



An Overview of Riparian Rights in Florida

by Brendan Mackesey^{1*}

Introduction

This article provides a concise reference point for the attorney who represents—or sues—a riparian (waterfront) owner. By no means is this article intended to be exhaustive. Quite the opposite . . . each one of the different riparian rights discussed below warrants its own law review article. Notwithstanding, the author hopes that this article provides a helpful introduction for those unfamiliar with riparian rights and a useful refresher for others.

Origins of Riparian Rights

The concept of riparian rights originated in England, where title to navigable tidelands is held by the King (the sovereign) in trust for the public. *United States v. Gerlach Livestock*, 339 U.S. 725, 744 (1950); *Shively v. Bowlby*, 152 U.S. 1, 2 (1894). When the colonies rebelled against England and became sovereign, each new state acquired title to the submerged lands of “navigable” waters within their borders. *Martin v. Lessee of Wadell*, 41 U.S. 367, 410 (1842). Other states—including Florida—gained similar rights when they joined the Union via the Equal Footing Doctrine. *Pollard’s Lessee v. Hagan*, 44 U.S. 212, 228-29 (1845); see also *Geigor v. Filor*, 8 Fla. 325, 338 (1859). Rights of the public to use “navigable” waters evolved into the public trust doctrine. See *State v. Black River Phosphate Co.*, 13 So. 640 (Fla. 1893). In Florida, the public trust doctrine is codified at Article X, Section 11 of the State Constitution, which reads:

The title to land under navigable waters, which have not been alienated, including beaches below the mean high water line, is held in trust by the State, by virtue of its sovereignty, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest. Private uses of portions of such lands may be authorized by law, but only when not contrary to the public interest.

Florida’s public trust doctrine protects the public’s right to engage in navigation, fishing, bathing, and commerce over navigable waters.¹ Riparian owners share these rights with the public.² However, riparian owners also enjoy special rights—distinct from the public—by virtue of their upland ownership: (1) the right to access; (2) the right to a view; (2) the right to wharf out; (4) the right to accretions; and (5) the right to reasonable use³. See *Walton County v. Stop the Beach Renourishment*, 998 So. 2d 1102, 1111 (Fla. 2008) (citing numerous Florida Supreme Court cases). This article addresses each of these five riparian rights. First, however, it will discuss riparian rights generally.

When Riparian Rights Attach

At the outset, it is important to note that a “riparian” owner actually only refers to the owner of property abutting a river or stream; a “littoral” owner refers to the owner of a property abutting an ocean or lake. *Walton County*, 998 So. 2d at 1102

n.3 (citing *Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, Ltd.*, 512 So. 2d 934, 936 (Fla. 1987)). For the sake of brevity, this article only uses the term “riparian” owner. Second, it is important to remember that riparian rights—except for the right to reasonable use⁴—only attach to properties abutting “navigable” waters.⁵ See *Broward v Mabry*, 50 So. 826, 830 (Fla. 1909); *Martin v. Busch*, 112 So. 274, 277 (Fla. 1927). The test for navigability asks whether, at the time Florida joined the Union in 1845, the waterbody was (1) in its ordinary and natural state, (2) used or capable of being used by any watercraft (3) of a sufficient capacity of the year (4) as a public highway for commerce?⁶

The importance of “navigability” bears re-mentioning: Riparian rights

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From the Chair

by Rachael Bruce Santana

Dear ELULS Section Member,

In my first Chair's message I laid out for you the theme of the Environmental and Land Use Law Section this year- **ELULS 2020- Looking Backwards, Looking Forwards**. The theme really evolved from the phrase "hindsight is 20/20." It is easy to look backwards at what you should have or could have done once you already know what happens. It is much harder to look ahead and figure out where you would like to go. As ELULS approaches its 50th anniversary, that is exactly what the Executive Council is endeavoring to do- to envision the best version of the environmental and land use law community at a half century. We started that journey by reengaging with the former leadership of the Section.

Many, if not most, of the founding attorneys and key players in environmental and land use law have served as an ELULS Chair and are still in

practice. On August 14, 2020, over twenty Past Chairs joined this year's Officers for a Past Chairs' Roundtable zoom conference. We are so honored and appreciative that these distinguished professionals made the effort to chat with us and have agreed to serve as our Council of Wisdom. The meeting was a great success, reuniting colleagues and friends- some of whom had not seen each other in decades. These Past Chairs achieved great things, such as growing Section membership from 14 to over 1,000 members in a handful of years, raising public awareness of environmental issues, and promoting equal access and pro bono opportunities for those in need. What also struck me was how much fun everyone had and the relationships they built during their years of service with the Section. There was much debate among the Past Chairs as to which Long Range Planning Retreat was the best- with top contenders as Costa

Rica, Keystone, the Bahamas, and the Florida Keys. Due to Covid-19, this year's Long Range Planning Retreat was rescheduled to the first weekend in May and will be held at the Ritz Carlton on Sarasota Bay. We'd love to have you join us for some much needed in person interaction~ so mark your calendars now.

Within this Section Reporter you will find the first of several Historical Chair's messages to go along with the *Looking Backwards* part of the theme. We hope you enjoy reading about the past accomplishments of the Section. This Reporter also contains a Meet and Greet of this year's Executive Council and Officers. Feel free to reach out to any one of us if you are looking for a way to connect and get involved.

Warm Regards,
Rachael Santana

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THE FLORIDA BAR
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From the Chair – Historical Messages from Past ELULS Chairs

This year the Section Reporter will be highlighting historical Chair’s Messages as part of the “Looking Backwards” element of our theme. We want to give a special thanks to Irene Quincy for providing the compilation of documents. The featured message comes Committee Chair Joseph Fleming during the 1974-1975 year. The Section had humble beginnings as a Committee of The Florida Bar but was soon elevated to a Section. Enjoy!

by Joseph Z. Fleming, Chairman

The Environmental Law Committee, recognizing the need to provide information to members of the Bar regarding environmental law, sponsored a series of seminars throughout the state. Each meeting of the Environmental Law Committee was utilized for the purpose of enabling practitioners to keep up with the ever changing state and federal regulations applicable to the environmental law practice.

Set forth below are the seminars which were sponsored by the committee:

1. The Orlando Seminar on State Environmental Laws Regulating

Water Quality and Water Management. This seminar was held at the meeting on October 25, 1974. Speakers were Ross A. McVoy, general counsel for the Trustees of the Internal Improvement Trust Fund, James Brindell of the Department of Pollution Control, and Ralph Bogardus of the Central and Southern Flood Control District. The purpose of the meeting was to enable members of the committee and other interested guests to obtain an analysis of the functions of the Trustees of the Internal Improvement Trust Fund, the Department of Pollution Control and the Flood Control Districts. Representatives of each of the agencies discussed the agency jurisdiction, the statutes pursuant to which their agency operated and answered specific questions from the audience.

2. The Tallahassee Seminar on State Environmental Agencies. This seminar was held on February 13 and 14, 1975, and was cosponsored by state agencies. It was a two-day in-depth presentation of an analysis of the state environmental regulatory agencies, the laws and rules and regulations pursuant

to which they operate and the policies and goals. The seminar was organized by Kenneth Hoffman of the Attorney General’s office. Subsequent to the initial address by Attorney General Robert Shevin, there was an analysis of each agency by either the executive director or the executive director’s representative and the staff counsel. This enabled an understanding of not only what the purpose of the agency was as determined by the applicable laws, but also gave those in the audience an insight as to how the agency operated, how its decisions were made and its policies were implemented. Because of the way in which the seminar was structured by Kenneth Hoffman, there were lectures not only from attorneys, but from scientists and administrators. This seminar resulted in a unique understanding of the inter-relationship of the functions of the attorneys and the environmental experts working with the various agencies.

3. The Miami Seminar on Private Compensation in Oil Spill Situations was held on February 26,

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HISTORICAL MESSAGES:

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1975. Speaker was Thomas R. Post, attorney and port warden for the Port of Miami. This was an excellent presentation, not only of the history of the common law, but the current statutory laws relating to oil spills.
4. The Amelia Island Federal Environmental Laws Seminar. This seminar was held at Amelia Island on May 16 and 17, 1975, and involved an analysis of the applicable federal laws with an emphasis on those laws regulating air and water quality, the role of government in planning decisions and the federal land use legislative proposals. Among the speakers were Assistant Secretary of HUD and director of the New Communities Program, Otto Stolz; Colonel Emmett C. Lee, Jr., of the Army Corps of Engineers, Jacksonville District; Orin Briggs of the Regional Office of the Environmental Protection Agency; Vance Hughes, counsel for the Environmental Protection Agency in the Holland decision (a major decision interpreting the Federal Water Pollution Control Act); and Daniel O'Connell, past executive director of the Florida Environmental Land Management Study Commission.

In addition to the seminars, the committee sponsored the publication of the Environmental Law column in The Florida Bar Journal. Arthur Harper, editor of the column, did an excellent job in insuring that there were a series of excellent and highly topical articles regarding environmental law.

The committee also wishes to thank Linda Yates for her cooperation in connection with the Journal publication and Debbie Ginn who assisted with the seminars.

JOSEPH Z. FLEMING, Chairman

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ON APPEAL

by Larry Sellers, Holland & Knight LLP

Note: Status of cases is as of October 6, 2020. Readers are encouraged to advise the author of pending appeals that should be included.

FLORIDA SUPREME COURT

The City of West Palm Beach, Inc., v. Haver, et al., Case No. SC20-1284. Notice to invoke discretionary jurisdiction to review the 4th DCA decision in *Haver v. City of West Palm Beach*, 4D19-1537 (Jun. 10, 2020), in which the court certified direct conflict with decisions of other district courts of appeal, that is, *Detournay v. City of Coral Gables*, 127 So. 3d 869 (Fla. 3rd DCA 2013), and *Chapman v. Town of Redington Beach*, 202 So. 3d 979 (Fla. 2nd DCA 2019). 45 Fla. L. Weekly D1406c. Status: Notice to invoke filed August 27, 2020.

Classy Cycles v. Panama City Beach, Case No. SC20-118. Notice of intent to seek review of 1st DCA decision affirming trial court order upholding two City of Panama Beach ordinances restricting and then prohibiting the rental of scooters effective September 2020. 44 Fla. L. Weekly D2729a (1st DCA Nov. 13, 2019). Judge Makar filed a dissenting opinion. Status: Petition for review denied June 29, 2020.

Florida Wildlife Federation, Inc., et al. v. Jose Oliva, Bill Galvano and The Florida Legislature, Case No. SC19-1935. Notice to invoke discretionary jurisdiction to review 1st DCA decision affirming in part, reversing in part and remanding the trial court's Final Judgment for Plaintiffs: (1) interpreting Amendment 1 to limit the use of funds in the Land Acquisition Trust Fund created by Article X, Section 28 to the acquisition of conservation lands for other property interests the state did not own on the effective date of the amendment and thereafter, and to approve, manage, restore natural systems thereon, and enhance public access or enjoyment of those conservation lands; and (2) determining the numerous specific appropriations inconsistent with that interpretation are unconstitutional. 44 Fla. L. Weekly D2268a. Status: Petition for review denied June 29, 2020.

FIRST DCA

City of Destin v. Wilson, et al., Case No. 1D20-2585. Appeal from final order denying motion for attorney's fees pursuant to Section 120.569(2) (e) related to litigation involving a challenge to the modification of a DEP permit in connection with the dredging of East Pass in Destin, Florida. Status: Notice of appeal filed September 3, 2020.

1000 Friends of Florida, Inc., et al., v. State of Florida, et al., Case No. 1D20-2135. Appeal from final order of dismissal, dismissing amended complaint challenging section 7, subsection (8)(c), Chapter 2019-165, *Laws of Florida*, that provides for prevailing party attorney's fees and costs in certain land development litigation, as unconstitutional. (This provision is now codified in section 163.3215(8) (c), *Florida Statutes* (2020)). Status: Notice of appeal filed July 17, 2020.

Neely Paul Towe as Trustee v. Fish and Wildlife Conservation Commission, Case No. 1D20-2066. Appeal from FWC final order dismissing amended petition for hearing seeking to challenge the renewal of a marine turtle permit. Status: Notice of appeal filed July 13, 2020.

Delaney Reynolds, et al. v. State of Florida, et al., Case No. 1D20-2036. Appeal from order granting motions to dismiss with prejudice the first amended complaint by which eight young Floridians seek declaratory and injunctive relief, asserting injury because of "defendants' deliberate indifference to the fundamental rights of life, liberty and property, and the pursuit of happiness, which includes a stable climate system in violation of Florida common-law and the Florida Constitution." The complaint further asserts that the "fossil fuel energy system" created and operated by the defendants does not, and cannot, ensure that the plaintiffs will grow to adulthood safely, enjoying the same rights, benefits and privileges of earlier-born generations of Floridians. The complaint sought declaratory relief and an injunction compelling defendants to develop and implement a comprehensive plan to bring

its energy system into constitutional compliance. Status: Notice of appeal filed July 1, 2020.

Uhlfelder v. DeSantis, Case No. 1D20-1178. Appeal from trial court order granting motion to dismiss with prejudice plaintiff's amended complaint for emergency injunctive relief, which sought to compel Governor DeSantis to close all of Florida's beaches. Status: Notice of appeal filed April 9, 2020.

Blue Water Holdings SRC, Inc. v. Santa Rosa County, Case No. 1D19-4387. Appeal from final summary judgment denying Harris Act claim for failure to comply with the Act's procedural requirements to submit a valid appraisal relating to the denial of a permit for a construction and demolition debris landfill. Status: Oral argument held on September 15, 2020.

Vickery v. City of Pensacola, Case No. 1D19-4344. Appeal from trial court order denying motion to dissolve a temporary injunction to prevent a property owner from removing a live oak tree located in the Northern Hill Preservation District, part of Pensacola governed by specific ordinances to protect Heritage trees. Status: Notice of appeal filed December 3, 2019.

John S. Donovan, et al., v. DEP and City of Destin, Case No. 1D19-4101. Appeal from DEP final order issuing consolidated joint coastal permit and sovereign submerged land authorization to the City authorizing periodic maintenance dredging of the federally-authorized East Pass in Destin Harbor navigation channels. Status: Motion to dismiss as moot filed on July 22, 2020.

GI Shavings, LLC v. Arlington Ridge Community Association, Inc. and Florida Department of Environmental Protection, Case No. 1D19-3711. Petition for review of DEP final order approving a consent order between GI Shavings and DEP but denying the application for revisions to its air permit for a wood chip dryer. Status: Notice of appeal filed October 14, 2019.

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ON APPEAL:

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City of Jacksonville v. Dames Point Workboats, LLC and Florida Department of Environmental Protection, Case No. 1D19-1728. Petition to review DEP final order granting consolidated ERP and sovereign submerged lands lease for a commercial/industrial tugboat and marine barge loading facility on the St. Johns River. Status: Oral argument scheduled for October 12, 2020.

Imhof, et al. v. Walton County, et al., Case No. 1D19-980. Appeal from a final judgment in favor of the county in an action brought by the plaintiffs pursuant to Section 163.3215 challenging the consistency of a development order with the county's comprehensive plan. The trial court followed the 2d DCA's decision in *Heine v. Lee County*, 221 So.3d 1254 (Fla. 2nd DCA 2017), which held that a consistency challenge is limited to whether the development order authorizes a use, intensity, or density of development that is in conflict with the comprehensive plan. Note: Regular readers will recall that the 3d DCA recently affirmed *per curiam* a similar ruling in *Cruz v. City of Miami*, Case No. 3D17-2708. Status: Oral argument held January 15, 2020.

SECOND DCA

Kochman v. Sarasota County, et al., Case No. 2D20-18. Petition for writ of certiorari by an adjacent property owner to review a trial court's denial of the petition for certiorari with respect to the County's approval of the Siesta Promenade, a mixed-use project on Siesta Key. Status: Petition denied *per curiam* on July 1, 2020; motion for written opinion denied on August 12, 2020.

Denlinger v. Southwest Florida Water Management District and Summit View, LLC, Case No. 2D19-3835. Appeal from a SWFWMD final

order dismissing a petition challenging the extension of an ERP pursuant to section 252.363, F.S., which provides for the tolling and extension of certain permits and other authorizations following the declaration of a state of emergency. Status: Order granting voluntary dismissal filed August 27, 2020.

FOURTH DCA

The Board of Trustees of the Internal Improvement Trust Fund of the State of Florida v. Waterfront ICW Properties, LLC and Wellington Arms, A Condominium, Inc., Case No. 4D19-3240. Petition to review final judgment quieting title in the name of the appellee and against the Trustees as to certain submerged lands constituting a part of Spanish Creek located in the Town of Ocean Ridge. Status: Oral argument scheduled for December 8, 2020.

Haver v. The City of West Palm Beach, et al., Case No. 4D19-1537. Appeal from circuit court's final order dismissing with prejudice a five-count complaint in a zoning enforcement action, alleging that the defendants failed to enforce zoning codes. Status: On June 10, 2020, the court reversed the dismissal of the first three counts, citing the Florida Supreme Court's decision in *Boucher v. Novotny*, 102 So. 2d 132 (Fla. 1958), in which the court held that "where municipal officials threaten or commit a violation of municipal ordinances which produces an injury to a particular citizen which is different in kind from the injury suffered by the people of the community as a whole[,] then such injured individual is entitled to injunctive relief in the absence of an adequate legal remedy." The court also certified conflict with the Third District's opinion in *Detournay v. City of Coral Gables*, 127 So. 3d 869 (Fla. 3rd DCA 2013), and the Second District's opinion in *Chapman v. Town of Redington Beach*, 282 So. 3d 979 (Fla. 2nd DCA

2019). Status: Motions for rehearing and rehearing en banc denied on July 28, 2020.

Great American Life Insurance Co. v. The Buccaneer Commercial Unit A, etc., et al., Case No. 4D19-868. Petition to review DEP final order granting consolidated ERP and sovereign submerged land lease for commercial unit A dock, after the ALJ determined that the applicants met all applicable navigational criteria. Status: Affirmed *per curiam* June 18, 2020.

FIFTH DCA

Glenda Mahaney v. Garber Housing Resorts, LLC and DEP, Case No. 5D19-3517. Appeal from DEP final order denying appellant's petition for administrative hearing with prejudice and approving a site rehabilitation completion order. Status: Notice of appeal filed November 27, 2019.

11th CIRCUIT COURT OF APPEAL

Florida Defenders of the Environment, et al., v. U.S. Forest Service, Case No. 20-12046. Appeal from order granting the federal defendant's motion to dismiss a complaint alleging that the state has operated the Rodman Dam without a permit. Status: Notice of appeal filed June 3, 2020.

UNITED STATES SUPREME COURT

Maggie Hurchalla v. Lake Point Phase I, LLC, et al., Case No. 20-332. Petition for writ of certiorari to review decision by the Florida 4th DCA upholding jury verdict finding Ms. Hurchalla liable for \$4.4 million in damages on a claim of tortious interference with a contract for a public project, due to her public comments in opposition to the project. 44 Fla. L. Weekly D1564a (Fla. 4th DCA 2019), *rev. denied* Case No. SC19-1729 (Fla. Apr. 13, 2020). Status: Petition for writ of certiorari filed on September 10, 2020.



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For Whom The Permit Tolls – Section 252.363, Florida Statutes, and the COVID-19 Emergency

by Jaime R. Maier, Attorney, Hill Ward Henderson, Tampa, Florida

Originally published in the Hillsborough County Bar Association LAWYER Magazine, May-June 2020 edition; Revised to reflect subsequent legal developments.

With the COVID-19 emergency causing uncertainty across all markets and industries right now, many developers and landowners are looking for some relief. Section 252.363 of the Florida Statutes is an avenue for relief from impending expiration dates and deadlines contained in permits and development orders. When the Governor of Florida declares a state of emergency, Section 252.363, Florida Statutes tolls these deadlines until the end of the emergency, and allows for an extension of the expiration date for however many days the emergency lasted *plus* six months (note that if emergencies overlap, the overlapping days may only be counted once in calculating the extension). Section 252.363 of the Florida Statutes has been used by many permit-holders subsequent to Florida's hurricane emergencies, and even after the Zika Virus emergency.

In 2019, however, Section 252.363 was revised to specify a “natural emergency” as the only type of emergency that will toll and extend expiration dates and deadlines. The other types of emergencies defined in Chapter 252, Florida Statutes include “manmade emergency” and “technological emergency.” A “natural emergency” is defined in the statute as “an emergency caused by a natural event, including, but not limited to, a hurricane, a storm, a flood, severe wave action, a drought, or an earthquake.” Though not exhaustive, this list does not specifically contemplate disease- or virus- related emergencies. Although the Zika Virus emergency did serve to toll and extend deadlines under the statute, that emergency occurred before the statute was narrowed; therefore, the COVID-19 emergency is the first virus-related emergency affecting Florida since the revisions to Chapter 252 of the Florida Statutes.

Executive Order 20-52 (the “Executive Order”) , in which Governor Ron DeSantis declared the COVID-19 state of emergency, describes COVID-19 as a “Public Health Emergency.” “Public Health Emergency” is not defined in Section 252.363, Florida Statutes. However, Chapter 252 of the Florida Statutes includes a cross-reference to Section 381.00315, Florida Statutes which contains a definition of “Public Health Emergency” that includes infectious diseases. The Executive Order that declared the Zika Virus emergency similarly described Zika Virus as a “Public Health Emergency.” Therefore it is not clear from the “Public Health Emergency” terminology whether the Zika Virus or COVID-19 falls under the classification of “natural emergencies” as contemplated by Section 252.363.

The Florida Department of Business and Professional Regulation issued guidance on March 20, 2020 (the “FDBPR Guidance”), specifying that the COVID-19 emergency as declared by Executive Order qualifies as a “natural emergency” for purposes of tolling permits under Section 252.363, Florida Statutes. When issued, it was not clear from FDBPR's Guidance whether this was a policy decision for the COVID-19 emergency specifically, or implied that the term “natural emergency” will cover viruses and/or “Public Health Emergencies” for all purposes going forward. The possibility existed that a local government could deny an extension of a development order on the grounds that “natural emergency” did not cover viruses or disease.

Perhaps unsurprisingly, litigation as to whether “natural emergency” included viruses or diseases quickly ensued. In *Abramson v. DeSantis*, 2020 WL 3464376 (Fla. 2020), petitioner Abramson argued that the definition of “natural emergency” did *not* include a virus pandemic, and, therefore, COVID-19-related emergency orders issued by Governor DeSantis were void. The Florida Supreme Court, however, held that a pandemic is covered by the

“natural emergency” definition, thus effectively ending any debate on the question and ensuring that local governments will afford permit-holders the statutory extension.

Section 252.363, Florida Statutes provides a 90-day window after the conclusion of an emergency (and any extensions thereof) to notify a local government, in writing, of the intent to exercise the extension. If a client's expiration deadline is fast approaching and the COVID-19 emergency is not yet over, it may be beneficial to send a letter to the appropriate jurisdiction to put the jurisdiction on notice of the client's intent to exercise the client's rights under Section 252.363, Florida Statutes when the emergency is over. The issuing authority may respond with an acknowledgement of that right. Some jurisdictions will request that the client formalize the use of the extensions available under Section 252.363, Florida Statutes through the respective jurisdiction's process for extending deadlines. Sending a notice letter well before your client's deadline is therefore advisable, to provide enough time to determine if the issuing authority will require additional steps to extend the deadline as result of the emergency.

It is common for a local government's land development code to contain procedures for requesting deadline extensions for certain types of development orders and permits. The local government's development order and permit extensions could be used in tandem with a Section 252.363 request, or could be used before the COVID-19 emergency is over to extend your client's deadline before an extension under Section 252.363, Florida Statutes is ripe. Many jurisdictions, such as the City of Coral Springs, the City of Brooksville, St. Lucie County, and Seminole County, have issued executive orders regarding the tolling of various deadlines during local states of emergency, which may benefit your clients as well.



Environmental Case Law Update

by Gary Hunter, Hopping Green & Sams

***Manatee County v. Mandarin Development, Inc.*, 2020 Fla. App. LEXIS 3568 (Fla. 2nd DCA 2020) (Opinion filed March 18, 2020)**

Manatee County (Manatee) appealed a final judgement finding that the Land Development Code (LDC) was facially unconstitutional. An additional takings claim was affirmed in favor of Mandarin Development (Mandarin), but the facial challenge to the constitutionality was subsequently reversed. Therefore, the discrete issue on appeal was whether the statute of limitations begins to run on a challenge to the facial constitutionality of a land use ordinance.

The matter involved provisions of Manatee County LDC that required developers to dedicate conservation easements to the County over

required wetland buffers for the purpose of protecting and inspecting the conserved wetlands. In 2006, Kimball Hill Homes planned to develop a 41.2-acre parcel bisected by a linear wetland. Approval was granted in 2007, conditioned on the dedication of conservation easements over identified wetland buffers. Riva Trace subsequently purchased the property in late 2007, reducing the density of development yet not seeking a variance to the wetland buffers. Shortly after, corporate successor Mandarin took ownership of the property.

After significant development, Mandarin sought a variance from the wetlands buffer requirement. Manatee responded that such relief was not possible. Two years later, Mandarin filed a declaratory judgement

alleging that the wetland buffer provisions were facially unconstitutional under the doctrine of unconstitutional conditions, later withdrawing an as applied challenge. Prior to trial, the court denied a motion for summary judgement on the statute of limitations defense filed by Manatee. After a bench trial, the court found that one section of the LDC was unconstitutional.

On appeal, the Court addressed the specific question concerning when a statute of limitations begins to run on a facial challenge to the constitutionality of a land use ordinance. Manatee asserts that the statute of limitations starts to run when the land use ordinance was originally

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The image shows a laptop displaying the ELULS website. The website header includes the ELULS logo (Environmental and Land Use Law Section of The Florida Bar) and a search bar. Below the header, there is a navigation menu with links for Home, About Us, Membership, Publications, Committees, Treatise, Our Sponsors, RSS, CLE Seminars, Resources, Law Schools, Sign-up for our E-mail Lists, Affiliates, and Green Law Firm. The main content area features a large image of a tree trunk in a forest with the text: "Florida Environmental and Land Use Law Treatise - updated annually for Section Members...". Below this, there are four columns of text: "THE SECTION" (The Environmental and Land Use Law Section, part of The Florida Bar, is dedicated to serving the interests of over 1,300 members and affiliates through educational programs and publications), "JOIN THE SECTION" (Section Membership is open to members of The Florida Bar, law students, and affiliated professionals), "MEMBER BENEFITS" (Florida lawyers and affiliated land use and environmental professionals gain many benefits by joining the Environmental and Land Use Law Section including...), and "LATEST SECTION NEWS" (What is the Deal in This one? Why Should I be my Client's Care? - December 10th Webinar). At the bottom right of the website content, it says "Fall 2019 Section Reporter - Now Available!".

CASE LAW UPDATE:

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adopted in 1990. Mandarin argues that the statute of limitations can never bar a challenge to a void ordinance. Yet, the Court surmised that while the answer may be different in an as-applied challenge, the statute of limitations for a facial challenge begins to run when the ordinance is enacted or adopted.

In the context of land use ordinances, facial constitutional challenges are based on a single harm, measurable and compensable when the statute is passed. Since the harm occurs immediately, the statute of limitations begins to run at the point of enactment or adoption. Thus, Manatee was barred from bringing a declaratory judgement as to the constitutionality, as the four-year statute of limitations began to run in 1990.

In this case, the parcel was purchased with full knowledge of the conditions imposed by Manatee. Further, Mandarin proceeded with development without ever mentioning the facial unconstitutionality. In fact, Mandarin failed to pursue any remedy while accepting the benefits of development approval. Thus, the court “refuse[d] to hold that a developer may dictate when the statute of limitations begins for a facial challenge to the constitutionality of land development ordinances by virtue of its own actions.”

Additionally, it is arguable that Mandarin could not have suffered any actual loss, as future owners would pay the purchase price reflecting the burden of the ordinance. However, the court noted that this

ruling would not strip Mandarin from moving forward with an as-applied challenge. For reasons not on the record, Mandarin elected to dismiss its as-applied challenge prior to the trial.

***Jamieson v. Town of Fort Myers Beach*, 292 So.3d 880 (Fla. 2nd DCA 2020) (Opinion filed March 25, 2020)**

At issue is whether a purchaser deemed to have notice of an earlier enacted restriction is barred from claiming it effects a taking. Alternatively, at issue is whether such claims were ripe when the landowner still had “potential opportunities to secure development rights for the property”

In 2002, Jamieson purchased seven acres of platted vacant lands developed on three sides in the Town of Fort Myers Beach (Town). Prior to 1995, the land was under the jurisdiction of Lee County. In 1998, the Town adopted a comprehensive plan that designated the entire property as wetlands, permitting only one dwelling per twenty acres. This designation was carried over from Lee County’s comprehensive plan and not supported by any environmental study.

The property was subject to a “minimum use determination” (MUD) process for determining whether individual plats may be developed. Yet by 2003, the Town restricted the MUD process for property designated as wetlands via their development code. In 2010, Jamieson petitioned the SFWMD and determined that only 61% of the property was wetland. However, the Town determined that “no clear factual error” existed in the property’s current designation. In 2012, Jamieson applied for a MUD for all forty lots, which was denied

based on the Town’s land development code. In 2013, Jamieson applied for a small-scale comprehensive plan amendment, which despite a favorable recommendation, was denied in 2014. On appeal, Jamieson was granted a MUD allowing one single-family home per lot via a resolution. However, the land development code still barred development on wetlands. In 2015, Jamieson applied for a variance to the land development code, which the Town did not process citing that a variance of this kind would not be legally permissible.

In 2016, Jamieson filed a Bert Harris claim. In response, the Town offered to allow Jamieson to develop three lots but required this to represent the “full amount of development rights to which the property owner is entitled” to under the 2014 resolution. Jamieson rejected the offer and filed a three-count complaint alleging inverse condemnation, partial inverse condemnation, and a violation of the Bert Harris Act. The trial court granted summary judgement in favor of the Town on the inverse condemnation count, holding that the claim is not ripe. Soon after, the trial court granted summary judgement in favor of the Town on the remaining counts based on the same reasoning. After the trial court entered final judgement, Jamieson appealed.

First, the trial court ruled that Jamieson was not entitled to relief as the property was clearly not eligible for development when it was purchased in 2002. In reversing this decision, the Court heavily relied on *Palazzolo v. Rhode Island* in concluding that a transfer of property would not bar an inverse condemnation

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claim. Otherwise, a post enactment transfer would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. Reversing the trial court's distinction, the Court held that the language in *Palazzolo* "makes it clear that notice of a preexisting regulation does not operate as an absolute bar to a takings claim." Thus, Jamieson acquired full property rights when he acquired the property in 2002, including the right to challenge the wetlands designation.

Second, the trial court dismissed the remaining counts on the basis that possible opportunities to secure development rights rendered the issue unripe. However, the Court held that where the permissible uses of the property are known to a reasonable degree, a takings claim is likely to have ripened. While Florida courts have required a final determination, a limited exception exists in cases whether further attempts to obtain approval would be futile. Here, the permissible uses of property were clear to a reasonable degree, having submitted multiple challenges over the years. The settlement offer would only remove wetland designation for three lots. Thus, it is reasonably certain the Town will not permit development of the remaining ninety-three percent of the property. Accordingly, the summary judgement on all counts was reversed and remanded.

In re: Petition for approval of waiver of CIAC Rule No. 25-6.064, F.A.C. for new line extensions serving electric vehicle fast charging stations, by Tampa

Electric Company, 2020 Fla. PUC LEXIS 110 (Fla. P.S.C. 2020) (Decision issued April 16, 2020)

On January 6, 2020, TECO petitioned for a temporary waiver of Rule 25-6.064 5-year cost estimation requirement for the purpose fostering electric vehicle (EV) fast charging stations. The rule in question is intended to quantify the costs for certain new construction to determine the appropriate contribution-in-aid-of-construction (CIAC) from customers requesting said facilities. Ultimately, the Florida Public Service Commission granted the temporary waiver, subject to the condition that TECO makes annual reporting requirements.

TECO's petition relates to Rule 25-6.064 F.A.C., stating that estimated charge revenues shall be estimated not more than 5 years after the new facilities are placed in service. TECO states that the purpose of waiving this would be to create a pilot program and encourage EV growth in Florida, citing that initial cost is the main barrier. TECO states that revenues are very low when first installed, and that a 10-year revenue estimation would encourage more development of EV charging stations. Moreover, TECO requests that the waiver be limited to 5-years, giving enough time to determine whether the 10-year period has a beneficial impact of the EV market.

First, Rule 24-6.064 is implemented to prescribe just, fair, reasonable, and compensatory rates. TECO states that the underlying statute grants broad discretion in setting utility rates. Moreover, TECO states that the different estimation will not result in undue or unreasonable preference to any person and will not

impair the ability to prescribe fair, just, and reasonable rates. Further, TECO anticipates a de minimus impact on the general body of ratepayers as line extensions for EV chargers would not cause a material impact on the amount of CIAC collected relative to TECO's overall invested capital. Although TECO has only installed one-line extension for EV chargers to date, it has nonetheless served over 50 EV chargers. The Commission found that TECO demonstrated that the purpose of the underlying statute will be achieved if the waiver is granted.

Second, TECO alleges that strict application will create a substantial hardship to widespread development and growth of EV. Given the projected acceleration of EV, adopting a 10-year estimation would lower the CIAC barrier for construction of EV chargers. The Commission found that complying would create a substantial hardship. They note their concern for the limited information available but recognize the potential benefit in allowing TECO to explore this new methodology to encourage EV.

Third, the Commission's response is conditioned on TECO filing annual reports during the 5-year rule/waiver variance period, with the first report due on March 1, 2021. The Commission notes that their main concern is the potential level of cross subsidies if the waiver is extensively utilized. However, the reporting requirements should limit cross subsidies to be relatively small in comparison with TECO's net income. Accordingly, TECO's petition for a temporary waiver is granted, subject to the condition that TECO make the annual reporting requirements



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attach only to a parcel abutting a waterbody that was “navigable” when Florida joined the Union in 1845. Therefore, a riparian owner living alongside a waterbody that either is (a) non-navigable, or (b) became navigable after 1845, does not have riparian rights (again, except for the right to reasonable use).

An important caveat regarding the “navigability” analysis discussed above: The submerged lands underlying the abutting “navigable” waters *do not* have to be owned by the State—at least not in the Second District Court of Appeals. See *5F, LLC v. Dressing*, 142 So. 3d, 936, 947 (Fla. 2d DCA 2014). The paradox of privately owned, formerly sovereign, submerged lands is beyond the scope of this article.⁷ In addition, riparian rights are severable to a limited extent. See *Belvedere Development Corp. v. Department of Transportation, Division of Administration*, 476 So. 2d 649, 653 (Fla. 1986) (“[riparian rights] may be separated from the upland by bilateral agreement to reserve them in a deed of conveyance or all or any interest in riparian rights may be transferred by voluntary act of the upland owner”); see also *Brannon v. Boldt*, 958 So. 2d 367, 373-74 (Fla. 2d DCA 2006) (easement on plat may implicitly reserve riparian rights). However, a condemning government entity cannot sever riparian rights without compensating the upland owner or gaining his or her consent. *Belvedere*, 476 So. 2d at 654. This latter point is critical: Riparian rights are private property rights that may not be taken without just compensation.⁸

Right to Access

Riparian owners in Florida enjoy a right to access the water.⁹ The right to access may be broken up into two parts: (1) the right of ingress and egress *over the riparian property to navigable waters*; and (2) the reasonable right of access *over navigable waters for navigation*.

The first part is relatively straightforward. A riparian owner has the right to ingress and egress over his land to reach the water.¹⁰ Therefore, a riparian owner may enjoin a

government or private entity from activity that prevents the owner from reaching the water. Cf. *Game & Fresh Water Fish Commission v. Lake Waters*, 407 So. 2d 189, 192 (Fla. 1981). Significantly, this right of ingress and egress does not mean that a riparian property must *touch* the water. See *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702 732-33 (2010). As the U.S. Supreme Court astutely observed in *Stop the Beach*, the doctrine of avulsion (discussed with the “Right to Accretions” *infra*) necessitates scenarios where a riparian parcel is separated from the water . . . such as by a hurricane or from beach nourishment. See *id.*

The second part is trickier. A series of Florida Supreme Court cases (with conflicting DCA cases cited therein) illustrates how much Florida courts have struggled with defining a riparian owner’s access rights *over* navigable waters. See *Thiesen*, 8 So. at 491; *Webb v. Giddens*, 82 So. 2d 743 (Fla. 1955); *Game & Fresh Water Fish Commission*, 40 So. 2d at 189. The outcome of these cases is summed up *Game & Fresh Water Fish Commission*: “It is a recognized general rule of law that a riparian owner’s interest in waterway navigation is the same as a member of the public *except where there is some special injury to the riparian owner.*” *Id.* at 192 (citing F. MALONEY, S. PLAGER, & F. BALDWIN, JR., *WATER LAW AND ADMINISTRATION, THE FLORIDA EXPERIENCE* (1968)); see also *Webb*, 82 So. at 745 (“[W]e are concerned with a field of law that is unusually dependent upon the facts and circumstances of each case”). Therefore, like loss of access to a road, a substantial diminution or total denial of reasonable access over a navigable waterbody may be a taking. See *Game & Fresh Water Fish Commission*, 40 So. 2d at 193; see also Fla. Att’y Gen. Op. No. 85-47 (June 7, 1985) (enforcement of ordinance that prohibits boat access within 300-feet of public beach may be taking of riparian owners’ right to access). The majority of states, however, do not recognize a riparian right to access beyond the water’s edge.¹¹

Right to a View

Riparian owners in Florida enjoy a right to an unobstructed view of the water.¹² The paramount case in

Florida regarding the right to a view remains *Hayes v. Bowman*, 91 So. 2d 795 (Fla. 1956). There, the Florida Supreme Court recognized a problem without a neat answer: The shoreline is rarely straight. See *Hayes*, 91 So. 2d at 801. Accordingly, the Court adopted a rule requiring that courts delineate so called “riparian lines” on a case-by case basis; such riparian lines must preserve riparian owners’ views “as near as practicable” to the water.¹³

Taken to its next logical step, *Hayes* stands for the principle that an obstruction (to a view) must be more than a “mere annoyance;” it must be “substantial and material.” See *Lee County v. Kiesel*, 705 So. 2d 1013, 1016 (Fla. 2d DCA 2008). An obtrusive bridge has met this standard in Florida. See *id.* at 1016 (riparian owner entitled to compensation where bridge obstructed 80% of view). Several other states have recognized different obstructions. See, e.g., *City of Ocean City v. Maffucci*, 740 S.2d 630 (N.J. App. 1999) (dune obstruction); *Pierpont Inn, Inc. v. State*, 449 P. 2d 737, 745-46 (Cal. 1969) (freeway obstruction); *DBL, Inc. v. Carson*, 585 S.E. 2d 87 (Ga. App. 2003) (dock obstruction). The doctrine of laches may bar a right-to-view claim. *Eustis v. Firster*, 113 So. 2d 260 (Fla. 2d DCA 1959). Finally, the right to a view does not equate to an unqualified right to trim (or alter) mangroves; mangrove trimming (or alteration) must be consistent with the State Mangrove Trimming and Preservation Act, see F.S. §§ 403.9321-403.9333¹⁴, and the regulations adopted by delegated local governments. See, e.g., Pinellas County Code, Chapter 58, Article XVI.

Right to Wharf Out

Riparian owners in Florida enjoy a right to wharf out to the water.¹⁵ Unlike the other riparian rights included in this article, the riparian right to wharf out is a qualified one. *Dressing*, 142 So. 2d at 942 (citing *Williams v. Guthrie*, 137 So. 682, 685 (Fla. 1931); see also Fla. Att’y Gen. Op. No. 90-37 (May 10, 1990). This essentially means that approval for the dock at the federal, state, and local levels of government, as applicable, must be obtained. See *Freed*, 112 So. 841 at

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844-45 (“If such wharves, or piers, or docks are built without due authority, they may be removed as purprestures, or, if they are or become nuisances or are harmful to the rights of the public, they may be removed or abated by due course of law.”); cf. Pinellas County Code, Chapter 58, Article XV. Water and Navigation Regulations (providing a comprehensive example of dock regulations at the local government level).¹⁶ Rejected dock permit applicants at the local level may have a right to appeal to—or seek a variance from—an impartial quasi-judicial body. See, e.g., Pinellas County Code, §§ 58-536, 58-539. Rejected dock permit applicants at the state level may request a hearing before a State Administrative Law Judge. See F.S. §§ 120.569, 120.57.

Significantly, the right to wharf out only concerns access by the owner; it does not include commercial or other ancillary uses. See *BB Inlet*, 293 So. 3d 538 (citing *Shore Village*, 824 So. 2d at 211). Therefore, a riparian owner should not rely on riparian rights to operate a restaurant—or any other for-profit operation—on a dock. See *BB Inlet*, 293 So. 3d 538 (citing *Tewksbury v. City of Deerfield Beach*, 763 So. 2d 1071 (Fla. 4th DCA 1999)). Indeed, in Pinellas County, any sort of “developed use” over “navigable” waters is prohibited. Pinellas County Code § 128-3506. The same is true for roofs and vertical walls. *Id.* § 58-543(m).

Right to Accretions

Riparian owners in Florida enjoy the right to accretions.¹⁷ Accretion is the “gradual and imperceptible” accumulation of land along the shore. See *Walton County*, 998 So. 2d at 1112 (citing *Sand Key*, 512 So. 2d at 936).¹⁸ As the Florida Supreme Court explained in *Sand Key*, “[t]he test as to what is gradual and imperceptible . . . is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on.”¹⁹ Contrast the doctrine of accretion with the doctrine of avulsion, which is the “sudden and perceptible” loss or addition of land along the shore. See *Walton County*, 998 So. 2d at 1116 (citing *Sand Key*, 512 So. 2d at 936). If an avulsion occurs, the property boundary between the State and riparian owner does not change.²⁰

The doctrines of accretion and avulsion pose a quandary in the context of beach nourishment. The U.S. Supreme Court attempted to solve this quandary in *Stop the Beach*. See *Stop the Beach*, 560 U.S. 702. In a unanimous decision, the U.S. Supreme Court affirmed the Florida Supreme Court’s holding in *Walton County* upholding the facial constitutionality of the State Beach and Shore Preservation Act, which prescribes the Erosion Control Line (ECL) as the new State-private property line post-beach nourishment. See *id.* at 703; see also *Walton County*, 998 So. 2d at 1120-1121. Because beach nourishment is an avulsion, and because fixing the ECL at the pre-nourishment mean high water line is consistent with the doctrine of avulsion (where the State-private property line does not change), the Florida Supreme Court did not contravene the plaintiff beachfront property owners’

established riparian rights (and therefore commit a judicial taking). See *Stop the Beach*, 560 U.S. at 731-32.²¹ In addition to nourished sand (and other avulsions), a riparian owner is not entitled to ownership of accretions that he or she causes.²² However, a riparian owner is entitled to ownership of accretions caused by another. *Sand Key*, 512 So. 2d at 934-35. Moreover, where a dedicated roadway over a riparian parcel abuts the water, the riparian owner—not the government agency—is entitled to ownership of the accretions. See *Bonifay v. Dickinson*, 459 So. 2d 1089 (Fla. 1st DCA 1984) (citing *Burkart v. City of Fort Lauderdale*, 168 So. 2d 65 (Fla. 1964)).

Right to Reasonable Use

All property owners in Florida—not just “riparian” owners—enjoy the right to make reasonable use of the water on, under, or abutting their property.²³ Before 1972, the right to take and consume water in a reasonable matter was regulated under the common law. See *Tequesta v. Jupiter Inlet Corp.*, 371 So. 2d 663 (Fla. 1979), cert. denied 444 U.S. 965 (1979). In 1972, the Florida Legislature adopted the State Water Resources Act, which prescribed a permitting system that essentially replaced the common law reasonable use doctrine.²⁴ See *id.*; *Southwest Florida Water Management District v. Charlotte County*, 774 So. 2d 993 (Fla. 2d DCA 2001). Note that a landowner does not own the groundwater beneath his or her land until the owner legally diverts the water for his or her reasonable and beneficial use. *Claussen v. Aetna Casualty & Surety Co.*, 754 F. Supp. 1576 (S.D. Ga. 1990) (citing *Tequesta*, 371 So. 2d at 670). Therefore, where a property owner does not have a State Water Use Permit, government appropriation of groundwater beneath the owner’s property does not amount to a taking unless there is damage to the overlying land. *Tequesta*, 371 So. 2d at 672.

In the surface water context, when a property owner unreasonably obstructs or diverts the natural flow of surface water to the detriment of his or her neighbor, he or she may be liable to the neighbor. See *Westland*, 371 So. 2d at 962-63. This concept is inherently nebulous; nevertheless, as the Florida Supreme Court explained in *Westland*: “[A]n analysis centering on the reasonableness of the defendant’s conduct, in view of all the circumstances, is more likely to produce an equitable result than one based on arbitrary property concepts.” *Id.* at 963 (quoting *McGlashan v. Spade Rockledge Terrace Condominium Development Corp.*, 402 N.E. 2d 1196, 1199-1120 (Ohio 1980)); see also *Coachwood Colony MHP, LLC v. Kironi, LLC*, 263 So. 3d 263 (Fla. 5th DCA 2019) (remanding a drainage dispute between neighbors for application of the *Westland* test). Where different riparian owners own different submerged lands within the same non-navigable natural lake, all owners enjoy reasonable access to and use of the entire lake.²⁵

Conclusion

This article has provided a basic roadmap for understanding riparian rights. When assessing whether a property owner has riparian rights, the first question to ask is whether the owner’s property abuts “navigable” waters. If the property does not abut “navigable” waters,

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the only riparian right that may attach to the property is the right to reasonably use the water. If the property does abut navigable waters, attorneys should be aware that the right to wharf out is qualified by government regulation and that the right to accretions may be lost if an avulsion occurs. Moreover, the right to an unobstructed view may only preserve a narrow line of sight. Notwithstanding these limitations, a riparian owner enjoys an unequivocal right to access navigable waters from his or her property; however, absent special injury, this right does not guarantee passage over said waters.

Endnotes

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1 See, e.g., *Coastal Petroleum, Inc. v. American Cyanamid*, 492 So. 2d 339, 342-43 (Fla. 1986); *Brickell v. Trammel*, 82 So. 221, 226 (Fla. 1919); *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909).

2 See, e.g., *Shively*, 152 U.S. at 17; *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1111 (2008) (citing *Ferry Pass Inspectors' & Shippers' Association v. White's River Inspectors' & Shippers' Association*, 48 So. 643, 645 (Fla. 1909)).

3 The right to reasonable use is much broader than the other four riparian rights. This is because the "navigability" of the adjacent waterbody appears to be irrelevant. See cases cited at note xxv, *infra*. Moreover, non-riparian owners may be entitled to a right to reasonably use groundwater. See § F.S. 373.223 (use must be reasonable and beneficial to obtain State Water Use Permit); accord *Koch v. Wick*, 87 So. 2d 47, 48 (Fla. 1956) (right to draw percolating water bounded by reasonableness); *Cason v. Florida Power Co.*, 76 So. 535, 536 (1917) (ground water use of neighbors must be reasonable).

4 See note iii, *supra*.

5 The property boundary between riparian property is typically the mean high water line, or the ordinary high water mark. *State v. Florida Natural Properties, Inc.*, 338 So. 2d 213 (Fla. 1976); see also *Thiesen v. Gulf, Florida and Alabama Railway*, 8 So. 491 (Fla. 1919). However, when a beach nourishment project occurs, a new property boundary is set—the Erosion Control Line (ECL). F.S. § 161.191; see also *Walton County*, 998 So. 2d at 1106.

6 See, e.g., *id.*; *Odom v. Deltona Corp.*, 341 So. 2d 977, 981 (Fla. 1976); *Bucki v. Cone*, 6 So. 160, 161 (Fla. 1889). Note that a presumption of navigability attaches to the waterbody if it is shown as meandering on an official government survey; conversely, a presumption of non-navigability attaches to the waterbody if it is shown as non-meandering. *Odom*, 341 So. 2d at 988-89; *Martin*, 112 So. at 284.

7 See generally Jesse Reiblich, *Private Property Rights Versus Florida's Public Trust Doctrine: Do any Uses Survive a Transfer of Sovereign Submerged Lands from the Public to Private Domain*, Vol. XXXV No. 1 FLA. BAR ELULS REPORTER, Sept. 2013, at 3 (discussing the public's right to use formerly sovereign submerged lands now privately owned).

8 See, e.g., *Walton County*, 998 So. 2d at 1111; *Broward*, 50 So. at 830; *Thiesen*, 8 So. 491; *BB Inlet Property, LLC v. 920 N. Stanley Partners*, 293 So. 3d 538 (Fla. 4th DCA 2020).

9 See, e.g., *Walton County*, 998 So. 2d at 1119 (citing *Sand Key*, 512 So. 2d at 936); *Brickell*, 82 So. at 227; *Broward*, 50 So. at 830.

10 See *Walton County*, 998 So. 2d at 1119; *Ferry Pass*, 48 So. 643 at 645; *Merrill Stevens Co. v. Durkee*, 57 So. 428, 431 (Fla. 1911).

11 See e.g., *Miller v. Mayor of New York*, 109 U.S. 385 (1883); *Gilman v. City of Philadelphia*, 70 U.S. 713 (1865); *Becker v. Litty*, 556 A.2d 1101 (Md. 1989); *Colberg, Inc. v. State*, 432 P.2d 3 (Cal. 1967).

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12 See, e.g., *HaggertySmith, LLC v. Gerlander*, 236 So. 3d 462 (Fla. 5th DCA 2017) (citing *Walton County*, 998 So. 2d at 1111); *Brannon*, 958 So. 2d at 373 (citing *Thiesen*, 78 So. at 507).

13 *Id.* In drawing riparian lines, courts must consider the lay of the shoreline, the direction of the waterbody, and the needs of adjoining owners.

14 The riparian right to a view is recognized in F.S. § 403.9323(3) as follows: “It is the intent of the Legislature to provide waterfront property owners their riparian right of view, and other rights of riparian property ownership as recognized by [F.S. §] 253.141 and any other provision of law, by allowing mangrove trimming in riparian mangrove fringes without prior government approval when the trimming activities will not result in the removal, defoliation, or destruction of the mangroves.”

15 See, e.g., *Freed v. Miami Beach Pier, Corp.*, 112 So. 841, 844-45 (Fla. 1927); *Modrall v. Sawyer*, 297 So. 2d 562, 563 (Fla. 1974) (Ervin, J., dissenting); *Shore Village Property Owners’ Association v. State Department of Environmental Protection*, 824 So. 2d 208, 211 (Fla. 4th DCA 2002) (citing *Tewksbury v. City of Deerfield Beach*, 763 So. 2d 1071, 1071 (Fla. 4th DCA 1999)).

16 At the state level, an Environmental Resource Permit (ERP)—or exemption—is required for a dock. See F.S. §§ 373, 403; F.A.C. § 62-330; State of Florida Department of Environmental Protection et. al., *ERP Applicant’s Handbook*, Vol. 1 (June 1, 2018). If the dock is constructed over sovereign submerged lands, proprietary authorization from the State is also required. See F.S. §§ 253, 258; F.A.C. §§ 18-20, 18-21.

17 See, e.g., *Walton County*, 998 So. 2d at 1111; *Brickell*, 82 So. at 227 (citing *Broward*, 50 So. at 830); *Accardi v. Regions Bank*, 201 So. 3d 743, 746 (Fla. 4th DCA 2016).

18 Together with the right to accretions, riparian owners enjoy the (much less well-known) right to relictions. See *Sand Key*, 512 So. 2d at 936. Reliction is the increase in land from the “gradual and imperceptible” withdrawal of water. *Id.* Riparian owners also risk losing land due to erosion, which is the “gradual and imperceptible” deterioration of land. *Walton County*, 998 So. 2d at 1112.

19 *Sand Key*, 512 So. 2d at 936) (citing *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912) (quoting *St. Clair County v. Lovington*, 90 U.S. 46 (1874))).

20 See *Walton County*, 998 So. 2d at 1114 (citing *Bryant v. Peppe*, 236 So. 2d 836, 838 (Fla. 1970); cf. *Martin*, 112 So. 274 at 288 (Brown, J., conc.) (doctrine of relictions does not apply where land is drained and reclaimed by government agency).

21 Although the U.S. Supreme Court declined to address this point in *Stop the Beach*, see *id.* at n.5, the Florida Supreme Court reaffirmed that accretions are a future, contingent interest not guaranteed to a riparian owner in *Walton County*. See *Walton County*, 998 So. 2d at 1118; see also *Accardi*, 201 So. 3d at 746-47. Therefore, fixing an ECL does not deprive a riparian owner of any established (riparian) property right. See *Walton County*, 998 So. 2d at 1118.

22 *Board of Trustees v. Medeira Beach Nominee, Inc.*, 272 So. 2d 209, 212 (Fla. 2d DCA 1973) (citing *Brundage v. Knox*, 117 N.E. 123 (Ill. 1917); *State v. Sause*, 342 P.2d 803 (Or. 1959)).

23 See, e.g., *Westland Skiing Center v. Gus Machado Buick, Inc.*, 542 So. 2d 959 (Fla. 1989); *Koch*, 87 So. 2d 47; *Cason*, 76 So. 535; see also *Ferry Pass*, 48 So. at 644.

24 The State Water Resources Act is codified at F.S. ch. 373. To obtain a Water Use Permit under the Act, an applicant must establish that his or her proposed use of water: (a) is reasonable-beneficial as defined by F.S. § 373.019; (b) will not interfere with any existing legal use of water; and (c) is consistent with the public interest. See F.S. § 373.223.

25 See *Duval v. Thomas*, 113 So. 2d 791 (Fla. 1959); *Conrad v. Whitney*, 141 So. 2d 976 (Fla. 2d DCA 1976); *Publix Super Markets v. Pearson*, 315 So. 2d 98 (Fla. 2d DCA 1975); *Florio v. State*, 119 So. 2d 305 (Fla. 2d DCA 1960).

NEW RESILIENCY COMMITTEE

by Susan Roeder Martin, Chair-Elect

South Florida has been called “ground zero” for sea level rise. Together with water quality, these are two of the most important resiliency issues affecting our state. But, resiliency issues in Florida are much broader than these two issues. Resiliency is a broad topic which also includes climate change, water quantity, air quality, electric vehicles, and many other topics.

Because of the importance of these issues, a new Committee has been created by the Florida Bar’s Environmental and Land Use Law Section to address resiliency. The new Committee will host a series of webinars on resiliency issues beginning this winter. We hope you will join us in these webinars to learn more about the variety of resiliency issues facing our state.

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