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Death Is Not the End:

What Florida's Constitutional Prohibition on Agency Deference Can Predict About the Federal Administrative State Post-*Chevron*, with a Focus on Environmental Policy

By Hannah Robinson[1]

Introduction

Federal agency deference has had its moments at the forefront of academic and mainstream debate, but 2024 finds that debate livelier than ever. Seemingly imminent this year was the U.S. Supreme Court's long-expected overturning of its seminal 1984 decision in *Chevron v. Natural Resources Defense Council*,[2] which established arguably the most well-known and significant (and controversial) administrative law doctrine in this country's history; the case that allowed the Court to strike down *Chevron* was *Loper Bright Enterprises v. Raimondo*.[3] The primary doctrinal consideration in *Loper Bright* was whether *Chevron* deference should be discarded,[4] a question the Court answered in the affirmative.[5]

Many agency interpretations have been deferred to and upheld under *Chevron* since 1984, at both the Supreme Court and lower appellate courts. This has resulted in a wide array of strong support for or deep detestation of *Chevron* agency deference, both leading up to and in the months after the *Loper Bright* decision. Before *Chevron*'s reversal, many proponents believed the Court's ultimate rejection of *Chevron* deference would be a drastically negative development in the realm of administrative law, and several specifically focused on what they anticipate will be severely harmful implications to environmental regulations.[6] Opponents of *Chevron*, though, looked forward to its being overturned and celebrate the same expected impacts in the workings of federal agencies that proponents fear.[7] There are yet other neutral theorists who opined that *Chevron*'s being struck down will not so deeply affect the federal administrative state, especially in regards to environmental policy.[8] This Article argues that this third more muted outcome will likely be the outcome at the Federal level following the Court's reversal of *Chevron*, based on an observance of Florida in the years following the state's rejection of agency deference in its own intrastate affairs.

In 2018, voters in Florida approved a proposed amendment to the state constitution to prohibit agency deference in the courts.[9] Since the 2018 constitutional amendment, Florida judges have since been required to review agency interpretations de novo.[10] Several such interpretations have been challenged in the last few years, allowing Florida courts to demonstrate what de novo review looks like in practice.[11] Notably, Florida's administrative state is still alive and is indeed robust, active, and capable—and courts still affirm agency interpretations when warranted.

Florida's post-amendment jurisprudence demonstrates that federal agencies' statutory interpretations can still be upheld in the absence of a highly deferential standard, that *Chevron* being overturned will not inherently result in the loss of environmental protections, and that the overall impact of *Chevron*'s demise may not result in a sea change within the federal administrative state.

Federal Agency Deference and the Environment

Throughout legal practice, academic literature, and public opinion, *Chevron* deference has often been associated with environmental regulation, protection, and progress.[12] The *Chevron* case itself concerned environmental law, with the Court ruling in favor of the Environmental Protection Agency's ("EPA") statutory

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INSIDE:

From the Chair

Greetings ELULS Members,

I'm honored to be serving as your Chair for this year. My goal as Chair is to build on the successes of our past several Chairs and their efforts to make participation in ELULS informative and fun.

Our CLE Committee has prepared a strong slate of programming to keep our members up to date on the latest developments in environmental and land use law, to provide practice pointers, and to preview potential changes in the law. This slate of topics includes contamination, agritourism, enforcement, a legislative forecast, beach renourishment, and a lunch and learn with a DOAH judge. The CLE Committee's door is always open, so if you have ideas for a speaker or topic please do not hesitate to reach out.

Our Events Committee has also been hard at work, with several events planned around the state this fall and into early next year. Our goals with these events are to provide networking, opportunities to get outside and explore our state, and, perhaps most importantly, to have some fun. Please keep an eye out for announcements in your inbox so you can join us for one of these events. If you are interested in hosting one in your area, please let me know. Our Events Committee is ready to provide support.

We are also excited to announce the rollout of a new ELULS Discourse webpage. Many members have told us they miss the former ELULS ListServ, which provided a platform for discussion between Section members. Discourse is an online message board that will provide a similar central online forum for the Section, with areas for practice area discussions, Section updates, events, and more. I look forward to seeing all of you at one of our upcoming events!

Lastly, on a more somber note, I want to acknowledge the devastation that Hurricanes Helene and Milton wreaked on communities in their pathway across the State. The ELULS Executive Committee is keeping all our colleagues and others impacted by the storms in our thoughts as we wish for a speedy recovery.

Sincerely,

Malcolm Means

Chair, ELULS

Property Rights Liability of the Limited Growth System in the Florida Keys—Is the Concern Overstated?

By Richard Grosso, Esq.[1]

Introduction

The potential for private property rights liability is often cited as a reason that local governments in the Keys should lift the development caps established in their respective limited growth ordinances. Since the mid-1990's when the application of Florida's new growth management legislation to the comprehensive plans in the Florida Keys resulted in the adoption of "carrying capacity" growth limits in Monroe County and the Keys' municipalities, residential development there has been limited on an overall and annual basis. Hurricane evacuation time, more readily quantifiable than the capacity of impaired nearshore waters or the critical mass of upland ecosystem acreage, was chosen as the surrogate for the totality of all "carrying capacity" limits on development. Supported by statutory requirements, administrative rulings and technical and scientific evidence and study, the establishment of "carrying capacity"—based planning in the Keys was a landmark, precedent-setting, accomplishment. As the Keys approach the exhaustion of the calculated total "build-out" capacity for residential development, that planning framework is being tested by concerns about affordable housing and property rights.

While it is valid to observe that every local government in Florida has a finite amount of land appropriate for development, and infrastructure and fiscal resources available to support development, those capacity limits are most obvious and apparent in the Keys. In its 1995 administrative Final Order in *DCA v. Monroe County*, the Administration Commission applied the generally applicable "based upon" language in section 163.3177(6)(a), Florida Statutes, that governs all local government Future Land Use plans to the Keys, ruling, that, in the Keys, "adoption of a carrying capacity analysis . . . is required" *DCA v. Monroe County*, 1995 Fla. ENV LEXIS 129, 95 ER FALR **148** (Fla. ACC 1995) (citing § 163.3177(6)(a), Fla. Stat. (1994)).

Since then, each local comprehensive plan in the Keys has included an annual and overall development cap. The Third District Court of Appeal ("DCA") noted recently that, "[f]irst enacted in 1979, the [Area of Critical State Concern] Act expresses a legislative intent to establish a land use management plan to protect the Florida Keys environment, preserve the Keys' unique character, promote orderly and balanced growth, and protect and improve water quality." *Mattino v. City of Marathon*, 345 So. 3d 939 (Fla. 3d DCA 2022).

At issue in *Mattino* was whether a development increase for the Keys approved by the Governor and Cabinet, sitting as the Administration Commission, violated the statutory limit on residential development. The law requires that local governments in the Florida Keys Area of Critical State Concern:[2] "protect the public safety and welfare . . . by maintaining a hurricane evacuation clearance time for permanent residents of no more than 24 hours." § 380.0552(9)(a)2, Fla. Stat.

In *Mattino*, the Third DCA also noted:

> the [traffic study for the hurricane evacuation clearance time] model had to be run so as "to complete an analysis of maximum build-out capacity for the Florida Keys Area of Critical State Concern, consistent with the requirement to **maintain a 24-hour evacuation clearance time and the Florida Keys Carrying Capacity Study constraints.**

Mattino, supra, (emphasis added).[3]

Because its residents share an evacuation route with everyone else in the Keys, the state also required a binding policy in the Key West Comprehensive Plan that "the City shall manage the rate of growth in order to maintain an evacuation clearance time of 24 hours for permanent residents." *See* City of Key West Comprehensive Plan, Objective 1-1.16. As the Department of Economic Opportunity[4] explained in a 2017 report, all local governments in the Keys:

> are united by the need to maintain a hurricane evacuation clearance time of 24 hours prior to the onset of hurricane-force winds. . . . Evacuation of the . . . population in advance of a hurricane strike is of paramount importance for public safety. No hurricane shelters are available . . . for Category 3-5 hurricane storm events. A system of managed growth was developed . . . to ensure the ability to evacuate within the 24-hour evacuation clearance time . . . .[5]

While quantified hurricane evacuation capacity was adopted as the surrogate for all of the Keys' "carrying capacity" development limitations, the permit allocations were not to be increased unless and until all carrying capacity limits (including nearshore water quality, which the Cabinet found to be "at or over its carrying capacity" to assimilate pollution, and the Key's listed species habitats) have been resolved. *DCA v. Monroe County*, 1995 Fla. ENV LEXIS 129, 95 ER FALR 148 (Fla. ACC 1995).

Under the carrying capacity approach mandated by the Commission, "the limit of a natural system or a man-made facility, or infrastructure, to accommodate additional inputs without compromising the system's or facility's structural or functional integrity is determined and considered in deciding whether future growth should be allowed and, if so, the extent of that growth. *DCA, et. al.*

v. Monroe Cty., *Id.* at 140, ¶85. The Cabinet required an overall carrying capacity study to be completed and required the local governments to:

> "Implement the carrying capacity study by, among other things, the adoption of all necessary plan amendments to establish a rate of growth and a set of development standards that ensure that any and all new development does not exceed the capacity of the county's environment and marine system to accommodate additional impacts."

See Rule 28-20.100 (35), Florida Administrative Code.

In the intervening years, the completion of a Flordia Keys Carrying Capacity Study and a series of wastewater treatment improvements have not resulted in the successful achievement of the goal of ensuring that **"new development does not exceed the capacity of the county's environment and marine system to accommodate additional impacts", and the annual rate of growth limits[6] remain unchanged, and the previously—determined "build-out" development allocations are nearing depletion.**

This article addresses the private property rights issues that have been raised in support of a policy decision to amend Florida law to allow an increase of the 24-hour development limit in section 380.0552(9)(a)2, Florida Statutes, so as to allow the approval of additional development.

Private Property Rights Concerns

The concerns about the property rights implications of maintaining the existing development caps, and thus prohibiting any new residential development at all, or at least until such time as evacuation capacity is somehow increased, focuses on the judicial decisions holding that regulation categorically "takes" private property when it "denies all economically beneficial or productive use of land . . . ."[7] and that, if the development allocations are not increased, local governments will be required to pay "takings" full market value awards for each undeveloped lot in the Keys.

This article analyzes the key aspects of property rights law as they apply to the unique circumstances of the Florida Keys. In sum, while the inability to issue any new residential development permits raises obvious "takings" issues, (1) the governmental defenses against any such claims are numerous and strong; and (2) the potential number of privately–owned lots that might have a potentially valid "takings" claim may not be as great as is often assumed and should be identified by as much of a parcel-specific analysis as can be reasonably accomplished before development increases are approved based on general concerns about property rights liability.

Categorical Takings – When All Economically Viable Uses Are Permanently Precluded

The courts have emphasized that a "categorical taking" occurs only when regulation removes "*all* economically beneficial us[e]" of property**.** *Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528, 538 (2005).[8] As the U.S. Supreme Court explained in *Lucas*, the deprivation of economic value required for a facial takings claim is limited to "the extraordinary circumstance when *no* productive or economically beneficial use of the land is permitted." *Lucas*, 505 U.S. at 1017. (emphasis added). The *Lucas* opinion emphasized that this categorical rule would not apply if the diminution in value were 95% instead of 100%.[9] Anything less than a "complete elimination of value," or a "total loss," is not be a *per se* taking, and "takes" private property only if application of the *Penn Central* factors (discussed below) result in a judicial ruling that justice and fairness require taxpayer compensation to an individual landowner.[10]

In *Palazzolo v. Rhode Island*[11], the U.S. Supreme Court explained that, to prove a total regulatory taking, a plaintiff must show that the challenged regulation leaves "the property 'economically idle' " and that the plaintiff retains no more than "a token interest."[12] The plaintiff in *Palazzolo* failed to prove a total taking where an eighteen-acre property appraised for $3,150,000 had been limited as a result of the challenged regulation allowing only one home for a value of $200,000.[13]

Government is not liable for a "taking" just because regulations reduce, even substantially, the value of property. The US Supreme Court's decision in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) reiterated that "we must remain cognizant that 'government regulation—by definition—involves the adjustment of rights for the public good' . . . and that 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law . . . .'"[14]

The obvious current issue for the Keys is the extent to which the cessation of any additional residential building permit allocations would render parcels valueless or nearly–so and thus constitute a categorical taking.

The Florida Keys case of *Beyer v. City of Marathon*, 197 So. 3d 563 (Fla. 3d DCA 2016) and all "takings" decisions, hold that, absent extreme circumstances, any remaining reasonable economic use of the property will preclude a "takings" claim. In *Beyer*, the comprehensive plan prohibited all construction on the land; the only allowable use was camping, and the availability of building permit score dedication points, which gave the property a fair market value of $150,000. Since the property retained a reasonable economic value, there was no property rights violation.

In the Keys, even if a parcel cannot receive a permit for major construction, it may still retain value as a result of potential non-permanent or minor construction, a building permit aggregation or dedication point or other use. Some of the non-residential, commercial or industrial uses allowed by Keys local governments include passive recreation, mariculture and aquaculture, beekeeping, working waterfront, and potentially, conservation land for which there is a local, state or federal land acquisition market. The value these potential uses provide for individual parcels will be a significant factor that militates against a successful takings claim.

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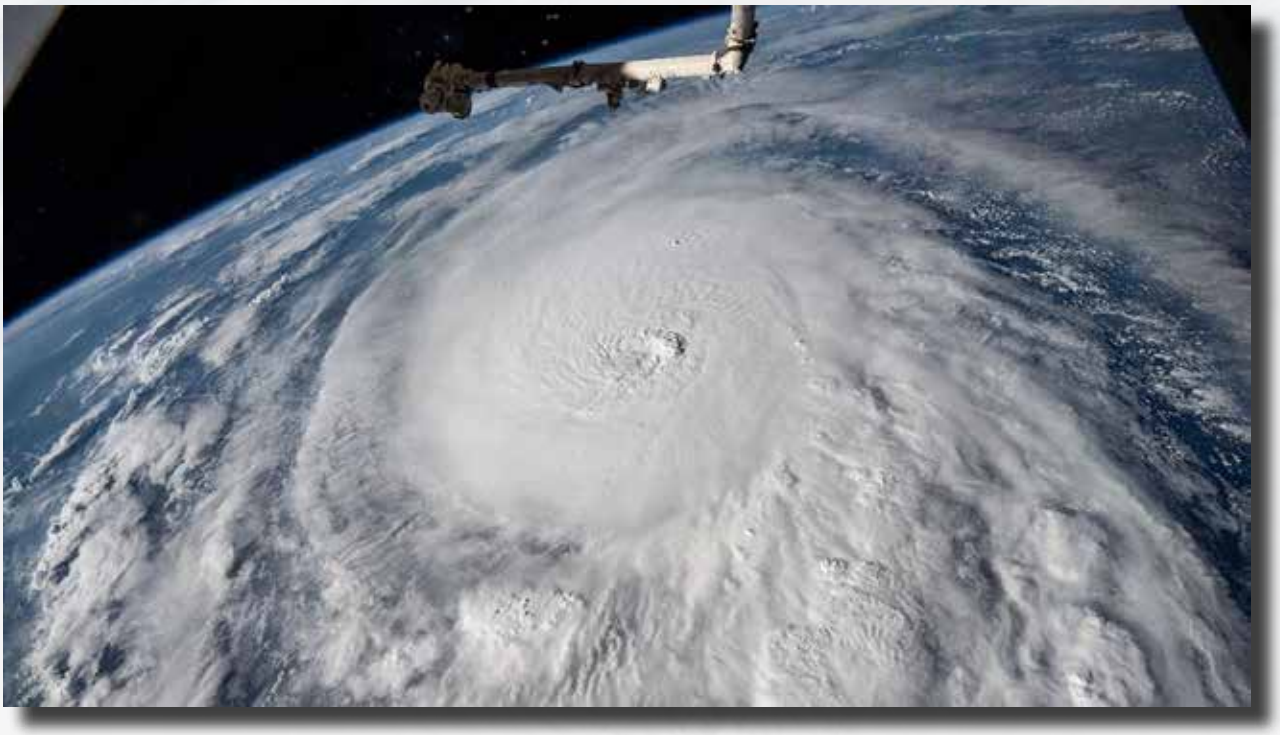
Hurricane Milton Seen From the International Space Station On October 8, 2024



Credit: NASA/Michael Barratt. This image was catalogued by Johnson Space Center of the United States National Aeronautics and Space Administration (NASA) under Photo ID: iss072e029127.

The Reporter staff wishes its colleagues in ELULS and everyone across Florida impacted by Hurricanes Helene and Milton a safe and speedy recovery. Because misinformation about FEMA disaster assistance can hinder recovery, impacted readers are encouraged to consult the following FEMA guidance:

https://www.fema.gov/disaster/recover/rumor-control

https://www.fema.gov/disaster/current/hurricane-helene

https://www.fema.gov/disaster/4834

Coastal Conservation Corner:
The Hurricane Party that Never Ends

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

As a native Floridian, I have been through dozens of hurricanes. It is part of our Floridian culture to treat these storms with respect but also with levity. The "hurricane party" is a fundamental rite of passage many of us have cherished. But this October has become the hurricane party that never ends, and I just want it to stop.

Hurricane Helene put two feet of water in my St. Petersburg house and caused tens of thousands of dollars' worth of damage. Our car was flooded and completely totaled after nearly catching fire. And I know so many people who fared far worse. Out on the beaches of Pinellas County, I have friends who lost everything—entire lifetimes' worth of belongings and memories just gone.

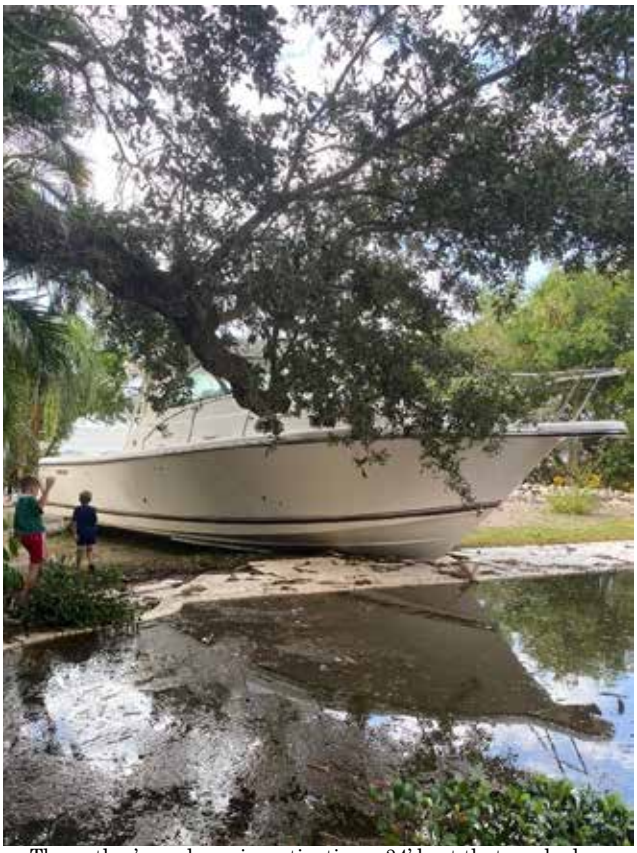
And then, like salt in the wound, Hurricane Milton comes along and pummels both coasts with more wind, storm surge, and power outages, rips the roof off Tropicana Field, and sends countless ancient live oaks through peoples' houses.

The Helene and Milton recovery efforts have resulted in a lost October for so many of us. I have been away from my desk for weeks. My children have missed weeks of school. Friends and family members are traumatized by the repeated and exhausting distress of staring down back-to-back weather events. The shock and trauma are severe. I will never forget the ominous dread I felt as I watched the water creep up my front steps and ultimately rush into my house. I will never forget the fishy stench of baywater mixed with the revolting reek of sewage tinged with the acrid electrical aroma of my burning Subaru.

The sad reality is that this kind of repeat, frequent devastation is only going to become more normal to us as the ravages of human-borne climate change take hold.

We Floridians need to be screaming out for mitigation against a changing climate at both the state and national levels. That means investing in renewable energy alternatives, capping emissions, and pioneering techniques for reducing carbon inputs into the atmosphere. Florida has one of the largest economies on the planet. It can exert a tremendous amount of influence in mitigating against a changing climate if it chooses to. Our position at the frontlines of North Atlantic hurricane seasons makes our duty to demand mitigation that much more dire.

In addition to mitigation, we need to be demanding commonsense, ecosystem-based measures for adapting against the impacts from a changing climate. It means we need to take a renewed look at our growth management laws that have been gutted and preempted by the state legislature and an agency once known as the Department of Community of Affairs that has changed its name to emphasize commerce over human and natural communities. We need to find ways to preserve wild ecosystems like seagrass beds, coral reefs, mangrove forests, and saltmarshes that buffer against coastal devastation from storms. Protecting those iconic Floridian ecosystems and incentivizing their restoration and expansion not only makes Florida more beautiful its tourism-dependent economy more prosperous, it makes us more resilient and helps sequester additional carbon out of the atmosphere. Adaptation needs to include measures that protect both the human environment and the natural environment.



The author's nephews investigating a 34' boat that washed up in a family member's back yard during Hurricane Helene.

To me, these are the sorts of legal and policy interventions that tragedies like Helene and Milton make blatantly apparent. These should be universal, non-partisan approaches that Floridians from across the political spectrum demand from city hall all the way up to Tallahassee and to Washington D.C.. It is too bad it takes a double whammy of hurricane induced human misery to lay our climate crisis plight bare, but I am hopeful that ultimately Floridians will rally in support of these types of climate policies. With stronger and rapidly intensifying storms, the "hurricane party" just isn't fun anymore.

Endnotes

1 *Jon Paul "J.P." Brooker, Esq works for Ocean Conservancy as the Director of the Florida Conservation Program. He is a sixth-generation Floridian living in St. Petersburg.*

The Property Line
Florida's Approach to Voluntary Annexation

By Randall Raban[1]

Introduction

In the State of Florida, the process of annexation is governed by the Municipal Annexation or Contraction Act (the "Annexation Statute").[2] Section 171.044 of the Annexation Statute addresses voluntary annexation—a process through which a landowner (with property located in an unincorporated portion of a county) may petition the governing body of an adjacent municipality to have his land annexed into the boundaries of the municipality.

General Requirements

The basic procedural requirements for voluntary annexation under the Annexation Statute include: (i) a petition bearing the signatures of *all* owners of property in the area proposed to be annexed must be delivered to the governing body of the municipality, (ii) the adoption of a nonemergency ordinance by the governing municipality to annex said property and redefine the boundary lines of the municipality to account for the inclusion of the property, and (iii) preparing a notice of the proposed annexation and publishing it at least once a week for two consecutive weeks in a newspaper of the annexing municipality. The notice must include a map that clearly shows the property to be annexed, as well as a statement that a complete legal description (metes and bounds) is available at the office of the clerk of the circuit court. The requirements described above make up the minimum state-prescribed procedural requirements for voluntary annexation under the Annexation Statute. Municipalities may, however, create additional requirements and procedures that landowners must follow in order to successfully annex into the municipality.

Prior to publishing notice of the annexation ordinance as described above, the annexing municipality is required to provide a copy of the annexation ordinance notice to the board of the county commissioners of the county where the municipality is located.[3] This notice must be delivered no fewer than ten (10) days prior to publishing the notice of the annexation ordinance in the newspaper. Upon receiving the notice from the municipality, the board of the county commissioners may bring a cause of action seeking to invalidate the annexation.[4] Once the municipality has officially adopted the ordinance, the ordinance is filed with the clerk of the circuit court, the chief administrative officer of the county in which the municipality is located, and the Department of State. This filing must occur within seven (7) days of the municipality's adoption of the ordinance.[5]

Contiguity, Compactness, and the Avoidance of Enclaves

In addition to the procedural requirements detailed above, there are three (3) major legal considerations that governmental authorities and courts look to when determining whether a piece of real property may be properly annexed into a municipality. These three considerations are: (i) whether the property is contiguous with the annexing municipality's boundaries, (ii) whether the property to be annexed is reasonably compact, and (iii) whether the annexation of the property will result in the creation of unincorporated enclaves.[6]

The Annexation Statute states that a property is considered contiguous when "a substantial part of a boundary of the territory sought to be annexed by a municipality is coterminous with a part of the boundary of the municipality."[7] Certain additional considerations are needed to determine contiguity where the boundaries of the property to be annexed and the annexing municipality are separated by a publicly owned park, right of way, watercourse, or other minor geographical divisions of a similar nature. For the most part, however, the requirement that the property be contiguous will usually be met where the property to be annexed shares *a substantial part* of a common boundary with the municipality.

Florida courts have interpreted the language of the Annexation Statute to require more than a mere touching of boundaries between the property to be annexed and the annexing municipality. Instead, a determination that the contiguous nature between the properties be "substantial" is often determinative of the outcome in the case. In *County of Volusia v. City of Deltona*, for example, the court held that a property was not considered contiguous to the municipality where only 350 feet of the western border of the property (consisting of a total of 22,116 feet) was shared with the municipality (i.e. only 1.6% of the boundary's total length).[8]

Florida courts have been careful, however, to distinguish between evaluating *a common boundary* as opposed to the *total area of the property* to be annexed when determining whether such property is sufficiently contiguous with the municipality. In *City of Sanford v. Seminole County*, the court dismissed Seminole County's argument that a property was not contiguous where the county had based its argument on the fact that only a small percentage of the *entire circumference* of the property touched the municipal boundary.[9] Instead, the court held that the Annexation Statute "only requires that a substantial part of *a boundary* touch municipal property." As such, the proper determination for whether contiguity exists must be based on an evaluation of a shared boundary between the property to be annexed and the municipality, not the percentage of the shared boundary relative to the total circumference of the annexed property.[10]

The Annexation Statute also requires that an annexation proceeding must be designed in such a manner as to ensure that the area being annexed will be reasonably compact. Compactness is defined as the "concentration of a piece of property in a single area and precludes any action which would create enclaves, pockets, or finger areas in serpentine patterns."[11] In determining compactness, however, Florida courts have been careful not to create any bright line rules. Instead, courts seem to prefer a "know-it-when-you-see-it" approach, and in doing so, commonly refer to a guiding principle regarding compactness that was provided in a legal opinion issued by the Attorney General in 1977,[12] which reads:

> The legal as well as the popular idea of a municipal corporation in this country, both by name and use, is that of oneness, community, locality, vicinity; a collective body, not several bodies, a collective body of inhabitants-that is, a body of people collected or gathered together *in one mass, not separated into distinct masses*, and having a community of interest because residents of the same place, not different places. So, as to territorial extent, the idea of a city is one of *unity, not of plurality*; of compactness or contiguity, not separation or segregation.

Thus, the principle of compactness serves to prevent separation, isolation, and division within a particular shared location. In applying this principle, courts must consider the facts surrounding each unique case.[13]

An enclave is defined in Section 171.031(5) as (i) any unincorporated improved or developed area that is enclosed within and bounded on all sides by a single municipality, or (ii) any unincorporated improved or developed area that is enclosed within and bounded by a single municipality and a natural or manmade obstacle that allows the passage of vehicular traffic to that unincorporated area only through the municipality.[14] In applying this definition, courts will typically focus their analysis on whether the property omitted from the annexation will become a "pocket" of unincorporated land, which Florida courts have defined as "a small, isolated area or group.[15]

In *Center Hill v. McBryde*, the court struck down an annexation ordinance due to the fact that the annexation would result in 100 acres of unincorporated land being surrounded by the municipality. The city argued that the unincorporated land was too big to constitute a "pocket" of land. The *Center Hill* court ruled that "small" is a relative term that is necessarily dependent upon the size and configuration of the parcel that is left out of the annexation process and the surrounding municipal property.[16] In the opinion of the *Center Hill* court, 100 acres was small relative to the 1,235 acres the city was seeking to annex. The court reasoned that the issue of identifying an enclave or pocket "must be determined in relation to the overall scope and configuration of the parcel in question and the surrounding municipal property. The statutory requirement that pockets not be created by annexations was intended to ensure that no vestiges of unincorporated property be left in a sea of incorporated property."[17]

Conclusion

In Florida, the Annexation Statute provides a way for landowners to petition a nearby (i.e. adjacent) municipality for the annexation of private land into the municipality's boundaries. The procedural steps for voluntary annexation are detailed in the Annexation Statute and the local ordinance of the municipality that is the recipient of the annexation petition. Because the annexation process is subject to legal challenges, it is important for landowners to follow the procedural steps outlined in the Annexation Statute and to ensure that the proposed annexation will not result in a failure to provide contiguity, compactness, and the avoidance of enclaves.

Endnotes

1 Randall Raban is an associate with Holzman Vogel where he focuses his practice on real estate matters, including purchase and sale transactions, leases, environmental law, and legal issues relating to land use, water use, and agriculture.

2 Fla. Stat. §§ 171.011-171.094 (2023).

3 Fla. Stat. § 171.044(2) (2023).

4 *Id.*

5 Fla. Stat. § 171.044(3) (2023).

6 *Center Hill v. McBryde*, 952 So. 2d 599, 602 (Fla. 5th DCA 2007).

7 Fla. Stat. § 171.031(3) (2023).

8 *County of Volusia v. City of Deltona*, 925 So. 2d 340, 344 (Fla. 5th DCA 2006) ("We hold that 350 feet out of more than 20,000 cannot constitute a substantial portion of the western boundary of the three parcels annexed together.").

9 *City of Sanford v. Seminole County*, 538 So.2d 113 (Fla. 5th DCA 1989).

10 *Id.* at 115.

11 Fla. Stat. § 171.031(2) (2023).

12 1977 Op. Att'y. Gen. Fla. 077-18, (February 18, 1977) at p. 38.

13 *County of Volusia*, 925 So. 2d at 344.

14 Fla. Stat. § 171.031(5) (2023).

15 *City of* Sanford, 538 So 2.d at 115.

16 *Center Hill*, 952 So. 2d at 603.

17 *Id.*

On Appeal

By Larry Sellers, Holland & Knight LLP

Note: Status of cases is as of September 26, 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; petition denied on July 3, 2024. Note: Legislation enacted in 2023 appears designed to address this issue. See Chapter 2023-309, *Laws of Florida.*

FIRST DCA

Miami-Dade County, et al. v. Florida Department of Economic Opportunity, Case No. 1D2024-1065. Appeal from final summary judgment in favor of defendants determining that a proposed amendment to the Miami-Dade County Comprehensive Development Master Plan was not timely adopted and transmitted, and the Department properly exercised its authority to notify the county that the amendment was untimely. Status: Notice of appeal filed April 19, 2024.

Bertine v. Florida Fish & Wildlife Conservation Commission, Case No. 1D2023-2360. Appeal from FWC final order revoking Bertine's stone crab commercial take licenses, tags, and endorsements based on his convictions in circuit court for multiple violations of FWC rules. On appeal, Bertine argues that the hearing officer erred in declining to terminate the informal proceeding and grant a formal hearing for purposes of resolving disputed issues regarding mitigating factors. Status: Affirmed on April 10, 2024; motion for rehearing denied on May 29, 2024.

Fickling & Company, Inc., et al. v. West Shore Legacy, LLC, et al., Case No. 1D2023-0459. Appeal from the ALJ's final order denying appellants' renewed motion for sanctions against appellee West Shore Legacy, LLC filed pursuant to ss. 57.105 and 163.3184(9), Florida Statutes. The appeal is limited to that portion of the final order denying sanctions against West Shore based on s. 163.3184(9). Status: Affirmed per curiam on May 31, 2024; motion for written opinion denied on July 8, 2024.

Rachowicz v. Florida Fish & Wildlife Conservation Commission, Case No. 1D2022-4096. Appeal from an FWC final order suspending Rachowicz's incidental take endorsement for stone crab based on a determination he had been convicted of a violation of s. 379.365(2)(c)1.a., for collecting stone crab traps that belong to another, even though he pleaded no contest and the court withheld adjudication. The statute authorizes suspension for a "conviction," and defines the term as "any disposition other than acquittal or dismissal, regardless of whether the violation was adjudicated." Status: Affirmed on May 8, 2024. Motion for rehearing denied on June 4, 2024.

Bradley v. Florida Fish & Wildlife Conservation Commission, Case No. 1D2022-3509. Appeal from final order denying motion for attorney's fees based on ALJ's determination that movant did not prove that Commission either filed the administrative complaints for an improper purpose or participated in the underlying license revocation proceeding for an improper purpose. Status: Affirmed on March 4, 2024; motion for written opinion denied on July 26, 2024.

Florida Wildlife Federation, Inc., et al. v. The Florida Legislature, et al., Case No. 1D2022-3142. 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, 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: Affirmed as moot on February 14, 2024; notice to invoke discretionary jurisdiction filed in Florida Supreme Court on April 16, 2024, Case No. SC2024-0556.

Florida Defenders of the Environment v. Lee, et al., Case No. 1D2022-3463. Appeal from the same final order as in *Florida Wildlife Federation*, above: Status: Affirmed as moot on February 14, 2024; notice to invoke discretionary jurisdiction filed in Florida Supreme Court on April 16, 2024, Case No. SC2024-0551.

SECOND DCA

Liberty Hospitality Management, LLC v. City of Tampa, Case No. 2D2024-2035 and *City of Tampa v. Liberty Hospitality Management, LLC*, Case No. 2D2024-2082. Petitions for review of a circuit court order on Liberty's petition for certiorari to review the city council's quasi-judicial decision denying Liberty's application to rezone its property for the development of a hotel. The circuit court, sua sponte, entered an order dismissing Liberty's petition for certiorari for lack of subject matter jurisdiction. The circuit court found as a matter of law that (1) Florida's circuit courts lack jurisdiction to issue writs of certiorari directed to local government legislative bodies, such as the city council in this case, and (2) under the Florida Constitution and its separation of powers, the city

council does not have (and has never had) the authority to conduct itself in a quasi-judicial manner, or to render quasi-judicial decisions. Liberty seeks a writ of certiorari quashing the order only if the order is construed to permit the city council to conduct site-specific rezonings of Liberty's property via the legislative (as opposed to quasi-judicial) process. Status: Petitions filed August 29, 2024 and September 4, 2024. The appellate court has determined that the cases will travel together, but they are not consolidated.

Reed Fischbach, Christopher W. McCullough and Joseph B. Sumner, III v. Hillsborough County, Case No. 2D2022-3270. 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, et al v. Miami-Dade County, et al, Case No. 3D2021-2063, and *Limonar Development LLC v. Miami-Dade County*, Case No. 3D2021-2077. Appeals from final order of the Administration Commission determining comprehensive plan amendment for the construction of the Kendall Extension in Miami-Dade County to be in compliance. Status: Affirmed on June 26, 2024; motion for clarification, rehearing, rehearing en banc and certification denied on August 23, 2024; notice to invoke discretionary jurisdiction of Florida Supreme Court filed by Limonar Development on September 24, 2024, Case No. SC2024-1395.

FOURTH DCA

Testa v. Jupiter Island Compound and Department of Environmental Protection, Case No. 4D2023-3070. Appeal from final order denying Jupiter Island Compound'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.

FIFTH DCA

S. R. Perrott, Inc. v. Belvedere Terminals Company and FDEP Case No. 5D2024-1336. Appeal from final order dismissing petition for hearing as being untimely filed. Status: Notice of appeal filed April 17, 2024.

Bear Warriors United, Inc., et al. v. Florida Department of Transportation and St. Johns River Water Management District, Case No. 5D2024-0958. Appeal from a SJRWMD final order issuing an environmental resource permit to construct and operate, including a stormwater management system, a project known as Pioneer Trail/I-95 Interchange, notwithstanding a contrary recommendation by the Administrative Law Judge. Status: Notice of appeal filed April 11, 2024.

City of Titusville v. Speak Up Titusville, Inc., Case No. 5D2023-3739. 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 s. 101.161, Florida Statutes, and that the substance of the initiative is preempted by s. 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; oral argument held on September 19, 2024.

Mansoor "John" Ghaneie v. Andy Estates LLC and Florida Department of Environmental Protection, Case No. 5D2023-3156. 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, and multi-family dock in the Banana River Aquatic Reserve, Merritt Island, Brevard County, Florida. Status: Notice of appeal filed October 23, 2023.

SJRWMD v. CeCe, Case No. 5D2022-2426. Petition for review of non-final agency action regarding ALJ's order rejecting remand after the ALJ recommended the denial of the application for a stormwater management permit filed by the Cedar Island Homeowners Association of Flagler County. Status: On August 11, 2023, in response to a motion for written opinion, the court denied the petition and remanded to SJRWMD for a final order either issuing or denying the application, which decision then may be appealed if the losing party chooses to do so. Note: Following the issuance of the court's opinion, SJRWMD issued a final order adopting the recommended order and denying the requested permit. That final order is the subject of an appeal filed by the CeCes in Case No. 5D23-2987.

CeCe v SJRWMD, Case No. 5D2023-2987. Appeal by the CeCes from the final order referenced above (in Case No. 5D22-2426), denying the application for a stormwater management permit requested by the Homeowners Association. In its answer brief, SJRWMD argues that the CeCes do not have standing to appeal because they are not adversely affected by the final order denying the permit application, as that is the relief that they requested. Status: On July 12, 2024, the court dismissed the appeal for lack of standing ("As a general rule, where an administrative challenge is decided in one party's favor, that party will not be able to show that they are adversely affected by the order.")

SIXTH DCA

Global Marine Exploration v. Department of State, Division of Historical Resources, Case No.: 6D2023-2413. Appeal from final order revoking exploration permit and denying application for recovery permit, relating to the right to explore and recover historic materials from an area of sovereign waters off the coast of Cape Canaveral said to include the remains of Spanish treasure ships, including *la Trinité*. Status: Affirmed

per curiam on June 11, 2024.

Lightsey Cattle Company v. Florida Fish and Wildlife Conservation Commission, Case No.: 6D2023-0587. Appeal from final order renewing license for private hunting preserve and refusing to continue to grant exemption from fencing requirement. Status: On July 12, 2024, the court issued an opinion concluding that it lacks jurisdiction because the Commission is not an "agency" subject to the APA, because the Commission was acting pursuant to powers derived from Article IV, Section 9 of the Florida Constitution. Accordingly, the court directed that the case be transferred to the Ninth Circuit Court in and for Osceola County.

11th CIRCUIT COURT OF APPEAL

Shawn Buending, et al v. Town of Redington Beach, Case No. 24-12896. Appeal from final judgment finding that the Town had adequately shown a history of "customary use" by the public of parts of the beach that are privately owned. Status: Notice of appeal filed September 10, 2024.

D. C. CIRCUIT COURT OF APPEAL

Center for Biological Diversity et al v. Michael Regan, et al, Case No. 24-5101. Appeal from district court's order vacating EPA approval of Florida's assumption of the Section 404 wetlands permitting program. Status: Notice of appeal filed April 23, 2024; motion for stay pending appeal denied on May 20, 2024.

UNITED STATES SUPREME COURT

Seven County Infrastructure v. Eagle County, Colo., Case No. 23-975. Issue: Whether the National Environmental Policy Act requires an agency to study environmental impacts beyond proximate effects of the action over which the agency has regulatory authority. Status: Review granted June 24, 2024.

City and County of San Francisco v. EPA, Case No. 23-753. Issue: Whether the Clean Water Act allows the Environmental Protection Agency (or an authorized state) to impose generic prohibitions in National Pollutant Discharge Elimination System permits that subject permitholders to enforcement for violating water quality standards without identifying specific limits to which their discharges must conform. Status: Review granted on May 28, 2024.

Ohio v. EPA, Case No. 23A349, consolidated with: *Kinder Morgan, Inc v. EPA*, Case No. 23A350, *American Forest & Paper Ass'n v. EPA*, Case No. 23A351 and *U.S. Steel Corp. v. EPA*, Case No. 23A384. Issue: Whether the court should stay the EPA's federal "Good Neighbor Plan" of the 2015 "Ozone National Ambient Air Quality Standards." Status: On June 27, 2024, the Court issued an opinion in which it held: The applications for a stay are granted; enforcement of EPA's rule against the applicants shall be stayed pending the disposition of the applicants' petition for review in the D. C. Circuit and any petition for writ of certiorari, timely sought.

Loper Bright Enterprises, et al., v. Gina Raimondo, et al., 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: On June 28, 2024, the Court issued an opinion in which it held that the Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous; *Chevron v. Natural Resources Defense Council* is overruled.

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: On June 28, 2024, the Court issued an opinion in which it held that the Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous; *Chevron v. Natural Resources Defense Council* is overruled.

State of Alabama, et al. v State of California, et al., Case No. 22O158. A group of 19 states, including Florida, petitioned the U.S. Supreme Court to block lawsuits from five other states seeking massive climate damages from major fossil fuel companies. Status: Motion for leave to file bill of complaint filed May 22, 2024.

filed September 28, 2023.

In the Circuit Courts

By Amelia M. Ulmer*

Note: Status of cases is as of September 26, 2024. Readers are encouraged to advise the author of pending or newly filed circuit court cases which may be of interest to the environmental and land use law practitioner for inclusion in future installations of *In the Circuit Courts*. Please send cases of interest to aulmer@orlandolaw.net.

***Setai Resort & Residences Condominium Association, Inc. v. Shore Club Property Owner, LLC.*, Case No. 2023-13 AP 01, 32 Fla. L. Weekly Supp. 66a (Fla. 11th Cir. Ct. April 11, 2024).**

The City of Miami Beach's Historic Preservation Board reviews, *inter alia*, certificates of appropriateness in the City's designated historic districts to determine whether development and redevelopment projects meld with the character and vision for the City's historic districts. The Shore Club requested a certificate of appropriateness from the City's Historic Preservation Board to permit the Shore Club to demolish, renovate, and construct additions to The Shore Club property. Following Board consideration, The Shore Club's certificate of appropriateness was initially denied. The Shore Club revised their site plans, and their application was heard again by the Historic Preservation Board, which then approved of their certificate of appropriateness despite opposition from The Setai, an adjacent Miami Beach property. This case involves a dispute between the Setai and the City of Miami Beach and The Shore Club over the approval of The Shore Club's certificate of appropriateness.

The Setai argued that the Historic Preservation Board did not properly analyze the adverse impact which new construction at The Shore Club would have on their and other neighboring properties, alleging that the Historic Preservation Board's approval of the certificate of appropriateness denied The Setai procedural due process. The Setai argued that they and members of the public were not provided with an opportunity to submit formal objections to The Shore Club's request for a certificate of appropriateness, thus denying interested parties an opportunity to be heard. The court rejected The Setai's argument, noting that interested parties were presented with the opportunity to speak at public hearings on the proposed certificate, which provided sufficient opportunity to raise objections to the Board. The Setai further argued that no competent substantial evidence was presented to analyze the impact of the proposed redevelopment of The Shore Club and upon which to base a certificate of appropriateness. The court noted that the City presented a report prepared by its professional staff, which courts have consistently held constitutes competent substantial evidence. The court also found that evidence presented in support of The Shore Club, including testimony from expert consultants, submitted construction plans, and testimony from former Historic Preservation Board members concerning the appropriateness of the construction plans all constituted competent substantial evidence upon which the Board could reliably base its approval of the certificate of appropriateness. Moreover, the conditions placed upon the redevelopment of The Shore Club by the Board were found to be clear, enforceable, measurable, and based upon sufficient evidence. The court ultimately denied The Setai's petition for writ of certiorari, determining that the Historic Preservation Board's grant of The Shore Club's certificate of appropriateness was supported by competent substantial evidence.

As of the drafting of this article, the case stands here, and provides a good review for the land use practitioner of the requirements for finding that a local government's land use decision was based upon competent substantial evidence.

**Amelia M. Ulmer is an attorney at the firm Garganese, Weiss, D'Agresta & Salzman, P.A., in Orlando, Florida, where she practices land use and local government law. Ms. Ulmer is a 2021 graduate of the Florida State University College of Law's Environmental, Energy, and Land Use Law program.*

October 2024 Florida Legislative Update

By Gary K. Hunter, Jr., Holtzman Vogel, P.A.

I trust you have all had a relaxing summer and are gearing up for what the Florida Legislature brings in the 2025 Session. Recall that 2025 is not an election year, so Session does not begin until March 4th of next year. It will run for 60 consecutive days (barring an extension) through May 2nd. Committee weeks start in December after the November elections and will be in full-force throughout January (13-17 and 21-24) and February (3-7, 10-14- and 17-21).

Also recall that bills need to be filed before the first day of Session, but in reality, if you have an issue which requires legislative attention those discussions should be happening now if at all possible to become part of a larger bill or to be a stand-alone bill. House members are limited to filing six (6) bills per member, so having your issue on a member's radar with a commitment to move your legislation is important.

The 2025 Senate President will be Ben Albritton from Wauchula, FL. President Albritton's background is within the citrus industry, but he has served in the legislature for fourteen years and with that brings a broad perspective on all issues impacting Florida. Following Senator Albritton as President in 2027/28 (and assuming the Republicans maintain control of the Senate, currently a 28-12 majority) will be Senator Jim Boyd from Manatee County. Senator Boyd is in the insurance business, however, like Senator Albritton he has a very good grasp of issues impacting Floridians.

The 2025 Speaker will be Danny Perez, who is a lawyer from Miami. Again, assuming the Republicans retain control of the House the next two (2) election cycles (they currently hold a majority of 86-34), Speaker Perez will be followed in 27/28 by Speaker-Designate Sam Garrison, also a lawyer from Clay County. Both are hard-working, focused legislators who will push diligently to advance Florida's interests.

It is a little early for the filing of bills for the 2025 Session, but that will begin to happen at a rapid pace after the November election and leading into the new year. Accordingly and as noted above, if you have an issue which warrants legislative action then you should be speaking with members sooner than later to make sure they have capacity to assist.

That's it for a pre-Session overview. More to come in the next issue once bills have been filed impacting our collective interests.

Administrative Law Update

By Derek Howard, Senior Assistant County Attorney, Monroe County

Note: Status of cases is as of October 16, 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).

***Howard Jeremiah Benedict v. Florida Fish and Wildlife Conservation Commission,* Florida Division of Administrative Hearings Case No. 24-0519.** On October 25, 2023, Petitioner requested to challenge the Commission's determination that his 48-foot houseboat was left derelict on waters of the State (specifically in Cow Key Channel in Atlantic shore waters within Monroe County, Florida). A Commission law enforcement officer noted that the vessel was derelict because it was junked and substantially dismantled—the outboard engine was damaged; the hull integrity was compromised; and the window and doors were unable to be closed to the elements. The vessel was later found to be in a "wrecked" condition because it was sunken and resting on the seabed without the ability to extricate itself absent mechanical assistance. Petitioner admitted that he was the owner of the vessel and did not contest the derelict condition of the vessel, but argued that other people caused damage to the vessel while he was incarcerated. In a Recommended Order dated September 25, 2024, the Administrative Law Judge found Petitioner's argument not credible and recommended that the "Commission enter a final order finding that Petitioner is the owner/responsible party of the vessel in this case, which is derelict pursuant to section 823.11 and is abandoned property under chapter 705, Florida Statutes; that the Commission may remove the derelict vessel from the waters of the State and destroy and dispose of the derelict vessel; and that Petitioner is responsible for all costs incurred by the Commission or its designee in the removal, destruction, and disposal of the derelict vessel." (For additional background on the regulation of derelict vessels in Florida, the reader is encouraged to read Byron Flagg's article entitled *Dealing With Derelict Vessels—A Sinking Feeling* that was published in the previous—June 2024—issue of The Reporter. Previous issues of the Reporter may be found at https://eluls.org/reporter/)

Derelict Vessel in the Florida Keys
Credit: Monroe County

***Daniel Carney, James Collier, and Kevin Sparks v. City of Cape Coral and Dep't of Env't Prot.,* Florida Division of Administrative Hearings Case No. 23-1786.** On February 17, 2023, The Department of Environmental Protection ("DEP") filed a notice of intent to issue Environmental Resource Permit No. 244816-006 ("ERP") to City of Cape Coral for several quality projects in the South Spreader Waterway ("SSW") in Lee County, Florida. The ERP authorizes the following improvements in the SSW: (1) remove the Chiquita Boat Lock and associated uplands; (2) install a 165-foot linear seawall along the north end; (3) plant over 3,000 mangrove seedlings; and (4) install oyster reef balls in the footprint of the Lock once removed. The ERP recognized that the authorized activities will occur in Class III waters and proposes improvements to receiving waters located within Matlacha Pass, a Class II Outstanding Florida Water. Petitioners alleged that removal of the Lock will change the flow of water into and out of the SSW that will result in changes to water quality (salinity, sedimentation, and nitrogen) and negative environmental impacts, primarily to the adjacent mangroves. Petitioners opined these impacts cause the City to be unable to provide reasonable assurances to meet the public interest test. Following an evidentiary hearing, the Administrative Law Judge issued a Corrected Recommend Order on July 3, 2024, finding that (a) the project does not adversely affect the public health, safety, or welfare, or property of others, and is therefore not contrary to the public interest; (b) Petitioner Carney did not satisfy the first prong of the *Agrico Chemical Corp. v. Dep't of Envt'l Reg.*, 406 So.2d 478 (Fla. 2d DCA 1981) test because he did not claim an injury that could reasonably arise as a result of removing the Lock (Carney did not fish behind the Lock and asserted the decline in water quality he observed in the Matlacha Pass Aquatic Preserve area and lower estuary part of the Caloosahatchee River caused him a loss of enjoyment in fishing, as lost habitat and reduced visibility decreased his success in catching fish, requiring him to travel mile further to find suitable waters); The order recommended that DEP enter a final order (1) dismissing Carney as a Petitioner and (2) issuing the ERP to the City of Coral Gable. On August 16, 2024, DEP issued its Final Order that adopted the Corrected Recommended Order (except as modified by rulings on exceptions) and followed its recommendations.

South Spreader Waterway
Credit: Cape Coral Breeze, CJ Haddad

***GB Retail, LLC v. Florida Community Services Corp. of Walton County and Dep't of Envt'l Prot.,* Case No. 24-0455.** On December 12, 2022, Florida Community Service Corporation of Walton County ("FCSC") applied for a permit to modify an existing 4.0 million gallons per day ("MGD") domestic wastewater treatment plant ("WWTP"), and allow for its expansion to a 6.0 MGD facility. On November 20, 2023, DEP provided notice of its Intent to Issue

the Permit. Petitioner owns Grand Boulevard, a commercial center with retail, office, and restaurant establishments located south and adjacent to the existing WWTP. Its Petition for Formal Administrative Hearing alleged that the odors from the existing WWTP are a chronic nuisance to businesses operating at its commercial center, and that the modification authorized by the permit will not abate the annoyance and nuisance, or comply with DEP rules. On August 16, 2024, the Administrative Law Judge entered a Recommend Order concluding as follows: "Applying the standards of reasonable assurance to the Findings of Fact in this case, it is concluded that the permit application for the expansion of the existing Sandestin WWTP meets relevant regulatory standards, and that reasonable assurance has been provided that the modifications will minimize odors, noise, aerosol drift, and lighting such that those effects will not adversely affect human health or welfare or unreasonably interfere with the enjoyment of life or property, including outdoor recreation." It recommended that DEP issue the permit. On September 24, 2024, the agency entered a Final Order adopted the Recommended Order (except as modified by rulings on exceptions) and approved the permit.

Florida State University College of Law Fall 2024 Update

By Erin Ryan, Associate Dean for Environmental Programs

For the last several years, we've started our Fall newsletter by acknowledging the unexpectedly large hurricane that unsettled us in the first month of school—Michael, Sally, Ian, Idalia—but also the resilience that we and our neighboring communities have shown in the face of these challenges. To celebrate the fifth anniversary of this newsletter, we have been greeted this month by not one but two monster storms, Helene, and not two weeks later, Milton. Our hearts go out to all impacted by these storms, including many of our students, colleagues, and their families.

Helene was significant not only because of the reach of its devastation, but also because it is one of the first storms that scientists have now concluded was not just statistically related to a warming climate, but definitely exacerbated by it. The force of the storm and the extraordinary rainfall it conveyed was only possible due to the extreme warming of the waters of the Gulf of Mexico. As communities in Florida, North Carolina, and neighboring states continue to work through the devastation of Helene and Milton, we resolve to continue our mission of preparing the next generation of lawyers and policymakers to cope with the demands of this new era of climate related challenges. These include planning for and responding to storms, fires, droughts, and floods, and also exploring new tools of energy development, land use planning, and technologies for adaptation and mitigation.

In service of that goal, in addition to our foundational courses and exciting line up of events this fall, we invite students to register now for a host of related course offerings next Spring, such as Climate Change Science & Policy, Coastal Planning, Oil and Gas Law, Energy Law, Ocean and Coastal Law, and Environmental Policy and Natural Resources Law. There is much work to be done, and many opportunities to make a difference! Students, we hope to see you in our classes, and alums, we are grateful for the differences you are already making in the wider legal world.

Faculty Scholarship and News

Shi-Ling Hsu,
D'Alemberte Professor

Climate Resilience: A Typology, __ UMKC L. Rev. __ (forthcoming symposium, 2025).

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 (Kuh, K. and Roesler, S.N., eds., forthcoming 2023) (with Kevin Lynch and Karrigan Bork).

Supplying Life Necessities in a Climate-changed Future, in Adapting to High-Level Warming: Equity, Governance, and Law (Kuh, K. and Roesler, S.N., eds., 2024).

Non-market Values in the Draft Update of Circular A-4, Yale J. Reg. Notice & Comment (2023).

Erin Ryan
Elizabeth C. & Clyde W. Atkinson Professor

Public Trust Principles and Environmental Rights: The Hidden Duality of Climate Rights Advocacy and the Atmospheric Trust, 49 Harv. Envt'l. L. Rev. ___ (2024).

Sackett vs. EPA and the Regulatory, Property, and Human Rights Based Strategies for Protecting American Waterways, 74 Case Western Res. L. Rev. 281 (2023).

Privatization, Public Commons, and the Takingsification of Environmental Law, 171 U. Penn. L. Rev. 617 (2023).

How the Successes and Failures of the Clean Water Act Fueled the Rise of the Public Trust Doctrine and Rights of Nature Movement, 73 Case Western Res. L. Rev. 475 (2022).

Environmental Rights for the 21st Century: A Comprehensive Analysis of the Public Trust Doctrine and Rights of Nature Movement, 42 Cardozo L. Rev. 2447 (2021) (with Holly Curry & Hayes Rule).

Mark Seidenfeld
Patricia A. Dore Professor of Administrative Law

Rethinking the Good Cause Exception to Notice and Comment Rulemaking in Light of Interim Final Rules, 75 Admin. L. Rev. 787 (2023).

The Limits of Deliberation about the Public's Values: Reviewing Blake Emerson, The Public's Law: Origins and Architecture of Progressive Democracy, 119 Mich. L. Rev. 1111 (2021) (Book Review).

Textualism's Theoretical Bankruptcy and Its Implications for Statutory Interpretation, 100 B.U.L. Rev. 1817 (2020).

The Bounds of Congress's Spending Power, 61 Ariz. L. Rev. 1 (2019).

The Problem with Agency Guidance – or Not, 36 Yale J. on Reg.: Notice & Comment (May 3, 2019)

Brian Slocum
Stearns Weaver Miller Professor

FSU Law Stearns Weaver Miller Professor Brian G. Slocum is among the **ten most-cited law faculty in the United States writing on legislation (including statutory interpretation and legislative process) based on the latest Sisk data**. This ranking is for the period 2019-2023 (inclusive) and is based upon the data collected in late May/early June of 2024. Other institutions represented on this list and for this category include Yale, Harvard, Georgetown, William & Mary, Northwestern and Stanford law schools. **Read more here**.

Major Questions, Common Sense? (with Kevin Tobia & Daniel Walters) , 97 S. Cal. L. Rev 5. (2023).

The Linguistic and Substantive Canons, 137 Harvard L. Rev. For. 70 (2023) (with Kevin Tobia).

Textualism's Defining Moment, 123 Colum. L. Rev. 1611 (2023) (with Willian N. Eskridge Jr. & Kevin Tobia).

Ordinary Meaning and Ordinary People, 171 U. Penn. L. Rev. 365 (2023) (with Kevin Tobia & Victoria Nourse).

Unmasking Textualism: Linguistic Misunderstanding in the Transit Mask Order Case and Beyond, 122 Colum. L. Rev. For. 192 (2022) (with Stefan Th. Gries, Michael Kranzlein, Nathan Schneider & Kevin Tobia).

Tisha Holmes
Courtesy Professor of Law, Assistant Professor, Department of Urban & Regional Planning

Can Florida's Coast Survive Its Reliance on Development? Fiscal Vulnerability and Funding Woes under Sea Level Rise. J. of Am. Planning Assoc. (in press) (with Shi, L., Butler, W., et al.).

Evaluating Public Health Strategies for Climate Adaptation: Challenges and Opportunities from the Cimate Ready States and Cities Initiative. PLOS Clim 2(3): e0000102 (2023) (with Joseph HA, Mallen E, McLaughlin M, Grossman E, Locklear A, et al.).

Spatial Disparities in Air Conditioning Ownership in Florida, United States, J. of Maps, 19: (2023) (with Yoonjung Ahn, Christopher K. Uejio, Sandy Wong, and Emily Powell).

What's Slowing Progress on Climate Change Adaptation?: Evaluating Barriers to Planning for Sea Level Rise in Florida, 28 Mitigation & Adaptation Strategies for Global Change, 42 (2023) (with Milordis, A., and Butler, W.).

Rural Communities Challenges and ResilientSEE: Case Studies from Disasters in Florida, Puerto Rico, and North Carolina, 7 Soc. Sci. & Human. Open (2023) (with Ivis Garcia Zambrana and Shaleen Miller).

Upcoming Events:

Fall '24 Distinguished Environmental Lecture

On October 30th, the Center proudly welcomes our Fall 2024 Distinguished Lecturer, **Gerald Torres**. Professor of Environmental Justice, Yale School of the Environment, and Professor of Law, Yale Law School, Gerald Torres will present ***Environmental Justice: Environmental Joy***.

"Joy, a transformative force with diverse meanings, can be a beacon enabling the pursuit of a better world. Joy can be innate, born of grace when one feels in harmony with nature, community, faith, culture, laws, policy, or even the economy. It is what injustice can take from us and what we regain when healing and repair occur. Joy is a core piece of what we seek when working for justice. It expresses the goal that sustains the work for a better world."

In his lecture, Professor Torres will explain how the primary objective of most environmental and climate initiatives is to alleviate suffering and enhance well-being and explore and celebrate how environmental justice achieves these goals. The aim is to assist the field of environmental and climate justice in discovering and enhancing practices that reduce harm and promote well-being.

Professor Torres's lecture will be held **October 30th from 3:30-4:30 p.m.** in the FSU Law Rotunda, with a reception to follow.

FSU Law Environmental Alumni Panel

On Wednesday November 13th, 2024, The Center presents an FSU Law Alumni Career Panel.

Hear from FSU alumni practicing environmental, energy, and land use law in government, NGO, industry, and private practice jobs.

Registration info will be sent via email and Student Announcements at a later date.

RECENT EVENTS

Climate Constitutionalism

On October 9th, The Center hosted Dr. Amanda Shanor, the Wolpow Family Faculty Scholar, Wharton School of the University of Pennsylvania for a guest lecture on Climate Constitutionalism.

Shanor asks: Does the Constitution protect a right to a clean environment? Or is it a barrier to governmental action against climate change?

Furthermore, the lecture discussed the role of constitutional law in the fight against the most challenging crisis facing humanity.

Get Ready for Spring Classes!

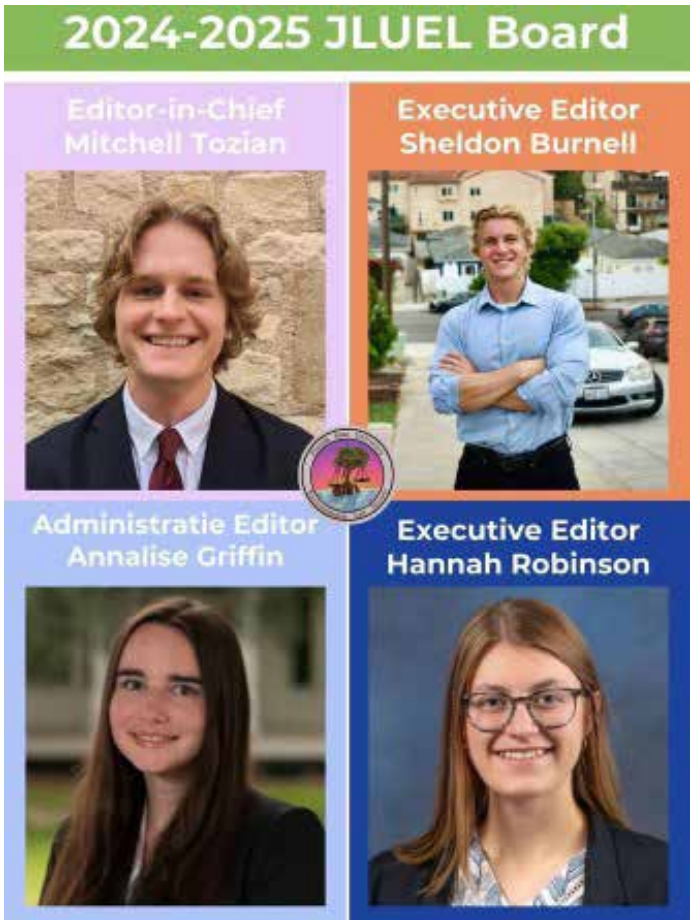
- **Administrative Law**- LAW6520-01 Tuesday, Wednesday, and Thursday 11:00AM-12:15PM, 4 Credits
- **Climate Change**- LAW7930-04 Monday & Tuesday 5:15pm-6:40pm, 3 Credits
- **Coastal and Ocean Law**- LAW7475-01 Wednesday and Thursday 1:40PM-3:05PM, 3 Credits
- **Coastal Planning**- URP5422 Thursday 9:45AM-12:30PM, 3 Credits
- **Energy Law and Policy**- LAW7481-01 Tuesday and Thursday 3:15PM-4:40PM, 3 Credits
- **Environmental Policy & Natural Resources**- LAW7930-17 Monday 3:10PM-5:10PM,3 Credits
- **Florida Administrative Law**- LAW7930-19 Friday 9:00 AM-10:50AM, 2 Credits
- **Negotiation Workshop**- LAW6313-01 Tuesday, 1:40PM-4:40PM, 4 Credits
- **Oil and Gas Law**- LAW7930-19 Wednesday and Thursday 9:20AM-10:45AM, 3 Credits.

Student Spotlight

Spring 2025 graduate Hannah Robinson will have her paper, *Death Is Not the End: What Florida's Constitutional Prohibition on Agency Deference Can Predict About the Federal Administrative State Post-Chevron, with a Focus on Environmental Policy*, published in FSU's Journal of Land Use & Environmental Law this fall. Her paper has also been selected for publication in the October edition of the Florida Bar Environmental & Land Use Law Section's *The Reporter*. The paper explores Florida jurisprudence after the state's 2018 constitutional amendment mandating de novo review of agency interpretations, and how that prohibition on deference has looked in practice, specifically within the environmental context, to address concerns that the Supreme Court's *Loper Bright* decision will upend federal environmental regulations and the administrative state more broadly.

After serving as a Legislative Fellow last year, Hannah interned in the North Carolina legislature's bill drafting division this past summer, where she gained a multi-faceted—and multi-state—understanding of the nuances of government. She hopes to return to nonpartisan legislative work after graduation.

Student Organization Spotlight



We are proud to introduce the 2024-2025 Board members of FSU Law's **Journal of Land Use and Environmental Law**. From top left:

Mitchell Tozian, Editor-in-Chief, is a 3L student who spent his summer working at Bercow Radell Fernandez Larkin + Tapanes in Miami, where he learned about land use and environmental law and the zoning approval process. Mitchell plans to return to BRFL+T upon his graduation in May 2025.

Sheldon Burnell, Executive Editor, is a 2L student who spent his summer working at Coppins Monroe, P.A. in Tallahassee, where he conducted legal research and drafted motions and memoranda on a variety of civil litigation matters, with a focus on defense of governmental entities.

Annalise Griffin, Administrative Editor, is a 2L student who spent her summer, working at Brennan Manna Diamond in Jacksonville, where she gained valuable legal research skills and drafted various memoranda with a focus on commercial litigation.

Hannah Robinson, Executive Editor, is a 3L student who spent her summer interning in the North Carolina legislature's bill drafting division and hopes to return to nonpartisan legislative work after her graduation this spring.

Alumni Spotlight

Salomé Garcia, JD (Class of '23) recently received The Future40 Award for her work in energy law. Maverick Pac recognizes conservative young professionals from across the United States.

Salomé has pursued a strong interest and passion in energy policy her entire career. She is an energy attorney and political strategist located in Atlanta Georgia with a decade of experience in political communications, campaign strategy, and energy policy. Salomé began her career with the Republican Party of Florida, working on the campaigns for Governor Rick Scott and Congressman Carlos Curbelo and leading youth voter and volunteer efforts across South Florida.

In her career Salomé successfully worked alongside elected and regulated bodies at the local, state and federal levels on energy policy. Salomé also worked in the office of general council at the Florida Public Service Commission and currently serves as a Senior Principal at a trade association focusing on energy generation, distribution, and demand.

Salomé has published articles on Nuclear Power regulation, spoken at the University of Miami and Florida International University on energy production policy and has helped shape energy policy platforms of elected officials since 2017.

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interpretation of the Clean Air Act as a "*permissible construction* of the statute which seeks to accommodate progress in reducing air pollution with economic growth."[13] *Loper Bright* too involved environmental regulation—federal fishery management legislation and the National Marine Fisheries Service's ("NMFS") observation aboard fishing vessels.[14] NMFS, alternatively called NOAA Fisheries, is the federal agency "responsible for the stewardship of the nation's ocean resources and their habitat."[15]

Specific case facts aside, *Chevron* deference and the administrative state is frequently associated with environmental law and policy because "it is a virtual certainty" that agency promulgations regarding the environment will result in some form of litigation.[16] This is because some parties (namely, businesses whose activities impact the environment in some way) will typically want to contest rules that limit their conduct; others (including activist groups) will often challenge promulgations they feel should do more to regulate commercial activity and protect the environment.[17] Environmental regulations are typically highly technical and complex, so Congress tends to delegate rulemaking authority to the relevant agency to promulgate appropriate regulations, based on a presumed high level of relevant expertise and capability of handling such scientific matters.[18]

That same expertise and technical nature of environmental regulation is largely why *Chevron* was decided as it was,[19] and a significant part of the reason why agency deference exists at all.[20] "Courts reviewing the regulation are generally reluctant to question or overrule an agency's evaluations and conclusions, especially when rooted in technical or scientific analysis within the agency's statutory charge."[21]

All of the above, in addition to the increase in opinionated online explanations of agency deference by prominent environmental organizations,[22] is likely why so many associate the *Chevron* doctrine with environmental law. This is a valid connection to make, and it is indeed backed by academic studies and jurisprudential observations. However, *Chevron* is likely not the make-or-break for environmental regulations that many may assume it is; one law professor's empirical study from 2008 suggests instead that courts have demonstrated "a strong willingness to defer, *under any doctrine or framework*, to agency action when environmental scientific expertise is required."[23] This quote, along with other evidence, points to the potential for *Chevron*'s death to not be so significantly impactful.[24]

Florida Agency Deference Before and After the 2018 Amendment

Before 2018, Florida courts employed a particularly high deferential standard. Two early Florida Supreme Court cases called agencies' interpretations "persuasive but … not controlling"[25] and held that they should be granted "great weight" by courts.[26] The court held in a third case that the "*contemporaneous* administrative construction of [a statute] by those *charged with its enforcement* and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized."[27]

Interestingly, the first of the above quotes comes from a 1941 case, predating the federal 1949 *Skidmore v. Swift* opinion in which the Supreme Court very similarly noted that agency interpretations were "not controlling upon the courts" but did "constitute a body of experience and informed judgment" which could prove helpful to courts in these considerations.[28] However, the Florida standard, especially following the state supreme court's 1952 decision, was much more deferential than *Skidmore*; at its core, *Skidmore* is closer to de novo review because it requires an individualized, factor-based approach to each interpretation. Florida instead held that interpretations should be given weight according to *Skidmore*-like factors, but that they should ultimately be deferred to unless clearly incorrect. Florida's deference standard is thus more agency-friendly than the federal *Skidmore* deference.

In 1985, a year after *Chevron* was decided, the Florida Supreme Court held that judges were required to defer to agency interpretations if they were "consistent with legislative intent" and the agency provided "substantial, competent evidence."[29] Several other Florida cases provided or expanded upon qualifications to this standard, namely, that interpretations do not warrant judicial deference if they are "clearly erroneous,"[30] if the situation is not one that invokes agency expertise,[31] or if the statute itself is unambiguous.[32] Exceptions aside, courts often upheld agency interpretations, especially as the highly deferential *Chevron* took hold at the federal level.[33]

Though a formal *Chevron* two-step inquiry was never implemented here, many of Florida's judicial opinions during this time demonstrated that the state was very much aligned with the federal *Chevron*-era jurisprudence—even before *Chevron* itself was decided by the Supreme Court. For example, in 1981, Florida's First District Court of Appeals opined that "[w]hether the Department's interpretation of section 381.272(7) is the only possible interpretation of the statute, or the most desirable one, we need not say. It is within the range of permissible interpretations of the statute. . . ."[34] This court's holding based on a "permissible interpretation" all but matches the *Chevron* Court's emphasis on a "permissible construction." A month after *Chevron* was decided, the same Florida DCA upheld another agency interpretation and said that "[a]gencies are afforded wide discretion . . . and will not be overturned on appeal unless clearly erroneous. . . . The reviewing court will defer to any interpretation within the range of *possible* interpretation."[35] The Florida Supreme Court in 2006 even made mention of the fact that federal and other states' courts "share [Florida's] principles" of agency deference, specifically citing *Chevron*.[36]

As demonstrated, Florida's strong history of agency deference, with some narrow exceptions, mirrored *Chevron* deference in terms of weight given to agency interpretations. Given that, the jump from this almost reflexive deference to the current de novo review seems jarring, but it followed a statewide and national trend of more conservative jurisprudence

regarding separation of powers and, more generally, regarding administrative law as a whole.[37]

The constitutional amendment, approved by Florida voters during the 2018 election, added Section 21 to the end of Article V (Judiciary), which now reads:

> Judicial interpretation of statutes and rules.—In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo.[38]

As of the amendment's effective date, then, there is no agency deference in Florida, and all challenged agency interpretations of statutes must be independently evaluated by each court.

Several Florida court opinions published soon after the amendment took effect specifically discuss this change in the standard of judicial review.[39] The Florida Supreme Court even analyzed the new de novo standard in the context of an environmental protection case (wherein the Court upheld the agency's interpretation), described below. After the amendment, agency statutory interpretations are still regularly upheld in Florida, even with de novo review—meaning that the fear of agencies predominantly losing post-*Chevron* may not hold much weight.

In the area of public utilities, Florida courts post-amendment (including the state's supreme court) have particularly cited the Florida Public Service Commission's ("PSC") understanding and expertise in its consideration of regulations, rate setting, or other agency activities.[40] The Florida Supreme Court in 2023 even recognized that agencies "lost any deference" with the amendment, but discussed the specific legislative delegation and past caselaw that acknowledged the PSC's "specialized knowledge and expertise in this area" in its opinion.[41] Ultimately, the court in that case remanded to the PSC because it had likely acted outside of the bounds of its legislative authority,[42] but the mention of an agency's expertise (which is a primary reason that agencies exist in the first place) is telling.

Further, Florida's First DCA in a separate case affirmed another of the PSC's interpretations in part and reversed in part, stating that the PSC "has much discretion . . . under the statutory framework" and (citing another case) that the PSC's "determinations of the applicable . . . considerations should be given greater weight since [they] are infused with policy considerations for which the [PSC] has special responsibility and expertise."[43] A review of reported post-amendment Florida cases shows that public utilities challenges stand out as an area where the courts will consider the particular expertise of the agency; time will tell if that respect will be bestowed upon other agencies or within other areas.

Statistical Analysis of Agency Success in Florida and What This Can Reveal About the Federal Level

Before analyzing three key state-level environmental cases decided after the amendment's passage, it might be helpful to delve into some statistics of what Florida's judicial review has looked like in practice. First, the author of this Article does not claim to be a statistical research expert, and these numbers are not meant to represent an empirical study. They are, however, intended to shed light on how often courts have affirmed and currently do affirm agency interpretations, and what that can possibly predict about federal agency deference.[44]

Three different time periods were collected: all cases addressing challenges to agency interpretations since the amendment's effective date (seventy-eight opinions), all such cases decided roughly five years right before the amendment (sixty-one), and all such cases from approximately five years before that (fifty-one). Notably, several more cases were heard each five-year period, which some may see as analogous support for the concern of a larger docket load for federal circuit courts following *Chevron*'s reversal.[45] However, this author believes it is likely instead a result of expanding executive action as Florida's agencies are legislatively tasked with handling more specialized matters to accommodate a rapidly growing population with increasingly complex issues (like environmental preservation, insurance, and health care). An average of only two or three additional cases per year does not seem particularly significant considering this growth of the administrative state via corresponding legislation, coupled with Florida's population increase of over four million residents between 2008 and 2023.[46] Whether that legislative delegation is a good thing is outside the scope of this Article.

Since the amendment's effective date, 20.7% of the case outcomes upheld agency interpretations, 28.0% reversed them, and 51.2% of the decisions fell outside of that binary. Excluding that third category, agency interpretations were upheld 42.5% and reversed 57.5% of the time.

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In the years right before the amendment's effective date, 31.3% of the outcomes were affirmations and 20.3% were reversals; 48.4% of the outcomes fell into the third "other" category. Removing the "other" outcomes, courts affirmed agency interpretations 60.6% of the time and struck them down 39.4% of the time.

Finally, in the five years preceding that, an immense 72.7% of the outcomes were outside the binary assessment; agencies were successful 12.7% of the time and unsuccessful 14.5% of the time. Disregarding those irrelevant cases, agency interpretations were upheld 46.7% of the time during this period and struck down 53.3% of the time. These numbers are, for the sake of clarity, represented in the table below.

These are the statistics, but what do they mean? For one, they reveal that, despite how deferential the judicial review standard of interpretations was on paper long before the amendment, agency wins and losses were comparable. Further, over half of the agency interpretations during that period were actually reversed rather than upheld. The expected trend of high deference to agencies is more clearly observed in the years immediately before the amendment's effective date, where interpretations were affirmed almost twice as frequently as reversed. That ratio supports many of the concerns about judicial deference to agencies in Florida previously, and indeed observation of this trend is likely why the amendment was brought to voters in the first place.

Perhaps most telling is the agency win ratio post-amendment, where interpretations are still upheld nearly half of the time. This is important because it helps alleviate the concern that agencies will never win following *Chevron* being overturned. Not only are Florida agencies still successful after the prohibition on deference, but it is almost an even split, which proves a crucial point. There is likely an assumption that de novo review results in more losses for agencies and far fewer wins, because a court starting anew when considering interpretations instead of looking at prior precedent or deferring based on permissibility certainly sounds less promising for those agencies. Indeed, this might be driving some of the fear that the loss of *Chevron* will hinder the ability of agencies to regulate because they will not be upheld in court. But a de novo standard of review *should* be expected to produce an even division over time; at its core, an application of de novo is a simple "yes" or "no" answer removed from the factors that weigh in support or opposition of agencies. Therefore, an agency's interpretation (a bit simplistically) has a fifty-fifty chance of being upheld in court under a de novo standard.

Further, as demonstrated in the statistics, most of the cases were decided on other grounds or were otherwise unrelated to the focused question of an agency's statutory interpretation. This might suggest, then, that the number of cases decided specifically on the issue of interpretation and regarding specifically an executive agency are smaller than is presumed, and that the fear of a post-*Chevron* tidal wave of agency reversals is not supported.

Thus, if Florida judges uphold interpretations almost half of the time even under a de novo review standard, then it seems a strong argument that federal agencies will also continue to see success in court if *Loper Bright* is ultimately understood to require de novo review (and more so if it is instead a stunted return to *Skidmore* deference).[47] Based on this evidence from Florida and the cases discussed below, it appears that the future of administrative law is *bright* indeed.

	AFFIRM (Agency Win)	REVERSE (Agency Loss)
After amendment's effective date (since 01/08/2019 [as of mid-April, 2024])	42.5%	57.5%
Right before the amendment (09/26/2013 – 01/07/2019)	60.6%	39.4%
Leading up to the amendment (06/14/2008 – 09/25/2013)	46.7%	53.3%

Percentages disregard the outcomes outside of the Affirm/Reverse binary.

Why Florida Can be a Good Federal Indicator

Florida is colloquially regarded as a leader in governmental operations, including, for example, the responsiveness of its Division of Emergency Management and the sometimes-groundbreaking enactments of its legislature. Florida is also demographically comparable to the country at large in terms of race and sex (among other attributes).[48] As the third largest state in the U.S. by population, one attorney has commented that Florida's size might likely be an important factor in other states observing Florida to see how a prohibition on agency deference looks in practice.[49]

Further, Florida is presently the only state in the country to prohibit judicial deference to agencies via constitutional amendment.[50] As one study explained, this fact likely makes Florida "the most significant" of all the jurisdictions to have put a statewide stop to agency deference.[51] This is so because in using a constitutional amendment, Florida is the sole state to have rejected deference through the approval of citizen voters—under a requirement of 60% voter approval, no less[52]—as opposed to a majority of legislators through lawmaking or judges via an opinion.[53] Florida's size and demographics, the state's known history of being particularly deferential to agency interpretations (including in *Chevron*-like opinions published right before the amendment's passage),[54] and this precedential constitutional change through a unique method likely make Florida a good indicator for how the federal level could operate post-*Chevron*.

Federal Lessons from Florida Cases Regarding Environmental Protections Post-Amendment

One of the biggest concerns regarding *Chevron* being overturned, as previously discussed, is the detrimental impact to the environment which

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many believe will be caused by the death of such an agency-friendly deferential standard. At first glance, this fear is not baseless: environmental agencies like the EPA interpret their enabling statutes (like the Clean Air Act) to make rules which constrain businesses' activities and therefore protect the environment. Under *Chevron*, so long as those statutes were ambiguous (which was not a high threshold) and the EPA's interpretation was permissible, then that interpretation was upheld and the EPA could enforce its environmental regulations. Without the *Chevron* doctrine, so that argument goes, courts will more frequently overturn EPA and other agency regulations instead of upholding them.[55]

However, there are likely two strong inter-related arguments to contradict this assertion and alleviate this concern. First, a less deferential standard of judicial review does not inherently mean that courts will strike down every interpretation; this was the main takeaway from the statistical analysis above, with proof from Florida courts that have continued to uphold agency interpretations (including environmental regulations) since the state's prohibition on deference. Second, just because an environmental agency's interpretation *is* struck down by a court does not automatically mean it is to the detriment of environmental protection, as has also been observed in Florida courts. Three key environmental cases have been decided in Florida since the amendment became effective; each has a different outcome and reveals more about what a prohibition on agency deference looks like in practice.

I. Struck Down on Erroneous Interpretation and Abuse of Discretion

In 2019, Florida's First DCA controversially[56] struck down DEP's denial of a business's permit application to drill for oil in the Everglades.[57] At first glance, that indeed seems a worrisome outcome for the environment, but a deeper read of the opinion reveals more.

The legislature delegated power to DEP to accept or deny these kinds of permits in a natural resources statute,[58] and in 1999 the same court had affirmed DEP's interpretation of this statute as being a balancing test.[59] In this instance, the court stated that whether it deferred to DEP as it had previously or reviewed the interpretation de novo, DEP's understanding of the balancing test was still correct; the question was whether DEP applied said test correctly here.[60] Holding that DEP had clearly misinterpreted a provision within the aforementioned statute, and that the DEP Secretary had committed a fact-finding "abuse of discretion" besides, DEP was ultimately found to have improperly applied the balancing test and the agency's action was struck down.[61]

From this can be drawn the necessary conclusion that even without the 2018 amendment and under the previous standard of deference, this court would still have rejected DEP's interpretation and ordered the acceptance of the requested permit. Moreover, the important lesson here is not that de novo review resulted in an environmental protection being struck down, but that the agency tasked with such environmental protection in this instance improperly abused its discretion and erroneously interpreted its authority. This fact stands with or without agency deference, at the state or federal level.

II. Struck Down on Improper Interpretation that Did Not Comply with Statute, and In Practice Did Not Protect Environment

In a science-heavy opinion released in 2023, Florida's First DCA again rejected a DEP interpretation of one of its authority-granting statutes—but this time with a clear environmentally-friendly outcome.[62] Several environmental advocacy groups challenged Basin Management Action Plans ("BMAPs") created by DEP on the grounds that the agency had not complied with two statutory requirements in designing and using those BMAPs.[63] Specifically, they argued that DEP's BMAPs did not include sufficient details regarding certain pollutants for the springs.[64] The challenge was ultimately, then, based upon the groups' belief that the agency had misinterpreted (or simply disregarded) its statutory duties and thus was inadequately fulfilling its obligation to protect Florida's environment.

Upon a de novo review, the court agreed with the challengers that DEP had misinterpreted the statute and had not properly created detailed BMAPs meant to "restore Florida springs from pollution."[65] In practice, DEP's interpretation was struck down because it did not adequately protect the environment according to its legislatively delegated authority. This demonstrates that simply because an agency's interpretation of an environmental statute is struck down does not necessarily mean that it is to the detriment of nature. Indeed, the court's rejection of DEP's interpretation in this case ultimately served to protect the environment; this is a helpful lesson that can be applied at the federal level with agencies like the EPA.

III. Upheld on Proper Inclusive Interpretation of "Protect the Environment"

Perhaps most importantly for this Article's argument is a Florida Supreme Court opinion from 2019. In *Citizens v. Brown*,[66] the court upheld a decision by the PSC to allow Florida Power and Light ("FPL") "to recover certain environmental compliance costs from ratepayers" under the PSC's reading of a statute titled "environmental cost recovery."[67] That statute defined "environmental laws or regulations" as all legal authority regarding utilities and "designed to protect the environment."[68]

Reviewing the interpretation de novo, the court held that the plain meaning of "protect" does, as the appellants urged, have a prospective and future-looking application.[69] However, in the environmental context, "protect" can also be retroactive and apply to "remediation of past harm," especially in order to better shield still unpolluted areas.[70] Therefore, the court affirmed the PSC's interpretation of "protect the environment" as allowing FPL to recover past environmental compliance costs.[71]

A Florida agency's interpretation regarding the very meaning of environmental protection was thus upheld under a de novo review by the highest court in the state—but more importantly, it was an arguably progressive meaning that included both

past and future harm prevention and cost recovery. The court even acknowledged that, as opposed to most contexts where harm has future impact only, that of the environment is such that can necessitate recovery costs for past injury to best protect nature moving forward.

From *Citizens* can be gleaned three important lessons for looking to the federal level's future post-*Chevron*. One, courts can (and should) be trusted with interpreting environmental statutes and understanding when the environmental context requires at least some special consideration. The Florida Supreme Court could have chosen to stop at the dictionary definition of "protect" as meaning prevention of future harm, but it did not. Instead, the court discussed how pollutants and other contaminants expand the meaning of "protect the environment" to include remedial damage. Second, the court clearly did not need to defer to the agency's interpretation in order to rule as it did. Citing the recent amendment before launching into its own statutory interpretation discussion,[72] the court's analysis did not hinge on whether the agency's understanding was permissible, reasonable, or clearly erroneous—and one can imagine a federal court similarly considering an EPA interpretation with the same independent eye. Third, Florida (a state with typically more conservative ideologies and laws) after *Citizens* recognizes an environmentally friendly understanding of an important statutory authority that may encourage other states as well as federal courts to follow suit, but more so should alleviate the concern that environmental protections can never be affirmed or gained following the *Loper Bright* decision.

Finally, to assume that environmental agencies require a deferential standard of judicial review to be upheld thus discounts both the agency and the bench; an executive interpretation upheld without the mandate of agency-friendly deference is arguably a stronger indication of the propriety of that interpretation.

Conclusion

One esteemed legal author opined in 2021 that *Chevron*'s reversal would lead to a "large shock to the legal system."[73] In the absence of evidence to the contrary, this view is not unreasonable. But, as this Article has demonstrated, such contrary evidence *does* exist within Florida's caselaw since a voter-approved constitutional amendment prohibiting agency deference took effect. Through analyzing statistics, drawing various comparisons between Florida and the federal level, and discussing how Florida can very well represent a predictive analogy for what happens federally post-*Chevron*, it has been made evident that the demise of *Chevron*—while significant jurisprudentially—will very likely not upheave the federal administrative state.

The death of *Chevron* certainly will not kill the federal administrative state, nor is it a foregone conclusion that environmental regulations will all be struck down and protections all lost. *Loper Bright* may well deeply impact how the administrative state is perceived by professionals and the public, but beyond courts abandoning the *Chevron* two-step dance and instead reviewing agency interpretations according to the Court's mandate that judges "exercise their independent judgment"[74] (and authors rewriting administrative law textbooks), all signs seem to point instead towards a more muted change in course. Florida's own experience, brought about by a specific and complete constitutional prohibition, demonstrates that agencies' statutory interpretations can still be upheld and affirmed without *Chevron*-like deference—even in the environmental context that is understandably of great importance to many citizens and professionals.

Given this Article's discussion, Florida is likely good evidence that the death of *Chevron* will not prove as momentous as many fear for agencies and their statutory interpretations, and that the outlook of administrative law and environmental policy may not nearly be so bleak as a quick online search might indicate. Though *Chevron*, and federal agency deference in its known form more generally, did not survive the U.S. Supreme Court's October 2023 term, the sky may not fall after all. Indeed, the Sunshine State rather seems to promise sunny skies for the federal administrative state after the Court's 2024 interment of *Chevron*.

Endnotes

1 Hannah Robinson is a juris doctor candidate at the Florida State University College of Law with an expected graduation date of May 2025. This Article has been adapted for publication in the Reporter. The full article has been published in the Florida State University College of Law's Journal of Environmental and Land Use.

2 467 U.S. 837 (1984).

3 *Docket No. 22-451*, U.S. Supreme Court, https://www.supremecourt.gov/docket/docketfiles/html/public/22-451.html (last visited Apr. 18, 2024).

4 *Docket No. 22-451: Questions Presented*, U.S. Supreme Court, https://www.supremecourt.gov/docket/docketfiles/html/qp/22-00451qp.pdf (last visited Apr. 18, 2024) (the second part of this inquiry involved potentially considering whether *Chevron* should instead only be clarified).

5 *Loper Bright Enterprises v. Raimondo*, 603 U.S. ___ (slip op. at 35) (2024).

6 *See, e.g.,* CleanLaw Podcast, *The* Loper Bright *Case and Fate of the* Chevron *Doctrine with Jody Freeman and Andy Mergen*, Harv. Law School Env't & Energy Law Program (Aug. 23, 2023), https://eelp.law.harvard.edu/2023/08/cleanlaw-the-loper-bright-case-and-fate-of-the-chevron-doctrine-with-jody-freeman-and-andy-mergen/.

7 *See, e.g., Pacific Legal Foundation calls for an end to* Chevron *judicial deference,* Pacific Legal Found. (July 17, 2023), https://pacificlegal.org/press-release/pacific-legal-foundation-calls-for-an-end-to-chevron-judicial-deference/.

8 *See, e.g.,* Berit DeGrandpre, *What Overruling* Chevron *Could Mean for Environmental Law*, Geo. Env't. L. Rev. Online (Nov. 6, 2023), https://www.law.georgetown.edu/environmental-law-review/blog/what-overruling-chevron-could-mean-for-environmental-law/.

9 *Proposed Constitutional Amendments and Revisions for the 2018 General Election,* Fla. Div. of Elections 1, 19 (2018), https://files.floridados.gov/media/699824/constitutional-amendments-2018-general-election-english.pdf.

10 Fla. Const. art. V, § 21.

11 *See, e.g., Citizens v. Brown,* 269 So.3d 498 (Fla. 2019).

12 *See, e.g.,* Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the* Chevron *Doctrine in Environmental Law*, 79 U. Colo. L. Rev. 767 (2008); Pamela King, *How a diminished* Chevron *doctrine could weaken Biden's climate law*, E&E News (Jan. 25, 2024, 1:25 PM), https://www.eenews.net/articles/how-a-diminished-chevron-doctrine-could-weaken-bidens-climate-law/; *How will the changes from the USA Supreme Court on the* Chevron *Deference case alleviate and protect the oil industry? Will we lose the clean water protections?* Quora, https://www.quora.com/How-will-the-changes-from-the-USA-Supreme-Court-on-the-Chevron-Deference-case-alleviate-and-protect-the-oil-industry-Will-we-lose-the-clean-water-protections.

13 *Chevron*, 467 U.S. at 866 (emphasis added).

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14 *Docket No. 22-451: Questions Presented*, *supra* note 3.

15 *About Us: Our Mission*, NOAA FISHERIES, https://www.fisheries.noaa.gov/about-us (last visited Apr. 23, 2024).

16 Thomas J. Grever, *The Demise of* Chevron*, or Another Red Herring?*, A.B.A. SECTION OF ENV'T, ENERGY, & RES. (Feb. 22, 2024), https://www.americanbar.org/groups/environment_energy_resources/resources/natural-resources-environment/2024-winter/the-demise-chevron-or-another-red-herring/.

17 *Id.*

18 *See generally Our Mission and What We Do*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/aboutepa/our-mission-and-what-we-do (last visited Apr. 23, 2024) ("EPA works to ensure that . . . federal laws protecting . . . the environment are administered and enforced fairly, effectively, and as Congress intended . . . . When Congress writes an environmental law, we implement it by writing regulations."); *see also* Michael B. Rappaport, *Using Delegation to Promote Deregulation*, CATO INST. (Winter 2015-2016), https://www.cato.org/regulation/winter-2015-2016/using-delegation-promote-deregulation ("[A]gencies have significant policy and political expertise . . . . Such expertise is one of the most common justifications offered for delegation.")

19 *Chevron*, 467 U.S. at 865 (The Court also discussed the EPA's ability and duty to politically balance interests in a way such that the judicial branch could not. "[T]he [EPA] Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies.").

20 *See, e.g.,* Thomas J. Grever, *supra* note 15.

21 *Id.*

22 *See, e.g., A Pair of Supreme Court Cases About Fisheries Management Could Put Important Protections at Risk*, EARTHJUSTICE (Jan. 16, 2024), https://earthjustice.org/article/loper-bright-chevron-doctrine-relentless.

23 Jason J. Czarnezki, *supra* note 11, at 771 (emphasis added).

24 *See generally* Berit DeGrandpre, *supra* note 7 (brief analysis as to why the Court overturning *Chevron* may actually not have the expected "watershed impact on environmental law" and regulations).

25 *Lee v. Gulf Oil Corp.*, 4 So.2d 868, 870 (Fla. 1941).

26 *City of St. Petersburg v. Carter*, 39 So.2d 804, 806 (Fla. 1949) (en banc).

27 *Gay v. Canada Dry Bottling Co. of Fla.*, 59 So.2d 788, 790 (Fla. 1952) (emphasis added).

28 *Skidmore v. Swift*, 323 U.S. 134, 140 (1944).

29 *Pub. Emp. Rel. Comm'n v. Dade Cnty. Police Benevolent Ass'n*, 467 So.2d 987, 989 (Fla. 1985).

30 *Doyle v. Dep't of Bus. Regul.*, 794 So.2d 686, 690 (Fla. 1st DCA 2001).

31 *See, e.g., Schoettle v. State, Dep't of Admin., Div. of Ret.*, 513 So.2d 1299, 1301 (Fla. 1st DCA 1987); *Bd. of Tr. of Northwest Fla. Cmty. Hosp. v. Dep't of Mgmt. Serv.*, 651 So.2d 170, 173 (Fla. 1st DCA 1995).

32 *See, e.g., City of Safety Harbor v. Commc'n Workers of America*, 715 So.2d 265, 267 (Fla. 1st DCA 1998); *Conservation All. of St. Lucie Cnty. Inc. v. Fla. Dep't of Env't Prot.*, 144 So.3d 622, 624 (Fla. 4th DCA 2014).

33 *See* Frank Shepherd et al., *The Demise of Agency Deference: Florida Takes the Lead*, 94 FLA. B.J. 18, 20 (2020).

34 *State Dep't of Health & Rehab. Serv. v. Framat Realty, Inc.*, 407 So.2d 238, 241 (Fla. 1st DCA 1981).

35 *Natelson v. Dep't of Ins.*, 454 So.2d 31, 32 (Fla. 1st DCA 1984) (emphasis in original).

36 *McKenzie Check Advance of Fla., LLC v. Betts*, 928 So.2d 1204, 1218 n.9 (Fla. 2006).

37 *See, e.g.,* Frank Shepherd et al., *supra* note 32, at 20-21.

38 FLA. CONST. art. V, § 21.

39 *E.g., Kanter Real Est., LLC v. Dep't of Env't Prot.*, 267 So.3d 483, 487-88 (Fla. 1st DCA 2019); *Lee Mem'l Health Sys. Gulf Coast Med. Ctr. v. Agency for Health Care Admin.*, 272

continued...

So.3d 431, 436-37 (Fla. 1st DCA 2019).

40 *See Floridians Against Increased Rates, Inc. v. Clark*, 371 So.3d 905, 910 (Fla. 2023); *Citizens of State through Fla. Off. of Pub. Counsel v. Fla. Pub. Serv. Comm'n*, 294 So.3d 961, 965 (Fla. 1st DCA 2019).

41 *Floridians Against Increased Rates*, 371 So.3d at 922 n.23, 910.

42 *Id.* at 914.

43 *Citizens of State through Fla. Off. of Pub. Counsel*, 294 So.3d at 965 (citing *Palm Coast Util. Corp. v. State*, 742 So.2d 482, 484 (Fla. 1st DCA 2019)).

44 The statistics in this section were gathered by entering the following in Westlaw's search bar: *"de novo" AND agency AND interpretation AND statute*, narrowed to show Florida courts only. From there, results were narrowed by Date for each selected time period: since the amendment's effective date ("all dates after" 01/08/2019 [as of mid-April in 2024, when this paper was written]); that same span of time before the amendment's effective date ("date range" 09/26/2013 to 01/07/2019); and the same span of time before 09/26/2013 ("date range" 06/14/2008 to 09/25/2013). From there, each result in each time period was read through for the holding and reasoning; tallies were made and categorized by Affirm/Agency Win, Reverse/Agency Loss, and Other Holding/Catch-all. That "Other" category includes non-state agencies (i.e., cities or other localities, citizen/private parties), cases considering an Administrative Law Judge's interpretation, cases regarding regulations rather than statutes, criminal cases, and other matters unrelated to state agency interpretations of statutes. Where a case was decided with more than one outcome, for example—an agency interpretation was affirmed in part and reversed in part, that was recorded as "0.5" Affirm and "0.5" Reverse; each "0.5" became essentially its own case, because each interpretation outcome was collected independently, even if two came from the same opinion.

Finally, these statistics include "bad law" because many deference cases, following the amendment, no longer comply with the current de novo standard but are inherently necessary for the analysis purpose here; therefore, if an opinion was marked as "treated negatively" or overturned on Westlaw, it was still included so long as the discussion was related to an agency's statutory interpretation.

45 *See e.g.*, Philip Hamburger, *Professor Thomas W. Merrill on the Future of the* Chevron *Doctrine*, Colum. Law School Story Archive (Jan. 11, 2024), https://www.law.columbia.edu/news/archive/professor-thomas-w-merrill-future-chevron-doctrine.

46 *See Florida Population 1900-2023*, Macrotrends, https://www.macrotrends.net/global-metrics/states/florida/population (last visited Apr. 28, 2024).

47 *See, e.g.*, Christopher J. Walker, *What* Loper Bright Enterprises v. Raimondo *Means for the Future of* Chevron *Deference*, Yale J. on Reg.: Notice & Comment Blog (June 28, 2024), https://www.yalejreg.com/nc/what-loper-bright-enterprises-v-raimondo-means-for-the-future-of-chevron-deference/ (there remains some disagreement over whether *Loper Bright* officially demands de novo review or allows some lesser form of deference).

48 *See QuickFacts: United States*, U.S. Census Bureau (July 1, 2023), https://www.census.gov/quickfacts/fact/table/US/PST045221; *QuickFacts: Florida*, U.S. Census Bureau (July 1, 2023), https://www.census.gov/quickfacts/fact/table/FL/PST045223.

49 Daniel M. Ortner, *The End of Deference: The States That Have Rejected Deference*, Yale J. on Reg.: Notice & Comment Blog (Mar. 24, 2020), https://www.yalejreg.com/nc/the-end-of-deference-the-states-that-have-rejected-deference-by-daniel-m-ortner/.

50 Martha Kinsella & Benjamin Lerude, *Judicial Deference to Agency Expertise in the States*, State Court Rep. (Oct. 26, 2023), https://statecourtreport.org/our-work/analysis-opinion/judicial-deference-agency-expertise-states.

51 Daniel M. Ortner, *supra* note 48.

52 *See* Fla. Const. art. XI, § 5(e) (proposed amendments must be approved of by at least 60% of voters in that election to pass); *Florida Amendment 6, Marsy's Law Crime Victims Rights, Judicial Retirement Age, and Judicial Interpretation of Laws and Rules Amendment (2018)*, Ballotpedia, https://ballotpedia.org/Florida_Amendment_6,_Marsy%27s_Law_Crime_Victims_Rights,_Judicial_Retirement_Age,_and_Judicial_Interpretation_of_Laws_and_Rules_Amendment_(2018) (last visited Apr. 28, 2024) (this particular amendment passed with 61.61% of citizens' votes in the 2018 election).

53 Daniel M. Ortner, *supra* note 48.

54 Frank Shepherd et al., *supra* note 32, at 20. *See also* Martha Kinsella & Benjamin Lerude, *supra* note 49; Daniel M. Ortner, *supra* note 48.

55 *See, e.g.,* Chevron *Case Imperils Environmental Protections To Benefit Big Oil*, Accountable.US (Jan. 17, 2024), https://accountable.us/chevron-case-imperils-environmental-protections-to-benefit-big-oil/.

56 *See, e.g.,* Jim Saunders, *Court clears way for drilling in Everglades*, The Fla. Times-Union (Feb. 7, 2019, 6:54 PM), https://www.jacksonville.com/story/news/2019/02/07/court-clears-way-for-drilling-in-everglades/6057158007/.

57 *Kanter Real Est., LLC*, 267 So.3d at 485.

58 Fla. Stat. § 377.241.

59 *Coastal Petroleum Co. v. Fla. Wildlife Fed'n, Inc.*, 766 So.2d 226, 228 (Fla. 1st DCA 1999).

60 *Kanter Real Est., LLC*, 267 So.3d at 488.

61 *Id.* at 490-92 ("Whether we review [DEP's] interpretation under a de novo standard, as required by [the new amendment], or with the deference required by our prior decisions, we reach the same conclusion: we reject the [DEP's] interpretation of [the statute], as it was both incorrect and clearly erroneous.").

62 *Sierra Club v. Dep't of Env't Prot.*, 357 So.3d 737 (Fla. 1st DCA 2023). *See also VICTORY: FDEP must rewrite Outstanding Florida Springs Basin Management Action Plans*, Sierra Club Fla. Chapter (Feb. 19, 2023), https://www.sierraclub.org/florida/blog/2023/02/victory-fdep-must-rewrite-outstanding-florida-springs-basin-management-action.

63 *Sierra Club*, 357 So.3d at 739.

64 *Id.* at 737.

65 Federico M. Pohls, *The Demise of Agency Deference in Florida Has Produced Mixed Results Regarding Separation of Powers and Due Process*, 48 Nova L. Rev. 120, 131 (2023).

66 269 So.3d 498, 506 (Fla. 2019).

67 *Id.* at 499.

68 Fla. Stat. § 366.8255(1)(c).

69 *Citizens*, 269 So.3d at 504.

70 *Id.*

71 *Id.* at 505.

72 *Id.* at 504.

73 Cass R. Sunstein, *Zombie* Chevron*: A Celebration*, 82 Ohio St. L. J. 565, 572 (2021).

74 *Loper Bright*, slip op. at 35.

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Most Takings Cases Are Decided On the Unique Facts of Each Case – the *Penn Central* factors

Absent a complete prohibition of any valuable use, each potential "takings" claim is judged on its own individual facts and merit. The property rights clause "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005). In *Pennsylvania Coal Co. v. Mahon*,[15] the U.S. Supreme Court ruled that regulation will be deemed a taking if it "goes too far,"[16] a finding that depends on the particular circumstances in each individual case to determine whether, in that situation, "justness and fairness require the burden to be borne by the public at large…" and not the individual landowner. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Takings cases involve the "essentially ad hoc factual inquiries" described in *Penn Central.*[17] Under this analysis, there is no "set formula" or "mathematically precise variables" for evaluating whether a regulatory taking has occurred, but instead "important guideposts" and "careful examination . . . of all the relevant circumstances."[18] The relevant factors include the "economic impact of the regulation" on the plaintiff; the extent to which the regulation "has interfered with" a landowner's "distinct investment-backed expectations"; and the "character of the governmental action."[19]

That is the legal standard, devoid of a hard and fast rule that the prohibition of construction or a substantial reduction in uses and value is a property rights violation. Takings analysis considers the entire set of circumstances, both community-wide and specific to the individual parcel of land.

A particularly relevant example for the Keys is the discussion in the *Lingle* decision indicating that stringent regulation that applies broadly, as opposed to "singling out" one or a few landowners may not be a "taking." Among its reasons for reversing a lower court's takings award was that "*Chevron* has not clearly argued—let alone established—that it has been singled out to bear any particularly severe regulatory burden."[20] In the Keys, the broad application of the development limits, and the comprehensive approach of which they are a part, supports the local governments in a takings challenge.

The Compelling Reason for the Strict Development Limits in the Keys is a Strong Factor in Defense of Property Rights lawsuits.

The more imperative the governmental interest, the farther regulation can go without being labeled a "taking". Regulations designed to prevent a public harm are less likely to be found to be a taking. For this reason, The U.S. Supreme Court has upheld land use regulations intended to prevent flooding and protect public safety. *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987).

The "character of the government action"[21]—the reasons for the strict development limits in the Keys—is a strong defense to property rights "takings" claims. The Governor and Cabinet (Administration Commission) 1995 Final Order made extensive findings about the Keys' unique and extreme vulnerability to hurricanes—a chain of islands, barely above sea level, connected to the mainland evacuation destination by a single road and multiple bridges (all prone to heavy flooding), and the great peril of being trapped on the road or at home during a dangerous hurricane.[22] The Commission found "[n]o local government in Florida faces a more unique and serious challenge to protecting its citizens from the impacts of hurricanes…",[23] and ruled: (a) "the minimum evacuation goal necessary to protect lives in the … Keys should be 24 hours;"[24] (b) "nothing greater than a 24-hour evacuation clearance time is acceptable given the geographic and infrastructure constraints;"[25] (c) "a hurricane evacuation time of more than 24 hours is not acceptable if the health, safety and welfare of the citizens and visitors . . . is the goal."[26]

The Commission ruled that the amount of development allowed by the original 1992 growth caps exceeded the evacuation capability and ecological carrying capacity. It required all Keys local governments to "limit . . . new residential development . . . provided that the hurricane evacuation clearance time does not exceed 24 hours . . . ."[27]

Also, since the 1995 Governor and Cabinet Order had also found "the nearshore waters cannot tolerate the impacts from sewage treatment and stormwater from additional development"[28] and ordered that "additional development, if any, will be limited to that amount which may be accommodated while maintaining a hurricane evacuation time of 24 hours and … meet environmental carrying capacity constraints."[29] It ruled "[i] f the infrastructure cannot handle any additional inputs and, either the capacity cannot be increased or the cost of increasing the capacity . . . is prohibitive, future development . . . must be limited or even stopped." [30]

Section 380.0552(4)(e)2., Florida Statutes, was subsequently amended to limit the amount of permanent residential development to that which can be evacuated in no more than 24 hours, and the comprehensive plans of all local governments in the Keys include that development cap.[31] As the Department of Economic Opportunity explained in a 2017 report to the Governor and Cabinet, all local governments in the Keys:

> are united by the need to maintain a hurricane evacuation clearance time of 24 hours prior to the onset of hurricane-force winds. The . . . Keys consist of a chain of islands that are connected by a narrow ribbon of U.S. Highway 1, stretching 112 miles and spanned by 19 miles of bridges. . . . Access to and from the Keys is primarily by U.S. Highway 1. Evacuation of the . . . population in advance of a hurricane strike is of paramount importance for public safety. No hurricane shelters are available . . . for Category 3-5 hurricane storm events. A system of managed growth was developed in order to ensure the ability to evacuate within the 24-hour evacuation clearance time . . . .[32]

In 2012, each local government in the Keys and the DEO entered into a Memorandum of Understanding to determine the hurricane evacuation clearance times for the Keys'

population, and "the maximum buildout capacity for the [Keys], consistent with the requirement to maintain a 24-hour evacuation clearance time and [environmental] constraints."[33] That process resulted in a determination that the maximum "buildout" of the Keys which would maintain a 24-hour hurricane evacuation time was 3550 additional residential development units. Each local government amended its comprehensive plan to cap residential development based on its proportional share of the 3550 units**.** All landowners have had notice of that cap since then.

This is the stringent regulatory regime that has applied to all undeveloped lands in the Keys for many years beginning with the Area of Critical State Concern designations in the 1970's, the *Growth Management Act* requirements of the mid-1980's, the growth caps of the early 1990's and the eventual establishment of a buildout cap in 2012. These strict rules are required by state law, applied comprehensively, and exist to protect lives during and after hurricanes. They are also necessary to protect the unique and extreme environmental fragility of the Keys, and the water quality essential to the Keys economy and way of life. These factors weigh heavily in government's favor in any "takings" analysis.

The Florida case of *Lee County v Morales*[34] is illustrative. *Morales* rejected a claim that a sharp reduction in allowable uses was a taking where the purpose of the rezoning was to preserve archaeological resources, protect the environment and adjoining aquatic preserve, and guard against the threat by hurricanes and flooding to development. The Court emphasized that the downzoning was not arbitrary but was instead based upon an expert study and legitimate environmental, public safety, and concerns related to protection of endangered species, severe erosion, and the constant state of change of the land due to storm damage.[35]

The strict development caps in the Keys are the product of extensive study and science about hurricane forecasting and evacuation, warming and rising seas and rapidly intensifying hurricanes, comprehensive water quality sampling and a $6 million ecological carrying capacity study. The public safety imperative (hurricane evacuation and structural damage to adjoining properties and persons), and the ecological carrying capacity bases for the strict development limits in the Keys are strong defenses to "takings" claims. The reality facing local governments in the Keys: the state of rising seas, more frequent and intense hurricanes, and the resulting financial liability for protecting buildings, infrastructure and people and for post-disaster relief are important considerations in any "takings" analysis. Restrictions designed to comply with statutory mandates to protect the loss of life and prevent catastrophic ecological damage are less likely to be seen as "going too far", "unjust", or "unfair." The Florida Supreme Court has ruled "[t]he degree of constitutionally protected property rights "must be determined in the light of social and economic conditions which prevail at any given time."[36]

The Court has also ruled that, in a case from the Florida Keys, that private property rights and the public interest to be balanced.[37] The conditions facing the Florida Keys–increasing evacuation challenges, rising seas, the prohibitive costs of massive infrastructure improvements, and ecological loss—will weigh heavily in their favor in a "takings" case. The growth caps exist to prevent loss of life in the face of major storms and hurricanes, the threat of which is exacerbated by global warming–induced stronger and more un-predictable hurricanes, and to protect the water quality and environmental integrity that is the very basis of the Keys economy and way of life. The paramount public purpose for these development limits, and that they are required to prevent a variety of public harms is a strong "takings" defense.

Of particular relevance in support of the Keys' growth caps is *City of Hollywood v. Hollywood, Inc.*, 432 So. 2d 1332 (Fla. 4th DCA 1983), where a city had adopted an annual cap on density based on its concerns for water and sewage capacities, fire and police protection, hurricane evacuation, ecological and environmental protection, aesthetics, and public access to the ocean. Under the cap, the number of permits to be issued was expressly based on traffic capacity because no other existing method would yield a specific number to represent the limitations that existed relative to the other factors. The Court upheld the density cap even though it found that the traffic study upon which the overall density cap was based was flawed.[38] Despite this flaw, the Court found that the growth limitation was based upon and justified by multiple valid considerations of the public interest, and not solely upon traffic considerations.[39]

The growth caps in the Keys strongly resemble the ordinance upheld in *City of Hollywood*. Moreover, the critical public safety reason for the 24-hour evacuation limit is a particularly strong governmental defense. It is not an arbitrary number plucked out of the air. It is based on the widespread understanding of the unique low-lying geographical and road infrastructure challenges of evacuating the population prior to a hurricane, the perils of being unable to evacuate, and the clear and consistent science that the landfall of a major hurricane cannot reliably be predicted.[40]

The Keys' Growth Limits Have Been Successfully Defended In Court

In addition to *Beyer v. City of Marathon*, *Dep't. of Community Affairs. v. Moorman*, and *Good v. United States*, discussed below, other judicial decisions have shown the strength of the Keys' growth restrictions to stand up in court. Monroe County's annual growth caps were upheld against a property rights challenge in *Burnham v. Monroe County*, 738 So. 2d 471, 472 (Fla. 3d DCA 1999), where the court held that the rate of growth ordinance was constitutional. The court ruled the ordinance was constitutional, "as it substantially advances the legitimate state interests of promoting water conservation, windstorm protection, energy efficiency, growth control, and habitat protection." *Id.* This was reiterated in a "takings" case—*Collins v. Monroe County*, 118 So. 3d 872 (Fla. 3d DCA 2013)—in which the County prevailed.

The *Collins* case and other decisions and analyses are explained in the excellent legal analysis provided

by Senior Assistant Monroe County Attorney Derek Howard in his December 2017 article in the Environmental and Land Use Law Section Reporter, Derek Howard, *Local Regulatory Taking Claims: Accounting for State and Federal Regulations to Minimize Liability and Damages Exposure*, ELULS Reporter Vol. XXXIV, No. 10 Dec. 2017. The article explains that a property owner must prove a "reasonable investment-backed expectation" of development that has been substantially thwarted by regulation. The principles that defeat a takings claim include "buyer beware" and "cannot sleep on one's rights." He also describes land use cases which were won by Monroe County.

Because, as reported by Mr. Howard, each case is considered on its own facts, and more takings claims fail than succeed, it should not be assumed that government compensation would have to be made for every vacant lot that is unable to receive a permit allocation, which is unlikely given the fact-specific nature of property rights legal analysis and many long-standing legal defenses to compensation claims discussed above.[41]

Those Who Purchased Land Subject to the Key's Growth Caps Have Diminished "Takings" Claims

Federal takings law[42] and Florida's *Harris Act*[43] protect a landowner's reasonable, investment-backed expectations and vested rights to use of the property. Thus, both the increasing general public awareness of the hurricane evacuation limitations facing the Keys, the growing impacts of sea level rise,[44] and the combination thereof, will tend to support the Keys' growth restrictions in response to "takings" claims.

When determining the reasonableness of a landowner's investment-backed expectations, courts consider, among other things, whether a discounted price indicated prior knowledge of a potential limitation to use or develop, and the overall riskiness of the investment. *Palazzolo v. Rhode Island.*[45] *Palazzolo* ruled that acquiring a property *after* a regulation had taken effect is a particularly relevant consideration.[46] Similarly, in *Abrahim-Youri v. United States,* 36 Fed. Cl. 482 (1996) the Federal Court of Claims wrote that:

> In assessing the reasonableness of investment-backed expectations, the question ... is whether plaintiffs reasonably could have anticipated that their property interests might be adversely affected by Government action. Where such intrusion is foreseeable, the commitment of private resources to the creation of property interests is deemed to have been undertaken with that risk in mind; hence, the call for just compensation on grounds of fairness and justice is considerably diminished.[47]

Landowners who purchased their land after the rate of growth restrictions will likely be viewed as possessing reduced reasonable investment-backed expectations. The purchase of property with existing zoning restrictions will likely preclude a takings claim when those restrictions prevent development; owners are deemed to acquire their land subject to existing regulations. In *Namon v DER*, 558 So. 2d 504 (Fla. 3d DCA 1990), the Court rejected a takings' claim where the owner, when he bought the land, had constructive knowledge of the need to secure a state wetland permit prior to development. Even though no construction or economic use could be made of the property, there was no taking when the owner was validly denied a permit when he had constructive knowledge that he might not qualify for a permit when he chose to buy the land:

> A person who purchases land with notice of statutory impediments to the right to develop that land can justify few, if any, legitimate investment-backed expectations of development rights which rise to the level of constitutionally protected property rights." . . . One who purchases property while it is in a certain known zoning classification, ordinarily will not be heard to claim as a hardship a factor or factors which existed at the time he acquired the property.

Namon is a strong defense to "takings" claims based on regulatory decisions in effect at the time the property is purchased.

Thus, in the Keys, among the key facts that would distinguish some vacant lot claims from others is whether the property was acquired before or after the enactment of the growth caps in 1992. The well-known strict regulatory regime that governs development in the Keys may preclude many owners from succeeding in a takings suit, particularly those who purchased their land after the 1992 adoption of the rate of growth limits.

Pre-Growth Cap Purchasers Also Are Not Immune From New Regulations

Landowners who bought their parcels prior to the enactment of the building permit caps are not necessarily due compensation as a result of strict regulation enacted after their purchase. Courts recognize the ability, indeed the responsibility, of government to respond to new information and science by changing regulations to respond accordingly. Landowners cannot hold vacant land for long periods of time while regulation increases in response to changed conditions and then expect courts to hold harmless from those regulations. Among the clearest cases on this point are judicial decisions involving development restrictions in the Keys.

In *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999), cert. denied, 529 U.S. 1053 (2000), a federal court of appeals rejected a 'takings' claim against the U.S. Army Corps of Engineers, which had denied a landowner permission to dredge and fill on land he owns in the Florida Keys.

The owner began seeking approvals to fill 7.4 acres of salt marsh and excavate 5.4 acres of salt marsh to create a 54-lot subdivision and a 48-slip marina. By 1984, the owner had secured federal, state and local permits needed to fill the wetlands. However, under the Florida Keys *Areas of Critical State Concern* process, the Department of Community Affairs (now Florida Commerce), ruled that the County's permit review had been flawed and required a re-analysis. By that time, the county's new comprehensive plan and development regulations prohibited the filling sought by the owner.[48]

By 1989, permits had been secured from all relevant agencies except the South Florida Water Management District. When District staff recommended the denial of that permit, the owner withdrew his application. His 1990 revised permit application to the Corps of Engineers under the Clean Water Act reduced the size of the proposed housing development, and requested authorization to fill 10.17 acres of wetlands. By then however, the Lower Keys marsh rabbit was listed as an endangered species under the Endangered Species Act, and, during the "consultation" process, the U.S. Fish and Wildlife Service ultimately recommended that the Corps deny the permit because the development would "jeopardize" the continued existence of both the Lower Keys marsh rabbit and the silver rice rat unless all homesites were built in uplands and water access was limited to a single communal dock. The Corps denied the permit.[49]

The landowner brought a property rights suit against the Corps., which the federal district and then appellate court rejected due to the owner's lack of constitutionally protected investment -backed expectations. The Court explained:

> The requirement of investment-backed expectations 'limits recovery to owners who can demonstrate that they bought their property in reliance on the non-existence of the challenged regulation.' Creppel, 41 F.3d at 632. These expectations must be reasonable. See Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005-1006, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984).[50]

The Court next rejected the owner's claim that his protected investment backed expectations had been taken on the theory that the Endangered Species Act had been adopted and federal wetland and local development restrictions had increased only after he purchased the property. These changes did not constitute a taking because, when the Plaintiff bought the land, he:

> had both constructive and actual knowledge that either state or federal regulations could ultimately prevent him from building on the property. Despite his knowledge of the difficult regulatory path ahead, Appellant took no steps to obtain the required regulatory approval for seven years.[51]

Thus, wrote Court, "rising environmental awareness translated into ever-tightening land use regulations. Surely Appellant was not oblivious to this trend."[52] In language that may be very important to the defense of takings claims in the Keys, the Court found it important that the owner had waited seven years, "watching as the applicable regulations got more stringent, before taking any steps to obtain the required approval."[53] The Court ruled that:

> While Appellant's prolonged inaction does not bar his takings claim, it reduces his ability to fairly claim surprise when his permit application was denied. Appellant was aware at the time of purchase of the need for regulatory approval to develop his land. He must also be presumed to have been aware of the greater general concern for environmental matters during the period of 1973 to 1980.[54]

The owner, wrote the Court, "must have been aware that the standards and conditions governing the issuance of permits could change," adding that, "[i]n light of the growing consciousness of and sensitivity toward environmental issues, [the owner] must also have been aware that standards could change to his detriment, and that regulatory approval could become harder to get."[55]

> The *Good* decision has important implications that tend to limit the extent of takings liability in the Keys. As explained by a subsequent decision by the same Court, *Palm Beach Isles Associates v. U.S,* while Good does not preclude a takings claim by a purchaser of heavily – regulated land, it does limit the amount of damages to which that owner may be entitled if a court finds that regulations does preclude all economically viable use of the property:
>
> The purchaser may have had no particular expectations regarding immediate use, but only purchased for long-term investment. Or the purchaser's expectations may have been wholly unrealistic, and she may have paid more than the property is worth. It matters not. The Government is not obligated to pay for her expectations, but only to pay for the property interest taken. The Government's cost for the taking — the just compensation the Constitution imposes — is measured by the fair market value of the parcel, not the owner's hopes regarding its use.[56]

The *Palm Beach Isles Associates* decision reiterated that the issue of pervasive use restrictions is a relevant factor in determining whether a categorical taking (all economically viable use precluded) has occurred, but plays an even larger role in the question of the extent of the "just compensation" due an owner in such situations:

> Once a taking has been found, the use restrictions on the property are one of the factors that are taken into account in determining damages due the owner.[57]

Next, in 2016 the US Supreme Court declined to review, and thus let stand, *Beyer v. City of Marathon*, 197 So. 3d 563 (Fla. 3d DCA 2016), which ruled in favor of Marathon in a takings case. In *Beyer*, the owner purchased an undeveloped nine-acre offshore island (Bamboo Key) in 1970, when it was under the jurisdiction of the County and zoned for General Use, which allowed one home per acre. In 1986, a zoning change to Cons. Offshore Island reduced the allowable density to one unit per 10 acres. In 1996, the County Plan was adopted and identified the island as a bird rookery and prohibited any development**.** The Beyers submitted a beneficial use application in 1997 but the County had taken no action by 1999 when Marathon incorporated. After a Beneficial Use hearing, a Special Master found the only allowable use of the property was camping, and that the assignment of points in the competitive scoring system used to determine the issuance of the quarterly allocation of development permits constituted

reasonable economic use—creating a total value of $150,000. The Special Master found the owners' inactivity over 35 years, despite increasingly strict land use regulations, precluded any reasonable expectation of greater development value. [58]

The owner sued Marathon for a taking and lost. The Court ruled that the existence or extent of Beyers' investment-backed expectations to develop Bamboo Key was a fact-intensive question, and that there was no evidence that the Beyers "had any specific plan for developing, dating from time of purchase in 1970, up to the present." It ruled that if the owners did not start development prior to the land use regulations, "they acted at their own peril in relying on the absence of zoning ordinances" and that a "subjective expectation that land can be developed is no more than an expectancy—does not translate into a vested right to develop the property."[59]

The lack of legally protected, investment-backed expectations resulted in a successful defense of a takings case by Monroe County in *Collins v. Monroe County*, *supra*, which emphasized that government is not required to compensate owners for land which remained undeveloped for many years, while regulation increased in response to government responsibilities to protect the public:

> While the Landowners own properties on distinct areas of the . . . Keys, there appears to be one underlying commonality among them: with [one] exception . . . the Landowners did not take meaningful steps toward the development of their respective properties, or seek building permits, during their sometimes decades-long possession of their properties. . . . 'Monroe County was designated an area of critical state concern in 1979, but the first land use regulations were not enacted until 1986. If the . . . owners did not start development prior to the enactment of these land regulations, they acted at their own peril in relying on the absence of zoning ordinances.' . . The . . . owner in *Galleon Bay* serves as a suitable contrast to the Landowners in the instant case. In *Galleon Bay*, the . . . owner, over the course of several decades, proceeded with numerous efforts to improve its land including, but not limited to, having its subdivision platted, having the zoning district changed, extensively negotiating with the County, and revising its plat. . . . Here, there was a noticeable lack of meaningful efforts by the . . . owners to explore the possible development options where . . . they became aware that building permits could be made available to them . . . .[60]

As held in *Monroe County, v. Ambrose*,[61] where the County, several municipalities and the state successfully defended a vested rights claim: "It would be unconscionable to allow the Landowners to ignore evolving and existing land use regulations under circumstances when they have not taken any steps in furtherance of developing their land."[62]

A recent case that rejected a federal constitutional "takings" claim on this basis is *Smyth v. Conservation Commission of Falmouth*.[63] In *Smyth* the Plaintiff owned an unimproved lot which had been purchased in 1975 for $49,000 with the intent to build a retirement home. The first steps ever taken to develop the lot occurred in 2006, but the development plans for a single-family house did not comply with the current development standards for wetlands and storm water. Without the ability to construct the house, the value of the lot was $60,000 due to the ability to use if for recreational uses. The value the lot would have been ~$700,000 if the home could be built.

Applying the *Penn Central* test to determine liability, the court found no taking because (a) the $60,000 value as regulated exceeded the $49,000 purchase price; (b) the opportunity to developed the property had existing for over 30 years before the plaintiff first sought to build; and (c) the regulations at issue applied generally to all wetland property in the town.

Given these rulings, the argument by Keys landowners that the limited growth ordinances existing at their time of purchase contemplated that a permit allocation or purchase offer would be issued after four unsuccessful applications will not necessarily support a takings claim for the full market value of the affected parcel. This is particularly true given the public awareness that a maximum "build-out" number of over 3,500 allocations had been identified in 2013.

Landowners have also witnessed a steady increase in environmental and hurricane- related development restrictions starting with the Area of Critical State Concern designations in the 1970, the significantly increased restrictions resulting from the 1985 Growth Management Act, the development caps in the early 1990s and the establishment of a final "build-out" development allocation in 2012. At the same time, the local governments and the state have expanded and maintained opportunities for owners to realize value from their land in the form of land acquisition programs, lot aggregation and donation incentives to increase the likelihood of securing a development permit, and transferrable development rights programs. Given these facts, a Keys landowner that took no concrete steps to apply for development approvals or avail themselves of those other options would bear a strong burden to convince a court that justice and fairness require a ruling that government has "taken" their property. This is particularly true given the unique, severe and paramount public safety other reasons for the strict regulatory regime in the Keys.

Single Ownership of Multiple Lots Reduces "Takings" Liability

Another key aspect of property rights law that can reduce, perhaps substantially, the "takings" liability of Keys' local governments is the judicial approval of lot aggregation/combination requirements.

The regulatory approach of aggregating lots to allow only minimal reasonable development on one of several adjoining lots received strong judicial endorsement in 2017 when the US Supreme Court ruled that lot merger requirements did not violate the private property rights of a family that was allowed to build only one house on two adjoining lots. In

Murr v. Wisconsin, 137 S. Ct. 1933 (US 2017), the Court observed that a central dynamic of property rights law is its flexibility to reconcile the individual's right to private property with government's power to adjust rights for the public good.[64]

The decision strongly supports the practice of treating multiple subdivided adjoining lots as one parcel to determine whether the owner has been allowed a reasonable economic use of the "property as a whole." The Court recognized that strict regulation can have positive impacts on the value of heavily regulated property by increasing privacy and recreational space or preserving surrounding natural beauty.[65] It explained that: "[I]f the landowner's other property is adjacent to the [Landowner's] lot, the market value of the properties may well increase if their combination enables the expansion of a structure, or if development restraints for one part of the parcel protect the unobstructed skyline views of another part."[66]

The Court also made clear that lot aggregation requirements are more likely to be upheld when enacted to protect highly sensitive and regulated resources. The factors to be considered are: "[T]he physical relationship of any distinguishable tracts, the parcel's topography, and the surrounding human and ecological environment. In particular, it may be relevant that the property is located in an area that is subject to, or is likely to become subject to, environmental or other regulations." [67]

"The land's location along the river is also significant. Petitioners could have anticipated public regulation might affect their enjoyment of their property, as the Lower St. Croix was a regulated area under federal, state, and local law long before petitioners possessed the land."[68] *Murr* reiterated the rule that knowledge of restrictions in place at the time of purchase weighs strongly against, although it does not preclude, a "takings" claim.[69]

In reasoning clearly applicable to the Keys, the Court upheld the regulation, finding it to be "reasonable . . . enacted as part of a coordinated federal, state, and local effort to preserve the river and surrounding land." The Court wrote: "Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit."[70]

Murr enunciates a particularly strong defense available to the state and local governments in the Keys, where lot aggregation and a highly restrictive regulatory regime designed to preserve a unique and fragile coastal ecosystem and way of life are key facts in a 'takings' case. The Florida Keys, where widespread listed species habitat exists, and which are designated as an Area of Critical State Concern under Florida law and a National Marine Sanctuary under federal law, are particularly suited to fall under a *Murr* takings analysis.

Third-Party Liability Defense

To determine the extent of a local government's potential takings liability, it is also important to know whether a parcel is undevelopable for environmental or other reasons; for example, the inability to acquire a federal wetland permit not attributable to the local regulation.[71]

In much the same vein as the U.S. Supreme Court's *Murr decision* and the federal court decision in the *Good* case, the fact that the Keys' growth caps are required by state law, and the strict state and federal regulations that apply independent of local restrictions to proposed development in the Keys is a significant factor both in reducing local government share of liability and in determining the real fair market value of undevelopable parcels. The totality of all regulations that reduce the ability to develop environmentally sensitive lands will tend to reduce the true fair market value of land which cannot receive a permit allocation, thus reducing the compensation value even if a taking is found to have occurred.[72]

The Nuisance Defense to Takings Claims

The potential for loss of life and limb, and physical harm to the other property, and the prevention of unsafe evacuation times that the Key's growth limits are designed to prevent may be a defense to takings claims. This is especially true given the clear projections of sea level rise and regular flooding that render proposed new development very unsafe in many locations in the Keys.

In *Lucas v. South Carolina Coastal Council,*[73], the U.S. Supreme Court held that a state regulation that deprives land of all economically beneficial use will *not require* compensation to the landowner "only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[74] In other words, unless "background principles" of state property law, for example, nuisance law, bar the owner's intended land use, a regulation that deprives that owner of all "economically viable use" is a taking.[75]

Transferrable Development Rights as Preventing a Taking

A transferable development rights program ("TDR") is a market tool local governments can use to completely preserve certain lands by allowing a landowner in a targeted preserve area to sell and "send" development rights to an owner of land where development is deemed appropriate. The owner of the land to be preserved is "compensated," and thus has not had their land "taken" if there is a reasonable market for the development rights to be sold. That market can generally be made to exist however, only if density/intensity, increases on targeted development lands are not allowed through the usual mechanisms of comprehensive planning or zoning increases, and thus require the acquisition of development rights from another landowner. Put another way, TDRs "allow an owner to exercise his right to build, elsewhere."[76]

Transferable development rights can be a particularly effective way to completely prohibit construction in vulnerable areas without violating private property rights. Courts have ruled that a well-designed "TDR" program adequately protects property rights.[77] Because TDRs have economic value, granting them can avoid a "taking" by retaining economic value for the owner.[78]

To be effective, such programs require an effective identification of an adequate number of "sender" and "receiving" sites, and the political will and discipline to require purchase of a TDR as a condition of achieving optimal development rights in targeted areas, to ensure that TDRs have real

market value. The highest density and intensity ranges potentially allowed in targeted areas should be strictly prohibited unless accomplished through the purchase of these TDRs. Those targeted areas, in turn should be those that are clearly outside of any current or projected vulnerable or environmentally sensitive areas. In other words, local governments in the Keys should not grant any "up-plannings" or "up-zonings" for any land without requiring the applicant to purchase a TDR from another landowner whose property is undevelopable. Only in this way can TDRs truly have real market value.

There is a recent, and potentially concerning, judicial decision by Florida's Third District Court of Appeal on the issue of "takings" and TDRs that remains on appeal. In 2023, that court issued a decision–contrary to almost a century of private property rights decisions–holding that the availability of TDR's in the Keys do not give value to regulated property, and thus do not act as a defense to takings claims. *Shands v. City of Marathon*, WL 3214154 (Fla. 3d DCA 2023). A motion for rehearing by the City of Marathon remains pending without a ruling. Many legal experts in the field see this decision as an outlier and great departure from precedent and a reasonable chance exists that the decision may be modified or reversed. Surely the Court's decision on the pending rehearing motion and / or any subsequent review by the Florida Supreme Court has major implications for the role of TDRs as a defense to property rights claims.

Florida's *Harris Act*

Since its enactment in the 1995, Florida's *Harris Act* has been mentioned frequently by lawyers for landowners and even some local officials as an impediment to strict regulation. That claim relies on the fact that the *Harris Act* "provides a cause of action for governmental actions that may not rise to the level of a taking under the State Constitution or the United States Constitution." § 70.001(9), Fla. Stat.

But the *Harris Act* only applies to new regulations enacted after its adoption in 1995, establishes a high bar for the granting of compensation, and provides a safety valve mechanism for government in the rare cases where regulations subject to the Act "inordinately burden" an individual property owner. These are significant limitations on the ability of landowners in the Keys to force the taxpayers to compensate them for the inability to build under the growth caps.

The growth caps are generally not subject to the Harris Act, because they were enacted prior to its adoption.

The *Harris Act* only applies "when a new law, rule, regulation, or ordinance … unfairly affects real property." § 70.001(1), Fla. Stat. It does not apply to the application of any law, rule, or ordinance adopted, or formally noticed for adoption, *on or before May 11, 1995. Id.* at (12). It applies to a subsequent amendment to any such law, rule, regulation, or ordinance only to the extent that the regulatory chance imposes an inordinate burden apart from the pre-existing law, rule or ordinance being amended. *Id.* Because the growth caps were enacted in 1992, they cannot be challenged under the *Harris Act*. This is a very broad limitation on any liability local governments in the Key might have under the *Act*.

Another important limitation on the applicability of the Act to the Keys is the exclusion from liability for "any actions taken by a county with respect to the adoption of a Federal Emergency Management Agency Flood Insurance Rate Map issued for the purpose of participating in the National Flood Insurance Program. *Id.* at (1)(b). Properties that are unable to be built upon due to their flood - prone character may be unable to invoke the Act for that reason.

Even if the Harris Act could apply to the permit caps (for example if a change to the point scoring system adopted after May 11, 1995, was the difference between receiving a building permit allocation or being denied such an allocation) that change would itself have to constitute an "inordinate burden". In all cases, that standard is an exacting one.

Under the Harris Act, landowners have the burden of proving they have suffered an "inordinate burden"—an exacting standard.

The "takings" standard under the *Act* is a difficult one to prove. The "Harris" Act entitles landowners to compensation only where they can prove that a regulation "has inordinately burdened an existing use of real property or a vested right to a specific use of real property . . . ." *Id.* at (2).

The existence of a "vested right" is to be determined by applying the principles of equitable estoppel or substantive due process under the common law or by applying the statutory law of this state. *Id.* at (3)(a). The term "existing use" means:

> 1. An actual, present use or activity on the real property, including periods of inactivity which are normally associated with, or are incidental to, the nature or type of use; or
>
> 2. Activity or such reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property.

Id. at (3)(b).

A landowner who can prove the existence of such a vested right or use, must then also prove that government has "inordinately burdened" that use. The terms "inordinate burden" and "inordinately burdened" mean:

> an action . . . [which] has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large.
>
> *Id.* at (3)(e)(1).

This is very similar to the ultimate standard courts have consistently applied to "takings" claims brought under the Florida or the US Constitution. It does not appreciably lower the threshold for government liability. The same defenses available to a local government defending a constitutional property rights claim are available when defending a *Harris Act* claim.

Moreover, the *Harris Act* requires a landowner to specifically document the evidence of an alleged inordinate burden" with "a bona fide, valid appraisal that supports the claim and demonstrates the loss in fair market value to the real property." *Id.* at (4)(a).

Just like in Constitutional "takings" claims, the constructive knowledge of pre-existing plans and ordinances when an owner purchases their land is a strong limitation, although not a prohibition, on the use of the *Harris Act* to seek compensation of the denial of development approval.[79]

In addition, landowners must strongly consider the merit of the claim before suing a local government under the Act. If a landowner sues an agency under the *Act* and ultimately fails to prove that the challenged regulation constitutes an inordinate burden, the owner must pay the local government's attorney fees. Id. at (6)(c)(2).

Successful *Harris Act* claims are rare, and appellate courts have regularly overturned trial court decisions that had found a *Harris Act* violation.[80] A valid *Harris Act* violation requires actions by the local government that clearly trample a landowner's vested rights. In *Ocean Concrete, Inc. v. Indian River Cty., Bd. of Cty. Comm'rs*, 241 So. 3d 181, 183 (Fla. 4th DCA 2018), the court affirmed a final judgment under the Act in favor of a landowner who had purchased a parcel of land to build a concrete batch plant only after meeting with county staff to confirm that the plant was permitted by the county code. After the owner filed multiple applications, acquired several permits, installed wells, cleared and graded the property, planted a landscape buffer, and began to install a rail spur and made other substantial expenditures in reliance on the zoning code, the County acceded to public opposition to the project and amended the code to prohibit the plant. Unsurprisingly, the Court found this to be the type of retroactive, "unfair" preclusion of a "reasonable, investment-backed expectation for the existing use" of land the Act prohibits.

Even if a local regulation were subject to the Act, and an owner has a valid claim that it inordinately burdens his or her property, the owner is entitled only to some relief—not necessarily compensation.

Even in those rare situations where a landowner could prove that the development cap or other land use or environmental restriction in the Keys is an inordinate burden, owner "is entitled to relief, which may include compensation for the actual loss to the fair market value . . . ." § 70.001(2), Fla. Stat. The law is intended to provide relief to owners who suffer inordinate burdens—not to require the taxpayers to buy their land at fair market value. The law is set up to give landowners the opportunity to present a valid claim to the government and authorize the agency to grant a variance or other relief from the burdensome restriction. The owner cannot bring suit under the Act unless it has first given the agency formal notice of its claim and the opportunity to either grant a variance or purchase the property.

At least 150 days prior to filing an action, the owner must present the claim, and the supporting evidence, in writing to agency. *Id.* at (4)(a). During the notice, the governmental entity then makes a written settlement offer of its choosing from any of the following options, which the Act authorizes it to effectuate:

1. An adjustment of development or permit standards.

2. Increases or modifications in the density, intensity, or use of areas of development.

3. The transfer of developmental rights.

4. Land swaps or exchanges.

5. Mitigation, including payments in lieu of onsite mitigation.

6. Location on the least sensitive portion of the property.

7. Conditioning the amount of development or use permitted.

8. A requirement that issues be addressed on a more comprehensive basis than a single

proposed use or development.

9. Issuance of the development order, a variance, special exception, or other extraordinary

relief.

10. Purchase of the real property, or an interest therein, by an appropriate governmental entity or payment of compensation.

Id. at (4)(c).[81]

While several of these options would not be available if the property is inordinately burdened as a building permit allocation limits, in all cases, the ability exists to grant a waiver or to purchase the land (or coordinate with other local, state or federal agencies to do so) to avoid liability and a compensation judgment. *Id.* at (4)(d).

If the owner rejects the settlement offer, in any suit the owner would bring under the Act, the court will consider the settlement offer and statement of allowable uses when determining whether the agency inordinately burdened the property. *Id.* at (6)(a).

The key implication of this procedure is that local governments need not anticipatorily loosen necessary valid restrictions out of fear of *Harris Act* liability. They can do so only on a case-by-case basis, where a specific landowner, based on specific circumstances, has proven that they would otherwise suffer the type of unfair burden the Act was enacted to prevent.

The *Harris Act's* emphasizes requiring proof of, and creates the opportunity to avoid, a *bona fide* claim prior to the filing of a lawsuit. No liability accrues to the agency prior to its staff and lawyers having the full opportunity to assess the actual evidence supporting a claim and advise the agency on how to proceed. Local governments need not loosen their rules across the board based on a generalized theoretical or threatened

potential for a claim, but should, as stewards of the public trust, maximize the substantive and procedural defenses available to them under the Act.

Moratoria

As current building permit allocations dwindle at the same time that water quality remains impaired, habitat continues to be lost and degraded and public infrastructure limitations become more apparent a moratorium on increases in building permit allocations would be a valid action at this time. The land use planning issues facing the Keys are complex and at a critical moment in time. Local and state leaders have important fact-gathering and analysis tasks ahead of them, and changes to comprehensive plans and land development code are probably necessary to effectuate the next phase of planning in the Keys. A moratorium on the issuance of new building permits, reasonable in duration, and supported by a rational, articulated plan for making the necessary revision, would be a smart and valid action that would not constitute a taking. The case for a moratorium is particularly strong at this point given the very recent experiences with Hurricane Helene and Hurricane Milton, which intensified more rapidly than any storm ever has before. That Hurricane Helene intensified, unpredictably, from a Tropical Storm to a Category 5 Hurricane in eighteen hours is a sobering reminder of the great risk being taken by allowing an increase in residential development in the Keys that depends upon the ability to get a sizeable portion of the evacuating public "out early". The state of Florida and the Keys' local governments must strongly consider the adoption of a reasonable moratorium to analyze the evacuation realities and capabilities and the planning, regulatory, land acquisition and public facility improvements needed to ensure public health and safety and the ecological health of the Keys are not compromised by an increase in residential development allocations.

Local governments concerned that new development requests and approvals in the interim between initiating and completing any newly-initiated process to amend its land use and development standards to incorporate climate and se level rise issues could grandfather the approved structures out from compliance with the new standards could enact a moratorium.

If a local government needs to maintain the status quo during the pendency or implementation of a study, including the adoption of substantial changes to a comprehensive plan or land development code, it may enact temporary moratoria for a reasonable time period as needed to serve a legitimate governmental purpose. *Penn Central*, 438 US. 104. As long as there is a rational nexus between the moratorium and the legitimate purpose to be served by the policies and regulations to be developed during the interim period, a temporary moratorium is not a taking.

In *TahoeSierra Pres. Council, Inc. v. Tahoe Regional Planning Agency,*[82] the U.S. Supreme Court rejected a takings claim against a 32month moratorium on development while a preservation plan for Lake Tahoe was being implemented. In *Moviematic Industries Corp. v. Board of County Commissioners of Metropolitan Dade County,*[83] the county imposed a building moratorium for the purpose of conducting and preparing a comprehensive study directed to the protection of the fresh water supply and the natural ecosystems in that part of the county. The court upheld the moratorium, holding that protection of drinking water supplies and ecological systems are legitimate objectives of zoning resolutions and ordinances. At least one commentator has observed: "The typical land use regulation, even where it drastically interferes with use of property for a period of two or three years or revokes an existing use, is unlikely to be held to constitute a regulatory taking".[84]

Another Florida case, *WCI Communities, Inc. v. City of Coral Springs*,[85] upheld a nine month moratorium on the processing of multi-family development applications. The case does not at all set nine months as the limit on moratoria. The standard is a sliding scale, with the reasonableness of the moratoria's length dependent upon the scale of work that must be done to determine, plan, and effectuate regulatory changes.

Requiring Any New Development to Pay For Itself

In *Koontz v. St. John's River Management District,*[86] the US Supreme Court ruled that "[i]nsisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack." This statement supports the strictest land use and environmental regulations that tolerate zero adverse offsite impacts outside the boundaries of an individual landowner's property. Allowances beyond that are gratuitous policy decisions made at the expense of the public at large.

This rule also applies to support exactions of funding or land to offset the public impacts of private development. An exaction is a condition requiring a landowner to convey a property interest in exchange for regulatory approval. Exactions must have an essential nexus to the impact of the proposed development on the public,[87] and the extent of the exaction must be roughly proportional to the impact.[88] In *Nollan v. California Coastal Comm'n,*[89] the U.S. Supreme Court established the rule that land use exactions must have an "essential nexus" to the impact or burden to the public expected to result from the development approval. In *Dolan v. City of Tigard*,[90] the Court ruled that exactions demanded as conditions for development permits must be "roughly proportional" to the impact caused by the new development. Together, these decisions "involve a special application of the 'doctrine of unconstitutional conditions,' which provides that 'the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property."[91]

This point of emphasis by the Supreme Court has particular resonance in the area of fiscal and budgetary subsidy of private enterprise. Policy choices that "there will be no forced retreat"[92] do "not necessarily mean that there will always be government help for shore protection."[93]

Local governments like those in the Keys that face monumental costs resulting from sea level rise or climate-change impacts will of necessity need to ensure that public budgets are not subsidizing an expansion of future budgetary needs by putting more private and public infrastructure at risk. Requiring developers to pay the entire cost of their share of infrastructure needs is a fiscally sound policy decision.

To that end, local governments should calculate and impose impact fees to cover the costs of capital improvements needed to protect coastal infrastructure in vulnerable areas. Funds could be used for maintenance of infrastructure required to serve existing development, where such infrastructure would not be located within an area where sea level rise is projected to compromise the safe and effective the function of the infrastructure.

Conclusion

Local governments enjoy much greater ability and responsibility under both constitutional and statutory property rights doctrines to protect the public than is commonly understood. The law of property rights is a nuanced body of law to be applied carefully in individual situations to prevent unfair and overly burdensome applications of regulation to individual landowners–not a broad, categorical yoke of financial liability for all strict regulation. The defenses available to local and state agencies in the Florida Keys are particularly strong relative to both liability and compensatory damages. No community in the country has a stronger set of defenses to takings' claims than those in the Keys, where the development caps are necessary not only to protect the function of a coastal ecosystem that is the very basis of the economy and unique character of the Keys, but also to protect human life itself.

Takings law does not diminish the responsibility and ability to enact and maintain the land use regulations necessary to protect the public from the fiscal, social, safety, ecological and other impacts of the development of private property. Nor does it insulate landowners from the application of laws that apply fairly and evenly to similarly situated landowners in a highly regulated, ecologically fragile, infrastructure–limited and hurricane and sea-level-rise-prone chain of low-lying islands.

An understanding of the flexibility and nuance involved in property rights jurisprudence counsels strongly against assuming that the local governments in the Keys will be required to pay takings judgments for every vacant lot that ultimately cannot be built upon because of the growth caps. Given the strength of the law on the side of the government's interests, the true extent of property rights liability, and the reasonably expected compensation amounts is likely to be far lower than many assume. The number of vacant lots, how many of them are owned by the same entity (or were, prior to the enactment of rate of growth restrictions), when they were purchased (and for what price), the current value as regulated, the natural and environmental character of the land, and other unique facts about each situation must be known before it can be assumed compensation would be due for the inability to build on the lot. There are also likely a significant number of vacant lots in the Keys that could not develop as a result of federal or state regulatory restrictions, even if they could be developed under local government comprehensive plans and codes. Local government takings liability would be reduced to that extent as well.

Endnotes

1 Richard Grosso is a public interest environmental and land use lawyer, dedicated to advising, advocating and litigating on behalf of clients seeking to use the law to promote and protect the public interest in preserving our natural resources, communities, and plant.

2 The Florida Keys Area of Critical State Concern includes Monroe County and the municipalities of Marathon, Islamorada, Key Colony beach and Layton. § 380.0552, Fla. Stat. The City of Key West is designated as its own Area of Critical State Concern. Because its residents share an evacuation route with everyone else in the Keys, the state also required a binding policy in the Key West Comprehensive Plan that "the City shall manage the rate of growth in order to maintain an evacuation clearance time of 24 hours for permanent residents." See City of Key West Comprehensive Plan, Objective 1-1.16.

3 *See also* Fla. Admin. Code R. 28-20.140.

4 The agency is now FloridaCommerce.

5 DEO 2017 Annual Report, p. 3.

6 The annual allocation has been approximately 350 residential building permits per year for all 5 local governments combined.

7 *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, at 1015, 112 S. Ct. 2886, 120 L.Ed.2d 798 (1992) (establishing a categorical rule that a 100 percent reduction in economic value of land is a "per se taking"). *See also*, *Agins v. City of Tiburon,* 447 U.S. 255, 261, 100 S. Ct. 2138, 65 L.Ed.2d 106 (1980); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

8 Citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), at 1019.

9 *Id.* at 1019, n. 8.

10 *Lucas*, 505 U.S. at 1019–20, n. 8.

11 *Palazzolo v. Rhode Island,* 533 U.S. 606, 630–631, 121 S. Ct. 2448, 150 L.Ed.2d 592 (2001).

12 *Id.* at 631, 121 S. Ct. 2448 (quoting *Lucas, supra* at 1019, 112 S. Ct. 2886).

13 *Id.* at 616, 631, 121 S. Ct. 2448.

14 *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922))

15 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922).

16 126 U.S. at 415. (emphasis added).

17 See *Lingle, supra; Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, supra* at 321–326, 335–336, 122 S. Ct. 1465 (2002).

18 See *Palazzolo, supra* at 633, 634, 636, 121 S. Ct. 2448 (O'Connor, J., concurring).

19 *Lingle, supra* at 2081–2082, quoting *Penn Central, supra* at 124. See *Tahoe–Sierra Preservation Council, Inc., supra* at 320, 122 S. Ct. 1465; *Leonard v. Brimfield,* 423 Mass. 152, 154, 666 N.E.2d 1300, cert. denied, 519 U.S. 1028, 117 S. Ct. 582, 136 L.Ed.2d 513 (1996)

20 544 U.S. 528, at 544.

21 *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

22 *DCA v. Monroe County*, 1995 Fla. ENV LEXIS 129; **95 ER FALR 148 (Admin. Comm., Dec. 12, 1995).**

23 *Id.* at *293 ¶*777 (emphasis added).*

24 *Id.* at *461 ¶*1349.*

25 *Id.* at *43-44.

26 *Id.* **at *321.**

27 *Id.* at *74.

28 *DCA, et. al. v. Monroe County,* *204, ¶407. (**e**mphasis added)

29 *DCA, et. al. v. Monroe County,* p. 309, ¶*930.*

30 *DCA, et. al. v. Monroe County,* p. 138,¶930) (emphasis added).

31 Section 163.3178, Fla. Stat., which also applies to the comprehensive plans in the Keys, requires that comprehensive plans "protect human life … in areas that are subject to destruction by natural disaster" and "protect[] human life against the effects of natural disaster, including population evacuation…." §163.3178 (1), and (1) d., Fla. Stat.

32 DEO 2017 Annual Report, p. 3. (emphasis added).

33 July 2012 Memorandum of Understanding.

34 *Lee County v Morales*, 557 So.2d 652 (Fla. 2nd DCA 1990).

35 *Id.* at 653 – 656.

36 *Dept. of Agric. & Consumer Servs. v. Mid-Florida Growers, Inc.*, 521 So.2d 101,103 (Fla. 1988).

37 *Dep't. of Comm. Affairs. v. Moorman*, 664 So. 2d 930, 933 (Fla. 1995) ("Landowners do not have an untrammeled right to use their property regardless of the legitimate environmental interests of the State.)

38 *Id.* at 1334.

39 *Id.* 1334 -1336.

40 As stated in the DEO 2017 Area of Critical State Concern Annual Report, at 3 & 4 of 11, "[t]he . . . Keys consist of a chain of islands that are connected by a narrow ribbon of U.S. Highway 1, stretching 112 miles and spanned by 19 miles of bridges. The . . . Keys are isolated from the rest of the state and receive electricity and potable water from . . . the . . . mainland. Access to and from the Keys is primarily by U.S. Highway 1. Evacuation of the . . . population in advance of a hurricane strike is of paramount importance for public safety. No hurricane shelters are available in the . . . Keys for Category 3-5 hurricane storm events. A system of managed growth was developed in order to ensure the ability to evacuate within the 24-hour evacuation clearance time . . . ."

41 The notable exception, *Galleon Bay Corp. v. Bd. of County Commissioners of Monroe County*, 272 So. 3d 396 (Fla. 3d DCA 2018) where the plaintiff succeeded partially in its claim, involved a pre-growth cap approved development which both the Beneficial Use Hearing Officer and, ultimately, the Court, found had been diligently pursued. For more history, see *Galleon Bay Corp. v. Bd. of County Com'rs of Monroe County,* 105 So. 3d 555, 558 (Fla. 3d DCA 2012).

42 *Avenal v. United States*, 33 Cl. Ct. 778, 785 (1995).

43 § 70.001(3)(e)(1), Fla. Stat.; *See also* Thomas Ruppert, *Reasonable Investment-Backed Expectations: Should Notice of Rising Seas Lead to Falling Expectations for Coastal Property Purchasers?*, 26 J. Land Use & Envtl. L. 239, 246 (2011).

44 Ruppert, Grimm & Candiotti, Sea-Level Rise Adaptation and the Bert J. Harris, Jr., Private Property Rights Protection Act, https://www.flseagrant.org/wp-content/uploads/2012/03/Ruppert_BH-Act_article.pdf.

45 *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

46 *Palazzolo v. Rhode Island*, 533 U.S. 606, 626 (2001).

47 Id at 486.

48 *Good*, 189 F.3d at 1357.

49 *Good*, 189 F.3d at 1358 - 1359.

50 *Id.*

51 *Id.* at 1362.

52 *Id.*

53 *Id.* at 1362 - 1363.

54 *Id.* (emphasis added)

55 *Id.*

56 *Palm Beach Isles Associates v. U.S.*, 231 F.3d 1354, 1364 (Fed. Cir. 2000) (citations omitted; emphasis added)

57 *Palm Beach Isles Associates v. U.S.*, 231 F.3d 1354, 1363–64 (Fed. Cir. 2000) (citations omitted)

58 197 So. 3d at 565.

59 197 So. 3d at 566 -567. The Bert Harris Act (§ 70.001, Florida Statutes, et seq Private Property Rights) also requires proof of a reasonable investment backed expectation. "In determining whether reasonable, investment-backed expectations are inordinately burdened, consideration may be given to the factual circumstances leading to the time elapsed between enactment of the law or regulation and its first application to the subject property."

60 *Collins,* 118 So. 3d at 876. (internal citations omitted)

61 866 So. 2d. 703 (Fla 3rd DCA 2003)

62 *Id.* at 711.

63 119 N.E.3d 1188 (Mass. App. Ct. 2019)

64 *Id.* at 1943.

65 *Id.* at 1946.

66 *Id.* at 1946.

67 *Id.* at 1945-1946.

68 *Id.* at 1948.

69 *Id.* at 1945.

70 *Id.* at 1947.

71 Similarly, in situations where a property is "unduly burdened" by the combined effect of multiple restrictions maintained by more than one agency, Florida's *Harris Act* makes government entities liable only for the percentage of responsibility each such governmental entity bears for that burden. §70.001 (6)(a), Fla. Stat.

72 *See* Derek Howard, *Local Regulatory Takings Claims: Accounting for State and Federal Regulations to Minimize Liability and Damages Exposure*, Florida Bar Environmental and Land Use Law Section Reporter (December 2017).

73 *Lucas v. South Carolina Coastal Council*, 105 U.S. 1003, 1030-31 (1992)

74 *Lucas,* 505 U.S. at 1027.

75 *Lucas,* 505 U.S. at 1027.

76 Columbia Center for Climate Change Law Columbia Law School (October 2013), at page 17

77 *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

78 *See* Kent Messer, Transferable Development Rights Programs: An Economic Framework for Success, 3 JOURNAL OF CONSERVATION PLANNING 47, 52 (2000).

79 Compare *Mojito Splash, LLC v. City of Holmes Beach*, 326 So.3d 137 (Fla. 2d DCA 2021) to *Jamieson v. Town of Fort Myers Beach*, 48 Fla. L. Weekly D35 (Fla. 2d DCA 2022).

80 *See e.g.*, *Town of Ponce Inlet v. Pacetta, LLC, et al*, 120 So. 3d 27 (Fla. 5th DCA 2013). *See also*, *M&H Profit, Inc. v. Panama City*, 28 So.3d 71(Fla. 1st DCA 2009); *Holmes v. Marion County*, 960 So.2d 828 (Fla. 5th DCA 2007); *Jacksonville v. Coffield*, 18 So.3d. 589 (Fla. 1st DCA 2009).

81 The agency may also choose to offer no changes to its action, which it would presumably do if it believes the claim to lack merit. § 70.001 (4)(c)11, Fla. Stat.

82 *TahoeSierra Pres. Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302 (2002)

83 *Moviematic Industries Corp. v. Board of County Commissioners of Metropolitan Dade County,* 349 So. 2d 667 (Fla. 3d DCA 1977).

84 *Santa Fe Village Venture v. City of Albuquerque*, 914 F. Supp. 478 (D.N.M. 1995) (30month moratorium to protect the status quo in lands within national monument not a taking); *Woodbury Place Partners a City of Woodbury*, 492 N.W 2d 258 (Minn. Ct. App. 1992) (twoyear moratorium on development pending traffic flow study not a taking); *Cappture Realty Corp. v. Bd. of Adjustment of the Borough of Elmwood Park*, 336 A.2d 30 (ICJ. Super. App. Div. 1975) (fouryear moratorium prohibiting construction of flood prone lands not a taking); *Estate of Scott v. Victoria County*, 778.S.W2d 585 (Tex, App. 1989) (sevenyear interim ordinance not a taking); *Matter of Rubin v. McAlevey*, 288 N.YS.2d 519 (1968) (two year interim development ordinance valid until the enactment of a new comprehensive zoning ordinance).

85 *WCI Communities, Inc. v. City of Coral Springs*, 888 So.2d 912 (Fla. 4th DCA)

86 *Koontz v. St. John's River Management District,* 133 S. Ct. 2586 (2013)

87 *Nollan v. California Coastal Comm'n* 483 U.S. 825 (1987) (The Supreme Court held that there was no "essential nexus" between a public access easement and the purpose for the easement to mitigate ocean view obstruction, and thus the requirement was a taking).

88 *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (The Supreme Court held that a permit condition requiring the dedication of a bike path constituted a taking because the City did not show that the condition was "roughly proportional" to the traffic impact it sought to mitigate.).

89 *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987)

90 *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994)

91 John R. Nolon and Jessica A. Bacher, 'Takings' Clarified: U.S. Supreme Court Provides Clear Direction, New York Law Journal, June 15, 2005, at 5.

92 Coastal Sensitivity to Sea Level Rise: A Focus on the Mid-Atlantic Region. (USEPA, Washington DC USA, 320 pp. at 203. (quoting former New Jersey Governor Whitman)

93 Coastal Sensitivity to Sea Level Rise: A Focus on the Mid-Atlantic Region. (USEPA, Washington DC USA, 320 pp. at 203.

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