



Local Regulatory Taking Claims: Accounting for State and Federal Regulations to Minimize Liability and Damages Exposure

Derek V. Howard, Esq.¹

I. Introduction

If maps and boundaries came to life, then the drive down the 113-mile stretch of the Overseas Highway for the tourists who fuel the local economy would reveal the jurisdictional odyssey that is Monroe County. The Florida Keys were designated as an Area of Critical State Concern (ACSC) by the Florida Legislature in 1979.² Its landmass includes over 13 state and federal parks, and habitat for over 30 land and water species protected under the Endangered Species Act (ESA).³ “Federal and State government involvement in Monroe County land use planning and decision-making is extensive due to the presence of these aquatic and terrestrial resources that are of regional and national significance.”⁴

All of Monroe County is considered a coastal floodplain subject to the Federal Emergency Management Administration’s (FEMA) National Flood Insurance Program (NFIP) requirements.⁵ The jurisdictional interplay within the County was highlighted by the *Florida Key Deer* litigation in federal court. The litigation was commenced in 1990 by conservation groups against FEMA, seeking to compel the agency to comply with its obligations under Section 7 of the ESA to consult with the U.S. Fish and Wildlife Service (USFWS) to ensure that its administration of the NFIP would not jeopardize the continued existence of the Key Deer and other endangered species.⁶ The *Key Deer*

plaintiffs successfully convinced the court of the causal relationship between the availability of federal flood insurance and new development, and obtained an injunction enjoining FEMA from providing any insurance for new development in the suitable habitat of listed species pending further consultation with USFWS.⁷ In a later inverse condemnation valuation trial involving property that was ineligible for federal flood insurance, the Director of the Monroe County Growth Management Division testified that the impacts of the injunction affecting nearly 50,000 parcels were monumental in halting development.⁸ The injunction remained in effect until September 13, 2012, after the County agreed to implementing new procedures for limiting and approving development in endangered species habitat.⁹

Despite its regulatory complexities, the Florida Keys still beckon those searching to live out their favorite Jimmy Buffett song in new primary and second homes. With only one road in and out of the island chain, however, not everyone can stay or play at the same time due in part to hurricane evacuation concerns, which were recently heightened by Hurricane Irma. In order to provide for adequate hurricane evacuation clearance time, the State limits the number of residential dwelling units and non-residential floor area that may be built each year. Residential property owners compete for the

limited number of building allocations through the point-based Rate-of-Growth Ordinance (ROGO) that was adopted by the County in 1992.¹⁰

Not everyone who wants a ROGO allocation gets one, and the jurisdictional interplay of federal, state, and local regulations in Monroe County has dashed dreams and given rise to numerous inverse condemnation actions against the County.¹¹

This article examines some of the defenses and strategies available to a local government that has been sued for a regulatory taking where state and federal regulations are also at play. It includes discussion of issues at each phase of an inverse condem-

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ON APPEAL

by Larry Sellers, Holland & Knight

Note: Status of cases is as of December 21, 2017. Readers are encouraged to advise the author of pending appeals that should be included.

FLORIDA SUPREME COURT

Brevard County v. Waters Mark Development Enterprises, LC, Case No. SC17-2205. Petition for review of 5th DCA decision concluding that the applicable statute of limitations for Bert Harris claim did not commence to run until the county denied the application for site plan approval. 42 Fla. L. Weekly D2247a. Status: Notice of intent to seek review filed on December 13, 2017.

Pacetta, LLC v. The Town of Ponce Inlet, Case No. SC17-1897. Petition for review of 5th DCA decision reversing trial court judgment that the Town is liable for taking as a result of the enactment of a planned mixed use redevelopment of waterfront property, including by referendum. 42 Fla. L. Weekly D1367b. Status: Notice of intent to seek review filed October 25, 2017.

FIRST DCA

Lundquist v. Lee County, Case No. 1D17-22. Appeal from a final order by the Administration Commission determining that the amendment to the Lee County comprehensive plan is in compliance, notwithstanding that the ALJ recommended otherwise. Status: Affirmed *per curiam* on November 2, 2017.

Florida Pulp and Paper Association Environmental Affairs, Inc. v. DEP, Case No. 1D16-4610. Appeal from final order dismissing challenge to proposed

DEP water quality standards rule as untimely. Status: Reversed on July 11, 2017; motion for rehearing denied August 10, 2017. Note: Two other appeals from this final order also were filed in the Third DCA. See below.

Destin Pointe Owners' Association, Inc. v. DEP and Destin Parcel B, LLC, Case No. 1D16-4573. Appeal of DEP Final Order dismissing the Association's amended petition for formal administrative proceedings with prejudice. The amended petition seeks to challenge DEP's issuance of a letter of consent to Destin Parcel B, which authorizes commercial, revenue-generating uses upon certain sovereign submerged lands, adjacent to property owned by the Association and its members. Status: Affirmed *per curiam* on July 27, 2017.

SECOND DCA

Pinellas County v. The Richman Group of Florida, Inc., Case No. 2D16-3279. Appeal from final judgment awarding the Richman Group of Florida, Inc. ("Richman"), over \$16.5 million in damages under 42 U.S.C. § 1983, based on the trial court's conclusion that the county violated Richman's substantive due process and equal protection rights by denying Richman's proposed amendment to the county's land use plan. Status: Reversed on November 29, 2017.

THIRD DCA

Florida Retail Federation, Inc., et al. v. The City of Coral Gables, Case No. 3D17-562. Appeal from final summary

judgment upholding the City of Coral Gables ordinance prohibiting the sale or use of certain polystyrene containers, based upon trial court's determination that three state laws preempting the ordinance are unconstitutional. Status: Oral argument held on December 13, 2017.

City of Coral Gables v. Rich and Silver, Case No. 3D17-206 and -213. Petition for writ of prohibition restraining circuit court from exercising jurisdiction over a consistency challenge to a small scale plan amendment. Status: Dismissed on September 5, 2017, following filing of stipulation for dismissal.

City of Miami v. DEP, Case No. 3D16-2129 and *The Seminole Tribe of Florida v. DEP*, Case No. 3D16-2440. Appeals from final order dismissing challenge to proposed DEP water quality standards rule as untimely. Status: Reversed on October 18, 2017. Note: Another appeal from this final order also was filed in the First DCA. See above.

FOURTH DCA

City of West Palm Beach v. SFWMD, et al., Case No. 4D17-1412. Appeal from final order granting environmental resource permit for extension of State Road 7 in Palm Beach County. Status: Notice of appeal filed May 12, 2017.

Minto PBLH, LLC v. 1000 Friends of Florida, Inc., et al., Case No. 4D16-4218. Appellant Minto appealed from an order denying his motion for attorney's fees under both Section 57.105 and Section

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From the Chair

By Janet Elizabeth Bowman

Despite a fall punctuated by an epic hurricane season, the Environmental and Land Use Law Section kicked off a busy fall with a mixer held at Ulele in Tampa. The event was organized by Josh Caldiron and Christine Senne and sponsored by Stearns Weaver Miller, Mason Bolves Donaldson & Varn and Golder Associates. The weather was perfect and attendees heard Dan Fahey of the City of Tampa tell the fascinating story of how a former Tampa waterworks was transformed from a hazardous waste

site to a beautiful restaurant and park. In addition, Jon Harris Mauer and the CLE Committee have developed an excellent slate of continuing legal education programming for 2017-2018. First, our annual Webcast Series contains a package of 6 one-hour CLE programs, one per month from November through May 2018. Next, the Energy Committee recently produced an outstanding one-hour CLE on "Electric Vehicles & Emerging Issues in Florida," that is free and available on-line to ELULS members.

Finally, mark your calendars to be in Tallahassee on March 1st, 2018 at Florida State University College of Law for an advanced CLE examining Florida's regulations and policies in the aftermath of hurricanes Matthew and Irma. This program will address hurricane preparation and response issues, funding mechanisms for recovery projects, and future resiliency efforts.

Happy Holidays and I look forward to a great 2018 for the ELULS section.



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163.3215(6), Florida Statutes, as to one of the Plaintiffs, 1000 Friends. The other plaintiffs, Alerts and the Schutizers, and their counsel, cross appealed an order sanctioning them pursuant to Section 57.015. Status: Affirmed as to main appeal; reversed as to cross-appeal on October 18, 2017.

FIFTH DCA

Waters Mark Development Enterprises, LC v. Brevard County, Florida, Case No. 5D16-1302. Appeal from final summary judgment dismissing a Bert Harris claim based on the statute of limitations. Status: On October 20, 2017, the court reversed and remanded, concluding that the applicable statute of limitations for Bert Harris claim did not commence to run until the County denied the application for site plan approval. Motion for rehearing and rehearing *en banc* denied on November 29, 2017; Notice of intent to seek review in Florida Supreme Court filed December 13, 2017.

The Town of Ponce Inlet v. Pacetta, LLC, Case No. 5D14-4520. Appeal from trial court judgment that Town is liable for taking as a result of enactment of planned mixed use redevelopment of waterfront property, including by referendum. Status: reversed and remanded on June 16, 2017, 42 Fla. L. Weekly D1367b; motion for rehearing and rehearing *en banc* denied on September 25, 2017; notice of intent to seek review by Florida Supreme Court filed on October 25, 2017.

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Streamlining Resiliency: Regulatory Considerations in Permitting Small Scale Living Shorelines

Alexandra Barshel, J.D. Candidate, Justin Caron, J.D., Lauren Grant, J.D. Candidate

Thomas T. Ankersen, Legal Skills Professor and Director University of Florida Conservation Clinic

I. Introduction to Living Shorelines

Living shorelines offer a valuable and environmentally friendly means of stabilizing shorelines while restoring and enhancing estuarine habitats.¹ They are being widely touted as an alternative to shoreline hardening in the toolkit of climate-change induced sea level rise adaptation strategies.² A variety of structural and organic materials, such as oyster reef breakwaters and emergent and submerged aquatic vegetation can be used in this approach to shoreline stabilization.³ In addition to shoreline stabilization and estuarine habitat protection, living shorelines also improve water quality by filtering upland stormwater run-off.⁴

Because construction of a living shoreline in Florida typically involves activities that occur in the navigable waters of the United States, in the waters of the State of Florida, and over the sovereign submerged lands of the State of Florida, both federal and state agencies have regulatory authority over their construction.⁵ Because living shorelines are considered environmentally beneficial, these agencies have undertaken coordinated efforts to reduce the regulatory burden required to construct them, particularly when they are relatively small scale and involve individual shoreline property owners. The mechanisms for accomplishing streamlined permitting for living shorelines come through state rule-based exemptions and federal programmatic permits known as “nationwide permits.”

Despite these streamlining efforts, variation continues in the construction techniques that are permissible under the streamlined permitting process. Moreover, streamlining efforts may have created unintended regulatory gaps that limit oversight of constructed living shorelines. Additionally, because living shorelines typically occur along an ambulatory littoral property boundary, special common law rules may affect property interests along the shore, and constructed living shorelines may affect those interests. Finally, in the northern portions of the state a changing climate may affect preferred living shoreline vegetation, with statutorily protected and northward marching mangroves invading salt marsh in constructed living shorelines.

This article examines the current status of state and federal streamlined permitting for living shorelines in Florida, and offers recommendations for reforms to further promote the use of small scale living shorelines.

II. State of Florida Small Scale Living Shorelines Permit Exemption

The Florida Department of Environmental Protection (FDEP) regulates the construction of living shorelines through Environmental Resources Permits (ERPs), and has created an exemption for qualifying small scale projects.⁶ Many individually owned shorelines on public

and private property are small enough to fall within the exemption of 62-330.051(12)(e) of the Florida Administrative Code (FAC).⁷

To qualify for an exemption, the living shoreline project must be 500 linear feet or less, be located no further than 10 feet waterward of the mean high water line, remove invasive plants, deploy a turbidity curtain, and not use fill material unless necessary for a breakwater.⁸ A breakwater may be utilized if permanent wave attenuation is necessary to maintain the shoreline vegetation.⁹ If the project requires a breakwater, the inner toe of the breakwater must extend no more than 10 feet waterward of the mean high water line, the breakwater must not be taller than the mean high water line, it must be composed predominantly of natural oyster shell cultch (in mesh bags having openings of no more than 3 inches, or securely fixed to matting) or other stable, non-degradable material, must not be placed within 3 feet of any submerged grass or emergent marsh vegetation, and must have gaps at least 3 feet wide located at least every 20 feet along the breakwater so as to not substantially impede the flow of water.¹⁰ According to FDEP, projects that meet these criteria fall below permitting thresholds and do not cause significant individual or cumulative impacts.¹¹

If the project does not qualify for an exemption, 62-330, FAC provides for those common minor projects that qualify for a general permit. There is no general permit for the installation of a living shoreline.¹² If the project does not qualify for a general permit, it will require more comprehensive review to receive an individual ERP.

III. State of Florida Sovereign Submerged Lands Authorization

Despite the fact that it may be exempt from permitting, any activity that occurs in, on, or over state-owned submerged lands may also be subject to separate authorization under Chapter 253, FS, and 18-21, FAC.¹³ In such cases the State is operating in a proprietary capacity, rather than a regulatory capacity. The Governor and Cabinet, sitting as the Board of Trustees of the Internal Improvement Trust Fund, hold sovereign submerged lands in trust for the use and benefit of the people of the state pursuant to the State Constitution.¹⁴ FDEP performs the major functions related to the management of this land for the Board of Trustees,¹⁵ and the Board has delegated some, but not all the authority to authorize use of sovereign submerged lands to FDEP. The forms of authorization include an Exception, a Lease, a Letter of Consent, and Consent by Rule.¹⁶

The construction of an exempted living shoreline will likely occur over submerged land.¹⁷ Thus, unless the submerged land is owned by a (public or private) non-state entity (discussed *infra*), a living shorelines project will need sovereign submerged lands authorization—regardless of

whether the activity is exempt from FDEP permitting. Unlike the regulatory exemption, there is no exception for living shorelines in the rule that governs submerged lands authorizations, and nothing to suggest that they would be governed under the Consent by Rule provision.¹⁸ Instead it would appear that living shorelines require a Letter of Consent, based on two applicable activities set forth in the rule. Rule 18-21.005(c)(15), FAC requires a Letter of Consent for “[h]abitat restoration, enhancement or permitted mitigation activities without permanent preemption by structures or exclusion of the general public....” By itself this would seem to authorize living shorelines that do not contemplate an oyster breakwater—arguably a permanently preemptive structure—which is permitted by the exemption. If an oyster breakwater is included, then the applicant will also have to rely on 18-21.005(c)(6), FAC, which allows for authorization by Letter of Consent for “[p]lacement, replacement, or repair of riprap, groins, breakwaters...no more than 10 feet waterward of the line of mean or ordinary high water [emphasis added].”¹⁹

IV. US Army Corps of Engineers Living Shorelines Permitting

The Corps currently has 4 regulatory mechanisms in place to streamline permitting for living shorelines. Two of these—NWP 13 and NWP 27—encompass a broader spectrum of activities that living shorelines fall within: bank stabilization and habitat restoration, respectively. The Corps also recently enacted a rule for a nationwide permit for small scale living shorelines—NWP 54. In addition, the Corps has adopted a fast-track approach that allows a spectrum of activities that are exempt under the State of Florida’s rules to receive little or no further review—SPGP V. This permit specifically includes state-exempted living shorelines, and, after briefly discussing other applicable federal permits, will be the primary focus of this article.

V. Introduction to Nationwide Permits

Nationwide permits (NWPs) are a form of federal permit that apply uniformly to certain classes of activities in jurisdictional waters and wetlands throughout the country.²⁰ The Army Corps of Engineers issues NWPs to activities that occur in the navigable waters of the United States under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899.²¹ NWPs are only awarded to activities that result in no more than minimal individual and cumulative adverse environmental effects.²² NWPs are intended to limit the amount and delay of paperwork when the proposed activity has no more than minimal adverse effects on the environment.²³

The NWPs were most recently reissued in 2017.²⁴ There are now 54 NWPs.²⁵ Three of these are especially relevant to the construction of a living shoreline: NWP 13, NWP 27, and most recently, NWP 54.

A. NWP 13- Bank Stabilization

NWP 13 authorizes relatively minor activities designed to shore up eroding banks. It provides for multiple methods of bank stabilization to be used, including hard structural measures (such as bulkheads and revetments), vegetative options, and hybrid techniques that involve both hard materials and vegetation components.²⁶ For example, a

bank may be graded and plant materials may be installed to stabilize portions of the bank, and riprap may be placed at the bottom of the bank for toe protection. It is important to note that NWP 13 has always had the flexibility to authorize a variety of types of bank stabilization measures depending upon the environment.²⁷

B. NWP 27- Aquatic Habitat, Restoration, Establishment, and Enhancement Activities

NWP 27 includes activities associated with the restoration, enhancement, and establishment of tidal and non-tidal wetlands and riparian areas, the restoration and enhancement of non-tidal streams and other non-tidal open waters, and the rehabilitation or enhancement of tidal streams, tidal wetlands, and tidal open waters, provided those activities increase aquatic resource functions and services.²⁸ Activities authorized by this NWP include, but are not limited to: the removal of accumulated sediments, the installation, removal, and maintenance of small water control structures, dikes, and berms, and activities needed to reestablish vegetation, including plowing for seed bed preparation.²⁹

C. NWP 54- Living Shorelines

NWP 54 was made effective in March of 2017.³⁰ NWP 54 complements NWPs 13 and 27 to provide general permit authorization for a living shoreline approach to bank stabilization. This NWP authorizes structures and work in navigable waters of the United States and discharges of dredge and fill material into waters of the United States for the construction and maintenance of living shorelines. The permit defines living shorelines as consisting mostly of native material and incorporating vegetation or other “soft” elements alone or in combination with “hard” shoreline structures such as oyster reefs.³¹ NWP 54 provides for limiting the placement of structures and fills to within 30 feet of the mean high water line or ordinary high water mark, and the project must be 500 feet or less in length along the shore.

VI. Department of the Army Permit State Programmatic General Permit (SPGP V)³²

State Programmatic General Permits (SPGP) are general permits designed to avoid the inefficient duplication of permitting between the Corps and state regulatory programs.³³ SPGP V avoids duplication of effort between the Corps and FDEP for a variety of minor works in Florida that are also located in waters of the United States.³⁴ The permit reduces the need for separate approval from the Corps for the approved project types. Approved project types include shoreline stabilization, specifically including living shorelines exempted under 62-330.051(12)(e), FAC.³⁵

Eligible permit applications are submitted directly to FDEP, which is authorized to employ a “stoplight approach” to processing. Instead of immediately forwarding a copy of the applications to the Corps, FDEP will review the project and give a project ranking of Green (project will be processed by FDEP and will not be forwarded to the Corps),³⁶ Yellow (projects will be forwarded to the Corps),³⁷ or Red (FDEP and the Corps will review the project separately).³⁸ Projects are likely to receive a ranking of Yellow or Red if any adverse impacts to the environment are suspected.³⁹

- a. Under SPGP V, the following stipulations have been placed on living shorelines:⁴⁰
- b. Only native plant species will be planted

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- c. Not more than 500 linear feet in length
- d. Not more than 35 feet waterward of the high tide line,⁴¹ or result in more than 0.5 ac area between the natural shoreline and the structure
- e. No discharge of earthen fill material, other than earthen material associated with vegetative planting
- f. Construction, maintenance and removal of approved permanent, shore-parallel wave attenuation structures is authorized. Approved permanent wave attenuation materials include oyster breakwaters, clean limestone boulders, and prefabricated structures made of concrete and rebar that are designed in a manner that cannot trap sea turtles, Smalltooth sawfish, or sturgeon. Reef balls that are not open on the bottom, triangle structures with a top opening of at least 3 feet between structures, and reef discs stacked on a pile may be used.
- g. For oyster breakwaters:
 - a. Reef materials shall be placed in a manner to ensure that materials (e.g., bagged oyster shell, oyster mats, loose cultch surrounded and contained by a stabilizing feature, reef balls, and reef cradles) will remain stable and prevent movement of materials to surrounding areas.
 - b. Materials must be placed in designated locations (i.e., shall not be indiscriminately/randomly dumped) and shall not be placed outside of the total project limits.

The SPGP V remains valid for five years from the date of issuance unless suspended or revoked by issuance of a public notice by the District Engineer.⁴² The Corps, in conjunction with the federal resource agencies, will conduct periodic reviews to ensure that continuation of the permit during the five-year period is not contrary to the public interest. If revocation occurs, all future applications for activities covered by the SPGP V must be evaluated by the Corps.⁴³

Reevaluations of permits may occur at any time the circumstances warrant it.⁴⁴ Circumstances that could require a reevaluation include, but are not limited to:

- a. Failure to comply with the terms and conditions of the permit.
- b. The information provided to obtain the permit proves to have been false, incomplete, or inaccurate.
- c. Significant new information surfaces which this office did not consider in reaching the original public interest decision.⁴⁵

The time limit for completing the work authorized by the SPGP V ends on July 26, 2021.⁴⁶

While the streamlining framework of SPGP V is well-intentioned, especially in projects like living shorelines that are environmentally beneficial, the relationship between SPGP V and state law is not entirely harmonious.

VII. Confounding Issues with Living Shorelines

A. Who's Minding the Store? Private Submerged Lands, Consent by Rule, and SPGP- V

Constructed living shoreline projects that are exempt

from FDEP permitting are allowed, but not required, to provide notice to FDEP for the purposes of permitting.⁴⁷ The Corps, however, does not have a similar provision precluding notice.⁴⁸ In the case of living shorelines over state-owned lands, notice to FDEP will be provided because the activity will still require sovereign submerged lands authorization. There are some activities that are authorized under the Consent by Rule provision, which operates in a manner similar to an exemption from permitting.⁴⁹ But living shorelines are not included in that category, nor are they explicit in any other category of sovereign submerged land authorization.⁵⁰ The construction or replacement of breakwaters⁵¹ and habitat restoration or enhancement⁵² are included in the rule as activities requiring a Letter of Consent. A Letter of Consent requires written authorization before the activity can commence.⁵³ Thus, FDEP receives notice of the project through this vehicle, meaning there is the potential for oversight.

However, an issue still arises when the submerged land where the living shoreline is being constructed in waters of the state but on land that state-owned.⁵⁴ If the land is owned by the private property owner or sub-state entity, that owner does not need sovereign submerged lands authorization, and if the living shoreline is exempt from permitting, there is no reason to report the activity to FDEP whatsoever. And while this may be acceptable under the state rule, it does not conform to the notification process required by the Corps in SPGP V. Accordingly, a prudent living shoreline constructor on non-state owned submerged lands should utilize FDEP's verification of exemption procedure to ensure compliance with SPGP V.

The interplay of these provisions leaves ample room for improvement. An obvious problem is that the requirement of a Letter of Consent for sovereign submerged lands authorization undermines one intent behind the exemption – that the exempt activity need not be reported. To further the goal of regulatory streamlining, including living shoreline construction in the Consent by Rule category of activities would keep this process in line with the exemption.⁵⁵

However, this still leaves the problem of these activities potentially not being reported to FDEP (and thus not being forwarded to the Corps). Work would be conducted over sovereign submerged lands in waters of the State of Florida and in waters of the United States with no knowledge of either of the federal and state agencies entrusted with safeguarding these waters. If there is no paper trail in either agency then there is no basis to know where, when or how these activities are taking place. Agency personnel and researchers would be unable to track the viability and success of living shorelines over time and assess their efficacy. Some level of notice should be provided to avoid these problems, while still respecting the goal of regulatory streamlining. A middle ground would be to allow Consent by Rule as the form of sovereign submerged lands authorization for the construction of exempted living shorelines, and to require verification by "self-certification" to FDEP and the Corps, in lieu of the Letter of Consent.

B. Living Shorelines, Ambulatory Boundaries and Riparian Rights

In tidal waters, where living shorelines are most commonly being deployed, the mean high water line (MHWL) ordinarily serves as the boundary between publicly owned

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submerged lands and privately owned uplands.⁵⁶ Known as an “ambulatory boundary,” the MHWL tends to migrate through the processes of accretion, erosion, and avulsion.⁵⁷ Accretion is the gradual addition of sand, sediment, or other material to the area below the mean high water line and over time tends to shift the MHWL waterward. As a result, accretion creates “dry lands which were formerly covered by water.”⁵⁸ Accretion can be seen as the opposite of erosion, which shifts the MHWL landward, resulting in additional submerged lands and less upland property. Avulsion is the rapid movement of the shoreline, resulting in perceptible change, caused by either a sudden increase or decrease of earth.⁵⁹ Rivers changing course or tidal inlets shifting due to hurricanes are possible examples of avulsion.

As the MHWL migrates due to accretion and erosion the property boundary moves with it. In *Stop the Beach Renourishment v. FDEP*, the United States Supreme Court reaffirmed the common law in Florida that the property boundary tracks gradual movement in the shoreline, whether by accretion or erosion.⁶⁰ Thus, the upland property owner loses when the uplands give way to erosion, and gains when the property naturally accretes.

Artificially induced accretion through “self-help” can yield a different result, however. Florida’s Beach and Shore Preservation Act provides that accretion caused by additions and improvements to land by the upland owner remains the property of the state.⁶¹ The Florida Supreme Court concluded that this also represents the common law in Florida,⁶² the rationale being that the law should not reward a property owner that fills in state public lands for private benefit.⁶³

In short, natural accretion maintains the ambulatory boundary, allowing the waterfront property owner to gain ground; whereas deliberately induced accretion by a private upland owner remains in the hands of the submerged land owner—usually the state. This has the effect of freezing the ambulatory property line, which no longer ambulates as the shoreline accretes, and may have further consequences.

The effect of depriving the upland owner of an ambulatory boundary is to also deprive the owner of waterfront property, and a unique and valuable attribute of waterfront property—riparian rights.⁶⁴ Riparian rights have been held to be a property interest,⁶⁵ albeit a “qualified” property interest.⁶⁶ Among the rights courts have found to be riparian rights are the right of access to the water, the right to accreted (or relicted) property, and the right to an unobstructed view.⁶⁷ As a result, property owners who install living shorelines that include a goal of accreting sediment—and succeed in that goal—could find their ambulatory boundary replaced by a static property line, and their riparian rights severed by their own well-meaning action. While this may seem unlikely in an era of rising seas, there is scientific documentation that vertical oyster reef growth can outpace sea level rise.⁶⁸ Thus, an oyster breakwater could facilitate an accumulation of sediment that outpaces sea level rise.⁶⁹ Indeed, that is the hope.

This seemingly unfair result could be easily cured by the Florida legislature by amending Chapter 373, Florida

Statutes, which authorizes the rule governing living shorelines permitting and exemptions in a manner similar to the approach taken in beach nourishment projects, which also have the effect of severing riparian rights. Section 161.201 of the Beach and Shore Preservation Act expressly preserves riparian rights where beach nourishment projects fill sovereign submerged lands seaward of the MHWL and fix the ambulatory boundary in a manner that would otherwise deprive the upland owner of those rights.⁷⁰ Alternatively, it may be possible for the State to preserve these rights on a case by case basis through a property-based instrument such as an easement.

C. When Life Hands You Mangroves, Make Lemonade

Mangroves, a tropical species, have steadily been moving northward as average annual temperatures rise and freeze-backs become less common and less severe.⁷¹ Mangroves offer myriad ecosystem services, many of which can aid in sea level rise adaptation such as storm surge protection, shoreline stabilization and sediment accretion.⁷² As such, mangroves can be effectively used in living shoreline designs. While southern Floridians are accustomed to these trees, many northern Floridians—more accustomed to the open scenic views of sprawling salt marsh—view mangroves as an unwanted invasive species, blocking a familiar view and altering an iconic landscape. Northern coastal residents—even restorationists—have expressed frustration with this new kid on the block, even rejecting living shoreline designs that trap and provide refuge for mangrove seedlings. And to their chagrin, mangroves are protected by a state statute that severely limits their removal and regulates trimming.⁷³

A “safe harbor” provision in living shorelines permitting could present a compromise for coastal residents and restorationists looking for ways to protect and enhance eroding shorelines while maintaining the ecosystem they prefer. Safe harbor agreements have been successfully utilized as conservation tools under the Endangered Species Act.⁷⁴ The safe harbor provision allows for an agreement between a landowner and the government in which the landowner engages in an agreed-upon activity that is beneficial to an endangered species, and the government promises to not impose further restrictions on the landowner, even if circumstances change and the Act would ordinarily require them.⁷⁵ In short, safe harbor agreements allow landowners to engage in an environmentally beneficial activity without being penalized.

A safe harbor provision for living shorelines would allow landowners to maintain a restored salt marsh shoreline free of invading mangroves in exchange for the construction of a living shoreline. This agreement would be mutually beneficial to both parties, and furthers the purpose of living shorelines—shoreline resiliency and habitat restoration—just as an agreement under the Endangered Species Act furthers the overall objective of species protection.

VIII. Conclusion

Streamlining the resiliency encouraged by living shorelines permit exemptions makes sense as an approach to coastal management in an era of rising seas. Under current law, a living shoreline that is exempt from FDEP regulation is effectively exempt from Corps regulation. However, there is no apparent mechanism for notice of living shoreline activity to be provided to the Corps. Because “[p]

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poorly constructed Living Shorelines could harm existing resources and adversely affect neighboring shorelines,”⁷⁶ this lack of monitoring could prove detrimental to the positive impact living shorelines traditionally provide. Moreover, uncertainty over the retention of riparian rights where constructed living shorelines lead to accretion that benefits the waterfront owner undertaking the construction could chill the enthusiasm of some who would otherwise take advantage of the streamlining processes. Prohibiting waterfront property owners who restore a salt marsh shoreline from removing invasive mangroves within the construction footprint could have a similar chilling effect. The recommendations below may help.

IX. Recommendations

- FDEP should consider amending 62-330.051(12)(e), FAC to require that all living shorelines constructed pursuant to the exemption provided therein complete the self-certification process of 62-330.050, FAC, and forward all such self-certifications to the Army Corps of Engineers in accordance with the stoplight approach of SPGP V.
- The Governor and Cabinet should amend Rule 18-21, FAC and specifically identify living shorelines as an activity that is subject to either Consent by Rule or a Letter of Consent, based on what is allowed by the FDEP exemption.
- FDEP and/or the Governor and Cabinet should expressly preserve the riparian/littoral rights of the waterfront property owner where the property accretes as a result of the actions of the landowner in constructing a living shoreline, at least one that employs a breakwater. This could occur through a change in statute similar to the approach taken in Chapter 161, or through agreements between the landowner and the State, such as an easement given through the permitting process.
- FDEP should consider incorporating a “safe harbor” provision into their permitting framework that allows landowners to cut or remove mangroves in conjunction with a living shoreline construction permit. This may require the addition of a living shoreline construction permit to the list of activities for which a mangrove trimming permit is not required under 403.9328(5), FS.
- FDEP should maintain a database of permitted and exempt living shorelines to facilitate long-term monitoring and research into their efficacy.

Endnotes

- 1 BILKOVIC, DONNA MARIE ET AL., *LIVING SHORELINES: THE SCIENCE AND MANAGEMENT OF NATURE-BASED COASTAL PROTECTION* 4 (2017).
- 2 *Id.* at 3–4.
- 3 *Id.* at 4.
- 4 Keryn Gedan et al., *The Present and Future Role of Coastal Wetland Vegetation in Protecting Shorelines: Recent Challenges to the Paradigm*, CLIMATIC CHANGE, May 2011, at 7.
- 5 And sometimes local regulation as well. Pace, Niki L., *Permitting a Living Shoreline: A Look at the Legal Framework Governing Living Shoreline Projects at the Federal, State and Local Level*, in *LIVING SHORELINES: THE SCIENCE AND MANAGEMENT OF NATURE-BASED COASTAL PROTECTION* 34 (2017).
- 6 FLA. LIVING SHORELINES, *Permitting* (2017) <http://floralivingshorelines.com/information-help-and-documents/permitting/>.

7 *Id.*

8 FLA. ADMIN. CODE ANN. r. 62-330.051(12)(e) (2013).

9 *Id.*

10 *Id.*

11 FDEP, *Start an Application*, http://publicfiles.dep.state.fl.us/dwrm/slerp/erphelp/mergedProjects/erphelp/Start_an_Application.htm.

12 FDEP, *General Permits*, http://publicfiles.dep.state.fl.us/dwrm/slerp/erphelp/mergedProjects/erphelp/Miscellaneous/General_Permits.htm. Note, there is a general permit for Restoration, Establishment, and Enhancement of Low Profile Oyster Habitat. FLA. ADMIN. CODE ANN. r. 62-330.632 (2013).

13 FLA. ADMIN. CODE ANN. r. 62-330.051 (2013).

14 FLA. STAT. § 253.001 (2017); FLA. CONST. art. X, § 11.

15 FLA. ADMIN. CODE ANN. r. 18-21.002 (2013).

16 FLA. ADMIN. CODE ANN. r. 18-21.005(a)-(d) (2013).

17 FLA. STAT. § 253.12(1) (2017).

18 The list of exceptions and Consent by Rule activities can be found at FLA. ADMIN. CODE ANN. r. 18-21.005 (2013); FLA. STAT. § 403.813 (2017).

19 Note that the FDEP permit exemption states that the inner toe of the breakwater must extend no more than 10 feet waterward. This provision implies that the outer toe of the breakwater can be waterward of 10 feet, which seems inconsistent. Clarification is needed.

20 US ARMY CORPS OF ENG'RS, *Obtain a Permit*, <http://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Obtain-a-Permit/>.

21 US ARMY CORPS OF ENG'RS, *Nationwide Permit Reissuance*, <http://www.usace.army.mil/Media/Fact-Sheets/Fact-Sheet-Article-View/Article/1043655/nationwide-permit-reissuance/>.

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 ARMY CORPS OF ENG'RS, *Nationwide Permit (13) Bank Stabilization* (2017), http://www.nao.usace.army.mil/Portals/31/docs/regulatory/nationwide-permits/Nationwide_Permit_13.pdf?ver=2017-07-13-114446-990.

27 *Id.*

28 ARMY CORPS OF ENG'RS, *Nationwide Permit (27) Aquatic Habitat Restoration, Enhancement, and Establishment Activities* (2017), http://www.nao.usace.army.mil/Portals/31/docs/regulatory/nationwide-permits/NationwidePermit_27.pdf?ver=2017-05-08-065624-320.

29 ARMY CORPS OF ENG'RS, *2017 Nationwide Permits, General Conditions, District Engineer's Decision, Further Information, and Definitions* 17 (2017), http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2017/nwp2017_general_conditions.pdf?ver=2017-04-27-084727-000.

30 ARMY CORPS OF ENG'RS, *Nationwide Permit (54) Living Shorelines* (2017), <http://www.nao.usace.army.mil/Portals/31/docs/regulatory/nationwide-permits/Nationwide%20Permit%2054.pdf?ver=2017-04-12-115820-837>.

31 *Id.* at 1.

32 ARMY CORPS OF ENG'RS, *Department of the Army Permit State Programmatic General Permit (SPGP V) State of Florida* (2016), http://www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/permitting/general_permits/SPGP/SPGPV-Permit%20Instrument-Complete.pdf.

33 US ARMY CORPS OF ENG'RS, *Obtain a Permit*, <http://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Obtain-a-Permit/>. See FDEP, *Coordination Agreement between the US Army Corps of Engineers (Jacksonville District) and the FDEP (or Duly Authorized Designee) SPGP*, https://floridadep.gov/sites/default/files/da_spgp_072312.pdf.

34 FDEP, *Federal Permits and Coordination Agreements Between DEP, WMDs, and the U.S. Army Corps of Engineers*, <http://www.dep.state.fl.us/water/wetlands/erp/spgp.htm>.

35 FLA. ADMIN. CODE ANN. r. 62-330.051(12)(e) (2013).

36 While the SPGP V provides that the Army Corps of Engineers will facilitate maintenance checks, if a project is ranked Green, the Corps is seemingly not notified of the project at all. This is problematic as efforts to review approved projects for continued maintenance is a vital aspect in ensuring living shoreline viability. Also, this means the Corps has no record of “Green” projects, and no record of how many of these projects have been approved.

37 The Corps will reply whether they wish to treat these projects as “Red”, “Yellow”, or “Green” with the addition of special conditions.

38 ARMY CORPS OF ENG'RS, *Department of the Army Permit State Programmatic General Permit (SPGP V) State of Florida* 5 (2016), http://www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/permitting/general_permits/SPGP/SPGPV-Permit%20Instrument-Complete.pdf.

39 *Id.* at 5–11.

40 *Id.* at 16–17.

41 Note that the FDEP exemption requires living shoreline construction

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to remain within 10 feet of the mean high water line. FLA. ADMIN. CODE ANN. r. 62-330.051(12)(e) (2013).

42 *Id.* at 19.

43 *Id.*

44 *Id.* at 23.

45 *Id.*

46 *Id.* at 22.

47 FLA. ADMIN. CODE ANN. r. 62-330.050(1) (2013). (“A notice to the Agency is not required to conduct an activity that is exempt under Rule 62-330.051, FAC, except where required in a specific exemption. Persons are encouraged, but not required, to use any available electronic self-certification service of the Agency to confirm that the activity meets the exemption.”)

48 US ARMY CORPS OF ENGINEERS, *Permitting*, <http://www.saj.usace.army.mil/Missions/Regulatory/Source-Book/>.

49 FLA. ADMIN. CODE ANN. r. 18-21.005(1)(b) (2013) (“...consent is herein granted by the Board and no application or written authorization is required...”).

50 *See* FLA. ADMIN. CODE ANN. r. 18-21.005 (2013).

51 FLA. ADMIN. CODE ANN. r. 18-21.005(1)(c)(6) (2013).

52 FLA. ADMIN. CODE ANN. r. 18-21.005(1)(c)(15) (2013).

53 FLA. ADMIN. CODE ANN. r. 18-21.005(1)(c) (2013).

54 This could occur for a multitude of reasons. The lands could have been sold in the public interest (FLA. CONST. art. X, § 11), accreted naturally (Stop the Beach Renourishment v. FDEP, 130 S. Ct. 2592, 2599 (2010)), or the water adjacent to the lands could have not been navigable upon statehood (Monica K. Reimer, *The Public Trust Doctrine: Historic Protection of Florida's Navigable Rivers and Lakes*, 75 FLA. B.J. 13 (Apr. 2001)).

55 Including the construction of living shorelines in FLA. ADMIN. CODE ANN. r. 18-21.005 in general would be an improvement.

56 In non-tidal boundaries, it is referred to as the Ordinary High Water Line. Richard Hamann & Jeff Wade, *Ordinary High Water Line*

Determination: Legal Issues, 42 FLA. L. REV. 323, 327 (1990). For purposes of living shorelines and this article, the ambulatory boundary analysis remains the same. Most living shorelines projects occur in tidal waters.

57 *See generally* Katrina M. Wyman & Nicholas R. Williams, *Migrating Boundaries*, 65 FLA. L. REV. 1967 (2013).

58 FRANK E. MALONEY ET AL., *WATER LAW AND ADMINISTRATION: THE FLORIDA EXPERIENCE* 385 (1968).

59 *Id.* at 386.

60 *Stop the Beach Renourishment v. FDEP*, 130 S. Ct. 2592, 2599 (2010). However, in the case of avulsion, the property line does not migrate; it remains static—in the position it was before the avulsive event.

61 FLA. STAT. § 161.051 (2017).

62 *Internal Imp. Tr. Fund v. Sand Key Assoc.*, 512 So.2d 934, 939 (Fla. 1987).

63 *Id.*

64 *See* Andrew J. Baumann, *General Overview of Riparian Rights in Florida*, <http://www.llw-law.com/wp-content/uploads/2016/04/General-Overview-of-Riparian-Rights-in-Florida.pdf>.

65 *Haynes v. Carbonell*, 532 So. 2d 746, 748 (Fla. 3d DCA 1988).

66 *Freed v. Miami Beach Pier Corp.*, 112 So. 841, 844 (Fla. 1927).

67 *Thiesen v. Gulf, Fla. & Ala. Ry. Co.*, 78 So. 491, 502 (Fla. 1918).

68 *See* Antonio B. Rodriguez et al., *Oyster Reefs Can Outpace Sea-Level Rise*, 4 NATURE CLIMATE CHANGE 493 (2014).

69 *Id.*

70 FLA. STAT. § 161.201 (2017).

71 P. W. Stevens et al., *The Interplay Between Mangroves and Salt-marshes at the Transition Between Temperate and Subtropical Climate in Florida*, 14(5) WETLANDS ECOLOGY AND MGMT. 435–44 (2006).

72 *See* Edward B. Barbier et al., *The Value of Estuarine and Coastal Ecosystem Services*, 81 ECOLOGICAL MONOGRAPHS 169 (2011).

73 FLA. STAT. §§ 403.9321–33 (2017).

74 16 U.S.C. §§ 1531–44 (2012).

75 *See* ENVTL. DEF. FUND, *SAFE HARBOR: HELPING LANDOWNERS HELP ENDANGERED SPECIES 2* (1999).

76 R. Benjamin Lingle & Thomas T. Ankersen, *A Legal Analysis of DEP's New ERP Exemption for Small Scale Living Shorelines*, 32(4) ENVTL. LAND USE L. SEC. REP. 4–7 (June 2011).

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Magazine Program

Conserving the Coasts: Stetson Law Hosts Fifth Annual ELI-Stetson Wetlands Workshop

On November 9, 2017, Stetson Law hosted the Fifth Annual ELI-Stetson Wetlands Workshop in Gulfport, Florida. Each fall, Stetson Law co-sponsors the event with the Environmental Law Institute (ELI). The workshop brings together leading wetland scientists, regulators, industry experts, attorneys, professionals, and students to discuss and learn about current wetland issues. This year, the theme of the workshop was “Conserving the Coasts: The State of Marine Ecosystems and Coastal Compensatory Mitigation.” The event included a morning field trip, afternoon presentations and panel discussions, and an evening poolside networking reception.

Tampa Bay Watch led the morning field trip, which included visits to sites near the North Shore Aquatic Complex and at Fort De Soto Park in St. Petersburg. Peter Clark (president of Tampa Bay Watch), Captain Andy Lykens (environmental scientists at Tampa Bay Watch), and others discussed Tampa Bay Watch’s aquatic restoration work at the sites, including seagrass and oyster reef restoration projects.



Field trip attendees at a restoration site in Fort De Soto Park

After the field trip, Dr. Max Finlayson (Institute for Land, Water and Society, Charles Sturt University, Australia) delivered the Edward and Bonnie Foreman Biodiversity Lecture to begin the workshop. Dr. Finlayson presented “Climate Change Impacts on Coastal Ecosystems—Evidence from Australia’s Great Barrier Reef and Mangroves.” Dr. Finlayson’s lecture was followed by the first panel on the status and conservation of reefs, mangroves, and seagrasses, which was moderated by Dr. Kirsten Work (Stetson University). The speakers on the first panel were Dr. Frank Muller-Karger (University of South Florida College of Marine Science), Dr. Benjamin Tanner (Stetson University), and Dr. Gary Raulerson (Tampa Bay Estuary Program).

After the first panel, David Urban (Ecosystem Investment Partners) delivered the keynote address, which was followed by a second panel discussion on the use of compensatory mitigation to offset coastal wetland impacts. John Pendergrass (Environmental Law Institute) moderated the second panel, which included Christina Storz

(Natural Resources Section, NOAA Office of General Counsel), Michael Dema (City of St. Petersburg), and Erin Okuno (Stetson University College of Law). The workshop facilitated engaging discussions that continued at the evening poolside networking reception, sponsored by Mechanik Nuccio Hearne & Wester, P.A.

The speakers’ presentation slides and a video of Dr. Finlayson’s lecture are available online at www.stetson.edu/law/biodiversity/wetlands-workshop.php. Special thanks to the Environmental and Land Use Law Section of The Florida Bar for the generous grant it provided to support the workshop!

Mark your calendars and join us in the spring for the Edward and Bonnie Foreman Biodiversity Lecture Series:

- February 1, 2018, at 12:00-1:00 p.m.: Vivek Menon, Wildlife Trust of India (on illegal wildlife trafficking)
- March 1, 2018, at 12:00-1:00 p.m.: Anne Harvey Holbrook, Save the Manatee Club (on manatee conservation)
- March 22, 2018, at 12:00-1:00 p.m.: Dr. Ruth Cromie, Wildfowl and Wetlands Trust, UK (on highly pathogenic avian influenza)

The lectures will be presented on Stetson Law’s Gulfport campus and are free and open to the public. To attend in person or remotely, RSVP to biodiversity@law.stetson.edu.

Stetson’s Institute for Biodiversity Law and Policy (Biodiversity Institute) serves as an interdisciplinary focal point for education, research, and service activities related to international, regional, and local environmental issues. The Biodiversity Institute was the recipient of the 2016 Distinguished Achievement in Environmental Law and Policy Award from the ABA’s Section of Environment, Energy, and Resources. To learn more about our activities and initiatives, please visit www.stetson.edu/law/biodiversity.



Dr. Finlayson presenting the Edward and Bonnie Foreman Biodiversity Lecture

Florida State University College of Law November 2017 Update

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

This column highlights recent accomplishments of our College of Law alumni, students, and faculty. It also features several of the programs the College of Law will host this fall semester. We hope Section members will join us for one of more of our future programs.

Recent Alumni Accomplishments



Leslie Ames



Winston Borkowski



David M. Corry.



Matthew Z. Leopold



Anne Longman



Haley Van Erem

- **Leslie Ames** is now working with the Department of Environmental Protection as Special Advisor to the Secretary. In her new position, she is overseeing Deepwater Horizon funding and related activities for the Secretary.
- **Winston Borkowski** of Hopping Green & Sams is serving as Chair of the Water Quality and Wetlands Committee of the American Bar

Association Section of Environment, Energy and Resources for the 2017-2018 committee year.

- **Jacob Cremer** has been promoted to partner at Stearns, Weaver, Miller, Weissler, Alhadeff & Sitterson, P.A.
- **Kellie Cochran** is working as a staff attorney for the Community Affairs committee in the Florida Senate. Her main bill topics relate to land use, growth management, and property issues.
- **Terry Cole** of the Gunster firm was recognized as a 2018 Best Lawyer in America and was selected by Florida Trend as Florida's Legal Elite 2017.
- **David M. Corry** has been appointed to the Board of Directors and Executive Committee of the Lynchburg Regional Business Alliance, a chamber and economic development organization in Lynchburg, Virginia. Corry is also the General Counsel for Liberty University, the world's largest Christian university.
- **Jody Finklea** was promoted to General Counsel and Chief Legal Officer at Florida Municipal Power Agency (FMPA).
- **D. Bailey Howard** has accepted a position as a Staff Attorney to Chief Justice Jorge Labarga of the Supreme Court of Florida.
- **Matthew Z. Leopold** has been nominated to be the General Counsel of the U.S. Environmental Protection Agency.
- **Anne Longman** of Lewis Longman & Walker was recognized in The Best Lawyers in America 2018 in the fields of Environmental Law and Environmental Litigation.
- **Stuart Nincehler** is working with the State of Florida's Constitution Revision Commission. The position includes legal and substantive analysis of proposals submitted by the public and commissioners, as well as the drafting of proposals.

- **Forrest Pittman** is working as an attorney for the US DOT's Pipeline and Hazardous Materials Safety Administration. He works on administrative enforcement and litigation concerning the safety of natural gas and hazardous liquid pipelines and helps to draft pipeline safety regulations, respond to congressional inquiries, and develop guidance for regulated entities and other stakeholders.
- **S. Brent Spain**, who practices in the Winter Garden office of Theriaque & Spain, recently made a presentation entitled, "Customary Use Doctrine – Providing Beach Access in Florida," at the Florida Shore & Beach Preservation Association's 2017 Annual Conference in Ft. Lauderdale, Florida.
- **Daniel Thompson** of Berger Singerman was recognized as a 2018 Best Lawyer in America and as Lawyer of the Year in the Water Law specialty.
- **Danielle Thompson** recently accepted a position as a hearing officer at the Agency for Health Care Administration.
- **Haley Van Erem** is working with the United States Department of Justice, Civil Rights Division, where she focuses on the enforcement of the Americans with Disabilities Act, particularly the provisions that require people with disabilities to be able to access care without being institutionalized.

Recent Student Achievements

- **Alan LaCerra** earned a book award for Comparative Law this summer while at the University of Oxford. He now holds five books awards in total (Legal Writing and Research I, Legal Writing and Research II, Criminal Law, Legislation and Regulation, and Comparative Law).
- **Mallory Neumann** was selected as a member of Class XIII of the Florida Gubernatorial Fellows Program, a program that pro-

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vides students with leadership experience in state government and public policy matters. Mallory will be working with the Florida Department of Agriculture and Consumer Services, where she will be assisting the Department in implementing the FDA Food Safety Modernization Act at the state level and researching antibiotic use in food-producing animals.

- Congratulations to this year's Goldstein Scholarship Recipients: **Keeley McKenna, Valerie Chartier-Hogancamp, and Joshua Funderburke.**
- Congratulations to this year's McLearn Scholarship Recipients: **Jill Bowen, Kacey Heekin, Jennifer Mosquera, and Hannah Rogers.**
- The *Journal of Land Use and Environmental Law* is pleased to announce that Volume 32:2 Spring 2017 Issue has been published and distributed. The issue features articles from the FSU College of Law Distinguished Environmental Lectures, and from the *Environmental Law Without Courts Symposium*, which was held in the Fall of 2016 at FSU College of Law. The issue includes articles written by **Professor Carol Rose, Professor Robert V. Percival, Professor Eric Biber, Professor Robin Kundis Craig and Catherine Danley, Professor Erin Ryan, Professor Sarah E. Light, Professors Robert L. Glicksman and Emily Hammond, Professor David L. Markell, Professor Hannah J. Wiseman, Professor Christopher J. Walker, Professor Arden Rowell, and Professor Mark Seidenfeld.** It also includes comments written by **Professor Shi-Ling Hsu and Professor Donna Christie,** as well as a note written by **Valerie Chartier-Hogancamp.**

Recent Faculty Achievements

- **Shi-Ling Hsu** presented *Anti-trust and Inequality* at the Midwestern Law and Economics Association meeting in Milwaukee, WI, October 20-21. He also chaired the panel *The Psychology of Climate*

Change, at FSU Law on September 29.

- **David Markell** is serving as Associate Dean for Research at the College of Law again this year. His article, *Agency Motivations in Exercising Discretion*, was published in 32 J. LAND USE & ENVT'L L. 513 (2017). Another article, *Can Non-Statutory Federal Climate Litigation Drive Federal Climate Policy?*, will be published in 49 TRENDS (Nov/Dec. 2017), a publication of the ABA environmental law section. Prof. Markell participated as a member of the Florida Coastal Resiliency Initiative in a webinar in October.
- **Erin Ryan** published *Negotiating Environmental Federalism* in the WISCONSIN LAW REVIEW. She traveled to London in November to share *Dynamic Federalism as Legal Pluralism* at a Queens University conference among contributing authors to the OXFORD RESEARCH HANDBOOK ON LEGAL PLURALISM. In October, she presented on the prospects for dynamic environmental federalism under the Trump Administration at Florida International University in Miami.
- **Hannah Wiseman** spoke on a keynote panel at the *Virginia Environmental Law Journal's* 2017 symposium entitled "Whose Mess Is It? Federalism and Environmental Regulation in a New Political Climate." With the help of Professor Shi-Ling Hsu, she also co-organized the conference "Energy Policy and Markets in a Shifting Federal-State Landscape" held at the College of Law FSU Law on November 8, 2017.

Fall 2017 Events

The College of Law has a full slate of environmental law events and activities on tap for the fall semester.

The Psychology of Climate Change: Why Do People Believe What They Believe?

This panel discussion, held on September 29 and organized by **Professor Hsu**, explored cutting-edge research on the psychology of climate change. The research suggests that, for people of all range of beliefs, views about climate change stem from a variety of factors that are not highly dependent upon

the state of climate science. This panel also explored possible paths forward in light of the psychological dimensions of climate change. Speakers included **Janet Swim**, Professor of Psychology, Penn State University; **Jerry Taylor**, President, Niskanen Center; **Irina Feygina**, Director of Behavioral Science and Assessment, Climate Central; **John Cook**, Research Assistant Professor, George Mason University; and **Janet Bowman**, Senior Policy Advisor, Florida Chapter of The Nature Conservancy. A recording of the panel is available on our [webpage](#) for those who could not attend.



From left to right: Janet Swim, John Cook, Jerry Taylor, Shi-Ling Hsu, Janet Bowman, and Irina Feygina

Guest Lectures

Jason Lichtstein, Partner at Akerman, LLP and former President of the Florida Brownfields Association, guest lectured about Brownfields redevelopment in Florida in **Professor David Markell's** Environmental Law course.

Rebecca O'Hara, Senior Legislative Advocate with the Florida League of Cities, guest lectured about the implementation of water quality standards in Florida in **Professor David Markell's** Environmental Law course.

Fall 2017 Distinguished Lecture

Professor Vicki Been, Boxer Family Professor of Law, New York University School of Law, presented our Fall 2017 Distinguished



Vicki Been

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Lecture, entitled “The City NIMBY & the Suburban NIMBY” on Wednesday, October 25. A recording of this lecture can be viewed [here](#).

Energy Policy and Markets in a Shifting Federal-State Landscape

This symposium, convened by **Professor Hannah Wiseman**, will discuss the changing energy regulatory and economic landscape from the local to the federal levels. Markets drive many aspects of energy policy, and local and state policies do not consistently align with federal ones. Thus, even with new federal incentives for certain fuels, such as coal, other fuels such as renewable energy and natural gas might continue to outcompete sources that have historically dominated the U.S. energy mix. Symposium participants will discuss this complex landscape, with one panel focusing on electricity issues (with a focus on renewables), and a second panel focusing on fossil fuels. Symposium speakers include **Lincoln Davies**, Hugh B. Brown Presidential Endowed Chair in Law, University of Utah College of Law; **Dr. Shanti Gamper-Rabindran**, Associate Professor, Graduate School of Public and International Affairs, University of Pittsburgh; **Emily Hammond**, Professor of Law, The George Washington University Law School; **Kate Konschnik**, Director of Harvard Law School’s Environmental Policy Initiative of the Environmental Law Program and Lecturer on Law, transitioning to Director of Climate & Energy programs, Duke University Nicholas Institute for Environmental Solutions (as of December 1); **Felix Mormann**, Associate Professor, Texas A&M University School of Law and Faculty Fellow, Steyer-Taylor Center for Energy Policy and Finance, Stanford University; **Jim Rossi**, Professor and Director, Program in Law and Government, Vanderbilt Law School; and **Kristen van de Biezenbos**, Assistant Professor, University of Calgary Faculty of Law. This symposium will be held on Wednesday, November 8. More

information, including speaker bios and a schedule, can be found on our [event page](#).

Student Animal Legal Defense Fund (SALDF) Recent Events

Members of the Student Animal Legal Defense Fund (SALDF) attended the 25th National Animal Law Conference in Portland Oregon. This three-day event included the inaugural Animal Legal Defense Fund Student Convention. Topics included animals as victims of criminal offenses, animal sanctuaries, and the worldwide growth of animal law.



The SALDF hosted a screening of “Unlocking the Cage” on September 27th that was open to the public. This documentary follows animal rights lawyer Steven Wise and The Nonhuman Rights Project legal team in their unprecedented court challenge to break down the legal wall that separates animals from humans. This event was open to the public and featured a Q&A with **Kevin Schneider**, an attorney with the Non-Human Rights Project and a College of Law alumnus. The following day, the SALDF hosted an animal law panel for law students featuring **Kevin Schneider**, **Ralph DeMeo** (with Pets Ad Litem and the Animal Law Section of the Florida Bar), and **Professor Sam Weisman**.



The SALDF hosted a meeting regarding Pet Trusts on October 19th, 2017. FSU College of Law alumnus **Max Solomon**, from Hueler-

Wakeman Law Group, discussed how lawyers can help their clients financially plan for their four-legged and winged loved ones. Students were able to learn how they can actively participate while law students in their community.



Every year Leon County Humane Society hosts Walk and Wag: Humane Heroes. Humane Heroes brings our community together to speak for those who have no voice of their own. The SALDF created a team of over 16 members, both students and alumni, and raised \$900.00. The SALDF was awarded the United Fur Justice Award for its contribution!



Environmental Law Society Recent Events

On September 26th, 2017, the Environmental Law Society (ELS) organized a career panel that featured professionals with diverse backgrounds and prominent careers in Environmental law. **Jason Wiles**, President and CEO at 7G Environmental Compliance Management LLC, **Ronni Moore**, Government Attorney at the House of Representatives, **Anne Harvey-Holbrook**, Staff Attorney at Save the Manatee, **Bud Vielhauer**, General Counsel at Florida Fish and Wildlife, and **Ralph DeMeo**, CEO at Hopping, Green, and Sams each discussed their law school experiences, their various roles in Environmental Law, and where they see the future of Environmental Law heading.

The ELS and the SALDF hosted Standing for Endangered Species on

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November 2nd, 2017. **Anne Harvey Holbrook**, Staff Attorney from Save the Manatee Club, spoke regarding animal standing in other countries versus their standing in the United States, with a focus on manatees. Q & A followed.

The Environmental Law Society (ELS) and the SALDF partnered with Pets Ad Litem (PAL) at the Twelfth Annual Puppies in the Pool event. All donations from the dog wash went to the City of Tallahassee animal shelter.



The ELS and the SALDF also spent a gorgeous fall morning outside beautifying Tallahassee with Pets Ad Litem on September 30th, 2017. Pets Ad Litem has adopted Easterwood Drive under the City of Tallahassee's beautification project. PAL helps save taxpayer dollars by reducing the need for the city to pick up litter. The ELS and the SALDF were glad to be a part of helping beautify Tallahassee while changing people's attitudes about litter.



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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nation suit, including: ripeness, joinder and impleader, liability determinations and apportionment, and valuation. The article is intended to assist the local government in ensuring that liability and damages are equitably apportioned to prevent the cost of the protection of nationally significant resources from falling on the backs of local taxpayers.

II. Pre-Trial Issues

A. Ripeness

A local government's land use regulations may try to complement or effectuate the intent of state and federal statutes such as the Clean Water Act (CWA) or ESA. In some cases, as with Monroe County, such regulations may be compelled by FEMA as a condition for the local government's continued participation in the NFIP.¹² A frustrated landowner who is unable to develop may be eager to obtain his first "no" to ripen a taking claim and enter the courthouse door. A local government should be cautious not to stand in the shoes of the state or federal government and substitute itself as the governmental entity that first says "no."

A review of a regulatory taking claim begins with determining whether a facial or as-applied taking has been alleged "because the dates of those events will fix the start of the limitations period in relation to the date of the Landowners' filing suit. There is an important distinction between the two types of claims and each raises different ripeness and statute of limitations issues."¹³ "The ripeness requirement . . . does not apply to facial takings, as the mere enactment of the regulation constitutes the taking of all economic value to the land."¹⁴

For as-applied taking claims "[t]o be ripe for judicial review the Landowners must show a final determination from the government as to the permissible use, if any, of the property. If there has not been a final determination, the Landowners' attempt to seek redress from the court is premature."¹⁵ "The ripeness requirement is usually met when the property owner files an application for a development permit with the local land use authority and receives a grant of denial of the permit."¹⁶ Although there is a futility

exception to the decisional finality requirement, that exception can only apply where at least one meaningful application has been filed.¹⁷

If an as-applied taking claim is alleged, the local government should examine whether development approval would be required from other levels of government. Where the plaintiff's claim is not ripe for failure to obtain a decision from another level of government, the local government should assert ripeness as an affirmative defense and tee up a motion for summary judgment.

Supporting authority for local governments on the issue of ripeness and liability includes *City of Riviera Beach v. Shillingburg*,¹⁸ and *Karatinos v. Town of Juno Beach*.¹⁹ In *Shillingburg*, the landowners sought permission to fill submerged lands running between Singer Island and the intracoastal waterway, described as "mangroves and special estuarine bottom lands . . . protected by federal, State and local agencies involved in the wetlands preservation."²⁰ The owners sued the City in 1992, challenging the City's comprehensive land use plan as a regulatory taking of its submerged lands. The Fourth District Court of Appeal (4th DCA) reversed the grant of summary judgment against the City, holding that that landowners' claims were not ripe for review.

In pertinent part, the *Shillingburg* court explained "there is an additional sound reason for requiring landowners to take the necessary steps and apply for the use that they claim is an economically viable use of their property. Any further development would necessarily involve filling the submerged lands, and thus, requests for an amendment to the plan and a request to fill the submerged lands would not solely be the decision of Riviera Beach but would require approval from state agencies, including the DER."²¹ Continuing, the court went stated that "Riviera Beach should not be held responsible in damages for a regulatory taking where it has not unequivocally prevented all economically viable use of the property, especially where the decision as to the intended uses is not solely its to make and where it appears that other agencies may indeed be responsible for opposing any further development."²²

In *Karatinos*, the landowners of unimproved oceanfront property sued

the Town of Juno Beach and the Florida Department of Natural Resources (DNR) in 1981 contending that the landowners were being deprived of all use of their property.²³ After DNR purchased their property in 1991 and was dismissed from the case, the landowners continued their suit arguing the town was liable for a temporary taking from 1982, when the town first turned their project down, to 1985, when the town approved two units.²⁴

The town essentially argued that it could not be held liable for damages because DNR's regulations trumped the town's, and those regulations would not have permitted development. At trial, "a coastal engineer with DNR who administered Florida's coastal construction regulatory program during the years involved here, testified that DNR would never have permitted any building seaward of the Coastal Construction Control Line on this property."²⁵

The trial court "found as a matter of fact that the Karatinos would never have gotten approval from DNR . . . and that accordingly the Karatinos' project 'was doomed, regardless of the Town's action.'"²⁶ The trial court therefore found that the town ordinance was not the result of owners' damages, and the appellate court affirmed.

In cases in which land development would also require state or federal approval, one possible strategy for the local government to use in avoiding takings liability is to require that the State or federal approval be obtained before the local permit application is decided. The Town of Juno Beach employed this strategy, for example, in its setback variance process that was available to the Karatinos.²⁷ The strategy is not without risk, however. The landowner could obtain state or federal permit approval, in which case the decision of whether to prohibit development, as well as possible takings liability if development is prohibited, would fall back on the local government. Additionally, the landowner could be caught in "a classic Catch-22" if the state or federal authority refuses to process an application until local approval is obtained, as the DNR did in *Karatinos*.²⁸

A variation of this strategy was also employed in *Clay v. Monroe County*.²⁹ In this case, a group of landowners on Big Pine Key filed an action against

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the county seeking a writ of mandamus to compel the issuance of building permits, as well as for a declaratory judgment and damages for permanent and temporary takings of their land, owing to the withholding of building permits due to concurrency requirements. The trial court ruled in favor of Monroe County. While the case was pending appeal, Monroe County agreed to issue the permits, with the following condition: "If required, each property owner shall obtain a letter of coordination from the U.S. Fish and Wildlife Service and submit it to the Building Department prior to the issuance of the building permit, unless the Habitat Conservation Plan for Big Pine Key is approved and eliminates this requirement."³⁰ The County then argued that the mandamus issues in the appeal were moot. The owners disagreed that the County's decision rendered their action moot, and asked the court to direct that a writ of mandamus be issued.³¹

In declining to grant the relief the owners sought, the Third District Court of Appeal (3rd DCA) stated that the condition was "appropriate," "derives from the federal agency's jurisdiction under federal law," and that the court could not "override the jurisdiction of the U.S. Fish and Wildlife Service . . ."³²

B. Necessary and Indispensable Parties; Third-Party Practice

In addition to asserting a ripeness defense where development approval would require a decision from another governmental entity, a local government should consider asserting the landowner's failure to join the other governmental entity as an "indispensable party" as an affirmative defense. "An 'indispensable party' is generally defined as one whose interest is such that a complete and efficient determination of the cause may not be had absent joinder."³³ Indispensable parties must be included in the litigation, and if they are not added under Fla. R. Civ. P. 1.250(c), then the action is subject to dismissal.³⁴

Local governments should not be held liable for a regulatory taking where the regulation is imposed by the state or federal government.³⁵ If a higher level of government imposed a confiscatory regulation on the local

government, then another option available to the local government is to file a third-party complaint against the higher governmental entity. Third-party practice, also referred to as impleader, was introduced in 1965 by Florida Rule of Civil Procedure 1.180. This rule states that a defendant may assert a claim against "a person not a party to the action who is or may be liable to the defendant for all or part of the plaintiff's claim against the defendant, and may also assert any other claim that arises out of the transaction or occurrence that is the subject matter of plaintiff's claim."³⁶

In the inverse condemnation cases of *Collins* and *Galleon Bay*, for example, Monroe County brought in the State of Florida as a third-party defendant.³⁷ The property at issue in *Galleon Bay* involved 14 platted lots along the Big Spanish Channel that surrounded a 2.05 acre landlocked lake.³⁸ The lots were zoned Commercial Fishing Village (CFV).³⁹ "The property owner, over the course of several decades, proceeded with numerous efforts to improve its land including, but not limited to, having its subdivision platted, having the zoning district changed, extensively negotiating with the County, and revising its plat."⁴⁰ In 2002—after failing to obtain allocations for its lots under ROGO—Galleon Bay filed its inverse condemnation action against the County. Galleon Bay's "odyssey of disappointment", which caused the 3rd DCA to mandate that the trial court find liability in the landowner's favor, included a denial by the Florida Department of Environmental Regulation ("DER") of the owner's application for a permit to dredge a channel from the lake to the Florida Bay, and an appeal of the County's approval of its plat by the Florida Department of Community Affairs.⁴¹ The County cited all of these facts in its third-party complaint against the State for indemnification, subrogation, and contribution.⁴² In a nutshell, the County's third-party complaint argued that ROGO—the offending regulation alleged to have taken the property—was imposed by the State in its exercise of regulatory oversight pursuant to the County's ACSC designation.

While joinder and impleader can be useful tools for getting other potentially liable entities at the table to assist in litigation and share in the apportionment of damages, govern-

mental entities cannot simply point the finger at one another to avoid liability.⁴³ In *Lost Tree Village*, the landowner sought to develop a residential community upon its islands and submerged lands.⁴⁴ Development had been blocked, however, because the City of Vero Beach had an ordinance prohibiting the construction of a new bridgehead and the Town of Indian River Shores had an ordinance prohibiting residential development without bridge access.⁴⁵ Because the property at issue was located partially within the Town and partially within the City, the landowner could not build a bridge and, therefore, could build no houses.⁴⁶ The landowner's taking claim therefore relied "upon the combined effect of the City's 'no bridgehead' ordinance with the Town's 'no development without bridge' ordinance, which effect deprives it from using its property in an economically viable manner."⁴⁷ The City and Town pointed fingers, "each argu[ing] that because their respective regulations do not solely deprive Lost Tree from using its property, neither can be liable for payment of compensation."⁴⁸

The 4th DCA rejected their argument that liability could not be based on the combined effect of the City's and Town's regulation. The court cited *Ciampetti v. United States*, for the proposition that "[a]ssuming that no economically viable use remains for the property, the Constitution could not countenance a circumstance in which there was no fifth amendment remedy merely because two government entities acting jointly or severally caused a taking."⁴⁹ "Multi-government action, of which the combined effect deprives a landowner, constitutes a taking: 'As a general principle, two levels of government should not be able to avoid responsibility for a taking of property merely because neither of their actions, considered individually, would unconstitutionally infringe upon private property rights.... Government decisions are not produced in a vacuum.'"⁵⁰ The court concluded that "[w]hile there may be issues of damage apportionment in such a case, that does not bar the claim and permit the taking without compensation. The Constitution entitles the landowner to a remedy."⁵¹

A local government with more stringent development regulations than the governmental entity it is seeking to join should be cautious of

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Golf Club of Plantation v. City of Plantation.⁵² In that case, the landowner purchased 214 acres of “property with the expectation that it could be converted to a single-family residential usage.”⁵³ “Approximately half of it [was] being used as a golf course, with the remaining half lying undeveloped.”⁵⁴ The property “was designated commercial recreation under the Comprehensive Land Use Plans of both the City and Broward County, permitting uses such as golf courses, tennis clubs, sports arenas, marina, and dog or horse racing facilities.”⁵⁵ The landowner filed its inverse condemnation action against the City after the City denied its applications to amend the land use designation to low residential use to permit rezoning of the property and the development of a single-family residential subdivision.⁵⁶

“The City moved for summary judgment, arguing that it could not be liable for taking Owner’s property because Owner had failed to obtain the County’s approval to amend its land use plan and that the Owner had failed to sue the County before the expiration of the statute of limitations.”⁵⁷ The trial court granted the City’s motion for summary judgment, holding in part that the County was an indispensable party.⁵⁸

On appeal, the Fourth DCA held that the County was not an indispensable party, agreeing with the Owner that “it is only the City against whom an inverse condemnation claim could or should be made.”⁵⁹ The court explained: “There is no suggestion by the City that its policy of barring all conversions of golf courses to any other uses has been imposed on it by Broward County. In fact, the record shows that the County has no such policy. As Owner pointed out at oral argument, if the City approved an alternative use that complied with the County’s comprehensive plan, there is a strong probability that County would approve the City’s change of its own plan.”⁶⁰

III. The Liability Phase

“The standard of proof for an as-applied taking is whether there has been a substantial deprivation of economic use or reasonable investment-backed expectations.”⁶¹ If an as-applied taking is determined to be ripe and proceeds to a liability determination, the local government should ensure that regulations imposed at other levels of government are taken into consideration when making the ad-hoc *Penn Central* inquiry.

A. Investment-Backed Expectations

“Consideration of expectations is central to resolution of a regulatory takings claim. . . . The lack of a reasonable investment-back expectation is determinative of a takings claim.”⁶² An unreasonable investment-backed expectation cannot sustain a regulatory taking claim.⁶³ Lack of reasonable investment backed-expectations proved fatal to the taking claims of Florida Keys developers in *Good v. United States*⁶⁴ and *Collins v. Monroe County*.⁶⁵

Based on *Good*, if regulation of property is pervasive at all levels of government, the local government can argue that it is unreasonable for a developer to purchase the property and continue making an investment in seeking local development approval. Mr. Good sought to develop his Lower Sugarloaf Key property that contained salt

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and freshwater wetlands and “provided habitat for several endangered species, including the Lower Keys marsh rabbit, the mud turtle and silver rice rat.”⁶⁶ The property was heavily regulated at both the County and State levels, and several negotiations, development plan modifications, permit denials, and appeals ensued.⁶⁷ There was a flurry of activity at the federal level as well, with USFWS playing a role in the permitting decision pursuant to its obligations under the Fish and Wildlife Coordination Act (FWCA) of 1934,⁶⁸ and the later adopted ESA. In 1994, “the Corps denied plaintiff’s 1990 application on endangered species grounds.”⁶⁹ Mr. Good, who remains something of a Florida Keys legend, was not a happy man and filed suit against the Corps. He alleged that the Corps’ denial of his 1990 permit application to dredge and fill wetland and access navigable waters resulted in a taking.

In determining if Mr. Good had reasonable investment-backed expectations, the court noted that (a) his initial purchase investment was predated by “pervasive federal and state regulation” of “ecologically sensitive areas” such as his property (b) by the time he chose to invest in development, the complained of regulation was already in place.⁷⁰ These facts proved fatal to Mr. Good’s claim. The court explained that “[t]he reasonable investment-backed expectations factor of the *Penn Central* test properly limits recovery to property owners who can demonstrate that their investment was made in reliance upon the non-existence of the challenged regulatory regime. In part, the rationale for this rule is that one who invests in property with the knowledge of the restraint assumes the risk of economic loss.”⁷¹ *Good* stated that “state and local restrictions must be considered in determining the presence or absence of reasonable investment-backed expectations to engage in the proscribed use.”⁷² The court further stated that “in a case where a developer could recoup his initial investment in the property, but nonetheless chooses to continue to invest in development in the face of significant regulatory limitations, no reasonable expectations are upset

when development is restricted or proscribed.” The court concluded that “the pervasiveness of the regulatory regime at the time plaintiff purchased Sugarloaf Shores deprives him of a reasonable expectation to effect his development plans.”⁷³

In addition to examining the application of state and federal regulations and if it was objectively reasonable for the landowner to purchase the property and invest in it notwithstanding these regulations, the actual efforts of the landowner must be examined. While this is important to the issue of ripeness and whether the landowner has obtained final decisions from all levels of government, it is also important to the issue of whether the landowner can demonstrate an investment-backed expectation. For example, if development of the property would require a Section 404 permit under the Clean Water Act (CWA) or an Incidental Take Permit (ITP) under the ESA, but the landowner has not made the necessary applications, then the local government could argue that this demonstrates that the landowner has no real investment-backed expectation.

In *Collins*, the failure of landowners to “take meaningful steps toward the development of their respective properties, or seek building permits, during their sometimes decades-long possession of their properties” proved fatal to their as-applied regulatory taking claims.⁷⁴ The 3rd DCA stated earlier that “[i]t would be unconscionable to allow the Landowner to ignore evolving and existing land use regulation under circumstances when they have not taken any steps in furtherance of developing their land.”⁷⁵ Whether the landowners took steps to develop their property is an inquiry under the investment-backed expectations prong of *Penn Central*. The *Collins* court clarified: “Here, the evidence presented at trial showed relatively passive landowners who took minimal action towards the improvement or development of their respective properties and invested little into the development other than their initial purchase costs. Under these facts, the trial court correctly found in favor of the appellees under the reasonable investment-backed expectation prong of *Penn Central*.⁷⁶ The failure of the landowners to take steps to develop their property was also fatal to the landowners’ claims

in *Beyer*.⁷⁷

B. Economic Impact

The economic impact prong of *Penn Central* requires evidence “on the change in fair market value of the subject property caused by the regulatory imposition.”⁷⁸ This is done by comparing, as of the alleged date of taking, (a) the fair market value (FMV) of the subject property with the offending regulation (“Scenario A”) and (b) the FMV of the subject property without the offending regulation (“Scenario B”).

The key for the local government in litigating the economic impact prong of *Penn Central* is to ensure that the landowner is not attempting to hold the local government liable for any diminutions in FMV that are attributed to regulations other than the one alleged to have caused the taking. Through discovery, the local government must carefully examine the landowner’s appraisal evidence that is necessary to demonstrate an economic impact, and ensure that the landowner’s appraiser properly considered state and federal regulations that would apply to the use valued under both Scenarios A and B, and that none of those regulations were improperly disregarded. The purpose of the economic impact prong—to isolate the percentage in the diminution in FMV caused by the offending regulation—would be thwarted if Scenario B also assumed state and federal regulations did not apply to development. Their exclusion would have the effect of artificially inflating the value of the use under Scenario B, and thereby the impact of the local regulation being tested.

If the landowner wishes to disregard an applicable state or federal land development regulation under Scenario B, then that landowner should properly allege that the regulation also contributed to the taking, and be forced to join the agency responsible for the regulation as a party to the litigation. This would help minimize the local government’s liability and damages exposure.

As a matter of policy, local taxpayers should not shoulder the burden of protecting resources that are of regional or national importance. The cost of protecting such resources should be spread out at the state and national levels. This is consistent with the design of the Fifth Amendment, which is to avoid having “some

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people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁷⁹

IV. Valuation Phase

If a local government is found liable for a regulatory taking and proceeds to the valuation stage, it will still want to ensure that federal and state regulations are accounted for, and that their impact is not excluded, which would have the effect of inflating the fair market value of the property at issue, and therefore, the compensation paid by the local government.

Prior to a valuation trial, the local government may want to file a motion in limine to prohibit the introduction of any appraisal evidence that does not properly consider applicable state and federal regulations. In *Galleon Bay*, for example, the County filed a motion in limine seeking to prohibit the landowner from presenting any “[v]aluation of the property absent any regulation other than ROGO,” which was the County’s regulation found to have taken the property.⁸⁰ The motion was filed because discovery and previous motions indicated that Galleon Bay sought to introduce an appraisal that did not properly consider application of the ESA and USFWS’s opposition to residential development (the alleged highest and best use being valued by Galleon Bay’s appraiser), nor did it consider regulations prohibiting the issuance of federal flood insurance because of the property’s location in a unit of the CBRs.

Galleon Bay, in fact, filed its own motion in limine in which it sought “to exclude any statement, evidence, or comment that suggests the [ESA] or any federal regulations that protects endangered or threatened species or their habitat is relevant to the valuation or the payment of just and full compensation.”⁸¹

The trial court denied Galleon Bay’s motion in limine but granted the governments’. Specifically, the court held that “[a]ny appraisal of the subject property as of [the date of taking], introduced into evidence or testified to must consider all applicable federal, state and local regulations other than [ROGO], which is

the regulation alleged and found to have taken the property.”⁸² The trial court’s decision is currently on appeal in the 3rd DCA.⁸³

The trial court’s decision is consistent with *Palazzolo v. Rhode Island*.⁸⁴ The Supreme Court in that case addressed the “concern . . . that landowners could demand damages for a taking based on a project that could not have been constructed under other, valid zoning restrictions quite apart from the regulation being challenged.”⁸⁵ The Court deemed this “a valid concern in inverse condemnation cases alleging injury from wrongful refusal to permit development.”⁸⁶ The Court clarified, however, that “[t]he mere allegation of entitlement to the value of an intensive use will not avail the landowner if the project would not have been allowed under other existing, legitimate land-use limitations. When a taking has occurred, under accepted condemnation principles the owner’s damages will be based upon the property’s fair market value [. . .]—an inquiry which will turn, in part, on restrictions on use imposed by legitimate zoning or other regulatory limitations.”⁸⁷

V. Conclusion

Local governments are often the first line of defense in protecting natural resources. In fulfilling this obligation to provide for the welfare of their citizens, as well as satisfying State and federal mandates, local governments will continue to be subject to inverse condemnation actions by landowners within their jurisdictions. In accounting for State and federal regulations, however, there are defenses and strategies available to the local government to minimize its liability and damages exposure, and to ensure that the costs of protecting natural resources are equitably spread with the benefit.

Endnotes

- 1 Mr. Howard is an Assistant County Attorney in the Monroe County Attorney’s Office and a member of the Florida Bar.
- 2 Monroe County, *Year 2030 Comprehensive Plan Policy Document*, 1 (2016) (citing Section 380.0552, F.S.).
- 3 *Id.*
- 4 *Id.*
- 5 *An Examination of FEMA’s Limited Role in Local Land Use Development Decision, Hearing Before the House Committee on Transportation and Infrastructure* (2016) (Testimony of Heather Carruthers)
- 6 *Fla. Key Deer v. Stickney*, 864 F. Supp. 1222 (S.D. Fla. Aug. 25, 1994) (“Key Deer I”);
- 7 *Fla. Key Deer v. Brown*, 364 F. Supp. 2d 1345

(S.D. Fla. Mar. 29, 2005) (“Key Deer II”); *Fla. Key Deer v. Brown*, 365 F. Supp. 2d 1281 (S.D. Fla. Sept. 12, 2005) (“Key Deer III”).

8 *Galleon Bay v. Monroe County* (Trial Tr. Vol. 5, 497, Feb. 8, 2016.)

9 Hurley Rev. Aff. (July 7, 2014), filed in *Galleon Bay v. Monroe County*, Case No. CAK-02-595 (Fla. 16th Jud. Cir.).

10 Monroe County, Florida Ordinance 16-1992 (June 22, 1992).

11 See, e.g., *Clay v. Monroe County*, 849 So.2d 363 (Fla. 3rd DCA 2003); *Bauknight v. Monroe County*, 994 So.2d 362 (Fla. 3rd DCA 2008); *Sutton v. Monroe County*, 34 So.3d 22 (3rd DCA 2009); *Emmert v. Monroe County*, 83 So.2d 703 (3rd DCA 2012); *Galleon Bay v. Monroe County*, 105 So.3d 555 (Fla. 3rd DCA 2012); *Collins v. Monroe County*, 118 So.2d 872 (Fla. DCA 2013).

12 “The NFIP allows FEMA to make federal flood insurance available only in those areas where the appropriate public body of the community has adopted adequate land use regulations for its flood-prone areas. . . . Monroe County . . . has in fact adopted such a land-use ordinance so that it may receive the benefits of the NFIP as a regulated community.” *Fla. Key Deer*, 864 F.Supp. at 1229.

13 *Collins v. Monroe County*, 999 So.2d 709, 713 (Fla. 3rd DCA 2008) (“A facial taking, also known as a per se or categorical taking, occurs when the mere enactment of a regulation precludes all development of the property, and deprives the property owners of all reasonable economic use of the property. . . . In an as-applied claim, the landowner challenges the regulation in the context of a concrete controversy specifically regarding the impact of the regulation on a particular parcel of property.”)

14 *Lost Tree Village Corp. v. City of Vero Beach*, 838 So.2d 561, 570 (Fla. 4th DCA 2002) (citing *Glisson v. Alachua County*, 558 So.2d 1030, 1036 (Fla. 1st DCA 1990)).

15 999 So.2d at 715 (citing *Williamson County Regional Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 186-94, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985))

16 *Collins*, 999 So.2d at 716 (citing *Glisson v. Alachua County*, 558 So.2d 1030, 1036 (Fla. 1st DCA 1990)).

17 See *Lost Tree Village Corp. v. City of Vero Beach*, 838 So.2d 561 (Fla. 4th DCA 2002); *Tinnerman v. Palm Beach County*, 641 So.2d 523 (Fla. 4th DCA 1994).

18 659 So.2d 1174 (Fla. 4th DCA 1995).

19 621 So.2d 469 (Fla. 4th DCA 1993).

20 *Shillingburg*, 659 So.2d at 1178.

21 *Id.*

22 *Id.*

23 *Karatinos*, 621 So.2d at 470 (“Their claim against DNR was for inverse condemnation, and their claim against the town was for declaratory relief and damages pursuant to 42 U.S.C § 1983.”)

24 *Id.* at 470-471.

25 *Id.* at 471.

26 *Id.*

27 *Id.* at 470 (“The town setback ordinance had a procedure for obtaining modification; however one of the requirements was approval from DNR.”)

28 *Id.* (“The Karatinos then filed an application with DNR for permission to build over the Coastal Construction Control Line, but DNR refused to process the application until the Karatinos received approval from the town. A classic Catch-22.”).

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29 *Clay*, 849 So.2d 363 (Fla. 3rd DCA 2003).

30 *Id.* at 365.

31 *Id.*

32 *Id.*

33 *State, Dept. of Health & Rehabilitative Services v. State*, 472 So. 2d 790 (Fla. 1st DCA 1985).

34 Fla. R. Civ. P. 1.140(b) provides that the pleader may raise the defense of failure to join indispensable parties by motion to dismiss rather than in a responsive pleading. The motion must be made before the pleading. However, if the facts supporting the motion are not apparent in the allegation of the complaint, then a motion to dismiss for failure to join an indispensable party may not be appropriate. Under such circumstances, the matters should be raised as an affirmative defense in the answer. See *LeGrande v. Emmanuel*, 889 So.2d 991 (Fla. 3rd DCA 2004) (“Although Rule 1.140 certainly provides that the failure to join indispensable parties may be raised by motion, we believe that the question of whether [there] are indispensable parties to this suit would be better raised as a matter of an affirmative defense in an answer. . . . That is because on a motion to dismiss, the trial court’s function is to determine whether the allegation contained in the four corners of the complaint state a cause of action. . . . Unless affirmative defenses appear on the face of the complaint, they may not be considered on a motion to dismiss.”).

35 See *Good v. United States*, 39 Fed. Cl. 81, 104, n. 43 (“Plaintiff does not argue here that the state and county restrictions were mandated by the federal regulatory regime. Where the state has effected the alleged taking action under order of the federal government, liability will rest, if at all with the federal government.”); *Golf Club of Plantation v. City of Plantation*, 847 So.2d 1028 (Fla. 4th DCA 2003) (“There is no suggestion by the City that its [regulation] has been imposed on it by Broward County.”); *Hendler v. United States*, 952 F.2d 1364, 1379 (Fed. Cir. 1991) (holding that takings liability for the state installation of groundwater monitoring wells would properly rest with the federal government where the state acted under federal order.”)

36 Fla. R. Civ. P. 1.180.

37 *Galleon Bay v. Monroe County*, 105 So.3d 555, 563-564n (Fla. 3rd DCA 2012) (“In May 2002, while it was pursuing administrative relief, Galleon sued the Board of County Commissioners (“BOCC”) for inverse condemnation. The State of Florida was later sued as a third-party defendant.”); *Collins v. Monroe County*, 118 So.3d 872, 874 (Fla. 3rd DCA 2013) (“In 2004, the Landowners filed an inverse condemnation action against the County “seeking just compensation for the alleged permanent constitutional taking of their property.” The County, in turn, filed a third-party action against the State of Florida.”) (internal citation omitted).

38 *Galleon Bay*, 105 So.2d at 557-558.

39 *Id.* at 558.

40 *Collins*, 118 So.3d at 875 (citing *Galleon Bay*, 105 So.3d at 555-61.)

41 *Galleon Bay*, 105 So.3d at 557-558.

42 “A claim for indemnification, subrogation, or contribution must be brought as part of any third-party action under [Fla. R. Civ. P. 1.180].”

New York Buffett, Inc. v. Certain Underwriters at Lloyd’s London, 950 So.2d 438 (Fla. 4th DCA 2007)(citing *Leggiere v. Merrill Lynch Realty/Florida*, 544 So.2d 240 (Fla. 2nd DCA 1989)).

43 *Lost Tree Village Corp. v. City of Vero Beach and Town of Indian River Shores*, 838 So.2d 561 (Fla. 4th DCA)

44 *Id.* at 565-66.

45 *Id.* at 568.

46 *Id.*

47 *Id.*

48 *Id.*

49 *Lost Tree Village, id.* at 568, quoting *Ciampetti v. United States*, 18 Cl.Ct. 548, 556 (Cl. Ct.1989).

50 838 So.2d at 569 (quoting Charles E. Harris, *Environmental Regulations, Zoning and Withheld Municipal Services: Takings of Property by Multi-Government Action*, 25 U. Fla. L.Rev. 635, 683 (1973)). See also *Anhoco Corp. v. Dade County*, 144 So.2d 793, 797 (Fla.1962) (holding that multiple governmental units engaged in a cooperative effort to obtain property can all be liable for the taking of property).

51 *Lost Tree Village*, 838 So.2d. at 568-569.

52 847 So.2d 1028 (Fla. 4th DCA 2003)

53 *Id.* at 1029.

54 *Id.*

55 *Id.* at 1029.

56 *Id.*

57 *Id.* at 1029-1030.

58 *Id.* at 1030.

59 *Id.* at 1030.

60 *Id.* at 1031.

61 *Collins*, 999 So.2d at 713 (citing *Penn Cent. Transp. v. City of New York*, 438 U.S. 104 (1978)) See also *Collins v. Monroe County*, 118 So.3d 872 (Fla. 3rd DCA 2013) (“As we have previously set forth, “[i]n addressing whether a ‘taking’ has occurred, the United States Supreme ‘Court’s decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations.”)

62 *Good v. U.S.*, 39 Fed. Cl. 81, 114 (1997). See also *Good v. U.S.*, 189 F.3d 1355, 1360 (Fed. Cir. 1999) (“Because we find the expectations factor dispositive, we will not further discuss the character of the government action or the economic impact of the regulations.”); *Fla. Dept. of Env’tl. Prot. v. Burgess*, 772 So.2d 540, 544 (Fla. 1st DCA 2000) (affirming judgment based on Appellee’s failure to demonstrate that he had reasonable, distinct, investment-backed expectations without any discussion of property values).

63 *Forest Properties Inc. v. U.S.* 177 F.3d 1360, 1366 (C.A. Fed. 1999) (holding it is not enough for the claimant to prove that he had an investment-backed expectation; he must also prove that the investment-backed expectation is reasonable).

64 *Good*, 39 Fed. Cl. 81, 114 (1997).

65 118 So.2d 872 (Fla. 3rd DCA 2013).

66 *Good*, 39 Fed. Cl. at 85

67 *Id.* at 85-90

68 16 U.S.C. §§662-666 (1994)

69 *Good*, 39 Fed. Cl. at 93

70 *Id.*

71 *Id.* (citing *Loveladies Harbor v. United States*, 28 F.3d 1171 (Fed. Cir 1994) and *Crepel v. United States*, 41 F.3d 627, 631 (Fed. Cir 1994)). The court further explained “[t]his inquiry is informed not only by whether the

specific regulatory restrictions at issue were in place at the time of purchase, but also by the regulatory climate at that time, and whether plaintiff’s investment in purchase and development can be considered objectively reasonable in light of that climate.” *Id.*

72 *Good, id.*

73 *Id.* at 111 (“While plaintiff was free to take the investment risks he took in this regulated environment, he cannot look to the Fifth Amendment for compensation when such speculation proves ill-taken.”)

74 *Collins*, 118 So.3d at 875.

75 *Collins I*, 999 So.2d at 718 (quoting *Monroe Cnty. v. Ambrose*, 866 So.2d 707, 711 (Fla. 3d DCA 2003).

76 *Collins*, 118 So.3d at 875 n. 7 (Noting in contrast, “*Galleon Bay* involved a landowner who expended hundreds of thousands of dollars in an effort to develop its property and in pursuit of its reasonable investment-backed expectations.”).

77 *Beyer v. City of Marathon*, 197 So.3d 563, 566 (Fla. 3rd DCA 2013) (Affirming the trial court’s grant of summary judgment in City’s favor, stating: “To be sure, the record is devoid of evidence that—not only at the time of purchase but in all the intervening years—the Beyers pursued any plans to improve or develop the property. They provided no evidence of investment-backed expectations at or since the time the property was purchased, nor demonstrated any reasonable expectation of selling the property for development.”)

78 *Leon County v. Gluesenkamp*, 873 So. 2d 460, 467 (Fla. 1st DCA 2004) (“In other words, the court must compare the value that has been taken from the property with the value that remains in the property.”). See also *Forest Properties*, 177 F.3d at 1367 (“The economic impact of the regulation upon the claimant is measured by the change, if any, in the fair market value caused by the regulatory imposition.”) The question in a takings case is not whether the owner can use its property for the most profitable use or even its planned or desired use. *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1031 (3d Cir. 1987) (“Although there has been a substantial diminution in value, this property retains a substantial value that establishes the existence of residual economically feasible uses. The Supreme Court has made it clear that general land use regulation may deprive an owner of the best use or uses of his property without compensation.”); *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1072-73 (11th Cir. 1996) (“The standard is not whether the landowner has been denied those uses to which he wants to put his land; it is whether the landowner has been denied all or substantially all economically viable use of his land.”) Rather, the question is whether there is any viable economic use available.

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

80 Def. [s] Mot. in Limine (Apr. 6, 2015), Case No. CAK-02-595.

81 Pl. [s] Mot. in Limine No. II: Endangered Species (April 8, 2015), Case No. CAK-02-595.

82 Order on Motions (Aug. 19, 2015), Case No. CAK-02-595.

83 *Galleon Bay v. Monroe County*, Case No. 3D16-1502 (Fla. 3rd DCA)

84 533 U.S. 606, 121 S. Ct. 2448, 150 L.Ed 592 (2001) (internal citations omitted).

85 *Id.* at 625.

86 *Id.*

87 *Id.*



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