as Taking or Damaging of Property Affected*, 37 A.L.R.3D 127, § 3 (1971) (providing a list of cases supporting the proposition that "mere plotting and planning in anticipation of a public improvement does not constitute a taking").

condemnation blight theory. This generally occurs when the government engages in "extreme activity" with the intent to take targeted property, or when the government's action "severely depreciate[d] the value of property required for a public improvement."[32]

Perhaps the most important case dealing with a de facto taking approach is *City of Buffalo v. J.W. Clement Co.*,[33] a 1971 decision from the New York Court of Appeals from which much of the literature on condemnation blight has developed. In *Clement*, the City undertook the urban redevelopment project of a specific area of the city. The Company's printing facilities were located in a large part of the city.[34] The City first advised the Company of the redevelopment project in 1954 with the property purchase scheduled for 1963.[35] At this point, and based on different statements issued by the government confirming the project's execution, the Company decided to move the whole printing facilities to a new location.[36] However, the City delayed the acquisition of the property until 1968, and, as a result, the Company was unable to sell or rent the property during the interval.[37] Eventually, the City acquired the Company's property in 1968, in the interim, the Company was responsible for paying the taxes, insurance, and maintenance costs on the property.[38]

To recoup the losses, the Company sued the City under a de facto takings theory, claiming that the City effectively acquired the ownership of the property in 1963.[39] The Court of Appeals, rejecting the decision of the lower courts to recognize a de facto taking in favor of the Company, stated that a de facto taking was limited to a situation "involving a direct invasion of the condemnee's property or a direct legal restrain on its use."[40] Furthermore, the *Clement* court tried to clarify the difference between a de facto taking and condemnation blight—or as

32. Alfert, *supra* note 4, at 69 (referencing Kemper, *supra* note 31, §§ 6(a), 8(a), 9(a)).
33. 269 N.E.2d 895 (N.Y. 1971).
34. *Id.* at 899–901 (describing the Company's expansion history and need for the large space).
35. *Id.* at 899.
36. *Id.*
37. *Id.* at 900–01.
38. *Id.*
39. *Id.* at 901–02.
40. *Id.* at 902 (internal citation omitted).

described by some scholars the difference between a claim for loss of use and one for loss of value:[41]

> [A] *de facto* taking requires a physical entry by the condemnor, a physical ouster of the owner, a legal interference with the physical use, possession or enjoyment of the property or a legal interference with the owner's power of disposition of the property. On the other hand, "condemnation blight" relates to the impact of certain acts upon the value of the subject property. It in no way imports a *taking* in the constitutional sense, but merely permits of a more realistic valuation of the condemned property in the subsequent *de jure* proceeding. In such a case, compensation shall be based on the value of the property at the time of the taking, as if it had not been subjected to the debilitating effect of a threatened condemnation.[42]

With its decision, the *Clement* court delineated the difference between condemnation blight understood as a "rule of evidence" and condemnation blight as a "rule of appropriation." This distinction has been used by different jurisdictions to establish their own condemnation blight approaches. As mentioned before, the majority of jurisdictions follow the *Clement* court's approach and consider condemnation blight as a property valuation concept. Other jurisdictions, however, have recognized that the *Clement* court's approach fails to address the question of who should bear "the economic burdens" imposed on property owners between the announcement of condemnation and the actual execution of a government project.[43] Jurisdictions concerned with this issue accept the existence of a de facto taking; however, the delineation of such cause of action varies among them.[44]

B. The Process of Condemnation

To recognize when a claim for condemnation blight may arise, it is important to understand the process for condemnation of private property by the government. This process may be broadly divided into three stages: (1) the precondemnation planning stage, or announcement of condemnation; (2) the passing of the resolution

41. Greer, *supra* note 22, at 344.
42. *Clement*, 269 N.E.2d at 903 (emphasis in original).
43. Gideon Kanner, *Condemnation Blight*, SH025 ALI-ABA 327, 337 (2002).
44. *See infra* note 137 (listing the cases accepting the existence of a de facto taking).

of condemnation; and (3) a final stage in which the government carries out the condemnation of the property by initiating eminent domain proceedings before the courts.[45]

During the first precondemnation planning stage, the government (in the form of a state agency, city, municipality, etc.) develops a plan or idea for a project.[46] The government may decide to go ahead and announce the project to the public depending on the government's assessment of the viability.[47] During the second stage, the government passes a condemnation resolution identifying the specific land it intends to acquire through exercise of its eminent domain power.[48] In the last stage, the government simply exercises its power of eminent domain by providing just compensation to the landowner in exchange for their property.[49]

It is important to note that the passing of the condemnation resolution does not necessarily imply that the government will indeed exercise its power of eminent domain. Rather, this is a preparatory step in the development of a project. For instance, in highly complex development plans, the government's power of eminent domain may take decades to be exercised, and in some cases, its exercise may never occur, which creates blight conditions on those properties subject to the announcement of condemnation.[50] Condemnation planning, therefore, can be both a tool to combat city blight and a tool to create such blight.

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45. *See* Freilich, *supra* note 15, at xi–xiii (differentiating "planning blight" in two types: (1) the "'preimprovement planning blight,'" which may include "the proposed construction of a highway" as well as the "enactment of a transportation corridor map as a portion of the traffic circulation element of a comprehensive plan"; and (2) the "'condemnation blight'" which include any "delay in time between the public announcement of condemnation and the actual taking of the land").

46. *Id.* at xii–xiii.

47. *Id.*

48. *See* FLA. STAT. § 73.015 (2016) (providing the presuit negotiation process for eminent domain in Florida).

49. The process to take property by eminent domain may involve many more steps than those broadly describe above. For the specific steps needed to take property by the government in Florida, see FLA. STAT. §§ 73.012–73.161 (2016). Some of those steps included the scheduling and performance of an appraisal, or environmental assessment of the property; offer to purchase the property made to the owner, notice of public hearing to acquire property by eminent domain; and filing of the eminent domain case in court, etc. *Id.*

50. *See, e.g.*, Lincoln Loan Co. v. State Highway Comm'n *ex rel* State, 545 P.2d 105, 109–10 (Or. 1976) (explaining that after a decade of having properties subject to condemnation planning, the property owners' inverse condemnation action against the State of Oregon to recoup loss of rental income caused by the State's inability to proceed with a proposed highway construction was recognized by the Oregon Supreme Court).

Thus, it can be deduced that there are two opportunities in which blight can occur from the process of condemnation: First, "when the public learns that particular property is being considered for public acquisition"; and second, when there are delays "between the public announcement of condemnation and the actual taking of the land."[51] The question left to answer in this Article is: What can property owners do to recover damages resulting from the government's condemnation planning process in Florida?

III. FLORIDA'S APPROACH TO CONDEMNATION BLIGHT

Landowners subject to a condemnation announcement—or as stated by some plaintiffs, subject to a "cloud of condemnation"[52]—may suffer damages that include the diminution in property value, the inability to find and retain tenants, the inability to obtain building and re-zoning permits, and the loss of business goodwill and profits.[53] In other words, a condemnation announcement may—with the passing of time—severely limit a landowner's right to fully use and enjoy the property.[54]

The existence of condemnation blight, without more, does not constitute a taking subject to just compensation under Florida law.[55] Condemnation blight is simply considered a factor in determining the amount of just compensation due to landowners once the eminent domain action has been initiated.[56] As a result, condemnation blight is understood as a "rule of evidence"—not of appropriation—in Florida.

However, other jurisdictions have moved in the opposite direction. These jurisdictions recognize that "governmental action

51. Freilich, *supra* note 15, at xi–xii.

52. Suess Builders Co. v. City of Beaverton, 656 P.2d 306, 310 (Or. 1982).

53. *See* State Rd. Dep't v. Chicone, 158 So. 2d 753, 755 (Fla. 1963), stating:

> Once [property is] selected for condemnation the marketability, both sale and rental, and to some extent the use, of property is sterilized and its value, either as determined by market value or use by the owner, is decreased. This decrease no doubt is in proportion to the lapse of time between the announcement that the lands will be taken and the actual taking.

54. *Id.*

55. Auerbach v. Dep't of Transp. of the State of Fla., 545 So. 2d 514, 515 (Fla. 3d Dist. Ct. App. 1989).

56. Teitelbaum v. S. Fla. Water Mgmt. Dist., 176 So. 3d 998, 1004 (Fla. 3d Dist. Ct. App. 2015).

short of acquisition or occupancy may constitute a constructive or de facto taking."[57] The latter approach is more in line with the evolution of the concept of property rights theory under Florida law,[58] and seems to be a better way to ensure that state agencies and other governmental entities plan development projects more carefully. To decide whether Florida's approach should be revamped, it is important to understand the evolution of condemnation blight among the Florida courts.

A. Florida's Jurisprudential Approach to Condemnation Blight

The most recent decision dealing with this issue and exposing the state of the law in Florida is *Teitelbaum v. South Florida Water Management District*.[59] Before digging into this decision, it is important to understand the line of cases preceding *Teitelbaum*, which constitute the starting point for analysis of any condemnation blight claim in Florida.

As mentioned before, *State Road Department v. Chicone*[60] was the first case in Florida to address the issue of whether a decrease in property value, due to condemnation blight, should be used to determine the amount of "full compensation" owed to a landowner under an inverse condemnation claim.[61] The specific question answered by the Court was "whether compensation for lands taken in eminent domain proceedings shall be measured by their value as affected by the imminence of condemnation or by their value as it would be if there had been no threat of taking."[62] In arriving at its decision, the Court held "[t]he whole purpose of . . . the constitutional provisions, both state and federal, relating to compensation for property condemned is to insure that the property owner will be adequately and fairly compensated in

57. Clay Cnty. Realty Co. v. City of Gladstone, 254 S.W.3d 859, 863 (Mo. 2008) (quoting Thomas W. Garland, Inc. v. City of St. Louis, 596 F.2d 784, 787 (8th Cir. 1979)).

58. *See infra* Part III(A) (detailing the relevant caselaw in Florida).

59. 176 So. 3d 998.

60. 158 So. 2d 753 (Fla. 1963).

61. The Florida Constitution uses the term "full compensation" instead of "just compensation" used in the Fifth Amendment of the U.S. Constitution. *Compare* U.S. CONST. amend. V, *with* FLA. CONST. art. X, § 6(a). The Florida Constitution establishes that no "private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner." FLA. CONST. art. X, § 6(a).

62. *Chicone*, 158 So. 2d at 756.

money for that property which is taken from him."[63] According to the Court, allowing the government (in this case the State Road Department) to take advantage of the depreciation in property value "would amount to a confiscation of the owner's property to the extent of the depreciation in value."[64]

The Court further held "the value of the property at the time of taking as depreciated or depressed by the prospect of condemnation is not a proper basis for measure of compensation for the property taken."[65] The Court concluded that compensation as a result of a condemnation proceeding should consider the value of the property at the time of the announcement of condemnation, and not the value of the property after it has been exposed to "the debilitating threat of condemnation."[66] In short, a landowner must be compensated for the fair market value of his or her property at the moment of the announcement of condemnation, not after.[67]

While *Chicone* was the first case to deal with the concept of "just" or "full compensation" in condemnation blight cases, *Auerbach v. Department of Transportation of the State of Florida* was the first case to specifically deal with the issue of whether condemnation planning could constitute the basis for a takings claim.[68] In this case, a property owner brought an inverse condemnation claim against the Florida Department of Transportation ("DOT"). The owners alleged that the DOT's "administrative planning actions, preparatory to the institution of possible eminent domain proceedings, rendered their property economically useless and of no value."[69] In a very brief decision, the

63. *Id.*
64. *Id.* at 757.
65. *Id.* at 758.
66. *Id.*
67. A more recent case reaffirming this approach to property valuation in Florida, can be found in *Fla. Dep't of Envtl. Prot. ex rel. Bd. of Trs. of the Internal Improvement Fund v. West*, 21 So. 3d 96 (Fla. 3d Dist. Ct. App. 2009). In this case, the court established:

> Where no formal exercise of eminent domain power is undertaken, a property owner may file an inverse condemnation claim to recover the value of property that has been *de facto* taken. . . .
>
> However, a property owners compensation must await the actual taking of his or her property. [T]he compensation is based on the value of the property without the effects of "the debilitating threat of condemnation." This is what is commonly referred to as "condemnation blight valuation."

Id. at 98 (internal citations omitted).
68. 545 So. 2d 514 (Fla. 3d Dist. Ct. App. 1989).
69. *Id.* at 515.

Third District Court of Appeals held that "such administrative planning . . . does not in itself constitute a 'taking' sufficient to enable the property owner to maintain an inverse condemnation action."[70] The court argued that deciding otherwise would preclude the ability of the administration to take preparatory steps before instituting eminent domain proceedings.[71] Therefore, the court in this case established the general rule followed by the majority of jurisdictions—that government actions amounting to mere plotting and planning (precondemnation planning) cannot serve as the basis for a takings claim.

Nevertheless, during the 1990s, the Florida Supreme Court decided two cases that helped shape the differentiation between a substantive due process claim and a takings claim for just compensation in condemnation planning cases: *Joint Ventures, Inc. v. Department of Transportation*,[72] a case that was quickly clarified by the Court in *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp*.[73] For purposes of this Article, these cases are relevant because the petitioners' claims focused on the issue of loss of use, rather than the loss of property value. This focus challenged the Florida courts to understand, or at least to consider, condemnation blight as a "rule of appropriation," rather than a "rule of evidence."

In *Joint Ventures*, the Court ruled on the constitutionality of a Florida statute allowing the DOT to reserve privately owned land, pursuant to a "map of reservation" for future acquisition.[74] According to the facts, the Company owned around eight acres of vacant land located next to a highway.[75] Before the DOT determined that some acres of this land were needed in association with the planned widening of the highway, the Company contracted to sell this property contingent upon the buyer's ability to obtain land development permits.[76] Because the DOT needed the land, it "recorded a map of reservation in accordance with subsection 337.241(1), [of the] Florida Statutes (1987)."[77] The practical implication of this recording was that it "precluded the

70. *Id.*
71. *Id.*
72. 563 So. 2d 622 (Fla. 1990).
73. 640 So. 2d 54 (Fla. 1994).
74. 563 So. 2d at 623.
75. *Id.*
76. *Id.*
77. *Id.*

issuance of development permits for this property."[78] The Company then sued, claiming the moratorium imposed by the DOT amounted to a taking because the Company was unable to substantially use its property.[79] The DOT countered that the moratorium was simply a regulatory by-product of the DOT's valid exercise police power granted under the Florida statutes.[80] In reaching its decision, the Court concluded that the Florida statute allowing the moratorium was unconstitutional because it permitted the DOT to take private property without just compensation.[81]

In addressing the DOT's argument that the statutory moratorium "is a permissible regulatory exercise of the state's police power because it was necessary for various economic reasons,"[82] the Court held that the exercise of a government's police power to regulate property, even if reasonable, may "amount to a 'taking.'"[83]

> In the broad sense, when the state "takes" property, whether through its police power or power of eminent domain, it does so to promote the general welfare. Analytically, the two have been discussed in different terms. Regulation is analyzed in terms of the exercise of police power, whereas acquisition is analyzed in terms of the state's power of eminent domain.
>
> In this case, DOT suggests that . . . [the statutory moratorium] is a permissible regulatory exercise of the state's police power because it was necessary for various economic reasons. For example, without a development moratorium, land acquisition costs could become financially infeasible. . . . Rather than supporting a "regulatory" characterization, these circumstances expose the statutory scheme as a thinly veiled attempt to "acquire" land by avoiding the legislatively mandated procedural and substantive protections of [eminent domain].[84]

The Court then went further to establish that it did not perceive a "valid distinction between 'freezing' property in this

78. *Id.*
79. *Id.* at 624.
80. *Id.*
81. *Id.* at 623.
82. *Id.* at 625.
83. *Id.* at 627 (internal citations omitted).
84. *Id.* at 625 (internal citations omitted).

fashion and deliberately attempting to depress land values in anticipation of eminent domain proceedings."[85] Under these arguments, the Court concluded that the moratorium established under the Florida statutes was unconstitutional because it amounted to an impermissible uncompensated taking, and not to a regulation.[86]

Soon after *Joint Ventures*, the Court decided *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corporation*.[87] In this case, the Court clarified its holding in *Joint Ventures*.[88] The facts of *A.G.W.S.* are identical to *Joint Ventures* in that the Company brought an action for inverse condemnation against the Expressway Authority, arguing that a map of reservation imposing a moratorium over private property was a temporary taking of such land.[89] The Court set to decide "whether *Joint Ventures* established a *per se* taking claim for affected landowners seeking just compensation."[90] The Court concluded that a map of reservation, which is a form of precondemnation planning, did not in itself provide landowners with a right to be compensated.[91] Therefore, a landowner bringing a takings claim against the government would have to prove that the "regulation denie[d] substantially all economically beneficial or productive use of the land," to be considered a *per se* taking.[92]

The Court further clarified that in *Joint Ventures*, its decision to strike the moratorium reservation as unconstitutional was based on a due process analysis not on a takings analysis. When differentiating between these two,

> courts frequently fail to make the distinction between two ways in which government may abuse its power: first, government

85. *Id.* at 626.

86. *See id.* at 627 ("No one disputes that the state may exercise its power to achieve highway safety. Here, however, the state exercised its police power with a mind toward property acquisition.").

87. 640 So. 2d 54, 56 (Fla. 1994).

88. *See* Kanner, *supra* note 43, at 337 (discussing the interaction between these two cases).

89. *A.G.W.S.*, 640 So. 2d at 56.

90. *Id.* at 57.

91. *Id.* at 58.

92. *Id.*; *see also Joint Ventures*, 563 So. 2d at 624 (internal citation omitted) ("[T]he state must pay when it regulates private property under its police power in such a manner that the regulation effectively deprives the owner of the economically viable use of that property, thereby unfairly imposing the burden of providing for the public welfare upon the affected owner.").

> may act arbitrarily, in violation of due process; second, government may so intrusively regulate the use of property in pursuit of legitimate police power objectives as to take the property without compensation, in violation of the just compensation clause. In the first case, the government action is simply invalid; in the second case, the government action is invalid absent compensation, and so government may either abandon its regulation or validate its action by payment of appropriate compensation, i.e., by exercising its power of eminent domain. The failure to distinguish between these two abuses of government power has contributed to the confusion and apparent incoherence of takings law.[93]

The Court, therefore, established that under Florida law a landowner has two ways to challenge the enactment of a "map of reservation"—and likely other precondemnation activities—affecting its property through: (1) a substantive due process claim against the government aiming to invalidate the government action;[94] or (2) a takings claim against the government proving that the map substantially denies the landowner of "all economically beneficial or productive use of land."[95]

Considering the substantive due process claims, challenging an action taken by the government under its police power is, in general, very difficult to win.[96] Moreover, a landowner who suffers the typical condemnation blight damages—such as the loss of rental income and business opportunities—does not necessarily meet the "economically beneficial use of land" test laid out by the Court.[97] Consequently, the practical implication of the Court's decision is that property owners who suffer losses that do not rise to the level of a de facto taking will recover nothing.[98]

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93. Patrick Wiseman, *When the End Justifies the Means: Understanding Takings Jurisprudence in a Legal System with Integrity*, 63 ST. JOHN'S L. REV. 433, 438–39 (1988) (cited in *A.G.W.S.*, 640 So. 2d at 57).

94. *A.G.W.S.*, 640 So. 2d at 57 (establishing that in "situations where state action is declared an improper exercise of police power under due process, the regulation is simply declared unconstitutional" so, "a land use regulation can be held facially unconstitutional without a finding that there was an uncompensated taking").

95. *Id.* at 58.

96. Joseph D. Richards & Alyssa A. Ruge, *Most Unlikely to Succeed: Substantive Due Process Claims Against Local Governments Applying Land Use Restrictions*, 78 FLA. B.J. 34, 34–35 (Apr. 2004).

97. *Id.* at 35.

98. For example, in the specific case of "maps of reservation," the Florida Supreme Court in *Palm Beach County v. Wright*, established that a "Thoroughfare Right-of-Way Protection Map" (another way to call a map of reservation) is "an invaluable tool for planning purposes"

As mentioned before, the most recent decision dealing with condemnation blight in Florida is *Teitelbaum v. South Florida Water Management District*.[99] In this case, the Court clearly established that condemnation blight is not in itself a *per se* taking.[100] In 1995, the South Florida Water Management District ("the District") designated certain property on the Bird Drive Basin area of western Miami-Dade County as part of the "East Coast Buffer" to the Florida Everglades.[101] With this move, the District sought "to prevent massive flooding throughout Miami-Dade County and also to prevent saltwater intrusion from contaminating the freshwater wellfields responsible for supplying Miami and other outlying areas" with potable water.[102] As part of this plan, the District began acquiring property from willing landowners in the East Coast Buffer.[103]

In 1995 and 1998, the District publicly announced that it opposed "any attempts to rezone the land or allow further development of the property in the East Coast Buffer."[104] In 2002, the District passed a condemnation resolution to acquire the remaining land it could not acquire through a voluntary acquisition process by exercising its power of eminent domain.[105] Despite the announcement of condemnation, the District did not attempt to acquire the remaining land.[106]

In 2004, property owners filed a complaint against the District arguing that the District artificially depressed their property values by preventing "the development of the land in and around

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and "proper subject of the county's police power which substantially advances a legitimate state interest." 641 So. 2d 50, 51, 53–54 (Fla. 1994). In other words, the Court established that a map or reservation is likely to survive a substantive due process challenge. In addition, the Court recognized that "as applied to certain property, the . . . map may result in a taking." *Id.* at 54. However, it clarifies that "the taking issue may only be determined upon an individualized basis," which will normally "be precipitated by a property owner's application for a development permit." *Id.* Some authors have criticized this decision arguing that a taking "as applied to certain property" ignores the financial reality faced by many developers and landowners. This is that to apply for development permits, they must first apply for funding from banks and other financial institutions, which more likely will deny the loan request upon learning about the reservation imposed on the property. Kanner, *supra* note 43, at 339.

99. 176 So. 3d 998 (Fla. 3d Dist. Ct. App. 2015).
100. *Id.* at 1005–06.
101. *Id.* at 1001.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*

the Bird Drive Basin in order to keep the cost of the property artificially low."[107] In April 2008, and before this case was decided, the District withdrew its condemnation resolution, and Plaintiffs amended their complaint to argue that the voluntary acquisition process "left the area checkered [private property surrounded by state property] with largely unusable, undevelopable, and unsellable property."[108] Plaintiffs claimed that the precondemnation actions of the District constituted a "violation of the Takings and Due Process Clauses in both the Florida and United States Constitutions and that they [were] entitled to full compensation" upon the theory that condemnation blight constituted a de facto taking.[109]

The circuit court denied Plaintiffs' claims and held that condemnation blight was a measure of damages to be considered during the condemnation proceedings, "not an independent cause of action for a constitutional taking."[110] When Plaintiffs appealed, the district court sustained the lower court's decision by holding that:

> [U]nder current Florida law, condemnation blight is only relevant to the valuation of the taken property after a plaintiff has already established that a taking has occurred either by de jure condemnation via eminent domain proceedings or de facto condemnation via one of the three established tests; [physical takings test and regulatory taking's test under *Lucas* and *Penn Central*] it is not itself an independent grounds for a de facto taking.[111]

The court's decision in this case clearly shows that property owners in Florida have a difficult time finding a cause of action that allows them to recoup precondemnation damages resulting from the government's actions and inactions—even when those actions are intentional and a possible abuse of its police power. The property owners, in this case, were left behind with property subject to condemnation blight and with no means to recoup their losses.[112]

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107. *Id.*
108. *Id.* at 1002.
109. *Id.*
110. *Id.*
111. *Id.* at 1004.
112. Even if the plaintiffs would have brought their claims under one of the three test mentioned by the court, their chances to recoup their losses would have been closer to zero

According to the cases studied above, the law in Florida—as related to an inverse condemnation action based on condemnation blight—can be framed in two terms. The first is to bring a substantive due process claim against the government seeking to invalidate the government action (e.g., decree of condemnation).[113] The second is to bring a takings claim against the government arguing that the announcement of condemnation denies the landowner "all economically beneficial or productive use of land."[114]

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because there was no indication from the fact pattern that the government physically invaded their property; that the announcement of condemnation took away all economic uses from the owners; or that the announcement clearly interfered with the owner's investment-backed expectation. All of these are necessary elements to find a taking under the *Penn Central* and *Lucas* tests. Penn. Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015, 1029, 1034 (1992).

113. *See* Tampa-Hillsborough Cnty. Expressway Auth. v. A.G.W.S. Corp., 640 So. 2d 54, 57 (Fla. 1994) ("In situations where state action is declared an improper exercise of police power under due process, the regulation is simply declared unconstitutional. Therefore, a land use regulation can be held facially unconstitutional without a finding that there was an uncompensated taking.").

114. *Id.* at 58. At this point it is important to notice that bringing a claim for condemnation blight under a takings claim or a due process claim has different consequences for the government and the landowner. A way to value the differences between these causes of action is to appreciate their differences in linguistic terms. *Id.* at 57 (citing Judge Griffin's concurring opinion in Dep't of Transp. v. Weisenfield, 617 So. 2d 1071 (Fla. 5th Dist. Ct. App. 1993)). A due process claim involves the "deprivation" of a property right, while a takings claim involves the "taking" of a property right. *Id.* While the government's police power authorizes it to regulate certain activities that may deprive landowners of their property rights, only the power of Eminent Domain authorizes the government to take away property from landowners. *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 543 (2005) (discussing the difference between inquiring into whether a regulation amounts to a taking or a due process violation). In general, a claim for condemnation blight could be brought under one of these causes of action or under both. *See id.* (standing for the proposition that an owner deprived of a property interest has a separate due process cause of action from the takings clause). As mentioned before, it depends on the jurisdiction where the claim is brought. *Supra* note 9 and accompanying text. However, a due process claim carries a different burden of proof than a takings claim. While a due process claim may be considered a means-end test, a takings claim is only an ends test. *See Lingle*, 544 U.S. at 540 (establishing that the "'substantially advance' legitimate state interests," a means-end test, is an "inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence"). A plaintiff bringing a due process claim against the government must establish that the action of the government is arbitrary or unreasonable to achieve a legitimate government objective. *Id.* at 541–42. On the other hand, a plaintiff bringing a takings claim needs to prove that there is a physical invasion of his property by the government, an action of the government took away all economical value of his property, or a government regulation went "too far" as to have effectively taken his property. *See infra* note 128. The consequences for the government, as a defendant in such actions, are also different in due process claims and takings claims. If for example, a court finds in favor of the plaintiff under a due process claim the action of the government will be considered invalid. *Supra* note 93 and accompanying text. On the other hand, a taking of property will be considered invalid only for lack of compensation. *Id.* In other words, under a takings claim the government can validate its actions by exercising its power of eminent domain. The same cannot be said of an action of the government found to be a violation of

However, government actions involving mere plotting and planning (precondemnation planning) cannot serve as the basis for a takings claim.[115] In addition, "condemnation blight" in itself is not a de facto taking.[116] Condemnation blight is only relevant to the valuation of the property after a plaintiff has established that "a taking has occurred either by de jure condemnation via eminent domain proceedings or de facto condemnation via one of three established tests."[117] Therefore, the easiest way to be compensated for the diminution in property value is to wait for the government to move forward with the eminent domain proceeding. Afterward, the property owner can request to be compensated for the fair market value of the property at the time of the announcement of condemnation, not after.[118]

In short, the decisions of the Florida courts fail, as other jurisdictions do, to recognize the main problem faced by landowners dealing with precondemnation of their property: The landowners are carrying all of the burdens caused by the government's activities between the announcement of condemnation and the acquisition of land necessary to accomplish development projects.[119] In addition, the courts fail to recognize an even worse situation for the landowners—that the property owners will be left with no recourse to recoup their losses if the government cannot go ahead with the acquisition of the property due to lack of funding.[120]

B. Tension Between Property Rights and the Public Interest

The evolution of Florida's property rights theory is based on a strong constitutional protection of such rights. Both the Due Process Clause and the Takings Clause of the Florida Constitution provide the basis for private owners to protect their property from

due process, which in general is held as unconstitutional by the courts. *Id.* Therefore, for purposes of balancing the interest of the government and the landowners, a takings claim may be a better way for both parties to settle condemnation blight issues.

115. Teitelbaum v. S. Fla. Water Mgmt. Dist., 176 So. 3d 998, 1004 (Fla. 3d Dist. Ct. App. 2015).

116. *Id.*

117. *Id.*

118. State Rd. Dep't v. Chicone, 158 So. 2d 753, 758 (Fla.1963).

119. Kanner, *supra* note 43, at 338–39.

120. *Supra* note 112 and accompanying text.

unreasonable government interference.[121] Florida courts have long recognized property rights as "sacred right[s], the protection of which is an important object of government."[122] The courts have also recognized inverse condemnation claims as inherent rights of citizens.[123] However, governmental interference with those rights are considered to be reasonable, unless the interference rises to the level of a taking.[124] In other words, Florida, as well as other states and the federal government, recognized the tension between property rights and the general interest.

A typical example of this tension arises when private property is needed to accomplish infrastructure projects that aims to benefit the public as a whole. To build a road, for instance, the government may impose an easement or acquire a track of private land necessary for the project. These actions clearly interfere with a landowner's enjoyment of his or her property; there is little doubt that a private owner affected by such government action is entitled to bring a suit against the government to either invalidate such action—normally under a substantive due process claim—or to recover just compensation for the government's interference with their property rights—normally under the takings claim.[125]

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121. Haire v. Fla. Dep't of Agric. & Consumer Serv., 870 So. 2d 774, 780–81 (Fla. 2004); FLA. CONST. art. X, § 6; FLA. CONST. art. I, § 9; *see also* Daniels v. State Rd. Dep't, 170 So. 2d 846, 848–49 (Fla. 1964) (discussing the interaction between the Florida Constitution and the government's eminent domain and police power).

122. Corn v. State, 332 So. 2d 4, 7 (Fla. 1976).

123. *See* State Rd. Dep't of Fla. v. Tharp, 1 So. 2d 868, 870 (Fla. 1941) stating:

> American democracy is a distinct departure from other democracies in that we place the emphasis on the individual and protect him in his personal property rights against the State and all other assailants. The State may condemn his property for public use and pay a just compensation for it, but it will not be permitted to grab or take it by force and the doctrine of nonsuability should not be so construed. Forceful taking is abhorrent to every democratic impulse and alien to our political concepts.

124. THE FLORIDA BAR, FLORIDA EMINENT DOMAIN PRACTICE AND PROCEDURE ch. 13, § 13.3 (9th ed. 2014) (citing 870 So. 2d 774). *Haire* stands for the premise that a law requiring the destruction of private property (in this case citrus trees located close to trees infected with citrus canker) may be a valid exercise of the governments police power subject to a rational test analysis of constitutionality. 870 So. 2d at 787.

125. *See generally* Meltz, *supra* note 9, at 310–11 (quoting First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304, 314 (1987)) (establishing that a taking claimant "seeks compensation rather than invalidation of the government act[ion], because the Takings Clause 'does not prohibit the taking of private property, but instead places a condition on the exercise of that power'—namely, the payment of just compensation").

Albeit complicated, choosing the applicable test for these causes of action to a typical scenario is straightforward. The landowner may have an option to apply the rational test under the substantive due process claim,[126] the public use and just compensation analysis may be satisfied under the Fifth Amendment,[127] or one of the judicially developed tests applicable to regulatory takings may be satisfied.[128]

The problem with condemnation blight as a cause of action, however, is that the factual scenarios in which it arises do not necessarily fit into any of the aforementioned options. Generally, before the government actually takes physical possession of the owner's property, it may issue a notice to the public of its intent to take, or condemn, certain property—whether it be to build a highway, start demolition of surrounding properties, notify tenants and other neighbors of its intention to acquire property, and other actions that will negatively affect the value of the property.[129] However, none of the negative effects carried out by the planning, or the announcement of condemnation, such as the loss of tenants and rental income are compensable until the government initiates the eminent domain proceedings.

In recognizing the gaps between the different causes of action available to property owners, Florida has clearly shown interest in protecting property rights by providing a statutory solution. An example of this is the enactment of the Bert J. Harris, Jr. Private Property Rights Protection Act.[130] The purpose of the Act is to create

126. *See generally* Torromeo v. Town of Fremont, 438 F.3d 113, 118 (1st Cir. 2006) (establishing that the Substantive Due Process Clause "prevents governmental power from being used for purposes of oppression, or abuse of government power that shocks the conscience, or action that is legally irrational in that it is not sufficiently keyed to any legitimate state interest").

127. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

128. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (establishing that a taking occurs when government regulation of property "goes too far"); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124–25 (1978) (establishing the test to determine when a government action constitutes a partial regulatory taking); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1005, 1029 (1992) (establishing that a government regulation that completely eliminates economic use of the land is a *per se* total taking).

129. *See, e.g.*, Lincoln Loan Co. v. State Hwy. Comm'n, 545 P.2d 105 (Or. 1976) (under the same factual scenario the Oregon Supreme Court, different from the Florida courts, recognized plaintiffs' claim for inverse condemnation under a condemnation blight theory).

130. FLA. STAT. § 70.001 (1995).

> a cause of action that provides judicial relief for landowners who are restricted by government laws and regulations from using their land. Essentially, the [Act] was enacted to provide real property owners with protection from laws and regulations in situations that do not rise to the level of a taking under the traditional takings analysis.[131]

The Act is supposed to fill the gaps in cases where a normal takings claim will not be of use to a property owner.[132] Initially, it was thought that the Act could be a good mechanism for property owners to recover precondemnation damages. Yet, the way in which the Act is structured does not permit such recovery because the Act limits the government's police power, rather than the government's power of eminent domain.[133] Despite its shortcomings, the importance of the Act is that its sole existence shows Florida's interest in protecting landowners from government actions that interfere, burden, or take away the right of landowners to use and enjoy their properties.[134]

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131. Robert P. Butts, *Private Property Rights in Florida: Is Legislation the Best Alternative?*, 12 J. LAND USE & ENVTL. L. 247, 249 (1997).

132. The analysis of a condemnation blight claim under the Act is outside the scope of this Article. For a good overview of the difference between the application of the takings claim and the Act, see Susan L. Trevarthen, *Advising the Client Regarding Protection of Property Rights: Harris Act and Inverse Condemnation Claims*, 78 FLA. B.J., 61, 62–63 (Aug. 2004).

133. As seen in the Florida statutes where the Legislature recognized

> that some laws, regulations, and ordinances of the state and political entities in the state, as applied, may inordinately burden, restrict, or limit private property rights without amounting to a taking under the State Constitution or the United States Constitution. The Legislature determines that there is an important state interest in protecting the interests of private property owners from such inordinate burdens. *Therefore, it is the intent of the Legislature that, as a separate and distinct cause of action from the law of takings*, the Legislature herein provides for relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity in the state, as applied, unfairly affects real property.

FLA. STAT. § 70.001(1) (1995) (emphasis added); *Id.* § 70.001(10) (1995) ("This section does not apply to any actions taken by a governmental entity which relate to the operation, maintenance, or expansion of transportation facilities, and this section does not affect existing law regarding eminent domain relating to transportation.").

134. Since the enactment of this Act, Florida has received an "A" grade by the Castle Coalition, a political group seeking to protect individual rights from the exercise of the power of Eminent Domain by the government. This rating has no legal relevancy but is a clear indication of Florida's strong protection of property rights. *See* Castle Coalition, *50 State Report Card Tracking Eminent Domain Reform Legislation Since* Kelo, INST. FOR JUSTICE 13 (Aug. 2007), *available at* http://ij.org/wp-content/

Then, the question is, are Florida landowners bound to absorb the losses caused by the planning activities of the government *alone*?[135] Moreover, are landowners bound to absorb those incidental costs resulting from the "cloud of condemnation" imposed by the government on their properties *alone*? What happens when the government, for whatever reason, does not proceed to the condemnation proceedings? To answer these questions, we may look to the approach taken by other jurisdictions which recognized precondemnation damages as a cause of action and recognized incidental damages, such as loss of rental income, as "collectable under the just compensation provision of the state's constitution."[136]

C. Moving Past the Tensions: Missouri as a Case Study

Different from the approach that Florida follows regarding condemnation blight, Missouri—as well as other states—recognize condemnation blight as a cause of action.[137]

In *Clay County Realty Co. v. City of Gladstone*,[138] the Missouri Supreme Court recognized "a cause of action for precondemnation damages when the condemning authority . . . caused undue delay and committed untoward acts in implementing condemnation proceedings."[139] In this case, two commercial landowners brought

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uploads/2015/03/50_State_Report.pdf (discussing the Act as "[setting] an example by restoring eminent domain authority to its original and limited purpose by removing the blight exception and closing the book on its long history of property rights abuse").

135. Despite the U.S. Supreme Court decision in *Armstrong v. United States*, establishing that the government is barred "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." 364 U.S. 40, 49 (1960).

136. *See* Peterson, *supra* note 25, at 315–29 (citing Luber v. Milwaukee Cnty., 177 N.W.2d 380, 386 (Wis. 1970)).

137. Other jurisdictions that have recognized condemnation blight under a theory of inverse condemnation include Missouri, Minnesota, Nevada, Oregon, Pennsylvania, and California. Clay Cnty. Realty Co. v. City of Gladstone, 254 S.W.3d 859, 864–65 (Mo. 2008); Johnson v. City of Minneapolis, 667 N.W.2d 109, 115–16 (Minn. 2003); State *ex rel.* Dep't of Transp. v. Barsy, 941 P.2d 971, 976 (Nev. 1997) *overruled on other grounds by* GES, Inc. v. Corbitt, 21 P.3d 11 (Nev. 2001); Lincoln Loan Co. v. State Highway Comm'n, 545 P.2d 105, 109–10 (Or. 1976); Conroy-Prugh Glass Co. v. Dep't of Transp., 321 A.2d 598, 602 (Pa. 1974); Klopping v. City of Whittier, 500 P.2d 1345, 1350–51, 1355, 1360 (Cal. 1972).

138. 254 S.W.3d 859 (Mo. 2008).

139. *Id.* at 861.

> Considering the constitutional prohibition against takings without just compensation, this Court holds that actions for condemnation blight are inverse condemnation claims that property owners may advance in order to recover consequential precondemnation damages, . . . before property owners have a

inverse condemnation action against the city of Gladstone "alleging that the [c]ity had unlawfully taken their property without just compensation."[140] In October 2005, the city declared the landowners' properties blighted and subjected them to a redevelopment plan.[141] The approved plan provided for the exercise of the city's eminent domain power for economic development.[142] However, at the time of the lawsuit (three years later), the city had not approved an ordinance approving such a project.[143] Landowners further claimed that the city "engaged in undue delay and untoward activity in implementing condemnation proceedings against the property," and by failing to proceed with the development, the city caused the landowners loss of ongoing rental income and "diminution of the value of their properties."[144] "The city has thereby taken the [p]roperty for public use or purpose."[145] The city counterclaimed that the landowners "failed to state a claim for an unconstitutional 'taking.'"[146] The Supreme Court of Missouri held "that actions for condemnation blight are inverse condemnation claims that property owners may advance in order to recover consequential precondemnation damages," including "lost rental and lease income."[147]

Furthermore, the Court clarified that "before property owners have a viable cause of action for precondemnation damages, they must establish that there has been aggravated delay or untoward activity in instituting or continuing the condemnation proceedings at issue."[148] Additionally, the Court established that the plaintiffs "must prove that their damages were caused by the condemning authority's actions or inactions."[149]

In addition to providing a framework for a condemnation cause of action, the context in which this case was decided is

> viable cause of action for precondemnation damages, they must establish that there has been aggravated delay or untoward activity in instituting or continuing the condemnation proceedings at issue.
>
> *Id.* at 869.

140. *Id.* at 861.
141. *Id.* at 862.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 863.
147. *Id.* at 869.
148. *Id.*
149. *Id.*

important for subsequent cases. *Clay County* is the first case in Missouri to break with a long-standing tradition—in that state—to reject "claims alleging [incidental] damages resulting from condemnation blight."[150] In its reasoning, the Court clarified the holding of previous cases which rejected plaintiffs' arguments that they "had suffered an unconstitutional taking" as a product of an imposed "cloud of condemnation" over their property.[151] While the Court recognized that although some legislative initiatives were in place, the Court was silent in determining whether Missouri law provided a remedy for precondemnation damages. In finding an inverse condemnation claim for condemnation blight, the Court recognized that "[p]roperty owners enjoy constitutional protections that ensure that their property 'shall not be taken or damaged for public use without just compensation.' . . . These constitutional guarantees require that courts recognize that property owners are entitled to a remedy even where statutes do not provide one."[152]

In short, *Clay County* shows that other jurisdictions have recognized the right of property owners to be fully compensated for the negative consequences of the planning actions of the government. Based on this case, and the existing gaps in Florida's condemnation blight jurisprudence, this Article will focus on proposing a cause of action that allows for a balance between the right of private owners, to use and possess their property, and the government's exercise of its power of eminent domain.

IV. PRIMA FACIE PER SE *TAKINGS: A BETTER APPROACH TO ADDRESS CONDEMNATION BLIGHT IN FLORIDA*

Government actions that limit the use and value of property during a precondemnation period should be analyzed under a *per se* takings test. The elements of this test need to be well defined, using bright-line rules, and constructed under a classical prima facie cause of action structure allowing for the inversion of the burden of proof from the plaintiff to the defendant. The purpose of this test is to provide a better balance between the use of condemnation planning—as a tool to achieve public goals—and the right of Florida landowners to be compensated for the unreasonable interference with their property rights. In other

150. *Id.* at 865.
151. *Id.*
152. *Id.* at 868 (internal citation omitted).

words, the prima facie cause of action and not to take away the ability of the government to exercise its power of eminent domain.

A. *Per Se* Takings Versus Ad Hoc Takings

A prima facie *per se* takings approach is a better way to recover damages for condemnation blight. To understand the reason behind this proposition, it is necessary to first understand the differences between the courts' traditional approach to *per se* and ad hoc takings tests.

Per se rules are defined as "generalized rule[s] applied without consideration for specific circumstances."[153] When applied to takings, *per se* rules are understood as situations in which "the government either occupies in fact or has given itself the right to occupy private property—without paying for the privilege."[154] This is a situation in which the government appropriates rather than regulates property.

Two types of takings are generally considered *per se* takings. The standard taking occurs when the government invades private property to the point of creating a "permanent physical invasion of [such] property."[155] The second taking occurs under the concept of regulatory takings. A *per se* regulatory taking occurs when government regulation "call[s] upon [private owners] to sacrifice *all* economically beneficial uses [of their property] in the name of the common good."[156] Both takings aim to protect property owners from the total deprivation of their property rights in situations that are "so onerous that [their] effect is tantamount to a direct appropriation or ouster."[157] In this case, the invasion of private property is so severe that the action of the government is deemed to be a "taking" "without regard to the state's interest in possessing or otherwise using the property."[158]

Courts dealing with situations that do not fit neatly into an appropriation category should apply ad hoc tests. Unlike *per se* takings, where the courts apply a set formula—physical invasion

153. MERRIAM-WEBSTER'S DICTIONARY OF LAW 362 (1996).

154. Wendie L. Kellington, *New Takes on Old Takes: A Takings Law Update*, SG021-ALI-ABA 511, 514 (2001).

155. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005).

156. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992) (emphasis in original).

157. *Lingle*, 544 U.S. at 537.

158. Vesta Fire Ins. Corp. v. Florida, 141 F.3d 1427, 1430 (11th Cir. 1998) (citations omitted).

equals taking—ad hoc takings required the courts to apply a set of factors to determine whether a taking has occurred. For example, in order to determine whether a partial regulatory taking has occurred under the *Penn Central* test, a court must balance different factors. These factors include: (1) the economic impact on the regulation on the property owner; (2) the degree of interference of the regulation with the owner's investment-backed expectations; and (3) the character of the government's action.[159] The courts can also give these factors different weight—which is the reason why the two partial regulatory cases may not be decided in the same way.[160] In other words, a court applying an ad hoc analysis has more discretion to balance the interest of the parties and structure its decision than a court applying a *per se* takings test. The main consequence of bringing a claim under a *per se* taking test, therefore, is that if a court finds a physical invasion of the property, the court will consider this a taking subject to just compensation independently of the interest of the government.[161]

The situation of many property owners subject to condemnation blight resembles the situation of evicted owners. Because the property owners under condemnation blight are in virtual, and not real, possession of their property, they are still obliged to comply with the burdens of ownership, which include the payment of insurance, taxes, etc.[162] Likewise, because of their virtual ownership, the property owners are unable to take economic advantage of their property due to the blight conditions created by the action (announcement of condemnation) or inaction of the government (undue delay of the condemnation proceedings). Condemnation blight deprives property owners of the economic use and value of their property similar to a physical ouster. Therefore, a *per se* taking claim is a better approach to recover damages in this situation.[163]

159. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

160. Meltz, *supra* note 9, at 330.

161. *Supra* note 158 and accompanying text.

162. City of Buffalo v. J.W. Clements Co., 269 N.E.2d 895, 900 (N.Y. 1971).

163. Similar to condemnation blight cases, in which governmental interference with the use of private property exists without the need for a physical invasion, some courts have recognized an ouster of property owners when noise related to aircrafts' operations caused substantial interference with the use and enjoyment of their property. 3775 Genesee Street, Inc. v. State, 415 N.Y.S.2d 575, 585–87 (N.Y. Ct. Cl. 1979) (citation omitted) (holding that if noise from aircrafts "reached a point where it caused substantial interference with the use of the surface, a landowner could seek compensation through an action in inverse condemnation"); Fitzgarrald v. City of Iowa City, 492 N.W.2d 659, 663–65 (Iowa 1992)

B. Condemnation Blight as a Cause of Action

As mentioned before, property owners dealing with the consequences of an announcement or decree of condemnation are not only dealing with the government interference with the use of their property, but also with the issue of bearing alone a burden that "in all fairness and justice, should be borne by the public as a whole."[164] This being said, it is important to understand that government planning has an essential role to play in the way we build our communities. Indeed, planning is an essential tool for the government to provide for the general welfare.[165] Therefore, a *per se* taking claim based on condemnation blight must have clear limitations that permit the government to engage in conduct that is essential to the development of public projects.[166]

At this point, it is important to notice that the government uses two different powers to achieve public objectives. The first one is its power of eminent domain and the second one is its police power.[167] Condemnation blight should be understood as the product of the exercise, or better, the non-exercise of the power of eminent domain, not the product of the government's police power or the power to regulate property.[168] In other words, "[t]he planning and development of a major public improvement project is a governmental enterprise not a regulatory exercise of the police power."[169] However, the way that the courts have approached cases of condemnation blight seems to indicate confusion between the applications of these powers. For example, in *Teitelbaum*, the court held that the plaintiff should look into the *Penn Central* ad hoc test instead of attempting to bring a constitutional *per se* takings claim

(finding that noise could amount to a taking although "every noise or interference with property as a result of overflying aircraft does not constitute a taking").

164. Armstrong v. United States, 364 U.S. 40, 49 (1960).

165. John R. Nolon, *Historical Overview of the American Land Use System: A Diagnostic Approach to Evaluating Governmental Land Use Control*, 23 PACE ENVTL. L. REV. 821, 829–34 (2006) (describing the historic evolution of the government land-use planning as a response to problems arising with urban growth including "poor traffic circulation, inadequate waste disposal , . . . overcrowding[, and the] spread of diseases").

166. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

167. S. William Moore & Lorena Hart Ludovici, *Making a Case for Pre-Condemnation Blight*, SD40 ALI-ABA 93, 101–02 (1999).

168. *Id.*

169. *Id.* at 102.

based on condemnation blight.[170] In reaching its decision, the court understands condemnation blight as the consequence of the exercise of police power and not as a consequence of the government's power of eminent domain. Thus, the balance that needs to be achieved is a balance between property rights and the government exercise of the power of eminent domain.

1. Elements of the Cause of Action

This Article proposes that a plaintiff seeking to recover damages under a condemnation blight theory may establish a prima facie case of *per se* takings showing that: (1) the government undertook a qualified action that went beyond mere plotting and planning; (2) the government intended to take the property; and (3) the government action caused the owner to lose the use or economical value of its property.[171] Once a plaintiff has established these elements, the burden of proof will shift to the government to show that a delay in exercising its power of eminent domain is not unreasonable.[172] The government may establish, for example, that the size or complexity of the project requires a moratorium before going ahead with the de jure proceedings.[173] In situations in which the government is unable to meet this burden, the plaintiff should be entitled to recover incidental damages resulting from the blight conditions and force the government to go ahead with the purchase of the property when necessary.

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170. Teitelbaum v. S. Fla. Water Mgmt. Dist., 176 So. 3d 998, 1004 (Fla. 3d Dist. Ct. App. 2015).

171. These elements are similar to those proposed by the Plaintiff and rejected by the court in *Teitelbaum*. *Id.*

172. Similar to this Article's proposed structure, employment discrimination cases based on a theory of disparate treatment, allow for the shifting of the burden of production from plaintiff to defendant. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The reason for this is that the employer, not the employee, is in possession of direct evidence of discrimination. In other words, absent a smoking gun (e.g., email between the employer and employee describing the real reason for termination) an employee does not have the evidence necessary to prove his case. Tristin K. Green, *Making Sense of the* McDonnell Douglas *Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII*, 87 CAL. L. REV. 983, 1004, 1006 (1999).

173. For example, moratoriums established in good faith have been found not to be *per se* takings by the U.S. Supreme Court. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321, 342 (2002).

a. Qualified Action of the Government

Mere plotting or planning should be differentiated from the announcement of condemnation. Once an announcement of condemnation is issued, the government has moved beyond mere planning and targeted specific property that it needs to develop a project. At this point, a takings claim may arise because the government's intent to take is clearly established.[174] Mere planning, on the other hand, should not be considered enough to meet the prima facie case for a takings claim unless accompanied by affirmative actions of the government that affect the use and enjoyment of the owner's property rights.[175] Examples of this can be denial of building permits in the presence of an announcement of condemnation,[176] discussing openly the plans to condemn even if an announcement is not formally done,[177] and waiting a long time

174. When the government needs to target specific property, a takings claim may arise. *See, e.g.*, Brown v. Legal Found. of Wash., 538 U.S. 216, 220 (2003) (interest on lawyers' trust accounts); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 155–56 (1980) (interest on interpleader funds).

175. For example, in *Mingo v. City of Detroit*, the Michigan Appellate Court limited government actions by establishing that a government "may not by deliberate acts reduce the value of private property."

> Actions found to be deliberate include the filing of lis pendens, the published threat of condemnation, mailing letters and circulars concerning the project to area residents, refusing to issue building permits for improvements coupled with intense building violation inspection, reductions in city services to the area and protracted delay and piecemeal condemnation and razing.
>
> Other actions are not [*per se*] evidence of a taking without "proof of calculated action or specific directives by city officials for the purpose of reducing the value of appellant's properties." These other actions include the unsatisfactory provision of city services, such as "lax police protection, reduction in refuse collections, street cleaning and street repair." To amount to a taking, the government must do more than create and publicize project plans. "Threats must be coupled with affirmative action such as unreasonable delay or oppressive conduct directed to the neighborhood as a whole."

No. 277403, 2008 WL 2439993, at *3 (Mich. Ct. App. June 17, 2008) (internal citations omitted).

176. *See, e.g.*, Ward v. Bennett, 214 A.D.2d 741, 743–44 (N.Y. App. Div. 1995) (recognizing a prima facie de facto taking of private property when the City of New York refused to grant the owner a permit to build a one-family home and did not initiate condemnation proceedings after ten years of filing a map of reservation).

177. *See* Moore & Ludovici, *supra* note 167, at 96 (citing Commonwealth Dep't of Transp. v. DiFurio, 555 A.2d 1379 (Pa. Commw. Ct. 1989) and Lange v. State, 547 P.2d 282 (Wash. 1976) as examples of cases in which the government publicized condemnation proceedings through press releases causing precondemnation damages later recognized by the courts).

to go ahead with the condemnation hoping to obtain a lower price for the property.[178] The common denominator here is that the government has sent a clear message to the public of its intention to condemn specific property. In this way, a simple rumor, even if it affects the value of the property will not be enough to establish the first prong of the test.

b. Intent to Take

Absent a clear and publicize announcement of condemnation, the intent of the government to take property may be inferred in two ways: (i) by the government's unreasonable delay in exercising its power of eminent domain, or (ii) by acting in bad faith in its dealings with property owners.[179]

i. Unreasonable Delay

This delay may be the product of bad planning or the product of government intent to depreciate the value of the property.[180]

But see City of Chicago v. Loitz, 295 N.E.2d 478, 481 (Ill. App. Ct. 1973), *aff'd*, 329 N.E.2d 208 (Ill. 1975) stating:

> [T]he service of notices or the initiation of negotiations between the governmental agency and the landowner do not in themselves constitute a physical taking or the infliction of damage upon the property. These preliminary matters do not in any physical sense invade the property or infringe upon the possessory rights of the owner. In fact, practical considerations may compel abandonment of the proposed taking without damage to the property.

178. Madison Realty Co. v. City of Detroit, 315 F. Supp. 367, 371–72 (E.D. Mich. 1970).

> Where condemnation proceedings are protracted, the whole character of an area may be changed to the detriment of the property owner during the course of the proceedings. If an area has been made a waste land by the condemning authority, the property owner should not be obliged to suffer the reduced value of his property.

Id.

179. *See* Klopping v. City of Whittier, 500 P.2d 1345, 1355 (Cal. 1972) (establishing that "when the condemner acts unreasonably in issuing precondemnation statements, either by excessively delaying eminent domain action or by other oppressive conduct, our constitutional concern over property rights requires that the owner be compensated").

180. *See supra* note 174 and accompanying text (providing examples of bad faith delay cases). Examples of bad planning can be found in a situation where the government purchased property within the plan of condemnation and subsequently runs out of funding and abandons the project. This was the case in *Teitelbaum*, where private property (unable to be purchased by the government) ended up surrounded by public abandoned property,

Perhaps the most difficult element to prove is the unreasonable delay. What is an unreasonable delay? Courts have not defined this term; therefore, its application has been established on a case-by-case basis.[181] Because a homeowner may not be in the best position to provide proof of an unreasonable delay, which in many cases will depend on the size and difficulty of the project, structuring the cause of action on a shifting burden of proof will allow the government to put forward direct evidence to explain the reason for the delay. Plaintiff may be able to meet this element by simply showing that the government's proposed date for the de jure condemnation has come and passed. Then, the government will have to prove that the delay is reasonable.

ii. Bad Faith

The second form to prove intent is by claiming bad faith. Bad faith can be found in actions of the government that directly interfere or prohibit the enjoyment of property.[182] Some courts have used terms such as "untoward acts" and "oppressive conduct"[183] to describe such conduct. A possible example of bad faith can be found in situations such as those claimed by the *Teitelbaum* plaintiffs. As discussed before, the plaintiff claimed

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which led to the depreciation of property values in the area. Teitelbaum v. S. Fla. Water Mgmt. Dist., 176 So. 3d 998, 1004 (Fla. 3d Dist. Ct. App. 2015).

181. *See* Moore & Ludovici, *supra* note 167, at 96 (citing different cases in which delays ranging from three to ten years were found unreasonable, therefore, an unconstitutional taking of private property).

182. Kemper, *supra* note 31, § 8(a).

183. Clay Cnty. Realty Co. v. City of Gladstone, 254 S.W.3d 859, 862, 864 (Mo. 2008); Klopping v. City of Whittier, 500 P. 2d 1345, 1355 (Cal. 1972); *see also* James Doyne York Trust v. S. Fla. Mgmt. Dist., 4 Fla. L. Weekly Supp. 423(a) (Fla. 15th Cir. Ct. 1995) stating:

> [T]he court concludes Florida courts should recognize a cause of action for oppressive precondemnation conduct where the conduct goes beyond the mere planning and negotiation stages and indicates an intent to condemn on the part of the government agency. When a public entity acting in furtherance of a public project directly and substantially interferes with property rights and thereby significantly impairs the value of the property, the result is a taking in the constitutional sense and compensation should be paid. Further, if the public entity abuses its authority to acquire real property for public purposes by engaging in oppressive precondemnation conduct or delay tactics to coerce the owner to sell the property at below market value, the public entity should be liable for damages. To hold otherwise would compromise the intent of both the Florida and Federal Constitution which provide private property shall not be taken for public use, without just compensation.

that after the South Florida Water Management District publicly announce its intent to oppose any attempts to rezone the land or allow further development of the property; the government initiated the purchase of private property in a "checkerboard fashion."[184] The government's buying scheme "interspersed public ownership of properties throughout the area" limiting the use that private owners could give to their property.[185] Under this situation, property owners were expected to have their property condemned; however, this never happened as consequence of the cancellation of the project. While the Florida court did not find a *per se* taking in this case, these actions of the government will be enough to establish the element of bad faith. Other examples of bad faith are "open harassment to more sophisticated schemes, such as denial of building permits, either completely or on condition that the owner make a gift of his land to the governmental entity, the imposition of oppressive zoning, and kindred activities."[186]

c. Damages

A plaintiff must show economic damages or loss of use of its property. The idea is to show that the government actions indeed had a negative impact on the value of property.[187] Examples of these damages are the loss of rental income because tenants decided not to renovate their leases as result of the announcement of condemnation, and losses suffered due to vandalism and other criminal activities that occurred in blighted properties, among others.[188]

2. Prima Facie Cause of Action and the Burden of Proof

Similar to employment discrimination cases in which evidence of discrimination is in the hands of the employer, not the employee, the evidence to determine whether an unreasonable delay or bad

184. Petitioner's Brief on Jurisdiction at 2, Teitelbaum v. S. Fla. Water Mgmt. Dist., 2015 WL 7282097 (Fla. Nov. 6, 2015) (No. SC15-1994).

185. *Id.*

186. Kanner, *supra* note 2, at 769.

187. *See* Air Pegasus of D.C., Inc. v. United States, 424 F.3d 1206, 1215 (Fed. Cir. 2005) ("[A] claimant seeking compensation from the government for an alleged taking of private property must, at a minimum, assert that *its* property interest was actually taken by the government action.") (emphasis in original).

188. *See supra* note 5 and accompanying notes (taking note that condemnation blight does not apply if the property value increase when condemnation is announced).

faith exists is in the hands of the government, not the landowner.[189] The prima facie structure, therefore, allows the government to come forward with evidence that demonstrates, for example, that the delay in exercising the eminent domain power is reasonable in relation to the size and complexity of the public project, or that the landowners suffered only "slight incidental loss," which are normally assumed by property owners, during the "reasonable interval between announcement of a project and condemnation."[190]

It is important to notice that the opportunity given to the government to explain the unreasonable delay, or its acts in general, is not aimed to explain whether the decision to condemn the property was related to a legitimate interest. This is a valid explanation under the substantive due process clause, not the takings clause.[191] Therefore an argument that this is necessary to achieve the general welfare will not be enough for the government to sustain its burden of proof in this case.

3. Practical Application

Looking back at the facts in *Teitelbaum*, the application of the proposed cause of action could have provided a very different result for Plaintiffs. First, Plaintiff would have been required only to

189. *Supra* note 171. At least one author has discussed the benefits of applying a traditional prima facie system to determine adequate compensation for takings under a property rights statute, in the following terms:

> Takings clauses largely aim to prevent horizontal inequity stemming from a government's decision to impose a heavy burden on a few citizens instead of spreading that burden through the tax system. . . . [T]akings litigation should be structured into a prima facie case, to be pleaded and proved by a claimant, and a set of defenses, to be pleaded and proved by government. This is the structure used in mature doctrinal areas such as tort law and criminal law.
> Any land use activity can be appraised in terms of its relative desirability to neighbors. The prima facie case for a taking should be that a landowner has suffered loss by being barred from undertaking land uses whose externalities persons in the region consider to be no worse than normal. Landowners have a particularly poignant "why me?" complaint when they are prohibited from doing what many of their neighbors are permitted to do. Compensation should be measured only by the diminution in land value that stems from the prohibition of normal (or better) activities, and no compensation should be awarded for any diminution of value resulting from the prohibition of subnormal activities.

Robert C. Ellickson, *Takings Legislation: A Comment*, 20 HARV. J. L. & PUB. POL'Y 75, 82 (1996).

190. Moore & Ludovici, *supra* note 166, at 103.

191. *See supra* note 113 (discussing the differences between a substantive due process claim and a takings claim).

establish its prima facie cause of action, not to prove the ad hoc elements used under *Penn Central*.[192] Thus, instead, of showing the existence of an investment-backed expectations over the property, which indeed would have been difficult to prove because the land has been zoned for agricultural purposes since 1968,[193] Plaintiffs would have been required to establish, as they did, that the government went beyond mere planning, intended to take the property, and unreasonably delayed the condemnation proceeding causing the loss of use and value of their properties. However, the main consequence of applying the proposed cause of action to Plaintiffs' factual situation is that the government would have not survived summary judgment. The reason for this is that by shifting the burden of proof, the court would have also shifted the focus of the inquiry. The main question would have no longer been whether condemnation blight "does . . . give rise to a de facto taking,"[194] but whether the government acted unreasonable or in bad faith. Because the latter is a question of fact, this case would have gone to the jury, instead of being decided on summary judgment.

V. CONCLUSION

Under the current state of Florida law, landowners are bound to absorb the losses caused by the announcement of condemnation that is never executed. Private owners, therefore, are bearing alone the risks associated with failed public projects.

Moreover, decisions such as that in *Teitelbaum*, which leave landowners without viable options to recoup their losses go directly against Florida's long-standing recognition that property rights are "sacred right[s], the protection of which is an important object of government."[195] Allowing recovery for condemnation blight damages is the recognition that the right to enjoy and own property free from unreasonable government interference is a personal right recognized by the Florida and U.S. Constitutions. Moreover, it recognizes the idea that governments should not take advantage of its powers to gain an economic advantage over its citizens by

192. Teitelbaum v. S. Fla. Water Mgmt. Dist., 176 So. 3d 998, 1005 (Fla. 3d Dist. Ct. App. 2015).
193. *Id.* at 1001.
194. *Id.*
195. Corn v. State, 332 So. 2d 4, 7 (Fla. 1976).

engaging in an activity that is detrimental to the citizens' property.[196]

Finally, having a well-defined cause of action for condemnation blight will enable judicial prediction and homogenization of jurisprudence. This will not only provide property owners with a tool to limit the negative effects of the process of condemnation, but it will also help the government to be an effective planner.

196. For other public policy arguments see Peterson, *supra* note 25, at 315–21.