



The Bert Harris Act’s Forgotten Clause: Vested Rights Arising from Substantive Due Process

By Christina M. Martin¹

Introduction

Twenty-one years ago, the Florida Legislature passed the Bert J. Harris, Jr., Private Property Rights Protection Act (“the Harris Act” or “the Act”) to better protect property rights. The statute allows plaintiffs to recover compensation when government regulations inordinately burden an existing use or vested right. A “vested right” is “a right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person’s consent.”² Under Florida common law, a vested right arises when a landowner, in good faith, detrimentally relies on an

act or omission of the government, giving rise to equitable estoppel.³ A vested right may also arise under common law in the absence of detrimental reliance when the government acts in bad faith.⁴ Taking a different approach, the Harris Act states that vested rights arise by “applying principles of equitable estoppel or substantive due process.”⁵ After more than twenty years, however, courts have yet to tackle the question of how a right may vest under the substantive due process prong of the statute’s vesting test. Indeed, the issue appears to largely have been ignored by practitioners.

The Act’s substantive due process provision must offer unique protections to property owners beyond those granted by equitable estoppel.⁶ Although the protection has sat on the shelf for two decades, it is waiting to be put to use to offer Harris Act protections when the government acts in bad faith.

I. The Bert Harris Act vested rights test built upon the common law’s protection of vested rights

The Florida Legislature passed the Harris Act to increase protection of

See “Bert Harris Act’s,” page 16

From the Chair

As I write this, my first message as Chair of ELULS, I am so thankful for all of the enthusiasm and hard work I have witnessed from the Executive Council, the officers, the committee chairs, the committee members, and the three Program Administrators from The Florida Bar that I have had the pleasure to work with during my fourteen years as a member of the ELULS Executive Council. I am especially excited to welcome all of our Section members who have volunteered (most for the first time) to serve on committees this year. On behalf of the Section, the Executive Council, and the Committee Chairs,

thank you for volunteering, and we look forward to your participation and input.

The ELULS June Program, in conjunction with The Florida Bar Annual Convention in Orlando on June 17, 2016, was a great half-day of informative programming. Longtime Executive Council member Francine Ffolkes (Department of Environmental Protection) teamed up with the Honorable Judge Cathy Sellers (Division of Administrative Hearings) for our “2016 Administrative Law Update.” In addition, Larry Sellers (Holland

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CHAIR'S MESSAGE

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and Knight) and Terry Lewis (Lewis Longman & Walker) returned to provide the "2016 Legislative Update." Topics included the omnibus water bill, APA developments, the budget, public records, and various development-related issues.

Finally, Tim Center (Capital Area Community Action Agency) led the spirited "Agency Counsel Roundtable." The panel discussion featured General Counsel Fred Aschauer, Department of Environmental Protection; Assistant Deputy General Counsel John Costigan, Department of Agriculture and Consumer Services; Assistant General Counsel Christina Shideler, Department of

Economic Opportunity; Special Counsel for Environmental Affairs Kathleen Toolan, Department of Transportation; and General Counsel Harold "Bud" Vielhauer, Fish & Wildlife Conservation Commission. Discussion touched on water resources and ACF Basin litigation, Amendment 1 funds, wildlife conservation and hunting, risk-based corrective action for pollution control, land management and sector planning, and more.

Our CLE Committee, under the able leadership of Section Treasurer and CLE Committee Chair Patrick Krechowski, is finishing up the schedule for our annual webcast series, and our next full-day environmental and land use program to be held in Orlando near the end of January. Look for announcements on the listserv and the website (<http://eluls.org>). Next year, The Florida Bar Annual

Convention will take place at the Boca Raton Resort and Club in Boca Raton June 21 - 24, so save those dates.

You will also see announcements/invitations throughout the year for Attorney/Affiliate mixers organized by our Affiliate Membership Committee in different areas of the state, usually on a Thursday around 5:30 in the evening. I encourage you to attend when a mixer is scheduled in your area. The mixers are great opportunities to meet our affiliate members, other Section members, and to enjoy some snacks and drinks.

I look forward to meeting more of you this year.



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August 2016 Case Law Update

by Gary K. Hunter, Jr., Hopping Green & Sams

The purpose of the ripeness requirement in regulatory taking claims is to establish the nature and magnitude of restrictions that a permitting agency has imposed on a property owner. As such, a property owner must apply for variances and pursue alternative projects before a regulatory taking claim is ripe for review. *Dep't of Environmental Protection v. Beach Group Investments, LLC*, Case No. 4D14-3307 (Fla. 4th DCA 2016).

The Department of Environmental Protection ("DEP") appealed a trial court's decision that DEP's denial of a Coastal Construction Control Line ("CCCL") permit constituted an as-applied regulatory taking. DEP argued that the trial court erred because the takings claim was not ripe for review and its denial of the permit was not a taking. The Fourth District Court of Appeals agreed with DEP and reversed the lower court's decision.

Florida's Beach and Shore Preservation Act requires DEP to establish CCCLs to define the portion of the beach-dune system subject to severe fluctuations based on 100-year predictable weather conditions. After a CCCL is established, a permit from DEP is required to construct projects seaward of the CCCL. To get a CCCL permit, the project must be landward of the thirty-year erosion projection line. DEP calculates the thirty-year erosion projection line using a five-step process. The Erosion Control Line ("ECL"), Mean High Water Line ("MHWL"), Seasonal High Water Line, and the erosion projection rate are all used in this calculation. The first step to calculate the thirty-year erosion projection line is to locate the pre-nourishment project MHWL. The location of the MHWL is the central issue at contention between DEP and Beach Group Investments, LLC ("Beach Group").

In the instant case, DEP denied Beach Group's CCCL permit because its property was located seaward of the thirty-year erosion control line. When Beach Group originally purchased the property, the thirty-year

erosion projection calculation rule set the MHWL at the ECL (the "1997 ECL"). However, DEP amended its thirty-year erosion projection rule a few months after Beach Group purchased the property. The new rule required that if the ECL is not based on a pre-nourishment project survey MHWL, then a pre-project survey MHWL shall be used instead of the ECL. The amendment resulted in the location of the MHWL to be more landward than when Beach Group purchased the property. As such, the thirty-year erosion projection line was higher on the beach and Beach Group's proposed project was located seaward of the thirty-year erosion control line.

After DEP received Beach Group's application, a district engineer recommended that Beach Group redesign the project because the application was a "certain denial." DEP provided Beach Group with its analysis of the thirty-year erosion control line and recommended using a MHWL higher than the 1997 ECL. Then DEP denied the CCCL permit. Beach Group petitioned for an administrative hearing. An Administrative Law Judge ("ALJ") conducted the hearing and issued an order recommending denial of Beach Group's CCCL permit application because it would extend seaward of the 30-year erosion projection. The ALJ also recommended that continuing beach renourishment for the foreseeable future might be appropriate for consideration of a request for a variance for Beach Group's project. DEP adopted the ALJ's recommended order and noted that the denial is to the specific project only and included the ALJ's recommendation for Beach Group to pursue a variance.

Beach Group sued for an as-applied regulatory taking, stating that it purchased the property intending to develop it consistent with City land use and zoning regulations and to sell the project. The lower court found that DEP had taken the property because Beach Group had a reasonable expectation in the development, use and sale of the property. The lower court based its decisions off of DEP's published policies and historic

practices. In an email dated after the rule change, DEP had approved and used the 1997 ECL as the starting point for the thirty-year erosion projection line. The Court determined that DEP's policy change caused Beach Group to lose its expectations in the property.

On appeal, the Fourth District Court reversed the lower court's decision and held, for two reasons, that Beach Group's claim was not ripe for review. First, the Court found that ripeness requires the property owner to take all reasonable and necessary steps to allow an agency to exercise their full discretion in considering a development, including the opportunity to grant any variances or waivers. Beach Group admitted that it did not apply for a variance even though DEP incorporated into its Final Order that it would consider a variance or waiver. The Court determined that DEP provided Beach Group with an opportunity to apply for a variance. The second reason the Court found the claim unripe because Beach Group did not propose an alternative development plan. The record reflected that Beach Group could have considered alternative plans for the property and that its planner and attorney testified that it would be possible to develop the property with less units or a single-family residence. The Court stated that the mere fact that the denial of a permit deprives an owner of a particular use does not demonstrate a taking. Therefore, the Court held that Beach Group's takings claim was not ripe for review. The Court did not consider whether DEP's denial of the application constituted a taking because ripeness is a threshold issue that Beach Group failed to satisfy.

Applicants for a Major Conditional Use in Monroe County must comply with all standards set out in sections 110-67 and 146-5 of the Monroe County Code. Additionally, the term "immediate vicinity" refers to a radius

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CASE LAW UPDATE

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of less than one-mile and more than one-half mile. *Florida Keys Media, LLC., v. Monroe County Planning Commission, Case No. 16-0277 (DOAH June 1, 2016).*

The Monroe County Planning Commission (“Commission”) denied an application by Florida Keys Media, LLC (“Florida Media”) to erect a 199-foot communication tower on Upper Sugarloaf Key in the lower Keys portion of Monroe County. The proposed facility is in an area characterized by very low density residential properties and natural habitats. The Commission denied the Florida Media’s application and found: (1) the tower was incompatible with the community character of the immediate vicinity, (2) the tower would reduce the value of surrounding properties, and (3) that Florida Media failed to demonstrate that there were other limiting factors that would render existing facilities unsuitable. Furthermore, the Commission did not use a three-mile radius when considering the adverse effects of the tower on the immediate vicinity. On appeal to the Division of Administrative Hearings (herein, the “Court”), Florida Media argued, in part, that the Commission’s three findings were not based on competent substantial evidence and that the Commission’s proceedings failed to comply with the essential requirements of law by not using the three-mile radius required under section 146-5(1)a.14.(ii), Monroe County Code.

In Monroe County, a Major Conditional Use requires that the activity comply with nine standards set out in section 110-67, Monroe County Code. Relevant to the instant case, standards 2 and 4 require the Commission to consider whether the use is consistent with the community character of the immediate vicinity and whether the use will have an

adverse effect on the value of the surrounding properties. Also, section 146-5(1)a.14, Monroe County Code, requires new antenna supporting structures to be located in a manner consistent with the community character of the immediate vicinity and that height, mass and scale, materials and color, and illumination to be considered from vantage points within three miles of the proposed antennae supporting structure.

In its Final Order, the Court affirmed the Commission’s findings that the tower was incompatible with the community character and that the tower would reduce the value of surrounding properties. Additionally, the Court affirmed the Commission’s interpretation of “immediate vicinity” to mean a radius of less than one-mile and more than one-half mile around the site. Regarding the compatibility of the tower, the Court determined that the Commission based their decision on sufficiently relevant and material evidence because the denial of the application was based on the testimony of local residents. Specifically, the Court found that the local residents’ “observations were relevant, material, and fact-based” and were not generalized statements. Similarly, in regards to the towers effect on property values, the Court determined that the Commission’s decision to deny the application was supported by competent and substantial evidence. The Commission received appraisal reports from Florida Media, finding that cell phone and communication towers do not cause any measurable decrease in the value of adjacent properties, and contrasting testimony and reports from local realtors that the tower would have adverse effects on the surrounding properties. Additionally, the Commission had testimony that Florida Media’s appraisal was in areas that were not comparable to the rural values of the proposed development area. As such, the Commission’s denial was competently supported. With regards to the Commission’s

interpretation, the Court determined that Florida Media’s interpretation of “immediate vicinity” to include any land areas within three miles around the proposed project was absurd. The Court stated that such an interpretation would require the Commission to consider impacts far beyond the site and which could impact the secluded community character. As such, the Court found that the Commission’s findings were supported by competent and substantial evidence and that the interpretation of “immediate vicinity,” as distinct from the three mile provision, as reasonable.

However, the Court rejected the Commission’s finding that Florida Media failed to demonstrate other limiting factors rendering existing facilities unsuitable. According to the Monroe County Code, this standard can be met in one of four ways. Here, the Court determined that Florida Media relied upon and showed that existing facilities did not have sufficient structural strength to support the proposed facility and equipment. The Court found that Florida Media provided uncontested written and testimonial evidence stating that the existing towers were structurally insufficient. As such, the Court held that the Commission erroneously found that Florida Media failed to comply with the standard.

Appellants waive their right to argue insufficiency of a notice for application if they do not raise the insufficiencies in front of the Board prior to an appeal. *Kohut Family Trust, v. City of Clearwater, Case No. 16-0853 (DOAH May 20, 2016).*

Kohut Family Trust (“KFT”) appealed a development order provided by the City of Clearwater Community Development Board (“Board”). The development order approved Clearwater Marine Aquarium, Inc.’s (the “Aquarium”) Flexible Develop-

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ment Application (“Application”). The Aquarium was seeking to develop its three parcel property by adding a parking garage, two buildings, and a dolphin tank. Pursuant to section 4-505 of the Community Development Code, an Administrative Law Judge (“ALJ”) was assigned to serve as the Hearing Officer for the appeal. At the appeal, KFT argued that the notice informing nearby property owners of the Aquarium’s Application was insufficient and therefore the Board departed from the essential requirements of law when it approved the application. Specifically, KFT argued that the notice was insufficient for three reasons: (1) the mailed notice identified only one of the three parcels of the Aquarium site; (2) the notice was only mailed to property owners located 200 feet from the single identified parcel; and (3) the record did not evidence that a sign was posted on the Aquarium property regarding the application.

In order to be approved, the Aquarium’s proposed development had to meet the “flexibility standards” outlined in the City’s Community Development Code. Relevant in the instant case is section 4-206, Community Development Code, which requires (1) that notice of the application be mailed to owners of properties within a 200-foot radius of the perimeter boundary of the subject property and (2) that a sign be posted on the parcel proposed for development. The record before the Board indicates that the notice mailed by the City identified only one of the three parcels that make up the Aquarium site. In addition, the record shows that the calculation of 200 feet was made from the single identified property instead of the perimeter of the entire site. Also, the record does not indicate whether a sign was posted on Aquarium’s property. However, insufficiencies as to the notice and challenges that the notice failed to comply with section 4-206, Community Development Code, were not raised before the Board.

After reviewing the record, the ALJ held that KFT failed to meet its

burden to show that the decision of the Board departed from the essential requirements of law. Explicitly, the ALJ found that KFT’s arguments failed for three reasons. First, KFT failed to raise the errors in the notice, i.e. that the notice identified only one of three parcels, in front of the Board. The ALJ stated that an appeal does not mean that the “appellant can search through the record after an appeal is filed and then, for the first time, assert that the record does not show how the appellee complied with some of the requirements for approval.” Second, KFT waived its claim of insufficient notice because its representative appeared at the hearing and availed himself of the opportunity to fully and adequately present objections. Finally, the ALJ found that KFT did not show that the notice was insufficient because the record does not show that the 200-foot calculation was done improperly, that someone did not receive notice, or that the sign was not posted. As such, the Court affirmed the Board’s decision.



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DEP Update

Beach Group Investments, LLC v. Dep't of Env'tl. Protection, 2016 WL 41322112, --- So. 3d ---- (Fla. 4th DCA 2016): In 2007, the Department denied a coastal construction permit application to build a seventeen-unit condominium in St. Lucie County, and the developer petitioned for a formal administrative hearing. The recommended order included a recommendation of denial, with the central conclusion that the permit must be denied because part of the proposed structures would be seaward of the 30-year erosion projection. The final order incorporated the recommended order with minor changes. Crucially, as it turns out, the incorporated recommended order included a footnote suggesting a basis for the developer to apply for a variance under section 120.542, Florida Statutes, which would have provided additional flexibility to develop the project.

The owner sued the Department for inverse condemnation in circuit court, based on the "ad hoc" takings theory described in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). The developer pursued the theory that it had lost profits that it would have received if it were able to develop the seventeen-unit project described in the application, with the same amenities and the same configuration of residential units. The developer's planner testified that the property could have been developed as a multi-family project in different configurations, with up to fifteen residential units.

The developer prevailed at a non-jury trial and following a jury trial on valuation, was awarded a judgment in excess of \$10,400,000, plus over \$4,800,000 in prejudgment interest. The Court reserved jurisdiction to award attorneys' fees but did not adjudicate the amount.

The Department appealed the judgment, arguing on appeal that the claim was not ripe and that the developer had failed to prove a *Penn Central* taking. On August 3, 2016, the Court issued an opinion reversing the final judgment. The Court accepted the Department's first

argument, that the takings claim was not ripe because the developer failed to petition for a variance after the permit denial. The Court also accepted the Department's additional argument that the claim was not ripe because the developer did not pursue alternative, less ambitious development plans. The Court did not reach the issue of whether the record could have supported a *Penn Central* taking.

Steven Herbits & 1000 Venetian Way Condo, Inc. v. Bd. of Trustees of the Internal Improvement Trust Fund, 2016 WL 3450460 (Fla. 1st DCA 2016): In June 2014, a petition was filed challenging the Board of Trustees of the Internal Improvement Trust Fund's partial modification of restrictions in a deed issued to the City of Miami. Petitioners appealed the Board's dismissal of its petition with prejudice to the First District Court of Appeal asserting that modification of the deed restrictions at issue were subject to administrative rules governing activities on sovereign submerged lands. The Court affirmed the Board's dismissal with prejudice finding that modification of the deed restriction was a proprietary action which fell outside of Florida's Administrative Procedures Act and was specifically excluded from rule by definition. Appellants request for rehearing and certification of question to the Florida Supreme Court was denied.

Dep't of Env'tl. Protection v. South Palafox Properties, LLC, No. 2014-CA-001611 (Fla. 1st Cir. Ct. 2016): South Palafox Properties, LLC, owned and operated the Rolling Hills Construction and Demolition Debris Disposal Facility in Pensacola, Florida. The Department filed an action in circuit court against South Palafox seeking injunctive relief and civil penalties for the following violations: water quality violations, failure to implement a remedial action plan pursuant to the terms of a 2011 consent order, failure to provide adequate financial assurance for closure/long term care

and corrective actions, objectionable odor, disposing of unauthorized waste in the facility and depositing waste outside the permitted limits for the facility.

On June 7, 2016, final judgment was entered in the Department's favor granting all of the permanent injunctive relief requested by the Department and \$38,000 in civil penalties and costs. The injunctive relief granted includes access for the Department to perform final closure of the facility and requirements that South Palafox fully and properly construct and operate the remedial action system and remediate the surface water exceedances and groundwater contamination. The final judgment also required South Palafox to obtain sufficient financial assurance for closure, longterm care and corrective action.

Chapter 62-780: Contaminated Site Cleanup Criteria (aka RBCA rule)

Chapter 62-780, F.A.C., was adopted in 2005 and has not been substantially updated on a technical basis since then. In the intervening time, much has been learned with regard to applying Risk-Based Corrective Action (RBCA) principles to contaminated site management and closure. The Department has been in rulemaking for over a year. The rule chapter has been modernized to incorporate these "lessons learned" and to facilitate contaminated site closure. The rule was also revised to allow the use of new techniques and approaches and to reflect the changes to the RBCA statutes passed during the 2016 legislative session.

Specific adjustments to the rule include clarifications and updates on: 1) the use of existing governmental controls as institutional controls for site closure, 2) criteria for consideration when using a risk assessment, 3) taking the additive effects of chemicals into account, 4) procedures and documentation for emergency response and interim source removal, 5) use of alternative soil sampling and

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analysis techniques, and 6) noticing and reporting requirements throughout the chapter. The Department hopes to obtain the necessary internal approvals so that a Notice of Proposed Rulemaking can be published by early September.

Rule 62-772.300 and .401: Procurement Procedures for the Petroleum Restoration Program

On April 6, 2016, changes to two rules became effective in the Petroleum Restoration Program (PRP) regarding its contractor qualifications and assignment of these contractors to work on state-funded petroleum discharges. Rule 62-772.300, F.A.C., changes the contractor performance review forms due to experience gained during implementation of these new contracts which demonstrated the need to eliminate the annual evaluation form and modify the performance criteria in the remaining evaluation form to be more objective, streamlined, and compatible with the purchase order completion process. In addition, a new form is created to more formally solicit owner/responsible party input in contractor performance evaluations.

Rule 62-772.401, F.A.C., adds an administrative option for owners and responsible parties of sites with eligibility types that do not require a cost share to recommend an agency term contractor that the Department competitively procured to work on their sites. This option would be provided if such owners voluntarily enter into a conditional closure agreement with the Department where the owner agrees to a conditional closure in accordance Chapter 62-780, F.A.C.



On Appeal

by Larry Sellers, Holland & Knight

Note: Status of cases is as of August 12, 2016. Readers are encouraged to advise the author of pending appeals that should be included.

FLORIDA SUPREME COURT

Hardee County v. FINR II, Inc., Case No. SC 15-1260. Petition for review of the 2nd DCA's decision in *FINR v. Hardee County*, 40 FLW D1355 (Fla. 2d DCA June 10, 2015), in which the court held that "the Bert Harris Act provides a cause of action to owners of real property that has been inordinately burdened and diminished in value due to governmental action directly taken against an adjacent property," and certified conflict with the 1st DCA's decision in *City of Jacksonville v. Smith*, 159 So. 3d 888 (Fla. 1st DCA 2015) (question certified). Status: Jurisdiction accepted on August 18, 2015; oral argument date set for November 3, 2016. Note: the Florida Supreme Court also has accepted jurisdiction to review the question certified in *City of Jacksonville* (see below).

R. Lee Smith, et al. v. City of Jacksonville, Case No. SC 15-534. Petition for review of the 1st DCA's decision in *City of Jacksonville v. R. Lee Smith, et al.*, in which the majority of an *en banc* court determined that a property owner may not maintain an action pursuant to the Bert Harris Act if that owner has not had a law, regulation, or ordinance applied which restricts or limits the use of the owner's property. 159 So. 3d 888 (Fla. 1st DCA 2015). Status: Jurisdiction accepted on May 22, 2015; suggestion of mootness denied on March 18, 2016; Oral argument date set November 3, 2016. Note: Legislation enacted during the 2015 regular session clarifies that the Bert Harris Act is applicable only to action taken directly on the property owner's land and not to activities that are authorized on adjoining or adjacent properties. See Chapter 2015-142, *Laws of Florida*.

FIRST DCA

Nipper v. Walton County, Case No. 1D16-512. Appeal from final judgment granting Walton County's request for an injunction, enjoining operation of commercial skydiving activity. The appellants originally filed a complaint against Walton County seeking a declaration that the county could not regulate a skydiving business on appellants' farm, asserting that Section 570.96, Florida Statutes, preempts the county from regulating the skydiving business because it constitutes "agritourism" as defined in statute. The county counterclaimed for injunctive relief, which was granted by the court. Status: Notice of appeal filed February 8, 2016.

Putnam County Environmental Council, Inc. v. SJRWMD, Case No. 1D15-5725. Appeal from final order of the Florida Land and Water Adjudicatory Commission determining that St. John's River Water Management District's fourth addendum to the 2005 water supply plan is consistent with the provisions in and purposes of Chapter 373, Florida Statutes. Status: Notice of appeal filed December 16, 2015.

South Palafox Properties, LLC, et al. v. FDEP, Case No. 1D15-2949. Appeal of Florida Department of Environmental Protection ("DEP") final order revoking operating permit for construction and demolition debris disposal facility, DOAH Case No. 14-3674 (final order entered May 29, 2015). Among other things, the final order determines that the appropriate burden of proof is preponderance of the evidence, DEP has substantial prosecutorial discretion to revoke (as opposed to suspend) the permit, and that mitigation is irrelevant. Status: Notice of appeal filed June 25, 2015.

Herbits, et al. v. Board of Trustees of the Internal Improvement Trust Fund, Case No. 1D15-1076. Appeal from a final order dismissing an administrative petition filed by the appellants

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ON APPEAL . . .

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against the Board of Trustees of the Internal Improvement Trust Fund, which challenges the Trustees' decision to approve the City of Miami's request for a Partial Modification of Original Restriction to Deed No. 19447. The final order dismissed the petitioners' second amended petition on the grounds that the second amended petition: (1) is based upon the defective premise that the land in question is sovereign submerged lands; (2) fails to show that the petitioners as third parties may challenge this minor and purely proprietary Board action under sections 120.569 and 120.57, Florida Statutes; and (3) fails to establish that the petitioners' substantial interests will be affected by the Board's action granting Partial Modification of Original Restrictions to Deed No. 19447. Status: Affirmed per curiam on June 24, 2016; motion for rehearing and rehearing en banc denied August 3, 2016.

THIRD DCA

Atlantic Civil, Inc., v. Florida Power & Light Company Turkey Point, Case No.: 3D16-978. Appeal from DEP final order approving administrative order requiring FPL to take certain actions to address issues relating to the surface and groundwater quality due to the cooling canal system at the Turkey Point Power Plant. The administrative law judge had recommended that DEP rescind the administrative order or amend it in certain respects, because the administrative order issued by DEP is an unreasonable exercise of enforcement authority because the order does not require compliance with the law or specify a reasonable time for compliance. Status: Notice of appeal filed April 28, 2016; notice of voluntary dismissal recognized on August 8, 2016.

Atlantic Civil, Inc., v. Florida Power & Light Company Turkey Point, Case No.: 3D16-977. Appeal from final order entered by Siting Board approving modification of conditions of certification of the Turkey Point Power Plant Units 3, 4 and 5, located in southeast Miami-Dade County. The modification authorizes construction and operation of six new

production wells to withdraw 14 million gallons per day for use in the Turkey Point cooling canal system for salinity reduction and management purposes. Status: Notice of appeal filed April 27, 2016; notice of voluntary dismissal recognized on August 8, 2016.

Village of Key Biscayne, etc., v. DEP, Case No.: 3D15-2824. Appeal from final order dismissing with prejudice the Village's petition for administrative hearing challenging DEP's notice of intent to issue an Environmental Resource Permit ("ERP") to install temporary floating docks in Biscayne Bay at the Miami Marine Stadium in Miami-Dade County. In its final order, DEP determines that the petition's allegations do not demonstrate actual injury-in-fact or real and immediate threat of direct injury to interests that are protected in this type of environmental permitting proceeding. In addition, the final order determines that allegations regarding economic investments and contractual objections are not the types of interests protected by this type of proceeding. Finally, the final order also determines that the petitioner's allegations regarding local comprehensive plans and zoning regulations are also not within the zone of interest of this type of environmental proceeding. Status: Notice of appeal filed December 14, 2015; oral argument set for September 13, 2016.

Miami-Dade County, et al. v. Florida Power & Light Co., et al., Case No.: 3D14-1467. Appeal from final order of the Siting Board certifying two nuclear units at Turkey Point as well as proposed corridors for transmission lines. Status: Reversed and remanded to the Siting Board for further review on April 20, 2016; motion for rehearing and rehearing en banc filed June 6, 2016.

FOURTH DCA

One Watermark Place of the Palm Beaches Condo Association, et al., v. DEP, Case No.: 4D16-953. Appeal of DEP final order dismissing with prejudice a petition for administrative hearing challenging DEP's action on behalf of the Board of Trustees of the Internal Improvement Trust Fund to amend the sovereignty submerged lands lease issued in favor of Palm Beach Docks, LLC, in Palm Beach County. In its final order, DEP

determines (1) that the Administrative Procedure Act ("APA") does not apply to proprietary decisions; (2) execution of the lease was not "final agency action" subject to challenge; (3) the amended petition does not contain allegations demonstrating individual standing; (4) the amended petition does not contain allegations demonstrating associational standing; (5) the request for relief is not within the Board's jurisdiction; and (6) lack of notice is not a disputed issue of material fact. Status: Notice of voluntary dismissal filed July 11, 2016.

DEP v. Beach Group Investment, LLC, Case No. 4D14-3307. Appeal from order determining that plaintiff Beach Group Investments, LLC, prevailed in its claim for inverse condemnation based on DEP's refusal to issue the requested Coastal Construction Control Line permit. Status: Reversed on August 3, 2016.

FIFTH DCA

McClash, et al., v. SWFWMD, Case No. 5D15-3424. Appeal of Southwest Florida Water Management District's ("SWFWMD") final order issuing an environmental resource permit (ERP) to a Land Trust for its proposed project on Perico Island in Bradenton, over a contrary recommendation by the administrative law judge ("ALJ"). The ALJ recommended that SWFWMD deny the ERP because practicable modifications were not made to avoid wetland impacts and cumulative adverse effects and the project would cause significant environmental harm. In its final order, SWFWMD concludes that the mitigation proposed by the applicant is sufficient and that reduction and elimination of impacts to wetlands and other surface waters was adequately explored and considered. Status: Notice of appeal filed September 29, 2015.

St. Johns Riverkeeper, Inc., et al., v. SJRWMD, et al., Case No. 5D15-2831. Appeal from a final order of the St. Johns River Water Management District approving issuance of consumptive use permit for irrigation and support of a grass-fed cattle ranch. DOAH Case No. 14-2610 (final order entered July 15, 2015). Status: Notice of appeal filed August 13, 2015; oral argument set for September 27, 2016.

Law School Liaisons

Florida State University College of Law Fall 2016 Update

by David Markell, Steven M. Goldstein Professor

This column highlights recent accomplishments of our College of Law alumni, students, and faculty. We also feature the events the Environmental, Energy, and Land Use Law Program will hold during the fall semester.



HOWARD FOX



MARY THOMAS



JACOB CREMER



STEVEN SPECHT

Recent Alumni Accomplishments

- Two Florida State Univ. College of Law alumni are currently running for Congress. **Mary Thomas** qualified for the Republican primary for the U.S. House of Representatives in Florida's Second Congressional District. **Steven Specht** is the Democratic candidate for the U.S. House of Representatives in Florida's First Congressional District.
- **Colin M. Roopnarine** was listed for the third consecutive year in "Florida Trend" magazine's Elite, and is serving as the Chair of the "State and Federal Government and Administrative Practice" Board Certification Committee for 2016-2017.

- **Howard Fox** was promoted to shareholder at his firm, Fowler White Burnett. He recently gave presentations at the University of Miami and FIU law schools on environmental enforcement and other topics.
- **Terry J. Wood** received the Guardian ad Litem Program's statewide award for Courtesy and Collaboration at the 2016 GAL Disabilities Training Conference.
- **Jacob Cremer** spoke on a panel on June 2 during the annual conference of the National Forest Landowners Association titled "Understanding Your Rights as a Landowner in the Face of Increasing State and Federal Regulation." He also spoke on a panel on June 21st at the Florida Annual Environmental Permitting Summer School titled "Property Rights 101."
- **Russel Lazega** recently published a memoir called *Managing Bubbie* about his grandmother's incredible escape from the Nazis braided together with heartwarming stories of her later years (1980's). *Managing Bubbie* has won 18 book awards. In July it will be released as a star-studded cast audiobook including: Tony Award winner Linda Lavin ("Alice"); Grammy nominated comic Judy Tenuta; film star Lainie Kazan ("My Big Fat Greek Wedding" & "Beaches"); Ethan S. Smith ("All About the Benjamins"); voiceman extraordinaire JJ Crowne ("Graceland") and more. A movie script is also nearing completion.
- **Alissa B. Meyers** began work as the Environmental Regulatory Compliance Administrator for the city of Tallahassee. She is responsible for keeping the city in compliance with federal, state, and local environmental regulations.

- **Steven Specht** recently won an award for his paper "Developing an International Carbon Tax Regime," which was published in the *McGill International Journal of Sustainable Development Law and Policy*.
- **Jay Paull** is General Manager of pdvWireless in Reston, Virginia, a new telecommunications company created by the founders of Nextel Communications. He was an editor of the FSU Journal of Land Use & Environmental Law and following graduation practiced in a prominent, boutique land use and growth management firm in Tallahassee.

Recent Student Achievements

- **Mallory Neumann** recently completed a summer fellowship position with the University of California, Los Angeles School of Law's (UCLA's) Resnick Program for Food Law and Policy, where she conducted research and prepared memos on various food law issues including administrative, environmental, and corporate law. She is currently working on a project through the *Harvard Food Law and Policy Clinic Farm Bill Consortium* researching Title IV-Nutrition to recommend policy proposals for the next farm bill.
- The 2016-2017 Journal of Land Use & Environmental Law Executive Board consists of: **Travis Voyles**, Editor-in-Chief; **Daniel Wolfe**, Executive Editor; **Tyler Parks**, Executive Editor; **Suhail Chhabra**, Senior Articles Editor; **Brent Marshall**, Administrative Editor; and **Melina Garcia**, Associate Editor.
- The 2016-2017 Environmental Law Society Executive Board consists of: **Jess Melkun**, President;

continued...

LAW SCHOOL LIAISONS

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- **Jessica Farrell**, Vice President; **Blair Schneider**, Treasurer; **Janaye Garrett**, Secretary; and **Travis Voyles**, Networking Chair.

Recent Faculty Achievements

- FSU's Environmental Law faculty members have recently been recognized by the *Land Use & Environment Law Review*, a peer-selected annual publication of significant legal scholarship in land use and



Travis Voyles, Editor-in-Chief
Journal of Land Use & Environmental Law



Jess Melkun, President
Environmental Law Society

environmental law. Two of Professor **Hannah Wiseman's** articles were selected for republication in the 2016-2017 edition, including "The Fracking Revolution: Shale Gas as a Case Study in Innovation Policy" and "Regulatory Islands." In addition, Professor **Shi-Ling Hsu's** "The Accidental Postmodernists: A New Era of Skepticism in Environmental Policy," and Professor **Dave Markell's** "A Holistic Look at Agency Enforcement" articles were both included in the list of 25 finalists out of over 110 qualifying articles. FSU had the most papers selected of any law school in the United States with

4 papers in total; only three law schools had as many as 2 papers selected. Since 2000 FSU has had 8 papers recognized by the *Land Use & Environment Law Review*; only three other law schools have had more articles selected.

- **Erin Ryan** was appointed the Elizabeth C. and Clyde W. Atkinson Professor of Law at FSU and elected to the Board of Directors to the international Association for Law, Property, and Society. In June, she traveled to China, where she presented on American multilevel environmental governance at Ocean University in Qingdao and Tsinghua University in Beijing. In Beijing, she participated in *Pathways to a Clean Environment: Law, Enforcement, and the Public in China and the U.S.*, a conference co-sponsored by the University of Chicago and Tsinghua University. In May, she traveled to Northern Ireland to present on American federalism and secession at the Association for Law, Property, and Society conference at Queens University in Belfast. This summer, she published *Federalism, Regulatory Architecture, and the Clean Water Rule: Seeking Consensus on the Waters of the United States*, 46 ENVTL. L. 277 (2016). She recently provided press interviews to the Xinhua News Agency in China, about toxic playground equipment in Beijing; to Power Magazine in the U.S. about the Clean Power Plan case; and Bloomberg BNA about the constitutionality of promises by presidential candidates to abolish the EPA and Department of Energy.
- **Shi-Ling Hsu** was recently named the D'Alemberte Professor of Law. Additionally, Professor Hsu has published two book chapters, *International Market Mechanisms*, in the OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW, and *Carbon Taxes*, in GLOBAL CLIMATE LAW. In May, he also presented his work in progress, "Human Capital in a Climate-Changed World," at the Sustainability Conference for American Legal Educators in Tempe, AZ, and at the 8th Annual Meeting of the Society for Environmental

Law and Economics, in Austin, TX.

- **David Markell** is now serving as Associate Dean for Research. His recent and forthcoming publications include: *EPA Next Generation Compliance*, 30 NATURAL RESOURCES & ENVIRONMENT 22 (Winter 2016); *Compliance and Enforcement of Environmental Law* (L. Paddock and D. Markell, eds., Edward Elgar, forthcoming 2016); *Technological Innovation and Environmental Enforcement*, 43 ECOL. L. Q. __ (forthcoming 2016) (with Robert L. Glicksman); *Emerging Legal and Institutional Responses to Sea-Level Rise in Florida and Beyond*, 42 COLUMBIA JOURNAL OF ENVIRONMENTAL LAW __ (forthcoming 2016); and *Dynamic Governance in Theory and Application, Part I* (with Robert L. Glicksman), 58 ARIZONA L. REV. __ (forthcoming 2016).
- **Hannah Wiseman** presented her article on "Regional Energy Governance and U.S. Carbon Emissions" (co-authored with Hari Osofsky) at the Society for Environmental Law and Economics conference at the University of Texas Law School and delivered a "hot topics" presentation on energy preemption at Vermont Law School. Her upcoming publications include HYDRAULIC FRACTURING: A GUIDE TO THE ENVIRONMENTAL AND REAL PROPERTY ISSUES (with Keith B. Hall) (American Bar Association) (forthcoming 2016); ENERGY LAW CONCEPTS & INSIGHTS (with Alexandra B. Klass) (Foundation Press) (forthcoming 2016); and The Environmental Risks of Shale Gas Development and Emerging Regulatory Responses: A U.S. Perspective, in HANDBOOK OF SHALE GAS LAW AND POLICY (Tina Hunter, editor) (Intersentia) (forthcoming 2016).

Fall 2016 Events

Environmental Law without Courts Conference

FSU Law will host a conference on Friday, September 16th, Environmental Law without Courts. Follow-

continued...

LAW SCHOOL LIAISONS

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ing our successful 2014 event, Environmental Law without Congress, the 2016 conference will bring together prominent environmental and administrative law scholars from across the country, and explore different ways in which administrative agencies have implemented environmental policies largely without court supervision or intervention. Presenters will include **Eric Biber, Sharon Jacobs, Sarah Light, Christopher Walker, Robin Kundis Craig, Robert Glicksman, and Emily Hammond**. The event will begin at 9:30 a.m. in Room 310 of Roberts Hall.



SARAH LIGHT



ROBIN KUNDIS CRAIG



ERIC BIBER



CHRISTOPHER WALKER



ROBERT GLICKSMAN



EMILY HAMMOND



SHARON JACOBS

Fall 2016 Distinguished Lecture

Robert Percival, Robert F. Stanton Professor of Law and Director of the Environmental Law Program, the University of Maryland Francis King Carey School of Law, will be the fall Distinguished Lecturer. Professor Percival's lecture will begin at 3:30 p.m. on Wednesday, October 19 and will be followed by a reception in the College of Law Rotunda.



ROBERT PERCIVAL

Environmental Certificate & Environmental LL.M. Luncheon Speakers

Professor Blake Hudson, Burlington Resources Professor of Environmental Law and Edward J. Womac, Jr. Professor of Energy Law, Louisiana State University Paul M. Hebert Law Center. Professor Hudson's luncheon will begin at 12:30 p.m. on Wednesday, October 5 in Room A221.

Professor Roberta Mann, Mr. and Mrs. L. L. Stewart Professor of Business Law, University of Oregon School of Law. Professor Mann's luncheon will begin at 12:30 p.m. on Wednesday, November 16 in Room A221.



BLAKE HUDSON



ROBERTA MANN

Fall 2016 Externship Seminar Guest Lectures

Our Externship Seminar Guest Lectures will feature several leading attorneys, including: **Magistrate Judge Charles Stampelos**, U.S. District Court, **Administrative Law Judge Larry Johnston**, Division of Administrative Hearings, **Herb Thiele**, Leon County Attorney, and **Ross Vickers**, Department of Business Regulation.

Networking Luncheon

Michael Gray, United States Department of Justice Environment and Natural Resources Division. This networking luncheon will be held on Monday, October 24.

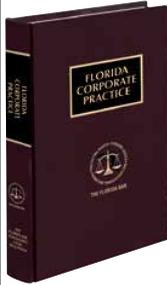
Information on upcoming events is available at <http://law.fsu.edu/academics/jd-program/environmental-energy-land-use-law/environmental-program-events>. We hope Section members will join us for one or more of these events.





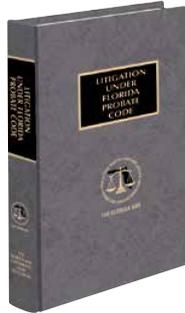
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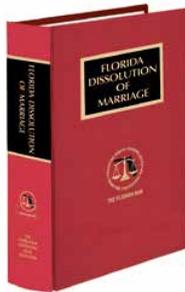
Business Litigation in Florida
Creditors' and Debtors' Practice in
Florida
Florida Corporate Practice
Florida Small Business Practice



ESTATE PLANNING AND ADMINISTRATION

Administration of Trusts in Florida
Asset Protection in Florida
Basic Estate Planning in Florida
Florida Guardianship Practice
Florida Will and Trust Forms Manual
Automated Forms Version
Florida Will and Trust Forms Manual
Florida Will and Trust Forms Manual & Automated Forms
Version Combo
Litigation Under Florida Probate Code
Practice Under Florida Probate Code
The Florida Bar Probate System

FAMILY LAW *(see also TRIAL PRACTICE)*



Adoption, Paternity, and Other
Florida Family Practice
Drafting Marriage Contracts in
Florida
Florida Dissolution of Marriage
Florida Family Law Case
Summaries
Florida Family Law Set
(Rules and Statutes)
Florida Juvenile Law and Practice
Florida Proceedings After Dissolution
of Marriage

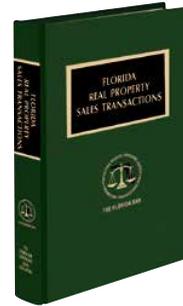
JURY INSTRUCTIONS

Florida Standard Jury Instructions in
Civil Cases
Florida Standard Jury Instructions in
Criminal Cases
Florida Standard Jury Instructions:
Contract and Business Cases



REAL PROPERTY LAW

Florida Practitioner's Guide: Mortgage
Foreclosure and Alternatives
Florida Condominium and Community
Association Law
Florida Construction Law and
Practice
Florida Eminent Domain Practice and
Procedure
Florida Real Property Complex
Transactions
Florida Real Property Litigation
Florida Real Property Sales Transactions
Florida Real Property Title Examination and Insurance
Foreclosures in Florida

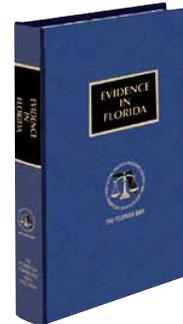


RULES OF PROCEDURE

Florida Criminal, Traffic Court, and
Appellate Rules of Procedure
Florida Probate Rules
Florida Civil, Judicial, Small Claims,
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Evidence Code
Florida Rules of Juvenile Procedure

TRIAL PRACTICE

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UF Law Update

Submitted by Mary Jane Angelo, Director, Environmental and Land Use Law Program, and Thomas T. Ankersen, Director, Conservation Clinic, University of Florida Levin College of Law

UF ELULP Graduate Awarded Prestigious Fellowship

ELULP Certificate holder and recent UF Law Graduate Adrian Mahoney has been selected to represent Florida in Washington D.C. as one of the National Sea Grant Knauss Fellows. Knauss fellowships allow recently graduated students from graduate and professional schools to spend 1 year with a paid internship in Washington D.C. working in marine and coastal policy in either Congress or the Executive Branch. Mahoney is the fourth UF Law alumnus and third ELULP certificate student to receive the prestigious Knauss Fellowship.

Reached as he hunkered down for Bar prep, Mahoney took a minute to reflect on the fellowship and how the ELULP prepared him: "I am thrilled to have been selected as a 2017 Sea Grant Knauss Fellow. I started my law school career at the University of Florida Levin

College of Law with a background in marine ecology and a desire to pursue a career in environmental law and policy - especially marine and coastal law. In order to accomplish my goals, I quickly signed up for the Environmental and Land Use Law Certificate Program and became involved with the Environmental and Land Use Law Society. Enrolling in the certificate courses and Conservation Clinic taught me the substantive legal knowledge and professional skills I needed to succeed while also connecting me with professors who were dedicated to helping their students reach their goals. My conservation clinic projects all involved marine and coastal law, including habitat restoration, marine debris and beach access. I would not be starting my legal career as a Knauss Fellow if it were not for the support and experience I received from the Environmental and Land Use Law Certificate Program."

UF Law Students Study In Costa Rica

The ELULP's 2016 Costa Rica study abroad program - Tropical Conservation and Sustainable Development: Law, Policy and Practice - included participants from the United States, Costa Rica, Peru, Brazil, Equatorial Guinea and the Netherlands. In addition to taking courses and exploring the jungles and beaches of Costa Rica, the students worked on a variety of projects and presented their final projects to stakeholders at the University of Costa Rica's Ciudad de Investigación (research campus) in San Jose. Doing group work is difficult enough but the challenge of doing it across languages, cultures, legal systems and disciplines makes it even more so. Add in the inconveniences of travel and you have the makings of an international consultancy, which is what the program seeks to provide. The students are pictured here in front of the National Cathedral in downtown San Jose.



Ten 2016 UF Law Graduates Received The ELULP's Certificate In Environmental And Land Use Law.

The 10 students are: Joseph Adams, H. Bryan Boukari, Wesley Hevia, Amanda Hudson, Jennifer Lomberk, Adrian Mahoney, William Michaelis, Tiffany Miles, Gennaro Scibelli and Bradley Tennant. While at UF Law, these students took in everything the Program had to offer: chairing the annual Public Interest Environmental Law Conference, leading the Environmental Land Use Law Society & law school woods restoration effort, participating in the national Environmental Moot Court competition, taking field courses from Costa Rica to the Bahamas, advancing Conservation Clinic projects throughout the state and otherwise demonstrating leadership that will no doubt lead them to where they want to go.

UF ELULP Extern Shines At The United Nations

Thanks to a strong network of alums and a deep bench of colleagues, The ELULP's externship program offers students experiential opportunities that stretch across the vast terrain of environmental law, from corporate compliance to environmental enforcement, from local governments to global governments. Perhaps no UF Law extern had a more interesting and exciting summer than 2L Anna Jimenez. A dual national Costa Rican, Jimenez took her talents and unique skill set to New York and the United Nations, where she externed in the Costa Rican U.N. embassy, under the supervision of attorney and deputy ambassador Rolando Castro. Castro has been collaborating with the ELULP's Costa Rica Program since he was a law student at the University of Costa Rica nearly 20 years ago. Most recently, he spoke at the 2016 ELULP Public Interest Environmental Conference. Jimenez's experience at the UN would be the envy of even seasoned attorneys. In her own words:

"Being exposed to the diplomatic environment has been fascinating, being able to witness how conversa-

tions become international agreements still gives me the chills. For example, I attended and represented Costa Rica at the Fish Stock Agreement revision, and I represented and spoke on behalf of Costa Rica at the STI forum for the G77 + China. Additionally, I participated in the Marine Debris, Plastic and Microplastic Informal Consultative Meeting, and I prepared materials for the consultative drafting meeting of the Biodiversity Beyond Nation Jurisdiction agreement (BBNJ). Costa Rica is a pioneer in the creation of this agreement and I was given the task to do research on other international agreements in order to draft an agreement that will work symbiotically with existing international conventions."

If all that international environmental law were not enough, Jimenez also served in the UN at an historic time. Costa Rica's Christiana Figueres, who serves as Executive Secretary of the United Nations Framework Convention on Climate Change, and is widely credited with spearheading the successfully concluded global climate agreement in Paris, has been nominated to be Secretary General of the United Nations. Jimenez's bilingual skills came in handy. She was

charged with translating and editing speeches and researching briefing documents for Figueres, who visited the UN for a round of interviews and discussions during Jimenez's externship. Aware of the significance of Figueres run, Jimenez notes:

"This election will not be forgotten as it is the first time women are running for the position of Secretary General. It was an honor for me to be part of the task force of Ms. Figueres as this is a legendary moment for Costa Rica in the international arena."

As a footnote to this post, before she became a global policymaker, Figueres was a keynote speaker at ELULP's fourth annual Public Interest Environmental Conference in 1998. It's a small world, and Costa Rica is a small country where UF's roots run deep.

Despite this immersion in environmental diplomacy, Jimenez has her heart set on practicing law in the United States, in the government or with a firm. She is also a member of the UF Law moot court team.

To keep abreast of the ELULP's activities, visit or like our Facebook page:

<https://www.facebook.com/uflawELULP/>



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MEMBERSHIP OPTIONS / DUES

The Florida Bar dues structure does not provide for prorated dues; your Section dues cover the period from July 1 to June 30. Your application and check should be mailed to The Environmental and Land use Law Section, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300.

I AM... (check one)	MEMBERSHIP OPTION	ANNUAL DUES
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	AFFILIATE – Professionals and Faculty	\$50
	AFFILIATE – Students	\$20

I understand that all privileges accorded to members of the section are accorded affiliates and law students, except that affiliates may not advertise their status in any way, and neither affiliates nor law students may vote, or hold office in the Section or participate in the selection of Executive Council members or officers.

CERTIFICATION: I hereby certify that I have never been denied admission to any bar, or been the subject of any proceeding questioning my moral character, disbarred from any legal bar, convicted of a felony, expelled from any University or Law School, or investigated for fraud, misappropriation or mismanagement of funds.

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property rights from government regulation.⁷ The Act passed unanimously in Florida's House and with only one dissenting vote in the Florida Senate.⁸ Declaring "an important state interest in protecting the interests of private property owners," it created a new cause of action when a government mandate "unfairly affects real property."⁹ It provides that property owners should be reimbursed for the loss of value to their property when a government regulation "inordinately burden[s]" an existing use or a vested right.¹⁰ Under the Act, an intended use becomes a vested right under either equitable estoppel or substantive due process: "The existence of a 'vested right' is to be determined by applying the principles of equitable estoppel or substantive due process under the common law or by applying the statutory law of this state."¹¹

Outside of the Act, a "vested right" has been almost synonymous with equitable estoppel in Florida.¹² Under equitable estoppel, a vested interest arises when a property owner in good faith, relying on an act or omission of the government, has made a substantial change in position or incurred such extensive obligations that it would be unjust to destroy the acquired right.¹³ Although uncommon, Florida courts have also recognized that a vested right arises without detrimental reliance by the plaintiff, when the government acts in bad faith in denying a permit or license.¹⁴ For example, in *City of Margate v. Amoco Oil Co.*, "the City illegally denied a permit that should have been issued and then tried to pass ordinances that would authorize a denial."¹⁵ The court found that the City exhibited "bad faith and an avoidance of duty, such that estoppel should apply."¹⁶

Substantive due process, on the other hand, forbids the government from acting in an arbitrary or capricious manner to deprive an individual of a constitutionally recognized right.¹⁷ In constitutional law, it applies to an already recognized right; it is not a test for determining what constitutes a recognized property right.¹⁸ Yet the Harris Act

provides that one can determine whether a vested right exists based on "principles of equitable estoppel or substantive due process."

The Harris Act's substantive due process vesting test, to be meaningful, must offer protections to real property rights that are not already protected elsewhere in the statute.¹⁹ Therefore, the court cannot resort to treating the substantive due process vesting as identical to equitable estoppel. Neither can the substantive due process provision be interpreted as merely protecting current or reasonably foreseeable uses, since the Act already protects "existing uses." Under the Act, "existing uses" includes not only present and actual uses, but also reasonable foreseeable uses that are non-speculative, compatible with neighboring land uses, and suitable for the land, such that it affects the property's fair-market value.²⁰ Although unsure of the provision's full reach, scholars have overwhelmingly agreed that substantive due process must create a new protection, significantly expanding the definition of a vested right.²¹

To best understand how property rights may vest under "principles" of substantive due process, it is necessary to better understand those principles and how substantive due process functions.

II. Vested interests under principles of substantive due process: bad faith, or arbitrary or capricious government action can convert otherwise unprotected interests into protected interests

The Constitution's due process requirement "was intended to prevent government officials from abusing their power, or employing it as an instrument of oppression."²² The Constitution recognizes substantive due process, as it relates to property, in the Due Process Clauses of the Fourteenth and Fifth Amendments, which provide that individuals should not be deprived of life, liberty, or property, without due process of law. Substantive due process forbids the government from acting in an arbitrary, capricious, irrational, or illegitimate manner.²³

Substantive due process protection is distinct from takings jurisprudence, although the two frequently overlap. When the government legitimately

uses its police power to "intrusively regulate the use of property," but fails to appropriately compensate the property owner, it violates the Just Compensation Clause; the land use ordinance or regulation itself is not invalid, rather it is the lack of compensation that violates the Constitution.²⁴ However, when the government acts arbitrarily or capriciously, the action itself is invalid under substantive due process.²⁵

There are two prongs to a substantive due process inquiry: a court will first determine whether there is a constitutionally protected right at stake; then the court will determine whether the government's action was arbitrary or capricious.²⁶ Determining whether there is a constitutionally protected real property interest simply involves applying the traditional vesting test of equitable estoppel or determining whether the interest is present and actual.²⁷ Both of these types of interests are already explicitly covered in the Harris Act.²⁸ Thus, to give meaning to the due process provision, the Bert Harris vesting test should focus on the arbitrary and capricious standard.

To determine whether the government has violated the arbitrary and capricious standard of substantive due process, a court must determine whether the government used a legitimate means to accomplish a legitimate public goal.²⁹ The test is deferential to the government, but not without teeth.³⁰ In *Joint Ventures*, the Florida Supreme Court found that the government violated substantive due process when it attempted to keep land values low in anticipation of eminent domain proceedings.³¹ Related behaviors forbidden under the arbitrary and capricious standard include government actions that shock the conscience or that are pretextual.³²

At minimum, the Bert Harris Act unequivocally protects interests like those in *Amoco Oil*.³³ There, the court held that the government's illegal permit denial and subsequent attempts to change the rules were arbitrary and capricious.³⁴ Thus, even where a plaintiff has not detrimentally relied on a government act or omission, his right to a particular

continued...

use should vest under the Bert Harris Act where the government acts in bad faith, or acts arbitrarily and capriciously.³⁵ But because Florida courts have suggested that this protection from bad faith is already part of equitable estoppel, the Act should go further than *Amoco Oil*.³⁶ Indeed, according to David L. Powell, Robert M. Rhodes, and Dan R. Stengle, attorneys involved in crafting the bill, the Bert Harris Act's substantive due process provision was intended to extend protection well beyond equitable estoppel, "enabl[ing] the judiciary to craft a constitutionally based vesting test separate from takings theories or remedies, and distinct from equitable estoppel."³⁷

Thus vested rights under substantive due process could serve to protect property owners when the government acts in bad faith, but the elements of equitable estoppel are lacking. Equitable estoppel requires good faith and substantial reliance on the part of the property owner, and it is limited—to some extent—by the regulatory status of the property at the time of the negotiations. But the Act's substantive due process provision should hold that where the government has acted in bad faith and put the property owner in an unfair position, the Bert Harris Act protects him.

III. What effect would vested rights arising from substantive due process have on actual Bert Harris Claims?

Vested rights under principles of substantive due process could, for example, allow a property owner who had received approval for an initial phase in a multi-phase project, to receive a vested right for the entire project.³⁸ Likewise, it could allow a property owner who relies on promises from the government that it will change its comprehensive plan or a particular regulation, to recover compensation when the government pulls the proverbial rug from underneath the property owner.

Vested rights under a substantive due process theory could have significant impacts for people like Sim-

one and Lyder Johnson. In *Pacetta v. Town of Ponce Inlet*, the Town of Ponce Inlet (the "Town") encouraged the Johnsons (owners of the Pacetta, LLC) to expand their modest plan to build a retirement home and small residential development into a more ambitious plan for a larger development.³⁹ The Town worked closely with the Johnsons, negotiating public improvements into the development, passing pro-development ordinances, and issuing permits for the early stages of the development.⁴⁰ The Town council subsequently turned against the project, and passed a series of moratoriums and anti-development ordinances. According to the trial court, the Town singled out the Johnsons' land and destroyed any economically feasible use of their property.⁴¹ The trial court found that the Town had unconstitutionally taken some of the Johnsons' property and that all of their land was "inordinately burdened" under the Bert Harris Act.⁴² Using equitable estoppel, the only type of vesting raised by the plaintiffs, the trial court determined that the Johnsons' right to their planned development had vested.⁴³ The Town, however, abdicated any responsibility for the Johnsons' reliance on the Town's actions by arguing that the comprehensive land use plan had never permitted the use of dry stack storage, something key to the entire development's success. On appeal, the Fifth District Court of Appeal agreed with the Town, holding that the Johnsons' rights had not vested, because their plan conflicted with the comprehensive plan.⁴⁴

But the substantive due process prong of the Bert Harris Act could have offered the Johnsons protections not provided by an equitable estoppel claim.⁴⁵ The trial court determined that the Town violated the Johnsons' rights to equal protection and due process.⁴⁶ Not only had the Town singled out the Johnsons for bad treatment, the trial court also found that the property owned by the Johnsons "had been long targeted for acquisition" by the Mayor and Town council members.⁴⁷ The Town's treatment of the Johnsons was designed to keep prices low to allow the Town or an alternate investment group to "acquire the property upon the developer's failure."⁴⁸ The Town acted in bad faith, with the intent to finan-

cially punish the Johnsons to acquire the land at a low price either directly or through government-selected investors.⁴⁹ The Town's actions, by definition, were arbitrary and capricious.⁵⁰ Specifically, the Town enticed the Johnsons to purchase additional land and to spend millions preparing for the development.⁵¹ Only after the Johnsons invested about \$16 million on the property purchases prompted by the Town and \$5 million in development costs did the Town renege, intending to acquire the property for itself at a cheaper price.⁵² The Town's actions were even more egregious than the government's act of attempting to freeze property values in *Joint Ventures*.⁵³ Thus, even though the Town's comprehensive plan forbade the development all along, the Bert Harris Act's substantive due process provision should have protected the Johnsons, because it acts as a prohibition against the government acting in an illegitimate bad-faith manner.

Conclusion

To effectuate the Bert Harris Act as the legislature intended, courts should find a property interest to have vested when the government arbitrarily or capriciously acts to burden interests in real property. But in order for courts to do this, practitioners should employ the Harris Act's vesting theory under substantive due process. This will better protect property owners across Florida from egregious governmental actions.

Endnotes:

1 Christina M. Martin is an attorney with Pacific Legal Foundation's Atlantic Center, located in Palm Beach Gardens, Florida. PLF is a nonprofit public interest organization that litigates to protect property rights, economic liberty, and other individual rights.

2 *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1333 (11th Cir. 2004) (quoting Black's Law Dictionary (7th ed.1999)).

3 *Id.* at 1334 (11th Cir. 2004); *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So. 2d 10, 15 (Fla. 1976).

4 *Coral Springs St. Sys.*, 371 F.3d at 1334.

5 Fla. Stat. § 70.001(2).

6 *See Sch. Bd. v. Survivors Charter Schs., Inc.*, 3 So. 3d 1220, 1233 (Fla. 2009).

7 Fla. Stat. § 70.001.

8 Roy Hunt, *Property Rights and Wrongs:*

continued...



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Historic Preservation and Florida's 1995 Private Property Rights Protection Act, 48 Fla. L. Rev. 709, 715-716 (1996).

9 Fla. Stat. § 70.001(1).

10 Fla. Stat. § 70.001(2).

11 Fla. Stat. § 70.001(3)(a).

12 Robert M. Rhodes & Cathy M. Sellers, *Vested Rights: Establishing Predictability in a Changing Regulatory System*, 20 STETSON L. REV. 475, 475-76 (1990-91) ("Florida courts have employed these concepts [of vested rights and equitable estoppel] interchangeably.")

13 *Id.*; *Hollywood Beach Hotel Co. v.* at 15. .

14 *Coral Springs St. Sys.*, 371 F.3d at 1336; *Harris v. State ex rel. Wester*, 31 So.2d 264 (Fla.1947); *Aiken v. E.B. Davis, Inc.*, 143 So. 658 (1932).

15 546 So. 2d 1091, 1094 (Fla. 4th DCA 1989).

16 *Id.*

17 *Greenbriar, Ltd. v. Alabaster*, 881 F.2d 1570, 1577 (11th Cir. 1989).

18 *See id.*

19 *See Survivors Charter Schs.*, 3 So. 3d at 1233 ("[T]he elementary principle of statutory construction [is] that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage.") (citations and quotations omitted).

20 Fla. Stat. § 70.001(3)(b); *see also, City of Jacksonville v. Coffield*, 18 So. 3d 589, 596 (Fla. 1st DCA 2009).

21 *See, e.g.*, Jane Cameron Hayman & Nancy Stuparich, *Local Government Law: Private Property Rights: Regulating the Regulators*, 70 Fla. Bar J. 55, 56 (Jan. 1996); David Spohr, *Florida's Takings Law: A Bark Worse Than Its Bite*, 16 VA. ENVTL. L. J. 313 (1997); David L. Powell, Robert M. Rhodes, & Dan R. Stengle, *A Measured Step to Protect Private Property Rights*, 23 FLA. ST. U. L. REV. 255, 270-71 (1995).

22 *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (internal quotations and citations omitted).

23 *Id.* at 845; *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54, 57 (Fla. 1994).

24 *Id.* at 57 (Fla. 1994); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536-37 (2005).

25 *A.G.W.S. Corp.*, 640 So. 2d at 57; *see Lingle*, 544 U.S. at 528, 543.

26 *Greenbriar*, 881 F.2d at 1577.

27 *See e.g., id.*

28 *See Fla. Stat. § 70.001(3).*

29 *Joint Ventures, Inc. v. Dep't of Transp.*, 563 So. 2d 622, 626 (Fla. 1990).

30 *Id.*

31 *Id.* ("We perceive no valid distinction between 'freezing' property in this fashion and deliberately attempting to depress land values in anticipation of eminent domain proceedings. Such action has been consistently prohibited."); *A.G.W.S. Corp.*, 640 So. 2d at 58 (clarifying that "[t]he statutory subsections [in *Joint Ventures*] were held invalid because they did not meet the requirements of due process").

32 *Hearn v. City of Gainesville*, 688 F.2d 1328, 1332 (11th Cir. 1982); *Lewis*, 523 U.S. at 847 n.8.

33 *Amoco Oil Co.*, 546 So. 2d at 1091

34 *Id.* at 1093 - 1094

35 *See id.* at 1094.

36 *See id.* (referring to the issue as "vested rights/equitable estoppel").

37 *See Powell, supra* at 270-71; David L. Powell, et al., *Florida's New Law to Protect Private Property Rights*, 69 FLA. B. J. 12, 14 (Oct. 1995).

38 *See Spohr, supra* at 334.

39 *Pacetta, LLC v. The Town of Ponce Inlet*, No. 2010-31696-CICI, 2012 WL 10688122 at 3, 13, n.1 (Fla.Cir.Ct. July 5, 2013).

40 *Id.* at 16-17.

41 *Id.* at 19-20.

42 *Id.* at 31-48.

43 *Id.* at 30.

44 *Town of Ponce Inlet v. Pacetta, LLC*, 120 So. 3d 27, 30 (Fla. 5th DCA 2013).

45 *Pacetta* also succeeded in the trial court on its takings claim. That claim is now pending before the Fifth District Court of Appeal. *Id.*

46 *Pacetta*, 2012 WL 10688122 at 3, 13, n.1 (Fla.Cir.Ct.) at 48-50.

47 *Id.* at 37-40.

48 *Id.*

49 *Id.* at 37-40.

50 *See id.* at 37-40, 48-50; *cf. Joint Ventures, Inc.*, 563 So. 2d at 626.

51 *Pacetta*, 2012 WL 10688122 at 27-30.

52 *Id.* at 27-30, 37-40.

53 563 So. 2d at 626.

