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Feeling the Squeeze: The Troubled Future of Lateral Beach Access In Florida

by Carly Grimm, Amanda Broadwell & Thomas T. Ankersen¹

"No part of Florida is more exclusively hers, nor more properly utilized by her people than her beaches."²

Introduction

A beachgoer strolling down the beach spots a large obstruction in the distance. As she nears the barrier, it takes the shape of a large rocky outcropping protruding into the tide, waves crashing against it in a confused swirl of shallow whitewater. The obstacle is a revetment, engineered to absorb and deflect wave energy before it hits an adjacent seawall, which dutifully protects a multistory

condominium. Faced with the challenge of wading through the turbid ocean surf, the beachgoer instead works her way up a dune at the edge of the revetment and begins walking along the narrow cap of the seawall, anxious to return to the sandy beach several hundred feet away. Midway through her journey, a man who has been relaxing by the condominium's pool shouts at her to get off the property. She is trespassing, he screams.

This is a true story, at least in its essential facts, and is one likely to be increasingly reenacted over the coming decades as rising tides, erosion,

and coastal armoring interrupt public access along Florida's shores. Of the state's 825 miles of sandy beaches, over 485 miles, nearly 60 percent, are experiencing erosion.³ Absent human interference, beaches tend to naturally migrate inland as higher water levels erode the shoreline.⁴ Intensive development along Florida's coasts and the construction of seawalls and revetments has arrested this process, resulting in a phenomenon ecologists have termed "coastal squeeze." Now, met with an increasingly immobile shoreline, rising seas are gradually swallowing up the beaches that have

See "Feeling the Squeeze," page 18

From the Chair

by Nicole C. Kibert

Hello ELULS Members and welcome to 2014! It's only February and ELULS has already had a busy year! On January 30, 2014, we had an Executive Council Meeting in conjunction with a packed networking reception at Tampa Bay Brewing Company. The next day on January 31, 2014, the section hosted a CLE program with RPPTL, "Emerging Trends on the Development Front for Environmental, Land Use and Real Estate Practitioners" at Tampa Airport Marriott. Chaired by Vinette D. Godelia, this year's program featured an updated format for this popular program and the recorded version of the program

will be available soon! Following the CLE, your hardworking Executive Council members spent the weekend engaged in long range planning led by Chair Elect, Kelly Samek. We thoroughly reviewed section activities and programs including a complete review of the section's Treatise with Treatise Chair, Janet Bowman, to be sure we are keeping up to date and adding timely articles.

We are pleased to announce that our Environmental and Land Use Law Audio Webcast Series begins February 18, 2014. You can register for a single program or the whole series. Here's the schedule of events:

See "Chair's Message," page 2

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CHAIR'S MESSAGE

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- February 18, 2014 - Update on Water Use Issues from Around Florida
 - Timothy J. Perry, Oertel, Fernandez, Bryant & Atkinson, P.A.
 - David Macintyre, PB Water
- March 20, 2014 - Managing Large Scale Development for the Long Term -- Sector Planning in Osceola County
 - Vivien J. Monaco, Burr & Forman LLP
 - Jeff Jones, Osceola County
- April 17, 2014 - Everyday Ethics: The Most Common Errors Attorneys Make (and how to avoid them)
 - Elizabeth Clark Tarbert, Ethics Counsel, The Florida Bar
- May 20, 2014 - Annual Legislative Wrap Up
 - Janet E. Bowman, Nature Conservancy
 - Gary K. Hunter, Jr., Hopping Green & Sams
- June 19, 2014 - Air Law Hot Topics: Fine Particulate Emission Limits, NSR Enforcement and More
 - Dorothy E. Watson, Foley & Lardner LLP

- Peter Anderson, Geosyntec Consultants

Note: All webinar presentations are scheduled to occur between 12:00 noon and 1:00 p.m. Eastern. For more information, please review the program information sheet at: <http://eluls.org/wp-content/uploads/2013/12/1626-Webseries.pdf>.

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If you are interested in sponsoring the section, please visit <http://eluls.org/our-sponsors/> for more

information. There are some sponsorship opportunities available for our next networking reception in South Florida in March 2014. Please contact Calbrail Bennett at CBennett@flabar.org for more information.

You are welcome to attend meetings of the Executive Council. The remaining 2013-2014 meeting dates for the ELULS Executive Council are listed below:

- April 2014 (date to be determined) – Orlando, FL
- June 26, 2014 – Gaylord Palms Resort, Orlando (in conjunction with The Florida Bar Annual Convention)
- August 6, 2014 (4:00 p.m.) – Omni Amelia Island Plantation

Also, feel free to visit the section website <http://eluls.org> at anytime for information about section events and committee activities. Did you know the section has several committees focused on substantive areas of environmental and land use law? You can read all about each committee and their activities on our website.

Finally, be sure to add August 7-9, 2014 to your calendar for the ELULS Annual Update's return to Amelia Island Plantation. We have some unique events planned for this special occasion that you will not want to miss! More to come on that in the next issue of the Reporter and also via the member e-newsletter.

This newsletter is prepared and published by the Environmental and Land Use Law Section of The Florida Bar.

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DEP Update

by Randy J. Miller, II, Senior Assistant General Counsel

Rulemaking Update:

Chapter 62-780, F.A.C., AIF Petition Rulemaking: The DEP's Division of Waste Management recently completed Phase 2 of the Chapter 62-780 Rulemaking (Phase 1 was the "merger" of the four contaminated site cleanup rule chapters into one). Phase 2 rulemaking for Chapter 62-780, F.A.C., involved proposed changes in response to a Petition filed by the Associated Industries of Florida (AIF) relating primarily to probabilistic risk assessments and the criteria for establishing alternative cleanup target levels at contaminated sites. The Notice of Proposed Rule (NPR) was published in the FAR in September 2013, and no one requested a hearing; however, the Joint Administrative Procedures Committee (JAPC) requested several changes. All JAPC issues were resolved, and the DEP published its Notice of Change in December 2013. The Chapter 62-780, F.A.C., Certification Package was signed by the Secretary and filed with the Department of State in mid-January, and the final rule became effective on February 4, 2014.

Chapter 62-345, Uniform Mitigation Assessment Method (UMAM): The Department published a Notice of Rule Development for Chapter 62-345, F.A.C., in May of 2013. This rulemaking seeks to refine the method to enhance clarification and consistency, and, among other goals, to provide better guidance on applying the method to benthic communities. The first rule workshop was held in June, with a follow-up held in December. The Department continues to seek comments, suggestions, and concerns from all stakeholders before it begins to draft rule amendments. A website providing updates on the rulemaking and contact information

has been established at <http://www.dep.state.fl.us/water/wetlands/mitigation/umam/rule.htm>.

Chapter 62-771 and 62-772, Petroleum Restoration Program: On May 30, 2013, the Division published a Notice of Rule Development to amend Chapter 62-771, F.A.C., and to create a new Chapter 62-772, F.A.C., in the Florida Administrative Register. Chapter 62-771, F.A.C., related to the priority ranking of petroleum contaminated sites, was amended for development of a definition of "Imminent Threat"; and to establish procedures to re-score a petroleum contaminated site based on site specific data. Chapter 62-772, F.A.C., was created to codify procedures for the competitive procurement of contractual services for the cleanup of state-funded petroleum contaminated sites, including the establishment of: minimum qualifications for contractors to perform rehabilitation activities; procedures for the evaluation of contractor performance; and procedures for the procurement of petroleum contaminated site rehabilitation services for state funded cleanup, including procedures to procure multiple agency term contractors. The Department held a rule workshop in Orlando, Florida on June 19, 2013. On October 4, 2013, the Department published a Notice of Proposed Rule and held a rule hearing on October 28, 2013. After receiving public comments and comments from the Joint Administrative Procedures Committee the Department published a Notice of Change on November 18, 2013 and on December 5, 2013. The rules were filed for adoption with the Department of State on December 27, 2013. A majority of the rule sections became effective on January 16, 2014, however Rule 62-772.300 and 62-772.400, F.A.C., will

not become effective until ratified by the legislature.

Numeric Nutrient Criteria:

As a result of a federal lawsuit, EPA made a necessity determination in 2009 that numeric nutrient criteria are necessary for the majority of surface waters in Florida, and entered into a consent decree under which it set a schedule to establish such criteria. Since that time, the Department has adopted numeric nutrient criteria (NNC) for lakes, springs, estuaries, coastal waters, and a majority of its streams. EPA has approved these criteria as being consistent with the Clean Water Act.

On November 30, 2012 and June 28, 2013, EPA signed revised determinations that removed a limited subset of waters from its original determination. It then filed with the court a motion to modify the consent decree to make the decree consistent with the necessity determination as revised. On July 30, 2013, the Department filed an amicus brief with the court in support of EPA's motion. On January 7, 2014, the court granted EPA's motion to modify.

By granting EPA's motion, the court has set the stage for Florida's NNC to go into effect. Section 3 of Chapter 2013-71, Laws of Florida, allows Florida's adopted NNC to become effective once EPA ceases further nutrient rulemaking in the State, EPA withdraws its federally promulgated NNC for Florida in 40 C.F.R. § 131.43, and the Department notifies the Department of State that EPA has completed the actions set forth in Chapter 2013-71. Modification of the consent decree provides the legal basis for EPA's cessation of further nutrient rulemaking in Florida. Federal repeal of 40 C.F.R. § 131.43 must go through normal

continued...



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DEP UPDATE

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federal rulemaking steps and is anticipated to take a number of months.

Litigation:

Angelo's Aggregate Materials vs. DEP, DOAH Case No. 09-1543, 1544, 1545, 1546

In 2006, Angelo's applied to the Department to construct and operate a 30 acre Class I landfill on its property in Pasco County. On February 12, 2009, the Department issued a Notice of Intent to Deny Angelo's permits. Angelo's filed a petition for hearing to contest the denial of its applications. A number of parties filed petitions for hearing in support of the denials, and intervened at DOAH in support of the denials. A Final Hearing was held in Tampa before Administrative Law Judge (ALJ) Bram Canter. The parties submitted proposed recommended orders, and the ALJ issued the recommended order on June 28, 2013.

The ALJ determined that Angelo's hydrogeological and geotechnical investigations did not adequately define the proposed landfill site's geology and hydrology and its relationship to the local and regional hydrogeologic patterns, as required by rule 62-701.410(1)(a), F.A.C. The ALJ found that without an adequate geotechnical investigation, Angelo's failed to insure that the integrity of the structural components of the landfill would not be disrupted. The ALJ found that the proposed landfill site is unstable because the evidence indicated loose soils, raveling, and sinkhole activity. The ALJ found that Angelo's did not demonstrate that proposed engineering measures would overcome the instability and make the site suitable for a landfill. Thus, the ALJ concluded that Angelo's did not provide reasonable assurance that the proposed landfill liner system would be installed upon a base and in a geologic setting capable of providing structural support as required by rule 62-701.400(3)(a), F.A.C.

On September 16, 2013, the Department issued the Final Order in the Angelo's Aggregate Materials vs.

DEP case adopting the ALJ's recommendation to deny the permit applications. No appeal was filed.

Save Our Creeks, Inc. and Environmental Confederation of Southwest Florida, Inc. vs. Florida Fish and Wildlife Conservation Commission and Department of Environmental Protection, DOAH Case No. 12-3427

The Department issued to Florida Fish and Wildlife Conservation Commission (Respondent), in May 2011, a Consolidated Environmental Resource Permit and Sovereign Submerged Lands Authorization (Permits). The Permits authorized the installation of six earthen check dams on Fisheating Creek to prevent the over-draining of Cowbone Marsh, through which Fisheating Creek runs. The work was completed later that year. The work became necessary after the Respondent contracted, in April 2010, with A & L Aquatic Weed Control ("A & L") to "[m]echanically dismantle floating tussocks" by "shredding vegetation and accumulated organic material to re-open the navigation across Cowbone Marsh." Approximately two miles of Fisheating Creek that runs through Cowbone Marsh was dredged by a "cookie-cutter" machine. The Department and the United States Army Corps of Engineers ("USACOE"), in July 2010, ordered Respondent to stop the project due to its adverse environmental impacts, including the draining of Cowbone Marsh. The Department approved Respondent's application, on September 10, 2012, to modify the initial permits. The modification would allow Respondent to backfill approximately two miles of Fisheating Creek. Save Our Creeks, Inc., and Environmental Confederation of Southwest Florida (Petitioners) timely filed a petition for administrative hearing that was referred to DOAH to conduct an evidentiary hearing and issue a recommended order.

The Final Order adopts the ALJ's recommendation to deny the requested modification to Respondent's Environmental Resource Permit and Sovereignty Submerged Lands Authorization. The ALJ found that the proposed modification would adversely affect public welfare by impairing navigation and recreation on Fisheating Creek. The proposed modification would adversely affect the

conservation of fish and wildlife by eliminating the Creek or permanently reducing its natural dimensions so that the uses of the Creek by fish and wildlife are also eliminated or substantially reduced. The ALJ found that the proposed modification would adversely affect navigation and the flow of water in Fisheating Creek, and that it failed to restore the functions performed by the pre-disturbed Creek. The ALJ concluded that the proposed modification is contrary to the public interest. The ALJ further concluded that the proposed modification failed to meet the criteria in rule 40E-4.301(1), Florida Administrative Code ("F.A.C."), to provide reasonable assurance that the proposed project would not adversely affect storage and conveyance capabilities, would not cause adverse secondary impacts, and would function as proposed.

The ALJ concluded that the proposed modification failed to meet the requirements of rule 18-21.004(1), F.A.C., that activities on sovereignty land not be contrary to the public interest, and that the authorization "contain such terms, conditions, or restrictions as deemed necessary to protect and manage sovereignty lands." The ALJ further concluded that the proposed modification failed to meet the requirement of rule 18-21.004(2), F.A.C., that sovereignty lands be "managed primarily for the maintenance of essentially natural conditions, propagation of fish and wildlife, and traditional recreational uses such as fishing, boating, and swimming."

National Parks Conservation Association & Sierra Club v. EPA & Regina McCarthy (11th Circuit Court of Appeals)

On September 30, 2013, the Environmental Protection Agency's (EPA) approval of Florida's Regional Haze State Implementation Plan (SIP) became effective. The SIP addresses the provisions of the Clean Air Act (CAA) that require states to remedy and prevent anthropogenic impairment of visibility in mandatory Class I areas (national parks and wilderness areas) caused by emissions of air pollutants from numerous sources located over a wide geographic area. In October, Petitioners filed a Petition for Review with the 11th Circuit. The Department has moved to intervene,

as has the Environmental Committee of the Florida Electric Power Coordinating Group. On December 6, the Petitioners and EPA filed a joint motion for a stay of proceedings in the case pending the outcome of a decision in a related case pending in another Circuit Court. On December 26, 2013, the court granted the joint motion to stay and required Petitioners and EPA to submit monthly status reports to the court. There is no time limit for the court to rule on the Department's pending motion to intervene; it may choose to wait until the stay is lifted before ruling on that motion.

Apalachicola-Chattahoochee-Flint (ACF) River Basin Litigation

The waters of the Chattahoochee and Flint River Basins provide essential inflows to the Apalachicola River and Florida's Apalachicola Bay, home to a historic and once-thriving oyster industry. Oysters in the Bay depend on freshwater flows from the Apalachicola River to maintain the necessary salinity conditions to survive. The Apalachicola Region's ecosystem and economy are suffering serious harm because of Georgia's increasing storage and consumption of water from both the Chattahoochee and Flint River Basins. Flow depletions from the Georgia portion of the ACF Basin have already shrunk available riverine and estuarine habitats in the

Apalachicola Region and precipitated a collapse of Florida's oyster fishery. The federal government recently recognized the collapse and issued a fishery disaster declaration for the oyster industry in Florida.

Georgia's overconsumption of water stems from numerous municipal, industrial, recreational and agricultural uses within the state, including withdrawals from the upper-Chattahoochee River for the metro-Atlanta region. Georgia estimates those withdrawals will nearly double by 2040. If Georgia's consumption increases as planned, the source of fresh water sustaining the Apalachicola River and Bay will shrink further, jeopardizing the viability of the Apalachicola Region's ecology, economy, and way of life.

On August 13, 2013, Governor Scott announced that Florida would file an Original Action in the U.S. Supreme Court seeking injunctive relief against Georgia's unmitigated and unsustainable upstream consumption of water from the Chattahoochee and Flint River Basins. The U.S. Supreme Court has original and exclusive jurisdiction over all controversies between two or more States. The complaint was filed on October 1, 2013 and Florida asks the Supreme Court to enjoin Georgia from interfering with Florida's right to an equitable share of the interstate river flows and to cap Georgia's

overall depletive water uses at the level existing on the date the states first entered into a Memorandum of Agreement to commit to a process for cooperative management and development of regional water resources (January 3, 1992).

Georgia filed its response on January 30, 2014, asking the Supreme Court to deny Florida's request to be heard, arguing that Florida should wait until the U.S. Army Corps of Engineers completes its update to the ACF River Basin Master Manual for operation of the five federal reservoirs. Georgia also alleged that Florida failed to show substantial injury, ignoring Florida's allegations of harm to state resources, such as the Apalachicola oyster fishery.

Florida's reply, filed February 10, explained that the Master Manual update cannot resolve the water dispute because the Corps has no authority to adjudicate water rights. Florida's reply also informs the Court that Georgia has long acknowledged only an equitable apportionment can resolve this dispute and that the Supreme Court is the only court able to address underlying water rights between the states. The reply reiterates that Florida has properly pled harm of a serious magnitude to Florida's economy, environment and its people and that the complaint justifies the exercise of the Supreme Court's jurisdiction.

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The New Phase I ESA Standard: When Can a Historical REC be a REC?

by Kaitlyn S. Rhonehouse, P.E. with Geosyntec Consultants

In November 2013, ASTM released the E1527-13 Standard for conducting a Phase I Environmental Site Assessment (ESA). This new Standard included several key changes to the prior version of E1527 that was published in 2005. The Federal All Appropriate Inquiries rule (aka AAI rule) currently recognizes E1527-13 as a method by which a Phase I ESA can be completed to help demonstrate AAI. A key goal of performing a Phase I ESA is to identify recognized environmental conditions ("RECs"), as defined by E1527-13, which represent certain environmental liabilities associated with a property. One of the key changes in the new Phase I ESA standard is the updated definition of a "historical REC" or "HREC."

Previously, the term HREC was sometimes used to refer to properties with regulatory closures where contamination remained at the property but had been addressed through the use of engineering and/or institutional controls. The new standard has redefined the term HREC to refer to a *"past release of any hazardous substances or petroleum products that has occurred in connection with the property and has been addressed to the satisfaction of the applicable regulatory authority or meeting unrestricted use criteria established by a*

regulatory authority, without subjecting the property to any required controls." This new definition limits an HREC designation to contamination matters where an "unconditional closure" was issued for the release and the regulatory agency concluded no contamination remained at the property as a result of the past release.

The HREC definition also prompts the environmental professional ("EP") to evaluate whether the past release may also be a REC: *"Before calling the past release a historical recognized environmental condition, the environmental professional must determine whether the past release is a recognized environmental condition at the time the Phase I Environmental Site Assessment is conducted (for example, if there has been a change in the regulatory criteria). If the EP considers the past release to be a recognized environmental condition at the time the Phase I ESA is conducted, the condition shall be included in the conclusions section of the report as a recognized environmental condition."* In other words, before concluding an HREC exists, the environmental professional must assess whether the past release may also be a REC based on current regulatory criteria which provide a more stringent cleanup level.

The Florida Department of

Environmental Protection's (FDEP) Groundwater Cleanup Target Level (GCTL) for arsenic provides an example of the importance of carefully evaluating a site's unconditional regulatory closure. The GCTL for arsenic was previously set at a target concentration of 50 micrograms per liter ($\mu\text{g}/\text{L}$) up until 2005, which meant that properties that had concentrations of no more than 50 $\mu\text{g}/\text{L}$ in groundwater received unconditional regulatory closure for arsenic. In 2005, the GCTL was reduced from 50 $\mu\text{g}/\text{L}$ to 10 $\mu\text{g}/\text{L}$. FDEP did not require the "reopening" of closed sites with groundwater concentrations greater than 10 $\mu\text{g}/\text{L}$; however, there are closed arsenic-affected properties in Florida where concentrations of arsenic above 10 $\mu\text{g}/\text{L}$ remain in groundwater.

Arsenic is one of a number of examples wherein it is important, with this new Phase I ESA standard, to carefully evaluate each unconditional closure to assess whether previously detected contaminant levels in the ground meet current (and possibly more stringent) cleanup requirements. This new HREC feature could require the need for potentially costly file reviews in cases where environmental documents are not readily available on the internet, such as in the case of FDEP files that cannot be accessed on the online Oculus database site. It can also mean informing a client that a site which is being considered for acquisition was previously deemed "clean" or "closed" by the regulatory agency but would not meet present closure requirements based on current cleanup criteria. It is important that the EP, as well as the involved attorney, are aware of this need to further evaluate contaminated site closures in the Phase I ESA process to assess whether an HREC could also be considered a REC, as well as to communicate these possible concerns to the user of the Phase I ESA.

Endnote:

¹ FDEP Chapter 62-777, Florida Administrative Code.

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Florida Case Law Update

by Gary K. Hunter, Jr. & Thomas R. Philpot, Hopping, Green & Sams, P.A.

When a beneficial use determination is delayed by a county and a city following comprehensive plan changes, the subsequent assertion of a defense of laches in an inverse condemnation suit is patently unfair to a landowner seeking relief. Nevertheless, the landowner must still show evidence of deprivation of reasonable economic use or frustration of reasonable investment-backed expectations to succeed in an “as applied” takings claim. *Beyer v. City of Marathon*, 38 Fla. L. Weekly D2286 (Fla. 3d DCA 2013).

The Beyers purchased a nine-acre parcel of underdeveloped property on Bamboo Key in 1970. At the time of purchase, the property was zoned for General Use, which permitted one single family home per acre. The property rezoned in 1986 to Conservation Offshore Island, limiting development to one dwelling per 10 acres. Ten years later, the property was designated as a bird rockery with the adoption of the Monroe County Comprehensive Plan, a classification that allowed camping but no development. From the date of purchase to the adoption of the comprehensive plan, the Beyers demonstrated no evidence of a specific plan for developing the property.

In 1997, the Beyers submitted an application for a Beneficial Use Determination to Monroe County. By 1999, no action on the BUD had been taken, and the City of Marathon assumed jurisdiction of the area upon incorporation. The City required the Beyers to submit a new BUD application and fee, which was put forward in 2002. Prior to the BUD application to the City, the Beyers also submitted a dock permit application in 2000. A special master hearing on the BUD was held in 2005, resulting in a recommendation of denial based on a determination that the allowable recreational uses for the property and the assignment of sixteen points on the City's Residential Rate of Growth Ordinance (valued at \$150,000.00) reasonably met the Beyers' investment-backed expectations.

The special master's recommendation was informed, in part, by the record showing the Beyers demonstrated no development activity for more than 30 years despite increasingly strict land use regulations.

The Beyers' initial suit claimed a per se, facial taking, which was ruled on summary judgment in favor of the City based on a statute of limitations. The Third District Court of Appeal (Third DCA) reversed and remanded, holding the Beyers' claim was not barred by the statute of limitations for an as applied, rather than facial, takings claim. (*See, Beyer, et al. v. City of Marathon*, 37 so. 3d 932 (Fla. 3d DCA 2010)). Again on remand, the trial court entered summary judgment, citing the Beyers' failure to produce evidence of how the land use regulations deprived their reasonable economic use of the property or frustrated their reasonable investment-backed expectations in the property. The trial court also ruled that the takings claim was barred by the doctrine of laches, asserted by the City, where the Beyers' thirty-year delay in pursuing development on the property resulted in prejudice to the City. Under de novo review, the Third DCA determined that the Beyers' reliance on a subjective expectation that the land could be developed in the absence of zoning ordinances did not equip the Beyers with a vested right to development. Furthermore, the dock application submitted by the Beyers in 2000 was viewed by the Court as an untimely attempt to demonstrate investment-backed expectations, an argument that had been advocated by the City in observing that the dock represented merely an appurtenant structure unconnected to any plans for development on the property that it could serve.

The Third DCA rejected the trial court's analysis of the laches defense. Based on the record, the Court noted that the delay of the Beyers' BUD application was not caused by action or inaction on their part. As the Court observed in reversing summary judgment on the basis of a statute of limitations, to allow the County or

the City to delay the processing of the BUD application, and thereafter claim laches or an expiration of the limitations as a defense, would be patently unfair, if not absurd. Regardless, under the “tipsy coachman” doctrine, the Third DCA held the judgment of the trial court was still supported by the record.

Legislative history demonstrates the 2012 amendment to § 163.3167(8), Florida Statutes, reaffirmed a longstanding prohibition on public referenda for local development orders except as grandfathered in specific charter provisions effective as of June 1, 2011. *Archstone Palmetto Park, LLC v. Kennedy*, 2014 WL 305086 (Fla. 4th DCA 2014).

In February 2012, the City of Boca Raton (City) adopted Ordinance 5203, which amended a previously approved development order by setting additional requirements for a four-acre parcel of land owned by Archstone. The ordinance, though styled as an amendment, was considered by both parties to be a development order. A group of Boca Raton residents filed a petition seeking a referendum as to whether the ordinance should be repealed. The petition was filed pursuant to section 6.02 of the City's charter which gave the citizens a general power of referendum with regard to the passage of city ordinances.

In 2012, the Florida Legislature amended section 163.3167(8), Florida Statutes, to allow local governments to retain and implement charter provisions that authorized an initiative or referendum process *in regard to development orders*, provided the charter provision was in effect as of June 1, 2011 (2012 Amendment). At the recommendation of the Department of Community Affairs, the 2012 Amendment had been undertaken to accommodate certain local governments whose limited referenda process had been eliminated by the Legislature's 2011 revision of the same statute. The City filed suit requesting a declaratory judgment that the amendment adopted under

continued...

CASE LAW UPDATE

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Ordinance 5203 was not statutorily subject to a referendum by effect of the 2012 Amendment. Archstone intervened in the action as a co-plaintiff and argued that the 2012 Amendment's "grandfather clause" applied only to charter provisions that specifically allowed for referendums regarding development orders, language not found in the City's charter. The trial court, however, interpreted the City charter's allowance for a referendum process on *any* ordinances to impliedly include development orders, and thus ruled that the 2012 Amendment enabled the referendum requested by the petition.

The Fourth District Court of Appeal (Fourth DCA) reversed. Looking to the legislative history of the statute prohibiting referenda on development orders, the Fourth DCA outlined legislative intent regarding this issue through the series of legislative amendments and legislative bill analysis accompanying the changes year by year. Of particular emphasis, the Fourth DCA noted that a 2013 amendment to the statute makes clear what the Legislature intended to accomplish in the 2012 Amendment, explicitly providing that "a general local government charter provision for an initiative or referendum process is not sufficient" to qualify for the grandfather provision. The staff analysis accompanying the 2013 amendment further showed that the opinion of the trial court in this case represented an overly broad interpretation of the 2012 Amendment that was contrary to the restriction of referenda for development orders the Legislature intended through the 2011 and 2012 amendments.

The exercise of state police power through the Citrus Canker Eradication Program (CCEP) may not employ a statutory presumption of harm to preclude all compensation for the destruction of uninfected trees. In an inverse condemnation proceeding, the statutory presumption does not supersede the purview of the court to determine a compensable taking or the province

of the jury to determine just compensation. Exclusion of scientific evidence relevant to the valuation of compensation for a taking, however, is in error. *Fla. Dep't of Agric. & Consumer Servs. v. Mendez*, 126 So. 3d 367 (Fla. 4th DCA 2013).

A class action for inverse condemnation sought compensation for takings as a result of the Department of Agriculture's (Department) destruction of more than 60,000 citrus trees in Palm Beach County through the Citrus Canker Eradication Program (CCEP). By Department rule, and as codified in section 581.184, *Florida Statutes*, the CCEP requires the destruction of trees infected with citrus canker and all trees within a 1,900-foot radius of infected trees. *Florida Statutes* authorizes compensation for removed trees at \$100 per tree, but also explicitly clarifies that the statutory compensation does not operate as a limit to the amount a court may award in a claim regarding trees destroyed in the CCEP.

At trial on liability, the trial court found that the destruction of non-infected trees within the 1,900-foot statutory radius constituted a taking, since the Department failed to prove that all non-infected trees would become infected by canker virus. In the trial for compensation, scientific evidence that could support the imminence of the trees at issue contracting citrus canker was excluded as duplicative of the liability phase and not concerning to the value of the destroyed trees. Trial witnesses for the plaintiffs and for the Department offered starkly different value assessments for the destroyed trees based on several factors, resulting in total values ranging from \$1.3 million according to the Department's witness and up to \$29.1 million according to a plaintiff witness. The jury awarded an average value of \$210 per tree which, after reductions and interest, totaled more than \$19.2 million. The Department appealed the award.

According to the Department, the trial court erred in not applying the statutory presumption of harm in section 11.066(2), Florida Statutes, which requires a person seeking monetary damages from the state to rebut by clear and convincing evidence the presumption of harm afforded legitimate exercises of state police power. The Fourth District Court of

Appeal (Fourth DCA) disagreed, instead emphasizing that undisputed and overwhelming evidence before the trial court showed that the CCEP, while a legitimate exercise of police power, destroyed uninfected trees which were not imminently dangerous to the public. Only in the narrowest circumstances where the property is imminently dangerous may the state take the property without compensation. Relying in part on the Legislature's own explicit provisions for compensation in the statute authorizing the CCEP, the Court observed that the Legislature and the courts considering this issue have determined that uninfected trees destroyed through the CCEP are a compensable taking that does not involve property imminently dangerous to the public welfare. Thus, even if the presumption of harm outlined in the statute applies in the context of the CCEP, it does not operate to render uninfected trees valueless. Accordingly, the Fourth DCA affirmed the trial court's ruling on liability for the takings.

In turning to the value of compensation, the Fourth DCA held that the trial court erred in excluding scientific evidence related to the citrus canker that could be relevant to explain an expert appraiser's recommendation of value for the trees as taken. The differences in valuation offered by witnesses for the plaintiffs and the Department could not be adequately explained for the jury without reference to the science of the diseases and how they spread. Nevertheless, the Fourth DCA cautioned that the science of citrus canker should not be a feature of the compensation trial beyond what is necessary to explain the facts related to any alleged reduction in value, and therefore, the reversal of the trial court on compensation did not compel admission of all scientific evidence from the trial on liability.

A city's discretion to file, prosecute, abate, settle or dismiss a building and zoning enforcement action against a private property owner is an executive function that cannot be supervised by the courts, absent the violation of a specific constitutional provision or law. *Detournay v. City of Coral Gables*, 38 Fla. L Weekly D2552 (Fla. 3d DCA 2013).

In 2004, the City of Coral Gables issued three administrative citations against Amace Properties, Inc., the operator of a private yacht basin within the City, for violating the local building and zoning codes. However, for years, the City did not pursue enforcement of the citations due to ongoing efforts to settle with Amace through proposed redevelopment of the yacht basin property. Two homeowners, along with their homeowners' association, sought a declaratory judgment (Count 1) and an injunction (Count 2) to force the City to proceed with the enforcement actions. Amace intervened as a defendant, although the homeowners made no claims against Amace in the instant case. The trial court dismissed Count I for lack of standing and found in favor of the city on Count II.

On appeal, the Third District Court of Appeal (Third DCA) affirmed the ruling on Count I, reaching the decision, however, by applying separation of powers rather than standing. Accordingly, relying on separation of powers, the Court reversed the ruling on Count II and remanded for dismissal. Separation of powers is the simplest and most direct explanation of why dismissal is proper, according to the Court. Citing a series of cases arising in torts, mandamus, and criminal law, the Third DCA emphasized that the governing principles attendant to separation of powers apply equally well to injunctions and declaratory actions. In essence, the Court observed, the City's discretion to file, prosecute, abate, settle, or voluntarily dismiss a building and zoning enforcement action is analogous to a prosecutor's discretion to file, prosecute, abate, settle, or dismiss a criminal or civil lawsuit. Absent a violation of a specific constitutional provision or law, this discretion is an executive function that cannot be supervised by the courts. The majority opinion explained that the separation of powers would be a hollow idea if it applied only to some procedures and not others. As for the homeowners opportunity to direct action against Amace, the Court noted that its decision does not speak to the validity of such a claim, as no relief has been requested against Amace in the instant case.

A lengthy dissenting opinion challenged the majority for its analysis

avoiding the standing issue and for introducing separation of powers, an issue not raised by either party before the trial court or the Third DCA. Undertaking a standing analysis, the dissenting opinion concluded that the City waived the issue in the proceedings below, and regardless, the homeowner allegations represented sufficiently special damages different in kind from other Coral Gables residents so as to maintain an action. Furthermore, the dissent expressed that the Declaratory Judgment Act did not require a special injury, as long as the elements of the Act are established as here by the homeowners' doubt as to the existence or non-existence of a right under the City's zoning ordinances and by the bona fide, actual, present and practical need for a declaration. The majority's reliance on tort-based case law required an unnecessary extension of municipal immunity from torts and damages to municipal immunity from declaratory and injunctive relief, a conclusion the dissent argued was an expansion of Florida law with the effect of immunizing Amace's conduct even though Amace had become a party to the suit.

Whether a city rezoning decision properly applied substantial deviation criteria to the modification of the number of hotel rooms in an approved DRI is moot under current law, given the Florida Legislature effectively eliminated hotel and motel developments from DRI review in 2011. *Ripps v. City of Coconut Creek*, 124 So. 3d 1007 (Fla. 4th DCA 2013).

In 1987, the City of Coconut Creek adopted an ordinance approving the development of regional impact (DRI) for the 101-acre Commerce Center of Coconut Creek, of which 45 acres are owned by the Seminole Tribe. The DRI was subsequently amended several times, including amendments in 2001 and 2007 that are at issue in this case. The 2001 amendment eliminated certain restrictions to allow any mix of commercial, office, and industrial use, provided the development did not generate more than 2,107 peak hour trips. The 2007 amendment introduced "hotel" to the allowable mix and eliminated "industrial" use.

An initial resident challenge to the

2007 amendment sought declaratory and injunctive relief in the circuit court, but was denied on the basis that the 2001 amendment allowed changes to the DRI as long as the 2,107 peak hour threshold was not exceeded, regardless of other criteria under section 380.06(19), Florida Statutes, which provides examples of proposed changes that constitute substantial deviations requiring additional review. Among the changes identified in the 2010 statute, an increase in the number of hotel rooms by 10 percent or 83 rooms, whichever is greater, constituted a substantial deviation. However, the Fourth District Court of Appeal (Fourth DCA) denied a petition for second tier review of the circuit court order, agreeing with the Tribe that the number of hotel rooms was not yet decided at the time of the amendment, and thus, did not trigger further DRI review.

In a 2010 rezoning application, the Tribe sought approval for a 1,000 room hotel and a seven-story parking garage within the DRI, asserting that the change conformed to the 2,107 peak hour trips limit. At the public hearing on the proposed rezoning, residents argued, in pertinent part, that the 1,000-room hotel represented a substantial deviation exceeding the statutory increase threshold of 83 rooms, and thus required further review. The rezoning ordinances were unanimously recommended by the Planning and Zoning Board and unanimously approved by the City Commission.

City residents again brought a challenge, petitioning the circuit court for certiorari review of the rezoning ordinances. The circuit court accepted the City's argument that rezoning within the DRI only needed to meet the 2,107 peak hour trip threshold and was not controlled by substantial deviation thresholds then existing in the DRI statute. The residents petitioned for second tier review in the Fourth DCA, a review the Court acknowledged is limited to whether the circuit court failed to provide procedural due process or applied incorrect law that results in a miscarriage of justice.

Although standing for the claim was at issue, the Fourth DCA declined to address standing, resting its second tier review instead on the fact that legislative changes to the

continued...

CASE LAW UPDATE

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DRI statute in 2011 eliminated any potential miscarriage of justice that would warrant extraordinary relief. The Legislature, by Chapter 2011-139, Laws of Florida, removed the substantial deviation standards relating to the number of hotel rooms from the DRI criteria. Further, 2012 amendments to the statute clarified that changes that do not increase the number of external peak hour trips do not constitute a substantial deviation. Thus, the Fourth DCA reasoned, the proposed hotel development is not subject to DRI review under current law. The Court acknowledged that the Tribe could withdraw and resubmit its rezoning application under current law without triggering a substantial deviation, effectively mooting any miscarriage of justice by the circuit court even if there had been error in the ruling.

Where one homeowners association owns a road and related property, an agreement to share costs and allocate primary maintenance responsibility for the road to an adjoining homeowners association does not relinquish the owning association's ultimate authority to control the property, absent provisions stating otherwise. *Grove at Harbor Hills Homeowners v. Harbor Hills Dev., L.P.*, 38 Fla. L. Weekly D2627 (Fla. 5th DCA 2013).

Homeowners associations (HOA) established by the same developer of two adjoining subdivisions, The Grove at Harbor Hills HOA (The Grove) and Harbor Hills HOA (Harbor Hills), entered into a joint use agreement regarding the maintenance and costs of a road, gate, guardhouse, and related property (the property) owned by The Grove and subject to an easement in favor of Harbor Hills. Notwithstanding the sharing of costs, the agreement specified that the property shall be maintained primarily by Harbor

Hills. Ultimately, however, disputes regarding the use and costs of the property's maintenance compelled the case at hand. In deciding the issues, the trial court determined that Harbor Hills had the right to maintain and control the gate. The Grove appealed.

Citing pertinent provisions of the agreement, the Fifth District Court of Appeal (Fifth DCA) rejected the trial court's conclusion that "control" and "maintenance" are synonymous, particularly where the terms are not defined in the agreement. Using definitions to determine the plain meaning of the terms, the Fifth DCA ruled that, even though the agreement allocates primary maintenance responsibility to Harbor Hills, the ultimate control of the property, including staffing decisions, remains with its owner, subject to the rights reserved for Harbor Hills in its easement.

Although the ten-year statute of repose applies to causes of action founded on the design, planning, or construction of an improvement to real property, plain language of *Florida Statutes* does not require the event triggering the statute of repose to be an improvement to real property. Filing of a final plat, even years after project completion, may raise sufficient issues of material fact to survive summary judgment on claims subject to the statute of repose. *Clearwater Housing Authority v. Future Capital Holding Corp.*, No. 2D12-5515 (Fla. 2d DCA 2013).

In 1998, Future Capital Holdings Corp. (Future Capital) was hired to construct apartments in the City of Clearwater, Florida, a project later purchased by Clearwater Housing Authority (CHA). A certificate of occupancy was issued, and CHA took possession of the property in 2000. Engineers for the project did not submit a final plat until 2003.

In 2009, CHA filed suit for negligence and construction defects, and then in 2011, named Future Capital as a defendant. The CHA claims are governed by section 95.11(3)(c),

Florida Statutes, which provides, in pertinent part:

An action founded on the design, planning, or construction of an improvement to real property must be commenced within 10 years after [1] the date of actual possession by the owner, [2] the date of the issuance of a certificate of occupancy, [3] the date of abandonment of construction if not completed, or [4] the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest.

The trial court granted summary judgment in favor of Future Capital, finding that the statute of repose barred CHA's claims. Future Capital had argued that submission of the final plat in 2003 could not be the triggering event for the statute of repose because the submission did not constitute design, planning, or construction of an improvement to real property.

On appeal, CHA argued that section 95.11(3)(c), Fla. Stat., does not require that the triggering event for the statute of repose be an improvement to real property, rather only the cause of action must be grounded in an improvement to real property. The Second District Court of Appeal (Second DCA) agreed. From the affidavits submitted by the parties, the Second DCA recognized genuine issues of material fact existed as to whether the final plat filing in 2003 was completed under CHA's contract with the engineering group for the apartment development (placing the claims within the limitations of the statute of repose), or as argued otherwise, whether it represented separate work under contract with the original property owner (placing the claims beyond the statute of repose expiration). Accordingly, the Second DCA reversed and remanded for further proceedings, emphasizing that even the slightest doubt that a genuine issue of material fact might exist renders summary judgment improper.



On Appeal

by Lawrence E. Sellers, Jr.

Note: Status of cases is as of February 7, 2014. Readers are encouraged to advise the author of pending appeals that should be included.

FLORIDA SUPREME COURT

Herrin v. City of Deltona, Case No. SC 13-2003. Petition for review of 5th DCA decision confirming the trial court's summary judgment in favor of the City of Deltona and rejecting the plaintiff's claim that the City violated the Florida Sunshine Law by not allowing Herrin to speak at the Deltona City Commission meeting, ruling that the public had no right to participate in the City's decision making process. 38 Fla. L. Weekly D1767a (5th DCA 2013). Status: Notice filed October 22, 2013.

DOT v. Clipper Bay Investments, LLC, Case No. SC 13-775. Petition for review of 1st DCA decision determining that the Marketable Record Title Act's exception for easements in right-of-ways is applicable to land held as a fee estate for the purpose of a right-of-way, so long as competent substantial evidence establishes the land is held for such a purpose. The court reversed the trial court's award of a portion of the land north of the I-10 fence line and remanded with instruction to quiet title to all of the land north of the I-10 fence line in Clipper Bay, except for the portion used by Santa Rosa County. 38 Fla. L. Weekly D271a (Fla. 1st DCA 2013). Status: Oral argument to be held on April 8, 2014.

SFWMD v. RLI Live Oak, LLC, Case No. SC12-2336. Petition for review of 5th DCA decision reversing declaratory judgment determining that RLI participated in unauthorized dredging, construction activity, grading, diking, culvert installation and filling of wetlands without first obtaining SFWMD's approval and awarding the District \$81,900 in civil penalties. The appellate court determined that the trial court improperly based its finding on a preponderance of the evidence standard and not on the clear and convincing evidence standard. 37 Fla. L. Weekly D2089a (5th DCA, Aug. 31, 2012). Subsequently, the district court of appeal granted

SFWMD's request and certified the following question: "Under the holding of *Department of Banking & Finance v. Osborne Stern & Co.*, 670 So. 2d 932 (Fla. 1996), is a state governmental agency which brings a civil action in circuit court required to prove the alleged regulatory violation by clear and convincing evidence before the court may assess monetary penalties." 37 Fla. L. Weekly D2528a (5th DCA, Oct. 26, 2012). Status: On March 7, 2013, the Florida Supreme Court accepted jurisdiction and dispensed with oral argument.

FIRST DCA

Florida Fish and Wildlife Conservation Commission v. Wakulla Fishermen's Association, Inc., et al., Case No. 1D13-5115. Appeal from final judgment enjoining any and all further enforcement of the net ban amendment as set forth in Article X, §16, the Commission's authority to adopt rules to regulate marine life with respect to the use of a "gill net" or an "entangling net" pursuant to Article IV, §9, and Rules 68B-4.002, 68B-4.0081 and 68B-39.0048. Case No. 2011-CA-2195 (2d Cir. final judgment entered October 22, 2013). Status: Notice of appeal filed October 23, 2013.

Putnam County Environmental Council v. SJRWMD, Case No. 1D13-2669. Petition for review of FLWAC final order denying the Council's request for review pursuant to s. 373.114, F.S., of the Fourth Addendum to SJRWMD's Water Supply Plan, relating to identification of withdrawals from the St Johns and Ocklawaha Rivers as alternative water supplies. Status: Notice of appeal filed June 5, 2013.

Capital City Bank v. DEP and Franklin County, Case No. 1D13-1489. Appeal from two final orders granting dismissal of plaintiff's third amendment verified complaint, by which plaintiff seeks an injunction pursuant to s. 403.412(2), Florida Statutes, for alleged violations of various statutes and rules relating to actions allegedly taken by Franklin County without DEP approval at Alligator Point. Status: Affirmed *per*

curiam on December 11, 2013.

State of Florida v. Basford, Case No. 1D12-4106. Appeal from order of partial taking in claim for inverse condemnation against the State of Florida as a result of the passage of Article X, Section 21, Limiting Cruel and Inhumane Confinement of Pigs During Pregnancy. Status: Affirmed on July 24, 2013. 38 Fla. L. Weekly D1567a; motion for rehearing and rehearing *en banc* denied on August 29, 2013.

FINR, II, Inc. v. CF Industries, Inc. and DEP, Case No. 1D12-3309. Petition for review of final DEP order granting CF's applications for various approvals, including environmental resource permit, conceptual reclamation plan, wetland resource permit modification and conceptual reclamation plan modification. Status: Affirmed *per curiam* on July 19, 2013; motion for rehearing and rehearing *en banc* denied August 22, 2013. The U.S. Supreme Court denied certiorari on January 27, 2014.

THIRD DCA

Padron v. Ekblom and DEP, Case No. 3D13-2446. Appeal from final order adopting recommended order determining that Ekblom's application to install a boat lift on an existing dock in a man-made body of water is exempt from the need for an ERP. Status: Notice of appeal filed September 24, 2013.

FOURTH DCA

Conservation Alliance of St. Lucie, et al. v. DEP, Case No. 4D13-3504. Appeal from a final order adopting a recommended order of dismissal, which dismissed for lack of standing a challenge to a settlement agreement resolving an enforcement action relating to alleged contamination of soil and groundwater at a bleach-manufacturing and chlorine-repackaging facility. DOAH Case No. 10-3807 (Final Order entered August 21, 2013). Among other things, the order concludes that petitioners were "foreclosed from asserting their interests under subsection 403.412(6), Florida Statutes, in a

continued...

ON APPEAL

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proceeding where DEP took enforcement action." Status: Notice of appeal filed September 19, 2013.

Conservation Alliance of St. Lucie County and Roman v. DEP, Case No.

4D13-2925. Appeal from final order adopting recommended order determining that the petition for hearing was filed untimely and that petitioners failed to demonstrate standing to request a hearing. Status: Notice of appeal filed August 8, 2013.

Archstone Palmetto Park LCC v. Kennedy, et al, Case No. 4D12-4554.

Appeal from trial court's order granting final summary judgment determining that the 2012 amendment to section 163.3167(8), Florida Statutes, does not prohibit the referendum process described in the City charter prior to June 1, 2011. Status: Reversed on January 29, 2014. 39 Fla. L. Weekly D230a.



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Law School Liaisons

A Spring 2014 Update from the Florida State University College of Law

by David Markell, Steven M. Goldstein Professor and Associate Dean for Environmental Programs

The Florida State University College of Law has a busy schedule planned for the spring. We hope Section members will join us in person or on-line for one or more events.

Spring 2014 Events
Environmental Law Without Congress (February 28, 2014, 8:50 a.m. in Room 310). This conference features leading national experts in law, policy and the social sciences who will discuss possible future directions for environmental law. Participants include **Richard J. Lazarus**, Howard and Katherine Aibel Professor of Law, Harvard Law School, **Todd Aagaard**, Associate Professor of Law, Villanova University School of Law, **Dallas Burtraw**, Darius Gaskins Senior Fellow, Resources for the Future, **Daniel A. Farber**, Sho Sato Professor of Law, University of California-Berkeley, School of Law, **William Funk**, Robert E. Jones Professor of Advocacy and Ethics, Lewis & Clark Law School, **Alexandra B. Klass**, Professor of Law, University of Minnesota Law School, **Nathan Richardson**, Resident Scholar, Resources for the Future, **J.B. Ruhl**, David Daniels Allen Distinguished Chair in Law, Vanderbilt Law School, **Theda Skocpol**, Victor S. Thomas Professor of Government and Sociology, Harvard University, **Janet Swim**, Professor of Psychology, The Pennsylvania State University, and **Sandra Zellmer**, Robert B. Daugherty Professor of Law, University of Nebraska College of Law.

Shi-Ling Hsu, Larson Professor, Florida State University College of Law will moderate the program.

For more information please visit: http://law.fsu.edu/events/environmentalconference_2014.html.

The conference will be streamed live at: <http://mediasite.apps.fsu.edu/Mediasite/Play/c431d54c2664432f82cd-3fce4e19b10a1d>



Spring 2014 Environmental Forum on the Apalachicola-Chattahoochee-Flint (ACF) River System (April 2, 3:15 p.m. in Room 310).

The Spring 2014 *Environmental Forum* will focus on the ACF river system, including the State's recent court filing with the U.S. Supreme Court. Featured participants include **Jonathan Glogau**, Special Counsel and Chief, Complex Litigation Office, Office of the Florida Attorney General and Adjunct Professor, Florida State University College of Law, **Ted Hoehn**, Florida Fish and Wildlife Conservation Commission, and **Matt Leopold**, General Counsel, Florida Department of Environmental Protection. **David Markell**, Steven M. Goldstein Professor of Law and Associate Dean for Environmental Programs, Florida State University College of Law, will moderate the *Forum*.

The forum will be streamed live at: <http://mediasite.apps.fsu.edu/Mediasite/Play/ba4c4ac598e345cd9fe2e-11a9863f7591d>



Student Activities

Andrew Missel (3L), **Curtis Filaroski** (3L), and **Sarah Spacht** (3L) will compete in the National Environmental Law Moot Court Competition at Pace Law School in White Plains, NY. Lawyers with the firm of **Oertel, Fernandez, Bryant & Atkinson, P.A.** are serving as coaches for the team.



Several of our students are participating in **Externships** this semester, including: **Ryan McCarville** and **Heather McLellan** (Department of Environmental Protection); **Beverly**

Law School Liaisons continued....

LAW SCHOOL LIAISONS

from page 15

Halloran (NextEra Energy); **Davis George Moye** (Governor's Office-Environmental Policy); and **James Flynn** (LL.M.) (Division of Administrative Hearings).

This year's **Environmental Law Society** has launched an innovative mentoring program to help our students connect with environmental and administrative legal professionals. Please contact Sarah Spacht ('14) if you would like to participate (sspacht@gmail.com).

Alumni Accomplishments and Honors

Jacob T. Cremer ('10), an associate with Smolker Bartlett Schlosser

Loeb & Hinds, was named a *Tampa Bay Business Journal* Up and Comer.

Kaitlin Monaghan ('13) joined Advanced Energy Economy in Washington, D.C. as an associate.

Trey Mills ('06) was elected as a shareholder at Rogers Towers. He was also elected to the Board of Directors for the North Florida Land Trust.

Sarah Taitt ('08), an Assistant County Attorney in Osceola County, gave a presentation at the Florida Association of County Attorneys

mid-year CLE. The presentation highlighted the growing trend of urban farming in Florida and around the United States.

Liesl Voges ('13) joined the City of Tallahassee as a Senior Planner in Growth Management.

For more information about our programs this semester, please consult our web site at: <http://www.law.fsu.edu>, or please feel free to contact Prof. David Markell, at dmarkell@law.fsu.edu.



VOGES



CREMER



MILLS



TAITT

UF Law Update

Submitted by Mary Jane Angelo, Director, Environmental and Land Use Law Program, University of Florida Levin College of Law

20th Annual Public Interest Environmental Conference Held

"Feeding the Future: Shrinking Resources, Growing Population and a Warming Planet" was the theme of the 20th annual Public Interest Environmental Conference, held Feb. 20-22, at the University of Florida Levin College of Law.

Dr. Dickson Despommier, Professor of Public Health in Environmental Sciences at Colombia University and author of *The Vertical Farm: Feeding the World in the 21st Century*, was the keynote speaker. His topic was "Urban Agriculture: Things are Looking Up."

The conference featured plenary sessions, including: "Resource Outlook: The Current State of Agriculture, Challenges We face and Opportunities for the Future" – speakers Sarah Bittlemen, Senior Agricultural Counselor, EPA; and Jack Payne, Senior Vice-President for Agriculture and Natural Resources, IFAS, University of Florida.

"Feeding the Future" – speakers

Philip Ackerman-Leist, Associate Professor, Green Mountain College; Director, Farm and Food Project; and Anna Prizzia, IFAS Farm to School Statewide Coordinator, UF.

The conference also included panels focused on three tracks: "Agricultural Frontiers"; "Natural Resources"; and "Legal/Regulatory Issues." Special events included a workshop on "Finding Collaborative Solutions for Natural Resources Issues"; a session on "Ethics & Professionalism for Attorneys"; a roundtable discussion on "Climate Change & Food Security"; and a career path event.

Nelson Symposium Discusses State & Local Elections

The 13th Annual Richard E. Nelson Symposium, held Feb. 7, featured national and state experts who explored the status of the Voting Rights Act after the U.S. Supreme Court's 2013 decision in *Shelby County v. Holder*; the legality and wisdom of voter ID laws, felon disenfranchisement, and voter roll purges; the phenomenon

of ballot-box zoning; and campaign disclosure for ballot measures. Since the 2000 presidential election, the Sunshine State has been closely identified with these and other controversial election topics, so the presentations and discussions during the Nelson Symposium provided fodder for continuing debates over current and future controversies.

Presenters included Michael S. Kang, Professor of Law, Emory Law School; Janai Nelson, Professor of Law, St. John's University School of Law; Kenneth A. Stahl, Associate Professor of Law, Fowler School of Law, Chapman University; Professor Terry Smith, Professor of Law, DePaul University College of Law; Mark H. Scruby, County Attorney, Clay County; Ilya Shapiro, Senior Fellow, Cato Institute; Daniel A. Smith, Professor, Department of Political Science, University of Florida; Nicholas M. Gieseler and Steven Geoffrey Gieseler, Gieseler & Gieseler, P.A., Port St. Lucie; Suh Lee and Emma Morehart, J.D. candidates, University

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of Florida Levin College of Law; and Michael Allan Wolf, Richard E. Nelson Chair in Local Government Law, University of Florida College of Law.

UF Law Costa Rica program joins international consortium

The UF Law Costa Rica Program is partnering with the Organization for Tropical Studies (OTS) and UF's Center for Latin American Studies, enhancing efforts to build interdisciplinary bridges between law, policy and the social and natural science of conservation and sustainable development. With administrative offices, classrooms and three internationally renowned field stations in Costa Rica, OTS is a consortium of U.S. and international universities and institutions focused on tropical research and education. Using OTS field stations as policy laboratories, the program will explore the issues of sustainable development through the lens of the ecosystems and communities that surround the stations at La Selva, Palo Verde and Las Cruces.

A skills emphasis: Practicums lie at the heart of the Program. Law and graduate students from the U.S., Costa Rica and elsewhere develop their knowledge and skills through an integrated suite of courses that coalesce around efforts to find practical, policy-relevant solutions to issues of immediate importance to the conservation and sustainable development community.

A field-based approach: For policymakers and those advising them, conservation and sustainable development issues are best understood where they occur. Each week the Program will embark on extended visits to OTS field stations and their neotropical context – rivers, wetlands, forests (wet, dry and cloud), beaches and mountains. They will also visit indigenous communities, meet with farmers and land owners, and encounter unique sustainable development projects – all grist for collaborative problem-solving approaches.

Speaker Series Focuses on Agriculture & Environment

UF law's annual Environmental Speaker Series paralleled the theme of the PIEC, featuring topics on "Agriculture and the Environment." Presentations occurred during January and February, 2014. The Gold

Sponsors for the speaker series are Alfred J. Malefatto, Shareholder, Lewis, Longman & Walker, P.A., West Palm Beach, FL; and Hopping Green & Sams, P.A., Tallahassee, FL.

Topics and schedule for the series included:

January 9, 2014: *Agricultural Law 101*, Mary Jane Angelo, UF Research Foundation Professor of Law, Alumni Research Scholar, Director, Environmental & Land Use Law Program, University of Florida Levin College of Law.

January 16, 2014: *Agricultural Strife: Industrial Food Animal Production in America*, Hannah Connor, Staff Attorney, Animal Protection Litigation, The Humane Society of the United States, Washington, D.C.

January 23, 2014: (via videoconference) *The Dating Game and beyond: Expiration Date Laws and Other Policy Levers to Reduce Food Waste*, Emily M. Broad Leib, Director, Food Law and Policy Clinic, Center for Health Law and Policy Innovation, Harvard Law School.

January 30, 2014: *Sustaining the Health of the Land: It all Begins with the Soil*, Frederick L. Kirschenmann, Distinguished Fellow, Leopold Center for Sustainable Agriculture, Iowa State University.

February 6: *Food Labeling, Public Health & the Environment*, Jason J. Czarnezki, Gilbert and Sarah Kerlin Distinguished Professor of Environmental Law, Pace Law School.

February 13, 2014: *The Food Safety Modernization Act and Small and Organic Farmers*, Danielle D. Treadwell, Ph.D., Associate Professor and Vegetable Extension Specialist, Horticultural Sciences, UF Institute of Food and Agricultural Sciences.

Faculty Publications and Presentations

Mary Jane Angelo, University of Florida Research Foundation Professor and Director, Environmental and Land Use Law Program, presented "Maintaining a Healthy Water Supply While Growing a Healthy Food Supply: Legal Tools for Cleaning Up

"Agricultural Water Pollution" at the University of Kansas Law Review Symposium: "Waters of the United States: Adapting Law for Degradation and Drought" and participated in a panel on "Urban Agriculture" at the fourth environmental conference at the University of Michigan.

Christine A. Klein, Chesterfield Smith Professor of Law; Director, LL.M. Program in Environmental & Land Use Law: Klein participated in Notre Dame Law School's "National Parks Roundtable." The superintendents of six National Parks together with eight natural resources law scholars participated in an all-day discussion of the challenges currently facing the parks. The roundtable participants also presented a lunch discussion and a Q-and-A session for Notre Dame law students.

Michael Allan Wolf, Professor of Law; Richard E. Nelson Chair in Local Government Law: Wolf published his paper, "The Brooding Omnipresence of Regulatory Takings: Urban Origins and Effects," in the Fordham Urban Law Journal. The cite is 40 *Fordham Urb. L.J.* 1835 (2013). Wolf's paper, "Strategies for Making Sea-Level Rise Adaptation Tools 'Takings-Proof,'" was published in the *Journal of Land Use & Environmental Law*. The cite is 28 *J. Land Use & Envtl. L.* 157 (2013). "Strategies for Making Sea-Level Rise Adaptation Tools 'Takings-Proof'" *Journal of Land Use & Environmental Law*

UF Law Foreign Field Study Opportunities Scheduled

UF law's ELULP will again offer two foreign field study opportunities this academic year in Belize and in Costa Rica. The courses are:

"*Sustainable Development: Law, Policy & Practice*" is offered during spring break, 2014, in Belize for 2L, 3L, and LLM students. The two-credit, eight-day course is hosted by the Belize Foundation for Research and Environmental Education (BFREE). Students will travel through Belize to delve into international and domestic law issues concerning protected areas, indigenous land rights, intellectual property in biological diversity, water, mining and energy, cultural resources, fisheries and coral reef conservation – all within

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the context of national pressures for human development. In addition to domestic Belizean law and international development law and policy, students are exposed to the unique legal framework of the commonwealth Caribbean.

“Conservation and Sustainable Development: Law, Policy and Professional Practice” is an interdisciplinary

policy-focused program consisting of three linked courses integrating international and comparative sustainable development law and policy, contemporary issues in tropical conservation and development, and professional skills for practitioners. The 2014 summer program will consist of a foundational course in international sustainable development law and policy; a topical course in water, wetlands and wildlife conservation, and a sustainable development practitioner skills course. All three courses are integrated through

practicums based around current issues of conservation and development in Costa Rica and elsewhere, jointly developed by U.S. and Costa Rican faculty. Costa Rican law and graduate students as well as young professionals also will participate. The course will include lectures at the Organization for Tropical Studies headquarters, site visits to international and domestic institutions in San Jose such as the Inter-American Court for Human Rights, and field trips to biological field stations of topical relevance to the course.

FEELING THE SQUEEZE

long served as a cornerstone of Florida's economy, ecology, and culture.⁵ This trend presents a tremendous obstacle to public “lateral” access: that is, the ability of the public to move down the beach along the wet sand, a common law right it possesses on most shores.⁶

Much of the existing body of literature regarding public beach access in Florida focuses on access *to* the beach rather than *along* the beach. This article evaluates whether current Florida law is equipped to address the growing number of impediments facing lateral access along the state's beaches and discusses possible future legal innovations to tackle this problem. The article first examines the tools provided by Florida common law doctrines relevant to beach access by the public. A review of the way in which other coastal jurisdictions have applied these common law doctrines to protect access to the beach follows. The article then considers whether current Florida statutory law regarding coastal construction and beach access provides sufficient protection for public lateral access. The advantages and shortcomings of each legal avenue are expressed in turn, accompanied by a brief discussion of where the law may go.

Public Access Under the Common Law

Rooting the public's right of lateral access to Florida's beaches in common law doctrine rather than addressing the issue statutorily helps to protect the state from constitutional takings challenges brought by private property owners.⁷ Defining the various rights of public and private users of the shoreline through the common law does not modify or extinguish the property rights of littoral property owners, but simply clarifies the boundaries of such rights as they currently exist.⁸ There are a number of common law doctrines in Florida relevant to public access to the state's beaches that may be useful in ensuring continued *lateral* access. Each are considered below.

A. The Public Trust Doctrine

The public trust doctrine is an ancient legal principal, originating from early Roman law, under which the sovereign holds title to certain submerged lands in trust for the benefit of its citizens.⁹ American law adopted this doctrine from English common law and applied it to the original 13 states.¹⁰ Under the equal footing doctrine, each new state received the same property interests in submerged land as granted to the original 13.¹¹

The public trust doctrine is codified in Article 10, Section 11 of the Florida Constitution, which states in pertinent part: “The title to lands under navigable waters, within the

boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people.”¹² This provision creates a constitutional duty on the part of the state to hold in trust certain lands seaward of the mean high water line (MHWL) on behalf of the citizens of Florida for the purposes of bathing, fishing, navigation,¹³ and “other implied purposes.”¹⁴

As a beach slowly erodes or accretes over time, the boundary between the land held in trust for the public and the dry sand beach, subject to private ownership, migrates with the MHWL.¹⁵ Analogizing to traditional property law principles, one commentator has described the land on either side of the MHWL as comparable to a defeasible estate, title to which changes hands upon the occurrence of a specific event – in this case, erosion or accretion.¹⁶ The public trust doctrine in effect reserves to the public a reversionary interest that vests when land becomes submerged seaward of the MHWL.¹⁷ These lands held in trust by the state may only be transferred out of the trust under limited circumstances and only when it is in the public interest to do so.¹⁸ Private use of these lands is permitted only when not contrary to the public interest.¹⁹

In addition to its duties under the public trust doctrine, the state of Florida has the complementary obligation to conserve and protect Florida's beaches as important natural

resources. Article II, Section 7(a) of the Florida Constitution states in relevant part, “It shall be the policy of the state to conserve and protect its natural resources and scenic beauty.”²⁰ As the Supreme Court of Florida has articulated, “[c]oncisely put, the State has a constitutional duty to protect Florida’s beaches, part of which it holds ‘in trust for all the people.’”²¹

On eroding beaches, the construction of seawalls and other coastal armoring structures artificially prevents the migration of the MHWL, potentially relegating (and shrinking) the public’s reversionary interest to the vertical space between the mean low and mean high water lines on the structure. On eroding armored beaches this practice will eventually result in the complete loss of the beach, depriving the public of the ability to use the wet sand beach seaward of the MHWL for the exercise of its public trust rights – bathing, fishing, navigation, and other implied purposes. Some commentators have suggested that overly broad armoring privileges granted by the state to littoral property owners that lead to such destructive outcomes are not within the property owners’ existing common law rights.²² They argue that administrative permits aside, courts should find such grants to be illegal transfers out of the trust: “[s]eawalls violate the public trust in a time of rising seas.”²³

By permitting coastal armoring on eroding beaches, the state arguably breaches its common law and constitutional duties regarding the protection and conservation of state beaches. Scholars have recommended that in light of the ancient principals underpinning the public trust doctrine, courts should support regulatory and statutory efforts that prohibit armoring that would impair public rights under this doctrine.²⁴ The public trust doctrine and accompanying constitutional provisions may provide the broad legal foundation needed to support regulatory decisions that allow the natural migration of the MHWL.

B. Custom

A second major common law source of the public’s right to use of the beach is the doctrine of custom. Distinct from the public trust doctrine, custom is a method by which the public may

acquire rights to use the dry sand area of the beach above the MHWL that is subject to private ownership. The Supreme Court of Florida first recognized the doctrine of custom in the 1974 case, *City of Daytona Beach v. Tona-Rama, Inc.*,²⁵ in which the court acknowledged the importance of public access to state shores:

We recognize the propriety of protecting the public interest in, and right to utilization of, the beaches and oceans of the State of Florida. No part of Florida is more exclusively hers, nor more properly utilized by her people than her beaches. And the right of the public of access to, and enjoyment of, Florida’s oceans and beaches has long been recognized by this Court.²⁶

In *Tona-Rama*, the court found that the public may acquire a right to use the dry sandy beach landward of the MHWL as a matter of custom if the recreational use of that area has been ancient, without interruption, and free from dispute.²⁷ The court clarified that such a right by custom prohibited the owners of the sandy area at issue from using their property in a way inconsistent with the public’s customary use or “calculated to interfere with the exercise of the right of the public to enjoy the dry sand area as a recreational adjunct of the wet sand or foreshore area.”²⁸

Although the doctrine of custom may secure the public’s use of discrete sandy beaches, its utility in ensuring unimpeded lateral access along the shore has been limited in a number of ways by the 5th DCA in *Trepanier v. County of Volusia*. In that case, the court established that the requisite elements of custom must be proven on a case-by-case basis and cannot be applied to the sandy beaches of Florida as a whole.²⁹ A court must “ascertain in each case the degree of customary and ancient use the beach has been subjected to.”³⁰ This requirement renders the doctrine of custom an unsuitable tool for acquiring public access rights to those private beaches where proof of ancient, uninterrupted, and peaceable recreational use is lacking.

Presenting a second challenge for the use of custom to preserve lateral access, the court held that even where the public’s right to use of a beach is successfully established

through custom, this right is not amulatory. That is, the right to use by custom does not migrate onto private property as beaches erode. Despite arguments from the county that to immobilize the doctrine of custom in the face of moving shorelines is to deny the public its right to access the beach, the 5th DCA established that where customary use of a beach is made impossible by the landward shift of the MHWL, “it is not evident ... that the areas subject to the public right by custom would move landward with it to preserve public use on private property that previously was not subject to the public’s customary right of use.”³¹ Migration of the public’s customary use of the sandy beach is a matter of proof.³²

Pending a split among the district courts of appeal or an opinion by the Supreme Court of Florida overturning the precedent of the 5th DCA, the common law doctrine of custom is of limited use in ensuring continued lateral access along Florida’s beaches as they are reshaped by rising seas and coastal armoring.

C. Prescriptive Easements and Dedication

Two final common law doctrines are worth noting in relation to public access. Both prescriptive easements and dedication have been used to acquire public use rights in private land, though neither is a particularly apt tool for preserving lateral access.

In order for the public to gain a prescriptive easement in land, its use of private land must be actual and continuous, for a period of 20 years, adverse under a claim of right, and must be either known to the owner or so open, notorious, and visible that knowledge of the adverse use by the public can be imputed to the owner.³³ One cannot gain access through prescription if the property owner expressly or impliedly allows that person to be there,³⁴ which is often the case on Florida’s sandy beaches. Further, like custom, a prescriptive easement is location-specific and granted on a case-by-case basis. These factors make it an impractical and cumbersome method by which to gain access along Florida’s 825 miles of shoreline.

The public may also acquire the right to use private coastal property through dedication. To claim

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use through dedication a private property owner must have expressed “a present intention to appropriate his lands to public use.”³⁵ Long and continued use by the public will not lead to a presumption of dedication; the burden is on the government to prove dedication.³⁶ Because this doctrine operates parcel by parcel and is dependant on a voluntary act of individual property owners, it too is an ineffective common law device for removing obstacles to lateral access.

D. Common Law Doctrines and Public Access in Other Coastal Jurisdictions

As currently interpreted and applied, the common law doctrines of Florida provide only a patchwork of legal tools with which to secure public lateral access along the state’s coast. The common law approaches applied in a number of coastal jurisdictions are examined below as they may prove instructive for the future of lateral access in Florida.

i. Texas

Texas has upheld and enforced a rolling easement doctrine longer and perhaps more forcefully than any other state.³⁷ Broadly speaking, the term “rolling easement” is used by one commentator to describe a collection of regulatory and legal mechanisms that require human activity and development to yield the right of way to naturally migrating shores.³⁸ The easement ensures public tidelands and associated public uses are allowed to migrate inland as sea levels rise at the expense of existing private uses.³⁹

Texas’s rolling easement is grounded in the Texas Open Beaches Act (TOBA), enacted in 1959 to codify common law principles of public access and use of state coastal areas.⁴⁰ The Act declares that it is the public policy of the state that if the public has acquired a right of use or an easement over an area by prescription, dedication, or

has retained a right by virtue of custom, “the public shall have the free and unrestricted right of ingress and egress to the larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico.”⁴¹

Although the language of the Act requires the public to prove the elements of the common law doctrines of prescription, dedication, or custom, Texas courts have been notably deferential to claims of public right under the TOBA.⁴² Amendments to the TOBA throughout the 1980s and 1990s further strengthened the public easement through measures such as disclosure requirements for executory contracts regarding the purchase of property located seaward of the Gulf Intracoastal Waterway.⁴³ All such contracts must include language warning purchasers of the legal and economic risks of purchasing coastal property near a beach, namely that structures found to be located on the public beach as a result of natural processes may be subject to suit by the state for their removal.⁴⁴

The Supreme Court of Texas abridged the breadth of the state’s rolling easement doctrine in 2012. In *Severance v. Patterson*, the court overruled a 1986 decision of the Texas Court of Appeals holding that after a hurricane moved the natural line of vegetation landward of appellant’s property, the public acquired the right to use the newly-located beach based on the doctrine of custom.⁴⁵ The Supreme Court of Texas reversed this portion of the opinion, asserting that rolling easements exist only where they are created by the gradual process of erosion and may not be found when coastal land is eroded through a sudden and violent occurrence known as “avulsion.”⁴⁶

As of the time of publication, proposed legislation has been introduced to the Texas Legislature to amend the definition of “public beach” within the TOBA to read “any beach area, whether publicly or privately

owned, extending inland from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico, as the line of vegetation may shift over time as a result of avulsive events or other forces of nature.”⁴⁷ If signed into law, this new definition would “correct” the holding in *Severance* and ensure the enforceability of the rolling easement even following avulsive events such as hurricanes.

ii. New Jersey

The New Jersey Supreme Court has employed the public trust doctrine to address problems of public access to the state’s beaches, both above and below the MHWL. As discussed by the court in *Matthews v. Bay Head Improvement Association*, the rights traditionally ensured by the public trust doctrine are effectively eliminated without coexisting rights to use adjacent sandy beaches. In rejecting the use of prescription, dedication, or custom to ensure continued public access to dry sand beaches, the court opined, “[a]rchaic judicial responses are not an answer to a modern social problem. Rather, we perceive the public trust doctrine not to be ‘fixed or static,’ but one to be ‘molded and extended to meet changing conditions and needs of the public it was created to benefit.’”⁴⁸

The court applied this dynamic public trust doctrine to ensure not only the public’s right to use the land seaward of the MHWL for fishing, navigation, and recreation, but also to provide the public a right to use the dry sand beach. “[W]here use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the doctrine warrants the public’s use of the upland dry sand area subject to an accommodation of the interests of the owner.”⁴⁹

iii. Oregon

The state of Oregon has invoked the common law doctrine of custom to keep its sandy beaches open to the public. Unlike Florida’s use of custom in

Tona-Rama, however, Oregon did not limit the doctrine to a case-by-case application. Instead, the Supreme Court of Oregon, recognizing that the public had enjoyed the dry sand areas along the Pacific shore since the beginning of the state's political history, held that "[o]cean-front lands from the northern to the southern border of the state ought to be treated uniformly."⁵⁰

iv. Montana

Even with the right of public access to submerged lands and sandy beaches secured at common law, physical barriers such as revetments and seawalls may continue to interfere with *lateral* access along state shores as illustrated by the introduction of this article. The Supreme Court of Montana addressed this issue directly in 1984, by carving out a small exception to the common law rule that the public has the right to use state-owned waters only to the point of the high water mark. Acknowledging the difficulties physical obstacles pose for common law public use and access, the court held that when such barriers are present, the public is allowed "portage around such barriers in the least intrusive way possible, avoiding damage to the private property holder's rights."⁵¹

E. The Future of Common Law Public Access in Florida

The gaps left in the common law of Florida regarding public access to its beaches leave local communities that wish to preserve lateral access in a difficult position. In 1999 and 2000, the city of Destin, Florida proposed three ordinances meant to address public beach access problems. The only ordinance of the three to make its way into the city's code prohibits beach vendors from setting up within 20 feet of the water east of Henderson Beach State Park where the beaches are narrower.⁵²

A second proposed ordinance attempted to codify a 10-foot pedestrian zone for lateral access through the voluntary granting of easements by littoral property owners. The

proposed ordinance failed after concern from the public that this ordinance could effect a regulatory taking and pose enforcement problems.⁵³ The third proposed ordinance carved out a 25-foot public use buffer zone from the most seaward permanent structure on the private beach. This ordinance was rooted in the doctrine of custom announced in *Tona-Rama*, but despite efforts by the city land use attorney to gather sufficient historical and archaeological evidence to prove that particular area should be protected by custom, the ordinance failed to pass after threats of suit from private landowners.⁵⁴

Destin eventually turned to an administrative tactic to preserve public access. The Okaloosa County Sheriff's Office, charged with patrolling the beaches of Destin, allows the public a leeway of 10 to 15 feet landward of the MHWL so long as there is no misconduct or disturbances.⁵⁵ Beyond this point, deputies will ask public beachgoers to leave the area only when a private beachfront property owner makes such a request.

Over the coming decades the common law doctrines of other coastal jurisdictions may provide valuable guidance in safeguarding lateral access to Florida's shores. Were Florida to extend the doctrine of custom to encompass all beaches uniformly, as Oregon did, the public would not have to resort to case-by-case litigation to establish use rights and avoid trespass claims. Expanding the public trust doctrine to encompass the dry sand beach as New Jersey did would accomplish as similar result. Overruling *Trepanier* to allow customary public use rights to the wet sandy beach to move with the MHWL as Texas has done (with respect to the dry sandy beach) would help preserve access along eroding coastlines. Allowing limited trespass around obstructions to permit free passage along the beach, in a manner analogous to Montana, would maintain the public's ability to exercise its public trust or customary right to use the beach. Regardless of whether the public gains a usufruct of some nature over private dry sandy beach, prohibiting shoreline hardening that impedes the migration of the MHWL will ensure the continued existence of a wet sandy beach on

which to exercise public trust rights, at least for the near term future.

Statutory Protection of Public Access

Until Florida revisits the common law to address lateral public access, legislative action may serve to fill a number of gaps. The primary statutory scheme regarding the conservation and protection of Florida's coasts is the Beach and Shore Preservation Act (the "Act"), enacted in 1965.⁵⁶ Among its many provisions, the Act regulates two key realms of activity that have major implications for lateral access: beach restoration and coastal construction.

A. Beach Restoration and Nourishment

Because erosion is the primary contributing factor to the problem of interrupted lateral access, a seemingly simple solution is to replace and maintain the sand that has washed away. Though the Act does include a legal mechanism by which to accomplish beach restoration and subsequent nourishment, this practice is no silver bullet for continued public access.

In recognition that "beach erosion is a serious menace to the economy and general welfare of the people of this state,"⁵⁷ the Act declares that it is the responsibility of the government to manage Florida's beaches, protect them from erosion, and to make necessary provisions for beach restoration and nourishment projects.⁵⁸ The Act creates a cost sharing scheme wherein the state may pay for up to 75 percent of the cost of restoring and nourishing an eroded beach, the balance of which is covered by the local government in which the beach is located.⁵⁹ All restoration projects completed under the Act must take place in an area designated as "critically eroded" shoreline, or must benefit an adjacent critically eroded shoreline.⁶⁰ The Florida Department of Environmental Protection (DEP) serves as the beach and shore preservation authority within the state and is charged with making the determination as to which beaches are "critically eroded."⁶¹

Beyond ensuring beaches will not be completely submerged as rising seas meet seawalls, restoration projects have other positive implications for public access. First, in order to

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receive state funds, a project must provide for “adequate public access.”⁶² Second, and more significantly in relation to lateral access, upon commencement of a restoration project, an erosion control line (ECL) is established and replaces the MHWL as the legally significant boundary by which to determine title to coastal lands.⁶³ In other words, the common law ambulatory boundary ceases to operate and title to all lands seaward of the ECL, whether wet or dry sand beach, is vested in the state. It follows that once the ECL is established, the common law “no longer operate[s] to increase or decrease the proportions of any upland property lying landward of [the ECL], either by accretion or erosion or by any other natural or artificial process.”⁶⁴ The functional result of this statute is the creation of a new dry sand beach, accessible by the public.

Despite these boons to public access, the practice of beach restoration and nourishment is an expensive approach to a complex and permanent problem. Armored and heavily developed coasts have created barriers beyond which shorelines cannot migrate, as they would naturally. Without the addition of new sand, these beaches become increasingly narrow. Over the last 10 years, the state of Florida has thrown \$393 million in matching funds onto its beaches through nourishment projects.⁶⁵ It is estimated that local, state, and federal entities spend roughly \$100 million each year in efforts to maintain the state’s shoreline.⁶⁶ This continuous battle against the forces of nature fought along hundreds of miles of beach may not be economically feasible in the long term.

Even if the money keeps flowing, the sand may not. A second major problem facing beach nourishment projects is a shortage of sand, namely “beach quality sand.” Beach quality sand is defined by regulation as sand “similar to the native beach sand in both coloration and grain size” and free from foreign debris.⁶⁷ As of February 2014, Miami-Dade County has reportedly used the last of its easily

accessible and environmentally safe offshore sand to nourish its beaches.⁶⁸ The dilemma has sparked politically charged conflicts between counties throughout southern Florida and some have resorted to trucking in sand purchased from central Florida, a practice that is more expensive and logically difficult.⁶⁹ In a sign of true desperation, Broward County has gone so far as to consider making sand out of recycled glass.⁷⁰

Finally, any increase in public access provided by beach restoration projects may be short-lived. If beach restoration is not commenced within two years following the establishment of the ECL or the restoration project is halted for a period exceeding six months, the ECL becomes null and void and title to coastal land reverts back to the MHWL under common law.⁷¹ The same result is reached if the entity charged with maintaining the restored beach fails to do so.⁷² Absent vigilant, perpetual, and costly upkeep, beach restoration and nourishment offer only a temporary solution to increased lateral access in the face projected sea level rise.

B. Coastal Construction Permits

In addition to restoring and nourishing our beaches, the Act declares that it is in the public interest “to preserve and protect them from imprudent construction which can jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection to upland structures, endanger adjacent properties, or interfere with public beach access.”⁷³ To this end, the Act requires that any individual or entity wishing to engage in construction below a line referred to as the Coastal Construction Control Line or CCCL first obtain a coastal construction permit, issued by the DEP.⁷⁴ Coastal construction activities below the MHWL must obtain a similar permit, which is consolidated with federal approval and authorization to use state lands.⁷⁵ “Coastal construction” is defined broadly and includes “any work or activity which is likely to have a material physical effect on existing coastal conditions or natural shore and inlet processes.”⁷⁶

The Act and Florida Administrative Code set forth a number of standards that must be met by a permit

applicant before the DEP may issue a permit. One such criterion is that the proposed project will not interfere with public access,⁷⁷ defined under the Act as:

[T]he public’s right to laterally traverse the sandy beaches of this state where such access exists on or after July 1, 1987, or where the public has established an accessway through private lands to lands seaward of the mean high tide or water line by prescription, prescriptive easement, or any other legal means.⁷⁸

The definition also declares, “development or construction shall not interfere with such right of public access unless a comparable alternative accessway is provided.”⁷⁹ If the DEP determines that a development’s interference with public access is unavoidable in order to protect the beach or an endangered upland structure, it may require, as a condition of the permit, that the developer provide alternative access.⁸⁰ Finally, any structure that does not meet such requirements of the Act will be declared a public nuisance and may be removed upon request of the DEP.⁸¹

Though, at first blush, these provisions seemingly provide robust protection for public access, the width of any mandatory alternative access may not be required to exceed the width of the access that will be obstructed as a result of the permit being granted.⁸² This limitation on permit conditions is likely a direct response to the U.S. Supreme Court’s regulatory takings jurisprudence in which the Court has held that there must be an ‘essential nexus’ between the legitimate state interest and the condition on the permit.⁸³ The Court also requires a rough proportionality between the projected impact of development and the permit conditions.⁸⁴ Because the consequences of coastal armoring structures such as diminished sand supply and subsequent interference with lateral access are often delayed rather than immediately perceptible, it is difficult to condition permits to account for a development’s actual impacts that may occur over the life of the structure. Moreover, coastal construction permits are just that – construction permits. Unlike other environmental permit regimes, there is no accompanying operation permit

that must be renewed periodically, based on long term monitoring and inspection.⁸⁵

In order to protect lateral access, coastal construction permits theoretically may be conditioned to require a permittee to grant the local government a future interest in certain property that would vest upon the occurrence of an event, such as when the MHWL reaches a point at which there is no longer a sandy beach. In addition to ensuring an essential nexus and rough proportionality of such a permit condition, a further difficulty with the use of future interests as a sea level rise adaptation tool may be the common law rule against perpetuities, codified in Florida Statute § 689.225. The rule states that a non-vested property interest in real property is invalid “unless: 1) when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or 2) the interest either vests or terminates within 90 years after its creation.”⁸⁶ Under Florida’s current laws, therefore, if none of the events specified by the grant of a future interest occur within 90 years to trigger the vesting of such interest, the future interest fails and the permittee holds the land in fee simple.⁸⁷ For this reason, the “use of future interests generally represents a complex, arcane, and limited ability to aid local governments in efforts to improve their long-term coastal resilience and efforts to adapt to rising sea levels.”⁸⁸

Conclusion

Neither the common law nor the acts of the state legislature and its agencies provide sufficient protection for lateral access along Florida’s shores in a time of rising seas and a diminishing and increasingly costly sand supply. Adopting measures to allow the public limited ingress to private property to circumvent obstructions as Montana has done will help to avoid the trespass scenario described in this article’s introduction. Were Florida law to reflect a prospective consideration of the impact of coastal construction on the public’s right to a wet sandy beach under the public trust doctrine, the causes of interrupted lateral access may be addressed more directly. Such an approach would include the denial

of construction permits on eroding beaches (which may raise constitutional issues) or conditioning them to provide for the public’s future interest in lateral beach access. Finally, a more sweeping judicial interpretation of the doctrine of custom and recognition that the customary use of the beach should roll with the tide would offer the greatest potential to realize the Supreme Court’s admonition that “No part of Florida is more exclusively hers, nor more properly utilized by her people than her beaches.”⁸⁹

Endnotes:

¹ Carly Grimm and Amanda Broadwell are third year law student associates in the Conservation Clinic at the University of Florida Levin College of Law, directed by Legal Skills Professor Thomas T Ankersen. Ankersen also serves as statewide legal specialist to Florida Sea Grant, which provides partial support to the Clinic’s marine and coastal project portfolio.

² *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 75 (Fla. 1974).

³ *Beaches and Coastal Systems: Why Restore Eroded Beaches?* Florida Department of Environmental Protection (February 28, 2013), <http://www.dep.state.fl.us/beaches/programs/beep/restore.htm>. Erosion is the result of both natural and human activity. As of early 2013, 387 miles of sandy beaches had experienced “critical erosion,” a level of erosion threatening substantial development, recreation, and environmental interests. *Id.*

⁴ Meg Caldwell and Craig Holt Segall, *No Day at the Beach: Sea Level Rise, Ecosystem Loss, and Public Access Along the California Coast*, 34 Ecology L.Q. 533, 540 (2007).

⁵ This article assumes that current sea level rise trends and sea level rise acceleration scenarios proffered by the Intergovernmental Panel on Climate Changes are accurate. Intergovernmental Panel on Climate Change, *Climate Change 2013: The Physical Science Basis*, (2013), <http://www.ipcc.ch/report/ar5/wg1/#.Uvf2MUKwLGk>.

⁶ Lateral access is to be distinguished from “perpendicular access” to the beach, which refers to the ability of the public to navigate from highways and parking lots to the sand.

⁷ For a compendium of beach access legal literature related to Florida see generally *Public Rights in Water*, Florida State Law Research Center, (Feb. 23, 2012), <http://guides.law.fsu.edu/content.php?pid=188286&sid=1580350>.

⁸ Caldwell and Segall, *supra* note 4, at 551-552.

⁹ Norwood Gay, *Tidelands*, 20 Stetson L. Rev. 143 (1990),

¹⁰ See *Martin v. Waddell's Lessee*, 41 U.S. 367 (1842).

¹¹ See *Mumford v. Wardwell*, 73 U.S. 423, 436 (1867).

¹² Fla. Const. art. X, § 11.

¹³ *Walton County v. Stop Beach Renourishment, Inc.*, 998 So. 2d 1102, 1109 (Fla. 2008) aff’d sub nom. *Stop the Beach Renourishment, Inc. v. Florida Dept. of Envtl. Prot.*, 560 U.S. 702 (2010).

¹⁴ *State v. Black River Phosphate Co.*, 13 So. 640, 648 (Fla. 1893); see also *City of West Palm*

Beach v. Board of Trustees of Internal Imp. Trust Fund, 714 So. 2d 1060, 1062 (Fla. 4th DCA 1998).

¹⁵ An exception to this rule exists where land is gained or lost through avulsion, defined as a sudden or violent event such as a hurricane, the effect of which is perceptible as it happens. In such a case, the boundaries between public and private land do not move.

¹⁶ James G. Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Coastal Property Owners*, 57 Md. L. Rev. 1279, 1370 (1998).

¹⁷ *Id.* at 1371.

¹⁸ Fla. Const. art. X, § 11.

¹⁹ *Id.*

²⁰ Fla. Const. art. II, § 7(a).

²¹ *Walton County v. Stop Beach Renourishment, Inc.*, 998 So. 2d 1102, 1110-1111 (Fla. 2008) aff’d sub nom. *Stop the Beach Renourishment, Inc. v. Florida Dept. of Envtl. Prot.*, 560 U.S. 702 (2010).

²² Caldwell and Segall, *supra* note 4, at 555.

²³ *Id.* at 554.

²⁴ *Id.* at 555.

²⁵ *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73 (Fla. 1974).

²⁶ *Id.* at 75.

²⁷ *Id.* at 78.

²⁸ *Id.*

²⁹ *Trepanier v. Cnty of Volusia*, 965 So. 2d 276, 290 (Fla. 5th DCA 2007).

³⁰ *Id.* (emphasis in the original).

³¹ *Id.* at 293 (emphasis added).

³² *Id.*

³³ *Downing v. Bird*, 100 So. 2d 57, 64 (Fla. 1958); see also *Trepanier*, 965 So. 2d at 284.

³⁴ *Id.*

³⁵ *Trepanier*, 965 So. 2d at 285.

³⁶ *Id.*

³⁷ Richard J. McLaughlin, *Rolling Easements As A Response to Sea Level Rise in Coastal Texas: Current Status of the Law After Severance v. Patterson*, 26 J. Land Use & Envtl. L. 365, 369 (2011).

³⁸ Titus, *supra* note 16, at 1313 (1998).

³⁹ McLaughlin, *supra* note 37, at 369 (2011).

⁴⁰ *Id.* at 370.

⁴¹ Tex. Nat. Res. Code § 61.011(a) (2013).

⁴² McLaughlin, *supra* note 37, at 371 (2011).

⁴³ *Id.* at 372.

⁴⁴ Tex. Nat. Res. Code § 61.025(a) (2013).

⁴⁵ *Matcha v. Mattox on Behalf of People*, 711 S.W.2d 95, 98 (Tex. App. 1986).

⁴⁶ *Severance v. Patterson*, 370 S.W.3d 705, 730 (Tex. 2012).

⁴⁷ 2013 Texas House Bill No. 325, Texas Eighty-Third Legislature (emphasis added to proposed language).

⁴⁸ *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J. 1984).

⁴⁹ *Id.*

⁵⁰ *State ex rel. Thornton v. Hay*, 462 P.2d 671, 676 (Or. 1969).

⁵¹ *Montana Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 172 (Mont. 1984).

⁵² Jennifer A. Sullivan, *Laying Out an “Unwelcome Mat” to Public Beach Access*, 18 J. Land Use & Envtl. L. 331, 341 (2003).

⁵³ *Id.* at 342.

⁵⁴ *Id.* at 343.

⁵⁵ *Id.* at 344.

⁵⁶ See, Fla. Stat. Chapter 161.

⁵⁷ Fla. Stat. § 161.088 (2013).

⁵⁸ *Id.*

⁵⁹ Fla. Stat. § 161.101(1) (2013).

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⁶⁰ Fla. Stat. § 161.088 (2013).

⁶¹ Fla. Stat. § 161.101(1) and (2) (2013). The Florida Administrative Code defines “critically eroded” shoreline to include beaches “where natural processes or human activities have caused, or contributed to, erosion and recession of the beach and dune system” to the extent that development, recreational, environmental, or cultural resources are threatened. The definition also includes shorelines that may not currently be eroded but “their inclusion is necessary for continuity of management of the coastal system or for the design integrity of adjacent beach management projects.” Fla. Admin. Code R. 62B-36.002(5).

⁶² Fla. Stat. § 161.101(12) (2013).

⁶³ Fla. Stat. § 161.141 and § 161.191 (2013). The constitutional validity of these provisions have been challenged and upheld. See *Walton County v. Stop Beach Renourishment, Inc.*, 998 So. 2d 1102 (Fla. 2008).

⁶⁴ Fla. Stat. § 161.191 (2013).

⁶⁵ Lilly Rockwell, *Impact: Beach and Shore*, Florida Trend (Jul. 8, 2013), <http://www.floridatrend.com/article/15815/span-stylecolor777im-pactstyle-beach-and-shore>.

⁶⁶ Tamara Lush, *Beach Replenishment A Tough Issue In Florida, St. Joseph Peninsula*, Huffington Post (Mar. 15, 2012), <http://www.huffingtonpost.com/2012/03/15/beach-replen->

ishment--tou_n_1346656.html.

⁶⁷ Fla. Admin. Code R 62B-33.002(8) (2013).

⁶⁸ Lizette Alvarez, *Where Sand is Gold, the Reserves are Running Dry*, N.Y. Times, (Aug. 24, 2013), http://www.nytimes.com/2013/08/25/us/where-sand-is-gold-the-coffers-are-running-dry-in-florida.html?pagewanted=1&_r=0.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Fla. Stat. §161.211(1) (2013).

⁷² Fla. Stat. §161.211(2) (2013).

⁷³ Fla. Stat. § 161.053(1)(a) (2013) (emphasis added).

⁷⁴ Fla. Stat. § 161.053(2)(a) and (4) (2013).

⁷⁵ Fla. Stat. §161.041(1) (2013). Section 161.055 consolidates coastal construction permits, environmental resource permits and sovereign submerged lands authorizations for the DEP to consider concurrently and issue a single “joint coastal permit.” Fla. Stat. §161.055(1) and (2) (2013).

⁷⁶ See Fla. Stat. §161.021 (2013).

⁷⁷ Fla. Admin. Code R. 62B-33.005(4)(g).

⁷⁸ Fla. Stat. § 161.021(1) (2013).

⁷⁹ *Id.*

⁸⁰ Fla. Stat. § 161.041(1)(a) (2013).

⁸¹ Fla. Stat. § 161.053(6) (2013).

⁸² *Id.*

⁸³ *Nollan v. California Coastal Com'n*, 483 U.S. 825, 836-37 (1987).

⁸⁴ *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). The Supreme Court recently clarified that these requirements apply even where a permit is denied. *Koontz v. St. Johns River Water Management Dist.*, 133 S.Ct. 2586, 2596 (2013).

⁸⁵ Not only are permitted construction projects

free from future audits, empirical research suggests that denial rates of coastal construction permits by DEP are notably low. A large majority of permit applications are approved with no system in place for continued inspection. See Thomas Ruppert et al., *Eroding Long-Term Prospects for Florida's Beaches: Florida's Coastal Management Policy*, University of Florida Institute for Food and Agricultural Sciences, 82 (August 19, 2008), http://www.law.ufl.edu/_pdf/academics/centers-clinics/clinics/conservation/resources/coastal_management_finalreport.pdf.

⁸⁶ Fla. Stat. §689.225(2)(a) (2013).

⁸⁷ Thomas Ruppert, *Use of Future Interests in Land as a Sea-Level Rise Adaptation Strategy in Florida*, Florida Sea Grant College Program, https://www.flseagrant.org/wp-content/uploads/2012/08/Use-of-Future-Interests_8.8.12.pdf. A possible solution to the 90-year limitation imposed by Florida Statute § 689.225 is the use of a trust as the third party in which the future interest will vest upon the occurrence of the specified condition. Section (2)(f) of this statute states that as to any trust created after December 31, 2000, the provisions of § 689.225(2) shall apply to a non-vested property interest or power of appointment contained in a trust “by substituting 360 years in place of ‘90 years’ in each place such term appears in this section unless the terms of the trust require that all beneficial interests in the trust vest or terminate within a lesser period.” Fla. Stat. § 689.225(2)(f)(2013).

⁸⁸ *Id.*

⁸⁹ *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 75 (Fla. 1974).