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Who "Owns" This Land? Clarifying the Scope of Liability Protection Under Florida's Recreational Use Statute

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I. Introduction

Land acquisition program funding in Florida, including less than fee acquisitions, has reached some of its highest levels ever.[3] Governor Ron DeSantis' 2023-24 budget included nearly one billion dollars for land acquisition, much of it within the Florida Wildlife Corridor.[4] In 2023, the Florida Legislature enacted Senate Bill 106, relating to the Florida Shared-Use Nonmotorized Trail Network, creating the framework for a statewide system of bicycle and pedestrian trails with the goal of enhancing public access to Florida's broad suite of conservation and recreation lands.[5] Private conservation lands play an important role in this effort, as a tool to both conserve land and promote public access to the State's natural resources.

Given the importance of private conservation programs as part of a broader effort to ensure connectivity for wildlife and access for the public, it may be worthwhile revisiting Florida's recreational use statute, originally enacted in 1963.[6] Like all other states, Florida has a recreational use statute that protects "owners" and "lessees" from premises liability under tort law when those owners and lessees allow the public access for recreational purposes.[7] Florida's statute brings with it questions of scope, both in terms of who it protects, and how much it protects them. In this brief article we focus on the former.

We first provide an overview of state recreational use statutes generally, most of which stem from a model statute produced by National Conference of State Legislatures in 1965.[8] We briefly review the key issues that have arisen in the interpretation of these statutes over time. We then turn to the Florida statute and examine its key provisions. While recreational use statutes raise any number of significant issues, for this article we focus on the question of who is an "owner" for the purposes of the law's liability protection. We posit that in the absence of greater clarity, Florida holders of less than fee interests in land suitable for outdoor recreation, such as easements and licenses, who provide access to the public through these interests, may be exposed to liability for injuries that occur on the property arising from that access.

II. Overview: Recreational Use Statutes Generally

a. Public Policy Rationale

The public policy for recreational use statutes is straight forward and much discussed.[9] The demand for outdoor recreation has grown over time, outstripping the public resources available to satisfy that demand. A considerable amount of potential outdoor recreation land lies in private ownership. This may be because the land is being productively used for other economic purposes which are also compatible with some form of public recreation, such as the use of timberlands for hunting, or because it lies fallow for some future use, such as a generational wealth transfer. In either case, such land could be put to recreational use, provided the owners of that land are not unduly burdened with liability. However, in the absence of statutory protections, owners who allow the public onto their property are subject to the duty of care afforded to an "invitee" or a "licensee," and even trespassers can recover damages in some instances.[10] As a result, private landowners can be wary of providing public access to private property. To address this wariness, states began to pursue tort system reforms, beginning with Virginia in 1950.[11]

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INSIDE:

From the Chair

Greetings ELULS Colleagues and Members,

It's February 2024, and the Florida Legislative Session is now in full swing with several bills and policies that could significantly impact land use and environmental practice. For those looking to stay ahead, our one-hour Legislative Forecast CLE (available on the Florida Bar CLE website) provides a comprehensive preview of what to expect. Additionally, keep an eye out for our legislative recap later this year, which will offer insights and analyses on the outcomes of this Session.

The Section continues in our three areas of focus: connection, education, and scholarship. Our initiative to host local networking events across the state is more robust than ever. These gatherings are a fantastic opportunity for our members to connect, share insights, and enjoy the community. Keep an eye out for upcoming events in your area.

We are excited to announce several upcoming CLE offerings, including programs on community development district and special district issues, an administrative case law update, and the state agency General Counsel roundtable which will take place at the Florida Bar Annual Convention in June. These programs are designed to keep you informed and engaged with the latest developments in our practice area.

On scholarship, the ELULS Treatise limited-edition three-volume hard copy is still available for purchase. This comprehensive resource is an invaluable tool for our practice area.

The strength of our section lies in the active participation of our members. If you're interested in joining one of our many active committees focused on law schools, CLEs, publications, public interest, and several others, we warmly invite you to get involved. To join us, please reach out to myself or Whitney Bledsoe.

Warm regards,

Robert Volpe

Chair, The Florida Bar Environmental and Land Use Law Section

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The Property Line

By Zach Lombardo[1]

Obtaining proper approvals for development is important, but just as important is ensuring that you have identified the proper approvals and the authority of the entity granting those approvals.

It is tempting to rely upon local government officials (planners, building officials, growth management staff, etc.) to determine the appropriate approvals necessary for any particular project, and perhaps even more so as to whether or not certain rules and regulations can be sidestepped or worked around in obtaining those approvals. The case law surrounding estoppel and laches in development approvals, however, raises a cautionary tale against that reliance.

The core component of estoppel is reliance by one party on the action of another. This, if it were the only concept at play, would mean that if an action by a local government was relied upon by a third party, like a developer, the local government would not be later able to change its position. But, in permitting, this potential estoppel is not the end of the story. In permitting, the action itself must be evaluated. If the action was a prohibited one, then, as explained herein, there can be no estoppel. A local government engages in an ultra vires (and thus void) action when it lacks the authority take the action. *Neapolitan Enters., LLC v. City of Naples*, 185 So. 3d 585, 593 (Fla. 2d DCA 2016). Thus, even when local governments approve an action, that action is void if the local government did not have the authority to do so. As a result, among other things, that action can be subject to challenge by a neighboring property owner as was the case in *Neapolitan Enterprises*.

Importantly, this determination of void approval can happen after construction and the construction may have to be demolished. In *Town of Lauderdale-by-the-Sea v. Meretsky*, 773 So. 2d 1245 (Fla. 4th DCA 2000), development approval for a wall was declared void when it was built on a public right-of-way counter to the town's ordinances because "the Town Commission authorized an act contrary to its own ordinances and, therefore, its approval was ultra vires and void." The offending wall was ordered removed.

More surprising to the reliant developer, in *Meresky* (unlike *Neopolitan Enterprises*), the challenging party was the local government itself, despite granting approval at issue. *See also Dade Cnty. v. Gayer*, 388 So. 2d 1292 (Fla. 3d DCA 1980) (involving a local government that sought removal of a permitted wall that was, counter to code, located in a right-of-way), *review denied*, 397 So. 2d 777 (Fla. 1981); *Dade Cnty v. Bengis Assocs., Inc.*, 257 So. 2d 291 (Fla. 3d DCA), *review denied*, 261 So. 2d 839 (Fla. 1972) (involving a local government that sought removal of a permitted sign that was counter to code); *City of Miami Beach v. Meiselman,* 216 So. 2d 774 (Fla. 3d DCA 1968), *review denied*, 225 So. 2d 533 (Fla. 1969) (involving a local government that sought removal of a permitted sign that was counter to code); *Metro. Dade Cnty. v. Fountainebleau Gas & Wash, Inc.,* 570 So. 2d 1006 (Fla. 3d DCA 1990) (involving a local government that sought removal of a permitted gas station that was counter to applicable zoning).

The Third District Court of Appeal summarized the critical importance of this feature of the common law in *Gayer* as follows:

> [W]hile at first blush it seems that the application of the rule may be harsh, it would be inconceivable that public officials could issue a permit, either inadvertently, through error, or intentionally, by design, which would sanction a violation of an ordinance adopted by the legislative branch of government. Only the duly constituted members of the [governing body] enjoy that prerogative and then only in accordance with established procedure.

Gayer, 388 So. 2d 1292. That is, it goes to the very separation of powers within a local government.

For the same reasons, laches also does not apply. "An act void in its inception will not become valid by the passage of time." *Coral Gables v. State*, 38 So. 2d 48, 50 (Fla. 1948) (internal citation omitted). So, timing does not necessarily foreclose a challenge. An ultra vires approval remains as such even if a neighbor or a local government does not challenge immediately.

Given the costs of construction and the importance of reliability on local government approvals, it is important for land use counsel to determine the right path forward and guide clients down it. Collaborating with local government officials is always helpful, but that is different than reliance.

It is critical for lawyers counseling developers to identify the proper process and follow it, even if the approving government sanctions a different path. As counselors to neighbors, it is important to remember that a declaratory judgment and an injunction are available when the proper process is not followed. And, as counselors to local governments, even if officials make mistakes, or take intentional incorrect action along the way, prohibited actions are just that: prohibited.

Endnotes

[1] Zach Lombardo is an attorney at Woodward, Pires & Lombardo, P.A. He is a Board-Certified Specialist in City, County and Local Government Law by The Florida Bar. Zach's primary focus is helping public and private clients in various land use and local government matters. Recently, Zach was appointed City Attorney for Everglades City.

On Appeal

By Larry Sellers, Holland & Knight LLP

Note: Status of cases is as of February 5, 2024. Readers are encouraged to advise the author of pending appeals that should be included.

FLORIDA SUPREME COURT

Jupiter Island Compound v. Testa, Case No. 2023-0848. Petition to review the question certified in *Testa v. Town of Jupiter Island*, Case No. 4D22-232 (Fla. 4th DCA 2023): "Where an ordinance proposed for adoption is initially advertised for a date certain public meeting in compliance with section 166.041(3)(a), Florida Statutes (2018), and the proposed ordinance is considered at the advertised public meeting, but the proposed adoption is postponed on the record from the advertised public meeting to a subsequent date certain public meeting, does section 166.041(3)(a) require the municipality to re-advertise the ordinance proposed for adoption for the subsequent date certain public meeting in compliance with section 166.041(3)(a)?" Status: Notice to invoke discretionary jurisdiction filed June 9, 2023. *Note*: Recently-enacted legislation appears designed to address this issue. See Ch. 2023-309, Laws of Fla.

FIRST DCA

Trend Exploration, LLC v. Department of Environmental Protection, Case No. 1D23-1837. Appeal from a Department of Environmental Protection final order denying an application for a permit to drill oil and gas in the Upper Sunniland Formation within the boundary of the Big Cypress Watershed. Status: Notice of appeal filed July 21, 2023; on November 7, 2023, the Court dismissed the case for Appellant's failure to secure the appearance of counsel as required by order of July 21, 2023.

Sarasota County, v. Ramirez, Case No. 1D23-1058. Appeal from final order determining that Sarasota County Ordinance No. 2021-047 (the "Ordinance") is inconsistent with the Sarasota County Comprehensive Plan. The Ordinance removes residential density limits from transient accommodations (i.e., hotels and motels) within commercial zoning districts throughout the County. Status: Notice of appeal filed May 3, 2023; dismissed on December 12, 2023. Note: The Administrative Law Judge's ("ALJ") final order included this Notice of Right to Judicial Review: "A party who is adversely affected by this Final Order is entitled to judicial review pursuant to sections 120.68 and 163.3213, Florida Statutes. Judicial review may not be commenced until the Administration Commission takes action to determine whether sanctions are warranted pursuant to section 163.3213(6)('If the administrative law judge in his or her order finds the land development regulation to be inconsistent with the local comprehensive plan, the order will be submitted to the Administration Commission … [which shall] hold a hearing no earlier than 30 days or later than 60 days after the administrative law judge renders his or her final order.'). Upon completion of the Administration Commission hearing, judicial review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings, accompanied by any filing fees prescribed by law, with the clerk of the district court of appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law."

Semmer v. Lee County, Southern Comfort Storage, Case No. 1D23-359. Appeal from a final order of the Administration Commission determining plan amendment to the County's Comprehensive Plan be "in compliance," notwithstanding a contrary recommendation by the ALJ. The ALJ had recommended that the amendment be found not in compliance because it did not meet the criteria in section 163.3178(8)(a), Florida Statutes, thereby rejecting the County's determination that the plan amendment complied with that section by providing for appropriate mitigation of hurricane evacuation and sheltering impacts attributed to the plan amendment. Status: Affirmed on October 25, 2023.

Florida Wildlife Federation, Inc., v. The Florida Legislature, Case No. 1D22-3142. Appeal from order dismissing case as moot and order allowing automatic statutory continuance as to the Legislature, as well as the associated order on reconsideration, the order on motion to tax costs and the final judgment. This appeal stems from a challenge to numerous 2015 legislative appropriations from the Land Acquisition Trust Fund (the "Fund"), in which appellants assert that the Legislature had violated the constitutional restriction that money from the Fund could be appropriated "only for" specifically listed purposes. The complaint alleged that about $300 million of the Fund had been appropriated for impermissible purposes. The challenged order dismissed the case based on its finding that the appellants could have but did not reach judgment before the end of fiscal year 2015-16. Status: Motion for oral argument denied August 18, 2023.

Florida Defenders of the Environment v. Lee, Case No. 1D22-3463. Appeal from the same final order as in Florida Wildlife Federation, above: Status: Motion for oral argument denied August 18, 2023.

In re: Affirming Existence of Recreational Customary Use on 1,194 Private Properties Located in Walton County, Florida, Case No. 1D21-3532. Appeal from Final Judgment as to certain parcels, determining that the County is unable to establish that customary use on certain defendants' properties has been either "uninterrupted" or "ancient," both of which elements must be proven under the judicially created customary use test. The final judgment also rejected an argument that the judicially created customary use doctrine is unconstitutional, and this issue is the subject of the cross appeal. Status: Oral argument held on October 25, 2023.

Sierra Club v. DEP, Case No. 1D21-1667. Appeal from final order adopting recommended order rejecting challenge to five BMAPs (the Suwannee River BMAP, Santa Fe River BMAP, Silver Springs, Upper Silver River and Rainbow Spring Group BMAP, Wekiwa Spring and

Rock Springs BMAP, and Volusia Blue Springs BMAP), and determining that these BMAPs were valid because they were designed to achieve the TMDLs, as required by sections 373.807 and 403.067, Florida Statutes, and implement the provisions of those laws. Status: Reversed and remanded on February 15, 2023. DEP Corrected Final Order on Remand issued on June 30, 2023; motion to enforce mandate filed on October 6, 2023; DEP responded by withdrawing the remaining challenged BMAPs and dismissing petitions for hearing. On January 3, 2024, DEP filed a suggestion of mootness as to the motion to enforce mandate and on January 16, 2024, the Sierra Club filed a response.

Suwannee River Water Management District v. Seven Springs Water Company, Case No. 1D21-888. The Suwannee River Water Management District ("SRWMD") filed an appeal of its own final order adopting the ALJ's recommended order and renewing the water use permit authorizing Seven Springs Water Company ("Seven Springs") to withdraw water in Gilchrist County for bulk sale to an adjacent water bottling facility. Status: Dismissed pursuant to Rule 9.350(a), Florida Rules of Appellate Procedure, on June 8, 2021.

Florida Springs Council v. SRWMD, Case No. 1D21-1445. This appeal involves the dismissal of a petition seeking to challenge the final order renewing a water use permit that was the subject of the appeal in Case No. 1D21-888 (above). The petitioner argued that an SRWMD rule authorizes the filing of the petition because the Governing Board took final action (granting the permit) that substantially differs from the written notice of the SRWMD's decision describing the intended action (which was to deny the permit). Status: Reversed and remanded on November 30, 2022; opinion on amended motion for rehearing on clarification issued on January 18, 2023. Note: Following the issuance of the opinion, Seven Springs filed an administrative challenge to the rule, and the ALJ entered a final order determining that the rule is invalid because it was not adopted in accordance with the applicable rulemaking requirements; in particular, the rule is a procedural rule that differs from the Uniform Rules and has not been approved as an exception to the Uniform Rules by the Administration Commission. *Seven Springs Water Co. v. Suwannee River Water Mgmt. Dist.,* Case No. 22-3908RX (DOAH Feb. 6, 2023). On the merits of the challenge to the permit on remand, the ALJ issued a recommended order recommending issuance of the permit. See Fla. *Springs Council v. Seven Springs Water Co.,* Case No. 21-1180 (DOAH Oct. 17, 2023). The governing board issued a final order adopting the recommended order and issuing the challenged permit (December 12, 2023).

SECOND DCA

MHC Cortez Village, LLC v. Cortez Road Investments and Finance, Inc., Case No. 2D23-1315. Appeal of a final order adopting the ALJ's recommended order and issuing an environmental resource permit to Cortez Road Investments. The permit authorized the construction of a linear dock for a residential development located along an upland-cut canal off of Anna Maria Sound. The ALJ found that the proposed project would not significantly impede navigability and met all other applicable conditions for issuance of a permit. Status: Notice of appeal filed June 22, 2023.

Reed Fischbach v. Hillsborough County, Case No. 2D22-3270. Appeal from final order determining Hillsborough County Comprehensive Plan Amendment HC/CPA 20-11 to be "in compliance." The Plan Amendment amends the County's Comprehensive Plan by replacing the text of the Future Land Use Element Residential Plan-2 ("RP-2"" category and changing the requirements necessary to obtain an increased density level per acreage in the RP-2 category. Status: Notice of appeal filed October 6, 2022; oral argument stayed on September 14, 2023, pending the filing of a joint status report.

THIRD DCA

Tropical Audubon Society v. Miami-Dade County, Case No. 3D21-2063. Appeal from final order of the Administration Commission determining that a comprehensive plan amendment for the construction of the Kendall Extension in Miami-Dade County to be in compliance. Status: Oral argument held on September 12, 2023.

FOURTH DCA

Testa v. Jupiter Island Compound and Department of Environmental Protection, Case No. 4D23-3070. Appeal from final order denying JIC's application for coastal construction control line permit to construct a single-family dwelling and pool seaward of the coastal construction control line. Status: Notice of appeal filed December 19, 2023.

Blue Water, LLC v. South Florida Water Management District, Case No. 4D23-0552. Appeal from a South Florida Water Management District ("SFWMD") final order suspending Blue Water's right to sell any of the wetland mitigation credits awarded to Blue Water upon recordation of the conservation easement over the Lucky L lands. Blue Water also appeals that portion of the final order ruling that the long term/perpetual maintenance financial assurance mechanism must be fully-funded upon the sale of any wetland mitigation credits. Status: Notice of appeal filed March 3, 2023; oral argument set for February 13, 2024.

FIFTH DCA

Mansoor "John" Ghaneie v. Andy Estates LLC, Case No. 5D23-3156. Appeal from final order issuing a consolidated environmental resource permit and letter of consent for use of sovereignty submerged lands to Andy Estates for a 692 square-foot private, multi-family dock in the Banana River Aquatic Reserve, Merritt Island, Brevard County, Florida. Status: Notice of appeal filed October 23, 2023.

City of Titusville v. Speak Up Titusville, Inc., Case No. 5D23-3739. Appeal from amended order granting final summary judgment in favor of defendant, determining the Right to Clean Water Charter Amendment approved by voter initiative is validly enacted and in effect. The challenged Amendment establishes the Right to Clean Water and authorizes any resident of the City to bring a legal action in the name of the resident or in the name of the waters in Titusville, to enjoin violations of the Right to Clean Water. The trial court

rejected arguments that the title and summary of the amendment failed to comply with section 101.161, Florida Statutes, and that the substance of the initiative is preempted by section 403.412(9)(a), Florida Statutes. In addition, the trial court rejected claims that the preemption statute is unconstitutional. Status: Notice of appeal filed December 21, 2023.

St. Johns Water Management District v. CeCe, Case No. 5D22-2426. Petition for review of non-final agency action regarding ALJ's order rejecting remand after the ALJ recommended the denial of the permit. Status: On August 11, 2023, in response to a motion for written opinion, the court denied the petition and remanded to St. Johns Water Management District for a final order either issuing or denying the application, which decision then may be appealed if the losing party chooses to do so.

SIXTH DCA

Wilde Cypress Branch, v. Noah Valenstein, Case No. 6D23-1412. Appeal from order granting defendants' motion to dismiss a complaint seeking to enjoin both Beachline South Residential, LLC from building and DEP from issuing a permit in connection with a mixed-use residential and commercial development in Orange County. The complaint is based on a provision in the Orange County Charter, which in pertinent part seeks to confer rights on bodies of water within Orange County to be free from pollution, provides injunctive relief as a remedy for any violation of those rights, and confers standing on certain persons to enforce those rights. The order dismissed the complaint because the charter provision is preempted by section 403.412(9)(a), Florida Statutes. The order also rejected claims that the preemption statute is unconstitutional. Status: Affirmed on January 19, 2024.

Rubinson v. Oklawaha Valley Audubon Society, Inc., Case No. 6D23-2787. Appeal from order granting defendants' motion for final summary judgment, determining that an Audubon Chapter in Central Florida can sell off six acres of century-old forest that were donated for conservation despite a former president's promise to preserve the parcel in perpetuity. Status: Notice of appeal filed June 1, 2023; notice of voluntary dismissal based on settlement filed January 17, 2024.

UNITED STATES SUPREME COURT

Sheetz v. County of El Dorado, Case No. 22-1074. Issue: Whether a building-permit exaction is exempt from the unconstitutional-conditions doctrine as applied in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, Oregon, simply because it is authorized by legislation. Status: Oral argument held on January 9, 2024.

Loper Bright Enterprises v. Gina Raimondo, Case No. 22-451. Petition to review D.C. Circuit opinion upholding National Marine Fisheries Service rules requiring the fishing industry to pay for federal inspectors onboard. The Court granted certiorari to the fishing companies on one of the two questions in their petition: "Whether the Court should overrule Chevron or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency." Status: Oral argument held on January 17, 2024.

Relentless, Inc. v. Department of Commerce, Case No. 22-1219. Consolidated with and question presented the same as in Loper Bright Enterprises (see above). Status: Oral argument held on January 17, 2024.

Devillier v. Texas, Case No. 22-913. Issue: Whether a person whose property is taken without compensation may seek redress under the self-executing takings clause of the Fifth Amendment even if the legislature has not affirmatively provided them with a cause of action. Status: Oral argument held on January 16, 2024.

11th CIRCUIT COURT OF APPEAL

Lionel Alford v. Walton County, Case No. 21-13999. Appeal from a federal judge's ruling in a dispute about whether waterfront property owners should receive compensation after Walton County temporarily closed beaches early in the COVID-19 pandemic. Status: Oral argument held November 17, 2022.

In Re: ACF Basin Water Litigation, Case No. 21-13104. Appeal from ruling that allows Atlanta-area cities to take more water from the Chattahoochee River upstream from Alabama and Florida's Apalachicola Bay. The order dismisses claims by the National Wildlife Federation, the Florida Wildlife Federation and Apalachicola Riverkeeper that the Army Corps of Engineers is holding back too much water in federal reservoirs upstream from Florida's Apalachicola River. Status: Notice of appeal filed October 6, 2021.

MONTANA SUPREME COURT

State of Montana v. Rikki Held, Case No. DA23-0575. Appeal from various orders, including order determining that youth plaintiffs have a fundamental constitutional right under the Montana state constitution to a clean and healthful environment and that the Montana Environmental Policy Act, which forbids the state and its agents from considering the impacts of greenhouse gas emissions or climate change in their environmental reviews, violates their right to a clean and healthful environment and is unconstitutional on its face. Status: Appeal filed September 28, 2023.

Adminstrative Law Update

By Derek Howard, Senior Assistant County Attorney, Monroe County

Note: Status of cases is as of February 1, 2024. Readers are encouraged to advise the author of cases or developments that should be included in the next issue of The Reporter (howard-derek@monroecounty-fl.gov).

***Bear Warriors United, Inc. v. Dep't of Transp.,* Case No. 23-1512 (DOAH Jan. 29, 2024).** On February 28, 2023, the St. Johns River Water Management District ("District") issued proposed agency action for a permit to the Florida Department of Transportation ("DOT") authorizing the construction and operation, including a stormwater management system, of a 74.13-acre project known as Pioneer Trail/I-95 Interchange ("Project"). Petitioners filed a Petition for Administrative Hearing. On January 29, 2024, the Administrative Law Judge ("ALJ") issued an Amended Recommended Order concluding: "But for the public interest test, DOT established that the Project meets all relevant [Environmental Resource Permit] criteria. If this case did not involve an [Outstanding Florida Water ("OFW")], and if the standard for issuance was whether the Project is not contrary to the public interest, the undersigned would have no hesitation in recommending issuance of the Permit. However, this case does involve an OFW, and the standard is whether the Project is clearly in the public interest. Based on the Findings of Fact as to each element of the public interest test set forth herein, and applying the public interest standards in section 373.414(1)(a), rule 62-330.302(1), and A.H. Vol. I, sections 10.2.3.1 through 10.2.3.7., it is concluded that reasonable assurances have not been provided that the activities to be authorized by the Permit are clearly in the public interest. Thus, application for Environmental Resource Permit No. 103479-2 should be denied."

***Falkenberg Real Estate LLC v. Dep't of Transp.*, Case No. 23-3202RU (DOAH Nov. 6, 2023).** Petitioner seeks to complete a shopping plaza development in Ruskin, Florida that received approval in 2008. Petitioner challenged the following statements by the Department of Transportation ("DOT") as unadopted rules in violation of section 120.54(1)(a), Florida Statutes: (a) that the driveway connection permit for the property automatically expired because the proposed development on the property was not constructed within one year of the issuance of the driveway connection permit; (b) that the driveway connection permit automatically expired because a "significant change" occurred on the property; and (c) that the initial burden was on Petitioner to take action addressing the "significant change" cited by DOT. The ALJ issued a Final Order on November 6, 2023. As to the first and second statements, the order found that they were unadopted rules and ordered that DOT immediately discontinue all reliance on the statements or any substantially similar statements as a basis for agency action. The order further found that rule 14-96.005(2)(c) of the *Florida Administrative Code* which set forth criteria for determining the "existing use" of a property when making findings as to whether significant change has occurred, is an invalid exercise of delegated legislative authority.

***Michael Hutchinson v. Sarasota Cnty.,* Case No. 22-3608GM (DOAH Dec. 20, 2023).** Respondent Sarasota County adopted Ordinance 2022-044 on October 25, 2022, that approved a Text and Map Amendment (the "Amendments") to the County's Comprehensive Plan ("Comp Plan"). The Amendments applied to a 4,120-acre site owned by LWR Communities LLC and added a new Village Transition Zone Resource Management Area, amending Future Land Use Policy 1.1.2 and RMA Goal 1 in the Comp Plan. The Amendment also approved a Future Land Use Map ("FLUM") by amending FLUM Maps RMA-1 and RMA-3 and adding the new Map RMA-5. Petitioners filed a petition for formal administrative hearing pursuant to section 163.3184(5), Florida Statutes, asserting that the Amendments are not in compliance because they are (1) not based on relevant and appropriate data and analysis, (2) inconsistent with the provisions of chapter 163, Florida Statutes, governing the Future Land Use Element of a Comp Plan, (3) internally inconsistent, and (4) inconsistent with the provision of the Comp Plan. They further asserted the changes would allow "a premature conversion of agricultural and rural land that inappropriately compromises and is inconsistent with the Comp Plan's goals of preserving the rural characteristics of the area," and the changes would allow excessive development that would reduce environmental and compatibility protections, and would be inappropriate given the existing farmland and character of the rural area within which the subject property lies. Following a disputed-fact evidentiary hearing in July and August 2023, the ALJ issued a Recommended Order on December 20, 2023, recommending that the Department of Economic Opportunity enter a final order determining that Ordinance 2022-044 is in compliance.

***Joan S. Newberger v. Fish & Wildlife Conser. Comm'n*, Case No. 23-2759 (DOAH Jan. 16, 2024).** The Florida Fish and Wildlife Conservation Commission (the "Commission") is the state agency with exclusive jurisdiction to regulate all wild animal life in Florida. *See* Art. IV, § 9, Fla. Const. Section 379.3762(1), Florida Statutes, provides that "[i]t is unlawful for any person or persons to possess any wildlife as defined in this act, whether native to Florida or not, until she or he has obtained a permit as proved by this section from [the Commission]." Rule 68-1.010(1)(e) of the *Florida Administrative Code* mandates that the Commission "shall deny applications for any license, permit or other authorization" if the applicant has "at any time" failed "to comply with chapters 369, 379, or 823, F.S., or the rules of the Commission."On November 22, 2021, a Commission law enforcement investigator went to Petitioner's residence in Putnam County, Florida to investigate a complaint that someone had been bitten by a monkey. Petitioner did not have the license or permit required to possess the capuchin monkey in

question, and so the investigator took custody of the monkey and transported it to an appropriately licensed facility. During the investigation, the investigator found that Petitioner was offering to sell a female capuchin monkey on www.exoticanimalsforsale.net for $9,500 and that Petitioner had previously sold a capuchin monkey. Petitioner was cited for violating section 379.3761(1), Florida Statutes. On June 2, 2023, the Commission issued a Notice of Denial informing Petitioner that her subsequent application for a Class III permit to possess a capuchin monkey for personal use was being denied based on her prior violations, and Petitioner requested a formal administrative hearing. On January 16, 2024, the ALJ issued a Recommended Order recommending that the Commission issue a Final Order denying Petitioner the requested permit.

***Adena Testa v. Jupiter Island Compound, LLC*, Case No. 22-0518** (DOAH Aug. 23, 2023). On October 28, 2021, the Department of Environmental Protection ("DEP") issued a Notice to Proceed and Revised Permit for Construction or Other Activities Pursuant to section 161.053, Florida Statutes ("Corrected Permit") that authorized Jupiter Island Compound ("JIC") to construct a single-family dwelling and pool seaward of the coastal construction control line. Petitioners filed a Petition for Formal Administrative Hearing ("Petition") challenging the permit. On August 23, 2023, the ALJ issued a Recommended Order that recommended DEP enter a Final Order denying the issuance of the permit. In doing so, the ALJ concluded that JIC failed to demonstrate by a preponderance of the competent substantial evidence that (1) the survey submitted as part of the application meets the requirements of rule 62B-33.0081 of the *Florida Administrative Code*; (2) the proposed beach house will be located landward of the frontal dune, as required by rule 62B-33.005(9) of the *Florida Administrative Code*; (3) due to the location of the proposed beach house on, or in very close proximity to, the frontal dune, its construction would not disturb the topography or vegetation such that the frontal due will become unstable or suffer catastrophic failure, as required by rules 62-33.005(2) and 62-33.005(4) of the *Florida Administrative Code*; (4) the construction of the proposed beach house will not result in the removal or destruction of native vegetation such that it will destabilize the frontal dune, as required by rule 62.33.005(4)(a) of the *Florida Administrative Code*; and (5) the proposed beach house qualifies for the exemption for single-family dwellings authorized by section 161.053(5)(c), Florida Statutes, because the beach house is proposed to be located landward of the thirty year erosion projections. On November 20, 2023, DEP issued its Final Order that ordered (1) the adoption of the Recommended Order except as modified by its rulings on exceptions, (2) JIC failed to demonstrate by the competent substantial evidence that the proposed Project to construct a beach house met the statutory criteria in section 161.053, Florida Statutes, and the applicable criteria in rule 62B-33.005 of the *Florida Administrative Code*, and (3) denying the permit authorizing JIC to construct a single-family dwelling and pool on Jupiter Island.

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Coastal Conservation Corner: An Op-ed Report on Florida's Ocean, Coasts, and Protecting the State's Blue Economy

Florida's Circularity Problem

By Jon Paul "J.P." Brooker, Esq.[1]

Florida has a circularity problem. No, we are not talking about heart health, we are talking about the way we deal with our trash and our waste.

For the longest time, our waste management systems have had a linear economy where we take, make, use, dispose, and pollute. But what we need to be working towards is a circular economy, where we make, use, reuse, remake, and recycle.

We are especially in need of a circular economy for plastic products, which are the most common items found on Florida's beaches during Ocean Conservancy's International Coastal Cleanup (the "ICC"), which happens every September. Without fail, the top ten items on the ICC list are plastic, including bottles, bags, utensils, and balloons.

With thousands of people moving to the Sunshine State every day, our brittle linear systems for managing trash and debris are becoming more and more strained. Those strains result in leakage of trash into our most precious commodity—our ocean and coasts. And since people are coming to Florida to enjoy our iconic environment, our wonderful beaches, and our incomparable oceans, it is incumbent on us to do everything we can to help usher forward a circular economy to protect our natural resources.

As a threshold matter, we can facilitate working towards a circular economy by implementing common sense legislation. For example, we have smart bills introduced during the 2024 regular Florida Legislative session that will prohibit balloon releases and will punish violators with a $150 fine. At present, Floridians can release up to nine helium filled balloons into the sky as a celebration—but what goes up must come down, and those balloons inevitably end up in our mangroves, on our beaches, and in our coastal waterways, where they have significant impacts on wildlife. Scientists have found balloons and other plastics in the guts of manatees, and sea turtles consume balloons mistaking them for jellyfish. Closing this balloon release loophole and declaring an end to that practice should be a no-brainer for Florida.

We should also be opposing legislation that makes it harder to regulate single-use plastic items. This session HB 1651 and its companion bill SB1126 purport to "Regulate Auxiliary Containers." But what these bills actually do is expand prohibitions on local governments from regulating single-use plastic items that ultimately end up in our waterways. Instead of shackling efforts to regulate pollution, we should be offering more tools in the toolkit for all levels of government to protect Florida's blue economy and our coastal ecosystems.

Movement towards a circular economy is inevitable. Our economic and ecological systems cannot withstand a permanent linear waste economy that is designed to pollute. Florida can and should lead the way towards the transition to a circular economy.

If the Florida Legislature wants to preempt local governments from regulating plastics, then it needs to step in and step up with coherent, robust regulation of these pollutants. Those of us in the environmental conservation community would warmly and loudly welcome Tallahassee's intervention.

Endnotes

[1] Jon Paul "J.P." Brooker, Esq is the Director of the Florida Conservation Program at Ocean Conservancy, the world's oldest marine conservation non-profit. He is a sixth-generation Floridian living in St. Petersburg.

Natural Resource Conservation: Rainwater Harvesting and Phosphate Recycling

By: William D. Slicker[1]

There are at least two major natural resource conservation efforts that are ongoing in the form of rainwater harvesting and phosphate recycling.

Rainwater Harvesting

Rainwater Harvesting is collecting and harvesting rainwater for reuse, rather than letting the water run off into drains, rivers, lakes, or the ocean.[2]

With the news focusing on climate change, rainwater harvesting is gaining more attention as parts of the world experience more droughts, the depletion of groundwater, and freshwater pollution.[3] Due to this new renewed interest in rainwater harvesting, many people think it is a new idea. However, systems for collecting rainwater date back centuries.

The History of Rainwater Harvesting

The people in the Indus River Valley (an area that today covers parts of Afghanistan, Pakistan, and India) developed a system of water reservoirs, baths, and sewage as early as 3,000 BCE.[4] Many cisterns have been found in ancient Greece and Israel.[5] The Romans built a highly advanced system of baths fed through aqueducts, as well as a very capable sewer system.[6] The largest cistern that has been found was built during the sixth century during the reign of the East Roman Emperor Justinian just southwest of the Hagia Sophia in Constantinople, which is now Istanbul. The cistern measured 138 meters (453 feet) by sixty-five meters (213 feet) which could hold about 80,000 cubic meters (2,800,000 cubic feet) of water.[7]

Rainwater v. Grey Water Benefits

The basic rainwater harvesting system is to direct roof runoff into a gutter and downspout that empties into a barrel. Without purification, this water is suitable for the same uses that grey water can be used for. Grey water is water that is water discharged from sinks, showers, bathtubs, washing machines, and dishwashers.[8]

Using this rainwater and grey water has several benefits. First, it reduces the fertilizers, pesticides, and other pollutants that get swept into our rivers, lakes, and oceans. Second, it reduces the water that someone would otherwise pay their local government to produce.[9] Finally, it also reduces demand for ground water, provides a water supply collected during a wet period that can be used during a dry period, and it reduces erosion caused by stormwater runoff.[10]

Recent Rainwater Harvesting Efforts

Several foreign countries are currently engaged in rainwater harvesting. More than 1.8 million German households and companies collect rainwater, making it the largest European market for rainwater tanks.[11] France, the United Kingdom, Switzerland, and Austria are also engaged in rainwater harvesting.[12] In Australia, rainwater usage has been incorporated into building requirements.[13]

Here in the United States, no state prohibits rainwater harvesting, although a few limit the amount people can collect.[14] Some states are actively encouraging rainwater harvesting. For example, Texas offers a tax exemption for that portion of a property's valuation that is due to the installation of water conservation equipment.[15] Virginia offers a tax credit.[16] So does Rhode Island.[17]

On a local level, some municipalities are promoting rainwater harvesting. The City of Tucson, Arizona offers a water harvesting rebate of up to $2,000.[18] The City of Orlando, Florida offers a free rain barrel to residents who take a rain harvesting workshop.[19]

Since fertilizer runoff is a top contributor to nutrient pollution that stimulates red tide, several Florida coastal counties, such as Pinellas, Hillsborough, Sarasota, and Manatee, all have seasonal bans on certain nutrients in fertilizers. Since a bill was recently introduced in the Florida Senate that would block local governments from imposing fertilizer bans, it makes even more sense for local governments to start encouraging the capturing or harvesting of rainwater.[20] Perhaps in the future, in addition to distributing recycling barrels for paper and aluminum, we will see local governments distributing rain barrels for the collection of rainwater.

Phosphate Recycling

The war in Ukraine has exacerbated the fertilizer storage. Russia exports 20% of the world's nitrogen fertilizer. Russia and Belarus together export 40% of the world's potassium.[21] Morocco controls about 75% of the world's phosphate reserves. Morocco, together with China, Algeria, Syria, and South Africa control 88% of the world's phosphate reserves.[22]

Meanwhile, demand for phosphate and nitrogen used in fertilizer has been increasing dramatically due to the green revolution.[23] Some estimate that since the early 1960's, global fertilizer production has increased fourfold.[24] Others estimate that global fertilizer production has increased tenfold.[25]

Estimates as to when the world's phosphorus reserves will run out vary greatly.[26] But these estimates generally agree that once the United States depletes its small reserves, mainly found in central Florida, the United States will be dependent on Morocco's phosphate to feed itself. The depletion of Florida phosphorus will probably happen in about thirty years.[27] This has spurred an urgency in finding alternative sources of phosphorus.

Without knowing the chemical phosphorus was the active agent, humans have used various sources of phosphorus for thousands of years. As long as 40,000 years ago, Australian hunter-gatherers control burned patches of land, which is a process that converts phosphorus in the soil into a form that is more easily absorbed by crops. The Inca in Peru used bird guano as a fertilizer for 2,000 years. In Japan, bat guano was used as fertilizer during the 1600–1800s. Animal waste was used in Europe as fertilizer during the Middle Ages.[28] While trying to convert metal into gold during the 1600s, a German chemist Hennig Brandt distilled phosphorus from urine.[29]

Today, researchers are pursuing several urine recycling projects throughout the world. Sweden tested urine as a fertilizer in the last 1990s. Germany, India, and South Africa all conducted tests with human urine in the early 2000s.[30] Starting in 2013 in Niger, twenty-seven female volunteers applied urine and animal manure to their millet fields. The next year, one hundred women farmers

used it. Then 1,000 women got involved. The results were that urine, either alone or with animal manure, increased the millet yield 30%.[31]

Here in the United States, the Rich Earth Institute (the "Institute") started a urine reclamation program in 2012. The first year, the Institute collected 600 gallons of urine from sixty donors.[32] The Institute is now creating the nation's first community-scale urine recycling program.[33]

It is estimated that humans expel three million metric tons of phosphorus annually. That's enough to meet almost a quarter of the global demand. Fifty to sixty percent of the phosphorus in human waste is in urine . . . and a year's worth of urine from just one person contains enough phosphorus to produce at least half of their annual food requirement.[34]

A second benefit of recycling urine is the possibility of decreasing sewage-fueled algae blooms. These algae blooms have caused the death of fish and manatee in Florida. Algae blooms have also occurred in Lake Erie, Lake Superior, Lake Champlain, Lake Tahoe, and other lakes across the United States. And the blooms have occurred in lakes around the world, including Lake Baikal, Lake Nicaragua, and Lake Victoria.[35]

Nutrient run-off is also creating dead zones in the oceans. These dead zones will only continue to grow unless something is done. Urine recycling would help decrease the nutrient run-off feeding these dead zones.[36]

Do not be surprised if in the future, in addition to recycling paper and plastic, cities start urine recycling programs. So, get over the "ugh" and get used to peeing into a funnel that leads into a large jug.

Endnotes

[1] William D. Slicker served as a law clerk to the Honorable Steven H. Grimes at Florida's Second District Court of Appeal and a law clerk to the Honorable Warren H. Cobb at Florida's Fifth District Court of Appeal. He received the Florida Bar President's Pro Bono Award for the Sixth Circuit, the Ms. JD Incredible Men Award, the St. Petersburg Bar Foundation's Heroes Among US Award, the Community Law Program Volunteer of the Year Award, and the Florida Coalition Against Domestic Violence Lighting the Way Award.

[2] *Starre Vartan, A Beginner's Guide to Rainwater Harvesting*, Tree Hugger (Nov. 8, 2022), https://www.treehugger.com/beginner's-guide-to-rainwater-harvesting-5089884.

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[9] *Id.*

[10] *Renee Picard, 15 Rainwater Benefits to Transform Household Water Consumption*, Greencoast (Mar. 14, 2023), https://greencoast.org/rainwater-harvesting-pros-and-cons.

[11] *Helmuth Ziegler, Raindrops Falling in My Reservoir – Harvesting Rain in Germany and the EU*, Smart Cities Dive, https://www.smartcitiesdive.com/ex/sustainablecitiescollective/raindrops-falling-my-reservoir-harvesting-rain-germany-and-eu/16781/.

[12] *Id.*

[13] *Chirhakarula Chubaka, et al., A Review of Roof Harvested Rainwater in Australia*, J. Of Env't & Pub. Health, Jan. 21, 2018, https://www.hindawi.com/journals/jeph/2018/6471324/.

[14] *Rainwater Collection Legal States 2024*, World Population R., https://worldpopulationreview.com/state-rankings/rainwater-collection-legal-state (last visited Feb. 6, 2024).

[15] *Frequently Asked Questions*, Tex. Water Dev. Bd., https://www.twdb.texas.gov/innovativewater/rainwater/faq.asp#title-08.

[16] World Population Review, *supra* note 13.

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[19] *Rain Barrel Workshops,* City Of Orlando, Fl, https://www.orlando.gov/Our-Government/Departments-Offices/Executive-Offices/CAO/Sustainability-Resilience/Green-Works-Focus-Areas/Clean-Water/Rain-Barrel-Workshops (last visited Feb. 6, 2024).

[20] Florida House Bill 1197 (2023); Florida Senate Bill 1240 (2023). Both bills died in committee.

[21] *Isavella Zavarise, As Chemical Fertilizer Shortages Persist, Peecycling – the Process of Recycling Human Urine – Could Increase the Yield of Nutrient-Rich Crops*, Business Insider (June 19, 2022), https://www.businessinsider.com/what-is-peecycling-human-urine-nutrients-crops-need-to-thrive-2022-6.

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[26] Jansen, *supra* note 21.

[27] Kolbert, *supra* note 23.

[28] Jansen, *supra* note 21.

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Florida State University College of Law Winter 2024 Update

By Erin Ryan, Associate Dean for Environmental Programs

Erin Ryan, Associate Dean for Environmental Programs

Happy New Year to all, from FSU! Around the start of each calendar year, we like to celebrate the scholarly contributions of our vibrant program faculty, including Brian Slocum's publications in the Harvard, Columbia, and University of Pennsylvania Law Reviews; Mark Seidenfeld's in the Michigan, Boston University, and Arizona Law Reviews; Shi-Ling Hsu's in the Utah Law Review and Yale Journal on Regulation; Tisha Holmes' extraordinary grants; and recognition by the Environmental Law Institute for my own article, Erin Ryan, *Privatization, Public Commons, and the Takingsification of Environmental Law*, as one of the best in the field in 2023. Below, we proudly celebrate these accomplishments, together with a sampling of our collective academic works, James Parker-Flynn's report on evolving climate litigation, selected accomplishments by our students and alumni, and the enriching contributions of our program visitors.

We also invite you to join us for another compelling programmatic series this Spring, headlined by our Spring 2024 Distinguished Lecturer and renowned property law theorist, Professor Gregory Alexander of Cornell University, who will present *Reversing Means and Ends: The Human Flourishing Theory in Conditions of Climate Change* on February 7th. We are also honored to be joined by David Bookbinder, former Chief Climate Counsel for the Sierra Club and Niskanen Center, for a fascinating and timely discussion on January 24th about the constitutional and common law claims that citizens, cities, and states are bringing against the fossil fuel industry, and by Timothy Bass, Assistant Chief Counsel in the Office of Chief Counsel for NASA, for a lively conversation on March 6th about environmental issues in space. All events are open to public.

Gregory S. Alexander Professor

Upcoming Events

On February 7th, the Center proudly welcomes our Spring 2024 Distinguished Lecturer, Gregory S. Alexander. Professor Gregory S. Alexander is the A. Robert Noll Professor of Law, Emeritus at Cornell Law School. An internationally renowned expert in property law and theory, Professor Gregory has taught at Cornell Law School since 1985. Professor Alexander's lecture will focus on his upcoming article, *Reversing Means and Ends: The Human Flourishing Theory in Conditions of Climate Change*, which will be featured in FSU Law's Journal of Land Use and Environmental Law.

As Professor Alexander will discuss, the human flourishing theory of property posits that property is necessary for the development of the capabilities necessary for humans to flourish. Climate change creates conditions in which it may be possible and necessary to reverse this means-end relationship. That is, at least in some circumstances resulting from climate change capabilities may be the means, rather than the ends. Certain human capabilities have become the necessary means for achieving the goal of protecting property, both human and natural. Of these capabilities, sociability, or cooperativeness, is especially important to protecting property. In his lecture, Professor Alexander will illustrate how cooperativeness facilitates the goal of property protection in a concrete context of disasters brought about by climate change, namely, wild fires in California. Connecting this discussion with Elinor Ostrum's work on the conditions of cooperation, he will point out the limits the capabilities approach to addressing the problems brought about by climate change.

Professor Alexander's lecture will be held February 7th from 3:30–4:30 p.m. in the FSU Law Rotunda, with a reception to follow. All are welcome.

Tim Bass
Assistant Chief Counsel at NASA's Kennedy Space Center

Evironmental Concerns in Space Exploration

On March 6th, the Center will welcome Tim Bass, Assistant Chief Counsel at NASA's Kennedy Space Center, for an Environmental Enrichment Lecture. Bass will discuss the environmental concerns in the ongoing development of space exploration. RSVP and livestream information will be sent out closer to the event.

Spring 2024 Lunch & Learn

On February 21st, the FSU Environmental, Energy, and Land Use Law Faculty will be hosting students for Lunch and to Learn more about the exciting classes we are offering in Fall 2024. We'll introduce the courses, answer your questions, and share some delicious local pizza. More info to come!

Trip to Wakulla Springs

Stay tuned for news on how to join the biannual FSU law Wakulla Springs State Park Field Trip on Wednesday afternoon, April 3rd, where we will take a guided boat tour along one of the last stretches of true regional wilderness, joined by alligators, anhinga, and if temperatures permit, manatees.

Fall 2023 Distinguished Lecture

Michael Gerrard

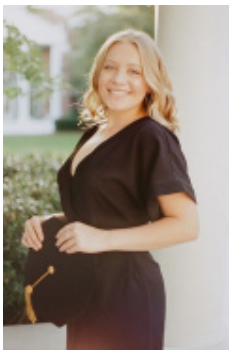
On November 9, 2023, the Center proudly welcomed our Fall 2023 Distinguished Lecturer, Michael Gerrard. Professor Gerrard is the Andrew Sabin Professor of Professional Pratice at Columbia University, and the faculty director of the groundbreaking Sabin Center for Climate Change Law. A widely respected expert on climate law and policy, Professor Gerrard's lecture focused on his upcoming article, *Urban Flooding: Legal Tools to Address a Growing Crisis*, which will be featured in FSU Law's Journal of Land Use and Environmental Law.

As Professor Gerrard discussed, climate change is making extreme precipitation events more intense and frequent in many parts of the world. This has led to damaging and often life-threatening flooding in many cities. Urban drainage systems were designed to accommodate rainfall patterns that no longer exist. A host of actions are required to help cities cope with the flooding that is now happening and that will become more severe in the decades to come: improved drainage systems; more "green infrastructure" to allow stormwater to infiltrate the soil; systems to store water temporarily; barriers to hold back water; elevating and otherwise redesigning buildings so that critical elements are above flood levels; and relocation of some uses away from vulnerable areas. His lecture explored the legal issues that arise with each of these types of actions, discussed how they can be financed, and made recommendations for legal reforms. It also considered the difficult task of setting priorities and making tradeoffs among potential actions.

Faculty Spotlight: Professor Ryan

Professor Erin Ryan's recent article, *Privatization, Public Commons, and the Takingsification of Environmental Law*, 171 U. Pa. L. Rev. 617 (2023), was selected by the Environmental Law Institute (in partnership with Vanderbilt Law School) as one of the 20 best pieces in the field in 2023. The article "takes on the critical but undertheorized question of how to balance private and public interests in critical natural resource commons, including air, water, public lands, energy, and biodiversity resources, all of which are prone to forms of diminution by private exploitation." In doing so, it identifies "a set of legal biases, which we might call 'the privatization paradox,' that effectively create a one-way ratchet toward privatization at the expense of environmental values in public natural resources." The article argues that this "one-way conversion of public resources into private interests can survive policy transitions after elections, because it relies on private law norms—such as property and contract law tools—that are more enduring than public regulatory norms."

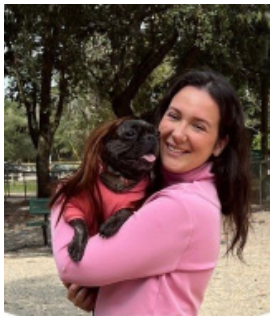
Alumni Spotlight



Rylie Slaybaugh

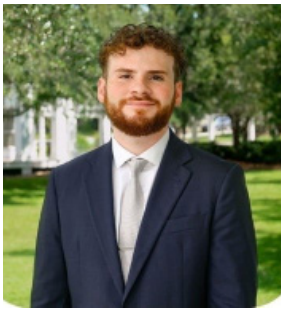
Rylie Slaybaugh, who graduated from FSU Law's Environmental Certificate Program in 2022, has taken her passion for environmental law to Colorado. After graduating, Slaybaugh first worked as a Fellow for the Denver City Attorney's Office in their Municipal Operations Section. That opportunity soon led to another, as she joined the Colorado Department of Law in 2023, working as an Assistant Attorney General in the Air Quality Unit of the Natural Resources Section.

Student Organization Spotlight



We are proud to introduce a the 2023–2024 leaders of FSU Law's Student Animal Legal Defense Fund, which provides forum for education, advocacy and scholarship aimed at protecting the lives and advancing the interests of animals through the legal system, raising the profile of the field of animal law.

Savannah Sherman (President) is a 3L who has always had a passion for animal welfare. She has held the position of SALDF President for her 2L and 3L years. Coming to law school, she discovered that an attorney can have a powerful role in advocating for the humane treatment of animals. She plans to relocate to Honolulu, Hawaii upon graduation.



Shawn Soscia (Vice President) is a 2L who has an interest in advocating for animal rights. His interest comes from his love of dogs, he currently

has a three-year-old golden retriever named Samson.

Mitchell Tozian (Executive Editor) is a 2L interested in animal rights and welfare. Mitchell hopes to pursue these interests as a member of SALDF and through pro bono work when he graduates law school. Mitchell has a five-year-old Husky, Kylo, who loves to explore the outdoors.

In the News: The Climates They Are a-Changin'

Based on preliminary data, it now appears that 2023 was the world's hottest year on record. The culprit—as it has been for the previous hottest years—is human caused climate change, amplified by a significant El Niño event. Several months set all-time heat records in 2023, and the temperature anomaly in September was so great that some climate scientists struggled to describe it, with one calling the month "gobsmackingly" hot. Given that the temperature effects from El Nino typically are most impactful the year after it begins, there is a chance that 2024 could quickly displace 2023 atop the record books.

James Parker-Flynn

Despite the scientific consensus that the climate is warming and will continue to do so unless emissions are drastically cut, climate litigants have been mostly unsuccessful in their attempts to effect meaningful change through the courts in the past two decades. However, 2023 suggests that the judicial climate may also be changing.

In August, Judge Seeley in the Montana First Judicial District Court, issued a lengthy order in Held v. Montana, concluding, among other things, that the plaintiffs have a "fundamental constitutional right to a clean and healthful environment, which includes climate as part of the environmental life-support system." More recently, at the very end of 2023, Judge Ann L. Aiken of the Federal District Court of Oregon issued an order in the long-running case Juliana v. United States. The court had previously dismissed the plaintiffs' claims "alleging injury from the devastation of climate change and contending that the Constitution guarantees the right to a stable climate system that can sustain human life," but subsequently allowed the plaintiffs to amend. In their Second Amended Complaint plaintiffs alleged that defendants "have violated the Due Process Clause and Equal Protection Clause of the Fifth Amendment; the 'unenumerated rights preserved for the people by the Ninth Amendment' and the public trust doctrine" by failing to address climate change despite understanding the grave threats posed by climate change. This time around, the court denied in part defendants' motion to dismiss, denied defendants' motion for interlocutory appeal, and granted plaintiffs' motion for a pretrial conference.

Held is, unsurprisingly, now on appeal in the Montana Supreme Court, while the DOJ may again ask the Ninth Circuit to block the District Court of Oregon in Juliana. Nevertheless, these cases give hope to climate change activists that moving forward, the courts may yet be a meaningful tool in the fight against catastrophic climate change.

Faculty Scholarship and News

Recruiting Capitalism for Environmental Protection, in Can Democracy And Capitalism Be Reconciled? (Milkis, S. and S. Miller, eds, forthcoming 2024).

Western Water Rights in a 4°C Future, in Adapting To High-Level Warming: Equity, Governance, And Law (Craig, R., J. Salzman & J.B. Ruhl, eds., forthcoming 2023) (with Kevin Lynch & Karrigan Bork).

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b. Model Statutes

There have been two model statutes created to guide states in drafting their own recreational use statutes, one drafted in 1965 and another in 1979. The 1965 model was drafted by the Council on State Legislatures.[12] According to the Council, at the time "something less than one-third of the states," including Florida, had already created some sort of liability protection for public recreational use on private land.[13] In 1979, a new model was offered by a commentator, University of Wisconsin law professor W.L. Church, in a report to the National Association of Conservation Districts titled "Private Lands and Public Recreation A Report and Proposed New Model Act on Access, Liability and Trespass.[14]

The 1965 model act defines owner very broadly: "Owner means the possessor of a fee interest, a tenant, lessee, occupant, or person in control of the premises."[15] This definition likely draws from the Restatement of Torts and its treatment of premises liability. The Restatement defines a "possessor of land" as "a person who is in occupation of the land with the intent to control it."[16] Professor Church's model suggests states adopt an even more expansive approach to ownership, because "legal ingenuity has resulted in an almost infinite variety of ownership interests."[17] In addition to easements, he queries whether life estates, lessors, tenants, or joint tenants in common not in actual occupancy, would qualify under the 1965 Model.[18] To remedy this uncertainty, Professor Church proposed the following language: "Owner means any individual, legal entity, or governmental agency that has any ownership or security interest whatever or lease or right of possession in land."[19] Our research suggests only one state, Missouri, has adopted this language verbatim.[20] However, as our survey below suggests, many have opted for more broadly inclusive language.

As noted here, Florida adopted its recreational use statute in 1963, prior to the publication of the 1965 model. The Florida statute is limited to owners and lessees, does not refer to "occupants" or "possessors," and does not define "owner." Although Florida has amended the original 1963 statute on a number of occasions,[21] it has not addressed the meaning of "owner" as used in the statute.

c. Survey of State Recreational Use Statutory Treatment of "Ownership"

To understand how states have addressed the question of "ownership" for the purposes of recreational use liability laws, we reviewed each state's laws. We found great variety. Many states adopt verbatim the language of the 1963 model statute, cited above.[22] Others expand upon the model statute to explicitly include additional interests in property. These include easements, licenses, managers, operators, permit holders, reversionary interests, life estate, "any estate," holder of a utility easement, security interest, person "managing, controlling or overseeing the premises," person "entitled to immediate possession," etc. The term "non-possessory interest" is sometimes used to describe interests other than fee interests.[23] An even broader catch-all is "or any other interest in land."[24]

Our research shows that nineteen of the fifty states with recreational use statues include easement holders within the text of their recreational use statutes. Of those nineteen states, ten states refer to easement holders specifically, while nine broadly provide liability protections for holders of all forms of nonpossessory interests.[25] Notably, one state, Montana, refers specifically to conservation easements.[26] Another state excludes licensees by implication.[27]

A complete state-by-state listing of these definitions or descriptions is included in Appendix I accompanying this article.

d. Judicial Interpretation of "Owner" in Other States

At least one state has found that an easement holder benefits from the recreational use statute's protection even where easement holders are not explicitly listed in the statute. In *Crawford v. Consumers Power Company*, the Michigan appellate court held that Michigan's statute applies to easement holders,[28] even though the statute on its face applied only to landowners, tenants, and lessees.[29] In California, a court found that that state's statute applied to the holder of a grazing permit on public land[30] where the California statute uses the all-encompassing language "any estate or any other interest in real property whether possessory or nonpossessory."[31] However, a court in Arizona concluded that an inner tube rental permit on public land would not suffice under the state's statute,[32] where the statute applied only to an "owner, occupant or lessee."[33]

III. Florida's Recreational Use Statute

Florida's recreational use statute, section 375.251, Florida Statutes, is titled "Limitation on liability of persons making available to public certain areas for recreational purposes without charge." The purpose of the statute, outlined in subsection (1), is to encourage the people of Florida to make their land available to the public to use for recreational purposes by limiting the liability of those landowners for injuries that occur on the land.[34] As previously noted, the Florida law was enacted in 1963, prior to the 1965 release of a model statute by the Council of State Governments in 1965.[35] Despite the fact that the Florida law predates the model, the language is substantially similar.

Section 375.251 contains two substantively similar provisions designed accomplish its express purpose of incentivizing the use of private lands

for public recreation. First, subsection (2) limits liability to owners or lessees who open their land for public recreational uses. Second, subsection (3) similarly insulates owners who enter into an agreement with a state agency to create opportunities for public outdoor recreational uses. These subsections are described more fully below.

Subsection (2)(a) states that "owner[s]" and "lessee[s]" who provide the public with an area (defined as "land, water, and park areas")[36] for "outdoor recreational purposes" (defined by a laundry list of such purposes)[37] owe no duty of care to keep the area safe or to give warning to persons entering the property about any "hazardous conditions, structures, or activities" within the area. It further specifies that owners or lessees are not presumed to extend any assurance that the area is safe for any purpose, do not incur any duty of care toward anyone who enters the area, and are not liable for any injury to persons or property caused by an act or omission of a person within the area. Subsection (2)(b) expands this protection to persons other than the general public, but only when the land is used for "hunting, fishing or wildlife viewing," and provided these persons are given advance or concurrent written notice or such notice is conspicuously posted. Presumably, this subsection was designed to facilitate specific invitees, such as private hunting, fishing and wildlife viewing organizations, entering private lands for recreational purposes that the public is not otherwise entitled to enter. Subsection (2)(c) restricts the owner or lessee from charging a fee for entry or use of an area for outdoor recreational purposes. The Florida Legislature amended the statute in 2021 to create an exception to this "no fee" requirement for concessions or special events, provided that any revenue derived from these must be used to "maintain, manage and improve" the area.[38]

Subsection (3) addresses "owners" who enter into "written agreements"[39] with a "state agency" to make their property available for outdoor recreational purposes.[40] The agreement must recognize that the state agency's responsibility is subject to the limitations set forth in the State's sovereign immunity statute, section 768.28, Florida Statutes. If this condition is met, the "owner" owes no duty of care to keep the area safe for entry or use, or to warn of hazardous conditions, structures, or activities. This subsection then repeats verbatim the liability limitations language of Subsection (2)(a), paragraphs 1–3 described above. Subsection (3)(b) states that it applies to "all persons" going on the area, including "invitees," "licensees," and "trespassers." Subsection (3)(c) discourages "owners" who enter into agreements with state agencies from being compensated above and beyond reasonable costs and expenses. However, under this provision the statute's liability protections remain in place even if compensation exceeds costs and expenses.

A final substantive section, subsection (4) states that the statute provides no relief from liability for "any person" for deliberate, willful, or malicious injury to persons and property, and that the statute does not "create or increase the liability of any person." The question of whether the statute unconstitutionally extinguished a common law tort was answered by the Florida Supreme Court in *Abdin v. Fischer*.[41] The Court concluded that the statute merely changed the standard of care owners and lessees must give to those entering the property, which is lawful under the Court's prior precedent.[42]

The remaining Subsection (5) defines the terms "area," "outdoor recreational purposes," and "state agency," each of which is discussed in context above. The term "owner" is not defined, however, which may lead to confusion where persons or entities having non-possessory interests make those interests available to the public for outdoor recreational purposes.

As previously noted, the language of Florida's recreational use statute is very similar to the 1965 Model Act put forth by the Committee of State Governments,[43] except for some differences in wording and some of the definitions—such as for "owner"—which the Model defines, and Florida does not.

IV. The Meaning of "Owner" Under Florida's Recreational Use Statute

Florida's recreational use statute appears to leave a notable gap in its liability protections. By its terms, Florida's statute cover "owners" and "lessees," but does not define or otherwise describe what, if any, less than fee ownership interests the legislature contemplated. Chapter 375, Florida Statutes, entitled "Outdoor Recreation and Conservation Lands," (the general chapter within which section 375.251 lies) contains a definitions section,[44] but it does not define owner. This could leave out those with interests in real property that could be made available to the public, including easement holders and licensees, which are customary ways in which individuals and entities offer their interest in property for recreational use by the public. This is fairly atypical among the rest of the states in the U.S. Only about seven other states do not have a definition of "owner" (or a similar term like "landowner" or "holder") within their recreational use statutes,[45] and the 1965 Model Act itself broadly defines owner within its text ("'Owner' means the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises").[46]

Looking elsewhere in the Florida Statutes does not help the issue. Similar language can be found in section 373.1395, Florida Statutes, which refers to Water Management Districts.[47] This provision grants a limitation to

liability for water management districts that make their land available to the public for recreational use but does not address circumstances where these Districts grant less than fee rights to entities who subsequently make that less than fee interest available for public recreational use.

Appendix II, accompanying this article, lists all the appellate cases in Florida that have interpreted the State's recreational use statute. Florida caselaw interpreting section 375.251 has considered the question of "owner," but only to the extent of determining that cities and counties are not afforded liability protections under the statute when they dedicate their land for recreational use by the public.[48] However, the 11th Circuit Court of Appeals has held that the United States can be a party that benefits from the liability protections from the statute.[49] None of the Florida cases interpreting section 375.251 further clarify the meaning of "owner."[50]

The statute's silence on the rights of easement holders and others with nonpossessory interests suggests that these interests may not be protected by the statute even if holders of nonpossessory interests offer their interest in the land for recreational use by the public. No caselaw from Florida courts interpreting the statute addresses the question of holders of nonpossessory interests.[51] One state that does not explicitly protect easement holders in its recreational use statutes has interpreted the statute to protect easement holders,[52] but such a determination has not happened in Florida. The 11th Circuit has considered a case involving an easement, but the court only considered the applicability of the statute to the easement grantor, not to the easement holder.[53] The statute at issue, patterned after section 375.251, provides liability protections for Water Management Districts. Section 373.1395 mentions easements, but only grants protections to those who grant easement to Water Management Districts, not easement holders.

V. Liability Protection Under Florida's Conservation Easement Statute

In addition to recreational use statutes, all fifty states—including Florida—have statutes which enable conservation easements to further private lands conservation.[54] Many of these are based the Uniform Conservation Easement Act, a product of the Uniform Law Commission.[55] The Uniform Act does not address liability protection for conservation easement holders. However, at least three states—Florida, Georgia, and Alaska—also include a liability protection provision.[56] The Florida and Georgia liability provisions are essentially identical. These provide that "ownership" of "rights" held by the "holder" of an easement does not subject the holder to any liability for any damage or injury that may be suffered by any person on the property or as a result of the condition of the property encumbered by a conservation easement."[57] Presumably, one such right that could be held by the "holder" of a conservation easement under this statute is the right to allow recreational access. We found no cases in Florida or Georgia that interpret this language. It would seem, however, that this provision does address the gap in liability protection under Florida's recreational use statute discussed in this article, at least for conservation easements. This provision does not resolve the concern for all non-possessory interests, as we show in the hypothetical below.

VI. A Hypothetical Application

To illustrate how the Florida statute might fail to apply, we offer the following hypothetical. Suppose a conservation organization wishes to facilitate a public hiking path across a private timber company's property in order to provide access between a state park and state forest. The timber company is willing but does not want to enter into a perpetual conservation easement because it may wish to sell its land unencumbered at some point in the future. The timber company and the conservation organization agree to either 1) a non-perpetual easement, or 2) an oral or written agreement (license) to allow transit by hikers along a path maintained by the conservation organization. While in transit, a hiker trips over rusted logging machinery and must have her leg amputated. She files suit against the timber company and the conservation organization as an invitee under a premises liability theory. The timber company and the Conservation Organization both move to dismiss the suit under Florida's recreational use statute.

A court should have no problem dismissing the timber company under the plain language of the statute. The company is clearly an "owner" within the meaning of the statute. However, the conservation organization may have more difficulty. The term owner is not defined in the Florida law, and not typically used in the context of easements ("holder" is more common in easement parlance). The conservation organization could point to the model recreational use statute, which broadly defines owner to mean "the possessor of a fee interest, a tenant, lessee, occupant, or person in control of the premises,"[58] but the Florida statute predates the model. The conservation organization could cite the few out of state cases which read easements and other non-possessory interests into similar statutes, but there is no guarantee a Florida court would follow this approach. At the very least, the conservation organization may end up having to go to trial and appeal an unfavorable ruling.

VII. Conclusions and Recommendations for Statutory Reform

Unlike many states, Florida's recreational use statute does not explicitly

extend liability protections to holders of interests in real property other than "owners" or "lessees." Nor does the Florida law define either term. As a result, holders of property interests that currently, or may in the future, allow public access under those interests—such as non-conservation easement holders and licensees—may not be eligible for the recreational use statute's liability protections. Given the strong interest in private less than fee land conservation and associated recreation in Florida, liability protections for these types of property interests should be included in the statute. As the preamble to the 1965 Model Act puts it, "Recent years have seen a growing awareness of the need for additional recreational areas to serve the general public . . . where private owners are willing to make their land available to members of the general public without charge, it is possible to argue that every reasonable encouragement should be given to them."[59] More than half a century later this public policy remains as relevant as ever.

The Florida Legislature should consider amending Florida's recreational use statute to explicitly provide liability protection to easement holders, licensees, and other holders of nonpossessory interests, as some states have done, or by using more broadly inclusive language that leaves no doubt that non-possessory interests benefit from the statute's substantive liability protection (which is the approach recommended by Professor Church in the 1979 Model Statute update).[60] Below we provide suggested amendatory language to section 375.251 that could accomplish this goal, and which similarly uses broadly inclusive language.

Suggested Language:

Section 375.251, Florida Statutes – "Limitation on liability of persons making available to public certain areas for recreational purposes without charge," is amended to read:

[Subsection (1) of the statute omitted]

(2)(a) An owner of any interest in real property, whether possessory or nonpossessory, who provides the public with an area for outdoor recreational purposes owes no duty of care to keep that area safe for entry or use by others, or to give warning to persons entering or going on that area of any hazardous conditions, structures, or activities on the area. An owner of any interest in real property, whether possessory or nonpossessory, who provides the public with an area for outdoor recreational purposes:

1. Is not presumed to extend any assurance that the area is safe for any purpose;

2. Does not incur any duty of care toward a person who goes on the area; or

3. Is not liable or responsible for any injury to persons or property caused by the act or omission of a person who goes on the area.

(b) Notwithstanding the inclusion of the term "public" in this subsection and subsection (1), an owner of any interest in real property, whether possessory or nonpossessory, who makes available to any person an area primarily for the purposes of hunting, fishing, or wildlife viewing is entitled to the limitation on liability provided herein so long as the owner of said interest provides written notice of this provision to the person before or at the time of entry upon the area or posts notice of this provision conspicuously upon the area.

(c) The Legislature recognizes that an area offered for outdoor recreational purposes may be subject to multiple uses. The limitation of liability extended to an owner of any interest in real property, whether possessory or nonpossessory, under this subsection applies only if no charge is made for entry to or use of the area for outdoor recreational purposes and no other revenue is derived from patronage of the area for outdoor recreational purposes. An owner may derive revenue from concessions or special events but will only retain liability protection under this subsection if such revenue is used exclusively to maintain, manage, and improve the outdoor recreational area.

[Remaining sections of the statute omitted]

Endnotes

[1] Professor Emeritus, University of Florida Levin College of Law. Professor Ankersen serves on the Board of Florida's Nature Coast Conservancy and previously directed the UF Law Conservation Clinic.

[2] Shaun Lynch is a third-year law student at the University of Florida Levin College of Law and a recipient of the College's Public Interest Law Fellowship, through which this work was performed. He currently works in the UF Law Environmental and Community Development Clinic.

[3] *Florida Chapter Results Report: 2023 Florida Legislative Session*, The Nature Conservancy, https://www.nature.org/content/dam/tnc/nature/en/documents/FL_Legislative_Results_Report_2023.pdf

[4] *Id.*

[5] Ch. 2023-20, Laws of Fla.

[6] § 375.251, Fla. Stat. (2021).

[7] *Id.*

[8] The Council of State Governments, Suggested State Legislation, Vol. XXIV, 150, 150–52 (1965).

[9] *See, e.g.*, Dean P. Laing, *Comment, Wisconsin's Recreational Use Statute: A Critical Analysis*, 66 Marq. L. Rev. 312, 315-16 (1983) (http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1971&context=mulr); Michael J. Lunn, *Class Dismissed: Forty-Nine Years Later Recreational Use Statutes Finally Align with Legislation's Original Intent*, 20.1 Drake J. Of Agric. L. 137 (2015); John D. Copeland, Recreational Access To Private Lands: Liability Problems And Solutions (2d ed. 1998). Terrence J. Centner, *Revising State Recreational Use Statutes to Assist Private Property Owners and Providers of Outdoor Recreational Activities*, 9 Buff. Envt'l. L. J. 1 (2001-2002).

[10] *See, e.g.*, Dan B. Dobbs, Paul T. Hayden And Ellen M. Bublick, The Law Of Torts § 273 (2d ed.) (Duties to Trespassers).

[11] Michael S Carroll, Dan Connaughton & J.O. Spengler, *Recreational User Statutes and Landowner Immunity: A Comparison Study of State Legislation*, 17:2 J. Of Legal Aspect Of Sport 164 (2007).

[12] *"Public Recreation on Private Lands: Limitations*

on Liability, in The Council of State Governments, Suggested State Legislation, Vol. XXIV, 150, 151 (1965)

[13] *Id.* at 150.

[14] W.L. Church, Private Lands And Public Recreation: A Report And Proposed New Model On Access, Liability, And Trespass 1-34 (1979).

[15] Supra note 8 at 151.

[16] Restatement (Second) Of Torts § 328E(a).

[17] Church, *supra* note 14 at 11.

[18] *Id.*

[19] *Id.* at 29 (Section 2(2) of Appendix D - Proposed Model Legislation).

[20] Mo. Rev. Stat. § 537.345.

[21] *See, e.g.*, Ch. 2012-203, Laws of Fla. (current version at Fla. Stat. § 375.251).

[22] *See, e.g.*, DEL. CODE tit. 7, § 5902; HAW. REV. Stat. § 520-2; LA. Stat. § 9:2795; KAN. Stat. § 58-3202.

[23] *See* § 16.02[3][a], Michael Alan Wolf, Powell On Real Property (2023). ("Because it involves the creation of an estate interest, which is a possessory interest the lease proper differs from a familiar and important family of so-called nonpossessory interests: licenses, easements, and covenant…. These nonpossessory interests, while they may resemble leases in the important respects of having a definite term and price, nevertheless do not create a right to possession in their holder, but only a privilege of use of property for limited purposes.").

[24] *See*, e.g., COLO. REV. Stat. § 33-41-102 ("'Owner' includes… the possessor of any other interest in land").

[25] *See* Appendix I.

[26] MONT. CODE § 70-16-302(2)(c) ("'Landowner' …includes… [the] grantee of conservation easement…").

[27] VT. Stat. tit. 12, § 5792. Owner defined as "person who owns, leases, licenses, or otherwise controls ownership or use of land, and any employee or agent of that person;" the mention of "licenses" suggests that licensors are protected, but not necessarily licensees.

[28] Crawford v. Consumers Power Co., 108 Mich. App. 232 (Mich. 1981).

[29] MICH. COMP. LAWS § 324.73301.

[30] Hubbard v. Brown, 785 P.2d 1183 (Cal. 1990).

[31] CAL. CIV. CODE § 846.

[32] Stramka v. Salt River Recreation, Inc., 877 P.2d 1339 (Ariz. Ct. App. 1994).

[33] ARIZ. REV. Stat. § 33-1551 (subsequently amended to include "public or private owner, easement holder, lessee, tenant, manager or occupant").

[34] § 375.251(1), Fla. Stat. (2021).

[35] *Supra* note 8.

[36] § 375.251(5)(a), Fla. Stat. (2021).

[37] § 375.251(5)(b), Fla. Stat. (2021) ("Outdoor recreational purposes" includes, but is not limited to, hunting; fishing; wildlife viewing; swimming; boating; camping; picnicking; hiking; pleasure driving; nature study; water skiing; motorcycling; visiting historical, archaeological, scenic, or scientific sites; and traversing or crossing for the purpose of ingress and egress to and from, and access to and from, public lands or lands owned or leased by a state agency which are used for outdoor recreational purposes."). A 2021 amendment added the final category which ensures that private owners who permit their property to be used for access to and from public lands will be covered. Ch. 2021-56, § 5(b), Laws of Fla..

[38] Ch. 2051-56, Laws of Fla.; § 375.251(2)(c), Fla. Stat. (2021).

[39] The statute originally used the term lease in this provision. It was amended in 2012 to substitute the term "lease" for "written agreement." Ch. 2012-203, Laws of Fla.

[40] The statute broadly defines state agency to mean "the state or any governmental or public entity created by law." Presumably, this definition by its terms, includes counties, municipalities, as was as special districts. Prior to an amendment in 2021, the operative term was "the State." Ch. 2021-56, § 5(c), Laws of Fla.

[41] Abdin v. Fischer, 374 So. 2d 1379.

[42] *Supra* note 8.

[43] 40 The Council of State Governments, Suggested State Legislation, Vol. XXIV, 150, 150–52 (1965).

[44] § 375.312, Fla. Stat. (1999).

[45] *See* Appendix 1, spreadsheet accompanying this article.

[46] *Supra* note 8.

[47] § 373.1395, Fla. Stat. (2009).

[48] *See*, e.g., City of Pensacola v. Stamm, 448 So. 2d 39, 41 (Fla. 1st DCA 1984); Chapman v. Pinellas Cnty., 423 So. 2d 578, 579 (Fla. 2d DCA 1982); McPhee v. Dade Cnty., 362 So. 2d 74, 80 (Fla. 3d DCA 1978).

[49] Kleer v. United States, 761 F.2d 1492, 1495 (11th Cir. 1985).

[50] *See* Appendix II.

[51] *See* Appendix II.

[52] *See, e.g.*, Crawford v. Consumers Power Co., 108 Mich. App. 232, 236 (Mich. 1981).

[53] Terrell v. United States, 783 F.2d 1562, 1567 (11th Cir. 1986).

[54] *Conservation Easements*, Am. Bar Ass'n, https://www.americanbar.org/content/dam/aba-cms-dotorg/products/inv/book/215328/Introduction.pdf (last visited Feb. 6, 2024).

[55] Unif. Conservation Easement Act (Unif. L. Comm'n 2007).

[56] Unif. Conservation Easement Act Study Comm. Background Rep. 52-53 (Unif. L. Comm'n 2017).

[57] § 704.06(10), Fla. Stat. (2023); GA. CODE § 44-10-3(e).

[58] *Supra* note 8.

[59] *Id.* at 150.

[60] Church, *supra* note 14, at 11 (1979).

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APPENDIX I (Recreational Use Statutes)

Alabama

Ala. Code § 35-15-1 to § 35-15-40 Statute specifically defines owner to include only people with right of possession (35-15-21); rec use statute (split across multiple statutes, but main language primarily in 35-15-1) merely mentions owners and lessees.

Alaska

A.S. §§ 09.65.200-202; § 34.17.055-100 Primary rec. use statute is 09.65.202. Said statute is limited to landowners. State has separate statutes that grant protection to those who create easements for the state/public to use their land for recreational purposes (§ 34.17.055, 34.17.100).

Arizona

A.R.S. § 33-1551 Statute extends protection to "public or private owner, easement holder, lessee, tenant, manager or occupant of premises."

Arkansas

A.C.A. § 18-11-301 to § 18-11-307 Definitions statute (18-11-302) defines owner as "possessor of a fee interest, a tenant, lessee, holder of a conservation easement as defined in § 15-20-402, occupant, or person in control of the premises." Easement holder protections limited to conservation easement holders.

California

Cal. Civ. Code § 846 Statute reads "An owner of any estate or any other interest in real property, whether possessory or nonpossessory..." This suggests that holders of less than fee interests, such as easements, also get protection.

Colorado

C.R.S. § 33-41-101 to § 33-41-106 ; § 34-32-116 Statute definition of owner (in § 33-41-102) states it "includes, but is not limited to, the possessor of a fee interest, a tenant, lessee, occupant, the possessor of any other interest in land…" This suggests easement holders would be included.

Connecticut

Conn. Gen. Stat. § 22a-133ff ; § 52-557f–k Has a separate statute specifically for recreational use easements granted to municipalities (22a-133ff), rec use definitions statute (52-557f) and the main rec use statute (52-557g) do not mention easements or non-possessory interests. Owner defined as "possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises."

Delaware

7 Del. C. §5901–§5907 Definitions statute (5902) has identical "owner" definition to 1963 model act (owner defined as "the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises").

Florida

FL Stat. § 375.251 Owner not defined in statute (375.251).

Georgia

O.C.G.A. § 51-3-20 to § 51-3-26 Definitions statute (51-3-21) has identical "owner" definition to 1963 model act (owner defined as "the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises").

Hawaii

HRS § 520-1 to § 520-8 Definitions statute (§ 520-2) has identical "owner" definition to 1963 model act (owner defined as "the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises").

Idaho

Idaho Code § 36-1601 – § 36-1604 Owner defined as "possessor of a fee interest, right-of-way, or easement, a tenant, lessee, licensee, occupant, operator, permit holder, or person in control of, or with a right or duty to maintain, the land."

Illinois

745 ILCS 65/1 to 65/7 Owner defined to include "the possessor of any interest in land, whether it be a tenant, lessee, occupant, the State of Illinois and its political subdivisions, or person in control of the premises." "Any interest in land" suggests that possessors less than fee interests like easements are protected.

Indiana

Ind. Code Ann. 14-22-10-2; 14-22-10-2.5 Owner not defined in either statute.

Iowa

Iowa Code § 461C.1 to § 461C.7 "Holder" used instead of "owner," but otherwise identical to owner definition in 1963 model act (Holder defined as "possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises") plus an additional qualification that the holder is not "the state of Iowa, its political subdivisions, or any public body or any agencies, departments, boards, or commissions thereof."

Kansas

K.S.A. § 58-3201 to § 58-3207 Definitions statute (58-3202) has identical "owner" definition to 1963 model act (owner defined as "the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises").

Kentucky

KRS § 411.190 Owner defined as "the possessor of a fee, reversionary, or easement interest, a tenant, lessee, occupant, or person in control of the premises."

Louisiana

La. R.S. § 9:2791 ; § 9:2795 Identical "owner" definition to 1963 model act (owner defined as "the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises").

Maine

14 M.R.S.A. § 159-A Protection extended to "An owner, lessee, manager, holder of an easement or occupant of premises."

Maryland

Md. Natural Resources Code Ann. § 5-1101 to § 5-1109 Definition statute (5-1101) defines owner as "the owner of any estate or other interest in real property, whether possessory or nonpossessory, including the grantee of an easement."

Massachusetts

MA Gen L ch. 21 § 17C and § 17D Statute specifically mentions easements ("Any person having an interest in land including… easements and rights of way…"), but no definition of owner in statute.

Michigan

MCL § 324.73301 Statute uses the term "owner, tenant, or lessee" when describing who gets protection.

Minnesota

Minn. Stat. § 604A.20 to § 604A.27 Owner defined (in 604A.21) as "the possessor of a fee interest or a life estate, tenant, lessee, occupant, holder of a utility easement, or person in control of the land."

Mississippi

Miss. Code Ann. § 89-2-1 to § 89-2-27 "Landowner" defined (in 89-2-21) as "the legal titleholder or owner of land or premises, and includes any lessee, occupant or any other person in control of such land or premises.

Missouri

R.S. Mo. § 537.345 to § 537.351 ; 537.355 Owner defined (in 537.345) as "any individual, legal entity or governmental agency that has any ownership or security interest whatever or lease or right of possession in land."

Montana

MCA 23-2-301 to 23-2-302; 23-2-321 ; 70-16-301 to 70-16-302 Landowner

defined (in 70-16-302) as "a person or entity of any nature... and includes the landowner's agent, tenant, lessee, occupant, grantee of conservation easement... and persons or entities in control of the property or with an agreement to use or occupy property." This suggests specifically conservation easements are protected but not other kinds.

Nebraska

Neb. Rev. Stat. §37-729 to §37-736 Owner defined (in 37-729) to include "tenant, lessee, occupant, or person in control of the premises."

Nevada

Nev. Rev. Stat. Ann. § 41.510 The term "an owner of any estate or interest in any premises…" is used in the rec use statute. This does implicitly suggest that less than fee interests are protected.

New Hampshire

NH 212:34 Landowner defined as "an owner, lessee, holder of an easement, occupant of the premises, or person managing, controlling, or overseeing the premises on behalf of such owner, lessee, holder of an easement, or occupant of the premises."

New Jersey

N.J.S.A. 2A:42A-2 through 2A:42A-8 No definition of owner. Protection extended to "owner, lessee or occupant of land."

New Mexico

New Mexico Ch. 17-4-7 No definition of owner. Protection extended to "owner, lessee or person in control of lands."

New York

NY § 9-103. No definition of owner. Protection extended to "an owner, lessee or occupant of premises."

North Carolina

North Carolina § 38A Owner defined in 38A-2. Defined to be "any individual or nongovernmental legal entity that has any fee, leasehold interest, or legal possession, and any employee or agent of such individual or nongovernmental legal entity."

North Dakota

North Dakota § 53-08-01 to 53-08-02 "Owner" defined in 53-08-01 to include "tenant, lessee, occupant or person in control of the premises." Language substantially similar to 1963 model act.

Ohio

ORC Ann. § 1533.18 to § 1533.181 No definition of owner in statue or in nearby statutes; protection extended to "owner, lessee, or occupant of premises."

Oklahoma

Okla. St. § 2-16-71.1. to § 2-16-71.6 ; § 74-3458 ; § 76-10.1 Contains a provision giving no liability for easement GRANTORS when they give the easement to the state; owner defined as "possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises."

Oregon

O.R.S. § 105.668 to § 105.699 Owner defined (in 105.672) to include "The possessor of any interest in any land, including but not limited to the holder of any legal or equitable title, a tenant, a lessee, an occupant, the holder of an easement, the holder of a right of way or a person in possession of the land."

Pennsylvania

32 P.S. § 5621 ; 68 P.S.§ 477-1 to § 477-7 "Any person, public agency or corporation owning an interest in land utilized for recreational trail purposes…" Lack of qualification on "an interest in land" suggests less than fee interests are protected too.

Rhode Island

RI § 32-6-1 Owner defined as "private owner possessor of a fee interest, or tenant, lessee, occupant, or person in control of the premises."

South Carolina

SC § 27-3-10 to 27-3-70 Owner defined in 27-3-20 to mean "possessor of a fee interest, a tenant, lessee, occupant, easement holder, or person in control of the premises," identical language to the 1963 Model Act.

South Dakota

SDCL § 20-9-12, 13 owner defined as "the possessor of a fee interest, a tenant, lessee, occupant or person in control of the land," language substantially similar to the language of the 1963 model act.

Tennessee

Tenn. Code. § 11-10-101 - § 11-10-103; § 11-10-104; § 70-7-101 to § 70-7- 105 Owner defined as "include[ing], but is not limited to, tenant, lessee, occupant or person in control of the premises" in the definitions statute for the rec use protections where owners give land to the state (11-10-101). In the rec use statue for owners who let the public use their land for rec purposes, it is defined (in 70-7-102) as "legal title holder or owner of such land or premises, or the person entitled to immediate possession of the land or premises, and includes any lessee, occupant or any other person in control of the land or premises."

Texas

Tex. Civ. Prac. & Rem. Code § 75.001 to § 75.002 ; § 75.0025 to § 75.004 Protection granted to "owner, lessee, or occupant of real property;" owner not defined in definitions statute or operative statutes.

Utah

U.C.A. 1953 § 57-14-101 to § 57-14-205; § 57-14-404 "'Owner' means the possessor of any interest in the land…" The broadness of the term suggests less than fee interests are protected.

Vermont

12 V.S.A. § 5791 to § 5795 Owner defined (in 5792) as "person who owns, leases, licenses, or otherwise controls ownership or use of land, and any employee or agent of that person;" the mention of "licenses" suggests that LICENSORS are protected, but not necessarily LICENSEES.

Virginia

Va. Code Ann. § 10.1-1008 ; § 15.2-6024 ; § 29.1-509 Landowner defined (in 29.1-509) as "the legal title holder, any easement holder, lessee, occupant or any other person in control of land or premises."

Washington

Rev. Code Wash. 4.24.200 to 4.24.210 Owner not defined in statute. The statute extends protection to "any public or private landowners, hydroelectric project owners, or others in lawful possession and control of any lands whether designated resource, rural, or urban, or water areas or channels and lands adjacent to such areas or channel."

West Virginia

WV §19-25-1 to 19-25-6 Owner defined as "includes, but shall not be limited to, tenant, lessee, occupant or person in control of the premises;" language similar to the 1963 model act.

Wisconsin

Wis. Stat. § 895.52 ; § 895.525 Owner defined to be a person who "owns, leases or occupies property" or a governmental body/nonprofit organization that has a recreational agreement with another owner.

Wyoming

Wyo. Stat. § 34-19-101 to § 34-19-107 owner defined (in 34-19-101) to include "the possessor of a fee interest, a tenant, lessee, including a lessee of state lands, occupant or person in control of the premises."

APPENDIX II (Recreational Use Caselaw)

McPhee v. Dade Cnty., 362 So. 2d 74 (Fla. 3d DCA 1978). The court finds it not applicable to a county, which sought immunity.

Abdin v. Fischer, 374 So. 2d 1379 (Fla. 1979) Upholds the constitutionality of the statute.

Metro. Dade Cnty. v. Yelvington, 392 So. 2d 911 (Fla. 3d DCA 1980). Reaffirms that 375.251 immunity does not apply to a county; statement in the earlier McPhee decision could be considered dictum.

Davis v. Tedder, 388 So. 2d 278 (4th DCA 1980). Appellant uses statute as an argument for reversing lower court decision, but DCA never reaches the statute here, deciding on a different ground.

Cakora v. Metro. Dade Cnty., 388 So. 2d 31 (Fla. 3d DCA 1980). Reaffirms that 375.251 immunity does not apply to a county.

Sea Fresh Frozen Prod., Inc. v. Abdin, 411 So. 2d 218 (Fla. 5th DCA 1982) Court applies statute to hold a defendant protected via the statute.

Chapman v. Pinellas Cnty., 423 So. 2d 578 (Fla. 2d DCA 1982). Reverses a lower court decision that gave a county immunity under the statute, agreeing with the 3rd District.

Arias v. State Farm Fire & Cas. Co., 426 So. 2d 1136 (Fla. 1st DCA 1983) Summary judgement reversed because it was a question of fact as to whether defendant was an owner of the land where injury happened.

City of Pensacola v. Stamm, 448 So. 2d 39 (Fla. 1st DCA 1984). Holds a government entity is not a person under the statute and is not entitled to liability protection, agreeing with 2nd District.

Kleer v. United States, 761 F.2d 1492 (11th Cir. 1985). Statue bars an action, holding that the exception for liability protection because of the conduct of commercial activity on applies when that activity is ON THE LAND being used for recreational use, not just anywhere in the total land of the owner.

Terrell v. United States, 783 F.2d 1562 (11th Cir. 1986). Statute does not protect U.S., distinguishes case from Kleer; U.S. did not provide the recreational areas at issue here, instead having given Florida the land as easements prior (and Florida later transferred ownership to a county).

Avallone v. Bd. of Cnty. Comm'rs of Citrus Cnty., 493 So. 2d 1002 (Fla. 1986). A passing reference is made to the statute by a dissenting judge in a footnote (as a comparison that liability would be protected if defendant was a private person, but not if they were a county, which they were here).

Zuk v. United States, 698 F.Supp. 1577 (S.D. Fla. 1988) Court uses statute as one of two grounds for judgement in favor of defendant.

Cox v. Cmty. Servs. Dep't, 543 So. 2d 297 (Fla. 5th DCA 1989)Reverses a lower court decision that gave a county immunity under the statute.

Dennis v. City of Tampa, 581 So. 2d 1345 (Fla. 2d DCA 1991). Statute brought up as an example of the legislature's desire to promote development of public parks.

Goodman v. Juniper Springs Canoe Rentals & Recreation, Inc.,

983 F.Supp. 1384 (M.D. Fla. 1997). Statute does not protect US because revenue is derived from the area.

Monzon v. United States, 253 F.3d 567 (11th Cir. 2001). Defendant argued that the case was barred by the statute in the court below, but the 11th Circuit decides the case on a different issue and never reaches the recreational use statute.

S. Fla. Water Mgmt. Dist. v. Daiagi, 824 So. 2d 216 (Fla. 4th DCA 2002). Case is about liability protection under a statute giving liability protections to water management districts (§ 373.1395), but the court uses logic from Abdin and Arias to find if there are any disputed facts in determining whether to reverse a summary judgement.

Lopez v. United States, No. 13-22427-CIV, 2014 WL 11894429 (S.D. Fla. June 10, 2014). Statute is used to protect the U.S. from liability, saying that while cities and counties cannot be protected, the U.S. can (citing Kleer and Terrell).

Wills v. United States, 111 F. Supp. 3d 1277 (M.D. Fla. 2015). In the background for this case, an administrative court used the statute to hold that the U.S. is shielded from liability under the statute.

Fernandez v. United States, No. 17-CV-21422, 2017 WL 6343575 (S.D. Fla. Dec. 12, 2017). Statute bars liability: court also finds that the changes to the statute did not implicitly overrule Kleer.

Hurst v. United States, No. 4:17CV25-RH/CAS, 2018 WL 11229153 (N.D. Fla. May 30, 2018). Statute given as an alternative ground to find for defendant, barring liability towards them.

Fernandez v. United States, 766 F. App'x 787 (11th Cir. 2019). Affirms lower court decision and holds that statute does prevent liability for U.S., and that Kleer is still good law under the new version of the statute.

Hurst v. United States by & through Dep't of the Agric. US Forest Serv., 782 F. App'x 978 (11th Cir. 2019). Affirms lower court decision and holds that statute does prevent liability for defendant U.S.

Fisher v. United States, 995 F.3d 1266 (11th Cir. 2021). No implicit exceptions for business-visitors invitees is included in subsection 2 of the statute; even though subsection 3 explicitly mentions them as covered, does not mean subsection 2 does not cover them; U.S. is protected from liability.

Caselaw From Other Jurisdictions

Loyer v. Buchholz, No. C.A. E-87-5, 1987 WL 14231 (Ohio Ct. App. July 17, 1987). Statute is cited as an example of a recreational use statute.
Howard v. United States, 181 F.3d 1064 (9th Cir. 1999) Statute is cited as an example of a recreational use statute.

Lonergan v. May, 53 S.W.3d 122 (Mo. Ct. App. 2001). Statute is cited as an example of a recreational use statute.

Sallee v. Stewart, 827 N.W.2d 128 (Iowa 2013). Statute is cited as an example of a recreational use statute, specifically those with a definition of "recreational use" patterned after the 1965 model act.

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