

ELULC COMMENTS ON THE “PROPERTY RIGHTS” INTERIM WORK PRODUCT
(KIETH & SCHNARS JUNE 2005)

The legal review concludes that the Watershed Study and Plan do not create legal exposure under Federal or State “takings” law. Studies, by themselves do not impact property rights and thus this is a clearly correct determination. The report does a good job of analyzing even those cases which could apply to planning efforts, and explains that the courts give government significant leeway to plan and consider potential regulatory changes that might have takings implications. The real question is whether the implementation – through government planning, development, permitting or other actions – of any of the Study’s recommendations might constitute a “taking” of private property. As the Study has not yet proceeded to the recommendation stage, final conclusions on this point cannot yet be drawn. However, as a result of the previously completed tasks (particularly Sub-tasks 1.8 and 2.2), the potential range and nature of the Study’s potential recommendations are known, and firm conclusions can be drawn about how private property rights might impact the substance of Study’s ultimate recommendations.

The consultant’s legal analysis is straight-forward and accurate. The basics of the law on property rights is currently subject to little debate, and the report accurately reports the most recent Supreme Court and lower court rulings on the subject. On all points addressed in this paper, it is difficult to imagine that there could be an alternative or different view or presentation of the law.

The paper clearly and accurately makes it clear that Miami-Dade County has significant leeway to enact whatever recommendations will emerge from the Watershed Study, without running afoul of private property rights. Indeed, while the paper appropriately did not attempt to speculate and address the property rights implications of potential recommendations, only the most drastic of potential Study recommendations would violate private property rights. As discussed in the attached article, recently published in the Florida Bar News, the following is true of property rights as granted by Florida and federal law:

- A landowner has no right to an increase in allowable land uses. Thus, County actions that simply do not increase densities, move the UDB or otherwise increase the type and amount of development currently allowed on land will not violate private property rights.
- Actions to decrease density or use on private land do not violate property rights unless they have such an adverse impact on land values that virtually all economically viable use has been “taken”. While this is not a “bright line” test, it is fairly clear that under the US and Florida Constitutions, this point is not reached until land values are diminished by around 80%. In Florida, the “Harris Act” may be interpreted in the future to set that threshold at a lesser reduction (say 60-75%), that is not at all clear, and would be a very conservative estimate. The bottom line is that, unless the County implements the Study by reducing densities by half or more, there will be no property rights issues. It should be noted that the County could even reduce densities

to almost, and including nothing, as long as it granted “transferable” development rights to the land, which could provide value to the land based on their resale value.

- Similarly, if the County were to implement the Study with regulations that increase environmental protections, set-asides, impact fees or other measures which increased the restrictions on the use of land or the amount of reimbursement the owner must provide to offset the cost of public services and facilities, there would be no property rights violation unless the requirement was not reasonably related to the actual impacts of the development or was for an invalid reason. Preventing urban sprawl, environmental or neighborhood values, drinking water supplies, traffic congestion, aesthetics, and recouping public costs and other issues have consistently been found to be valid bases for regulations.
- If it is determined that existing regulations allow development that is adverse to the needs of the region, as explained in the Study or otherwise, the County can enact a temporary moratorium on permitting for the time it takes to amend the regulations to resolve the deficiencies. Moratoriums of up to 6 years have been upheld, although the law is that the moratorium must be reasonable in duration relative to the issue being addressed during its pendency.
- One of the areas where property rights law provides much more room for government to increase public protections is in the area of impact and other fees or exactions. The constitution allows government to recoup all of the public costs for services and facilities generated by land use and development on private land, impact fees are typically only a fraction of actual costs.