

**TAKE ME TO THE WATER:
FLORIDA'S SHRINKING PUBLIC ACCESS TO THE
WATERFRONT AND THE STEPS TO PRESERVE IT.**

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I. INTRODUCTION

Florida is renowned for its waters. An extensive coastline of ocean and gulf waters is but a part of the state's vast water resources which include rivers, lakes, springs and innumerable wetlands. This article will focus on the physical access to a waterbody that is needed for boating purposes, the type of access that allows one to transition from being on the land to being on the water. In 2007, this type of access allowed Florida's 18.7 million citizens¹ to collectively log an estimated 21.7 million boating trips in Florida-registered boats.² With an estimated 9 billion dollar impact on the state's economy,³ maintaining this type of access is critical to the future well being of both the state and its citizens.

But this access is threatened. As population density increases along the waterfront, the public access points that provide citizens with boating access to the public waterways face increasing demand. Concurrently, population increases and speculative market cycles lead to rising property values as the exhortation to "Buy land, they're not making anymore," is refined into "Buy waterfront." And waterfront development responds. Consequently, privately owned, water-dependent businesses such as marinas and commercial docks used for fisheries and other marine-based work are subjected to a two part dynamic to convert the property to residential development. First, the rapidly inflating tax burden on the property overwhelms the property owner. Second, developers interested in the conversion of the property to private residential uses offer current owners a financial incentive to sell. Upon conversion,

¹ Florida Legislature's Office of Economic and Demographic Research, <http://www.edr.state.fl.us/>.

² Florida Fish and Wildlife Commission, Florida Boating Access Facilities Inventory and Economic Study 108 (2009) available at http://www.fwc.state.fl.us/RECREATION/boat_index.htm (last visited Mar. 30, 2010).

³ *Id.*

what was once an open passage to the waterbody becomes a restricted private access point.

The current collapse of the housing market⁴ provides a time to review the dynamics that lead to conversion and to consider current and potential methods to preserve and enhance public boating access in the future. Part II of this Article will highlight the problem and briefly identify the legislative response. Parts III through VI will present the multiple methods employed to address the issue. Part VII will discuss the methods presented with recommendations for additional action. Part VIII will offer a brief conclusion.

II. RECOGNIZING THE LOSS OF PUBLIC ACCESS TO THE WATERFRONT

A. Increasing Population, Decreasing Public Access

Between 1950 and 2009, Florida's population had increased more than five-fold⁵ to an estimated 18.7 million⁶ with eighty percent of the population living within 25 miles of the coast.⁷ As the number of people and registered boats increased, the rate of providing public access failed to keep pace.⁸ This decrease in the level of service was felt throughout the recreational boating community as access to boat ramps, marinas, moorings, etc. became limited due to demand.⁹ Concurrently, the supply of waterfront access was also being reduced for both recreational and water-dependent commercial working interests due to the conversion of waterfront access points from public access to

⁴ Staff report, *Florida ranks No. 3 in U.S. in Foreclosure filings*, MIAMI HERALD, Mar. 11, 2010, available at <http://www.miamiherald.com/2010/03/11/1523945/florida-ranks-no-3-in-us-in-foreclosure.html> (last visited Mar. 30, 2010).

⁵ Brian C. O'Neill ET AL., *Population and Climate Change* ix (Cambridge University Press 2001).

⁶ Florida Legislature's Office of Economic and Demographic Research, *supra* note 1.

⁷ O'NEILL, *supra* note 5, at ix.

⁸ Interim Summary Report of the Committee on Community Affairs, S. 2005-122, Reg. Sess. (Fla. 2004).

⁹ *Id.*

private use.¹⁰ The pressure to convert waterfront properties to private residential use was increased by the housing bubble of the early 2000's as investment flowed into the housing market, particularly the condominium sector.¹¹ The premium value of waterfront property attracted developers interested in converting current waterfront properties, such as marinas and commercial wharfs, into high-end condominium units with attendant private-access boat slips.¹² Property owners were presented with rapidly rising property values and, hence, taxes, on the one hand, and, highly attractive financial incentives to sell, on the other hand. This dynamic compounded the pressure to convert the property to its "highest and best" use.¹³

B. The Importance of Access and the Impacts of Loss

Recognizing that public access provides long-term positive economic benefits as well as quality of life benefits for both citizens and tourists,¹⁴ the state legislature responded to the growing problem of conversion by defining some of its components and processes. In 2004, an interim summary report on working waterfronts noted that land use for "water-dependant"¹⁵ activities was being converted for uses by "water-related"¹⁶ and

¹⁰ *Id.*

¹¹ See Parke M. Chapman, *Vultures Circle Condo Market*, National Real Estate Investor, Sep. 1, 2005, available at http://nreionline.com/mag/real_estate_vultures_circle_condo/.

¹² Interim Summary Report of the Committee on Community Affairs, S. 2005-122, Reg. Sess. (Fla. 2004).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ FLA. ADMIN. CODE r. 9J-5.012(137) (2010) defines "water-dependant" as "activities which can be carried out only on, in or adjacent to water areas because the use requires access to the water body for: waterborne transportation including ports or marinas; recreation; electrical generating facilities; or water supply."

¹⁶ FLA. ADMIN. CODE r. 9J-5.012(139) (2010) defines "water-related" as activities which are not directly dependent upon access to a water body, but which provide goods and services that are directly associated with water-dependent or waterway uses."

"water-enhanced" activities.¹⁷ A survey by the Senate Committee on Community Affairs revealed that conversions to private access use were impacting both commercial working waterfronts as well as recreational boater access.¹⁸

C. *Legislative Response to the Loss of Access*

Through laws enacted in 2005 and 2006, the legislature responded to the loss of access by instructing local governments to address the issue on the land-side,¹⁹ through land use planning, and by instructing the executive branch to address the issue on the water-side, through its sovereign submerged lands policies.²⁰ Additionally, a tax deferment program was created for recreational and commercial working waterfront properties²¹ and, in 2008, the state constitution was amended²² to allow property tax assessment of working waterfronts to be based upon current use value instead of the highest and best use of the property.

First, the legislature defined the term "recreational and commercial working waterfront"²³ and required all local

¹⁷ Interim Summary Report of the Committee on Community Affairs, S. 2005-122, Reg. Sess. (Fla. 2004).

¹⁸ *Id.*; Will Rothschild, *Commissioners Concerned with Boaters' Access*, The Sarasota Herald-Tribune, April 19, 2005, at A1; Timothy J. Gibbons, *More and more area residents are buying boats, but places to dock them are slipping away*, The Times-Union, March 13, 2006 at FB-12.

¹⁹ FLA. STAT. § 163.3177(6) (e) (2010); FLA. STAT. § 163.3178(2) (g) (2010); 2005-157 Fla. Laws 4.

²⁰ FLA. STAT. § 253.03(15) (2010) codifying 2005-157 Fla. Laws 5.

²¹ 2005-157 Fla. Laws 9-14; codified at FLA. STAT. § 197.303-197.3047 (2010).

²² FLA. CONST. art. XI, § 30 amending FLA. CONST. art. VII, § 4 to allow "for the assessment of working waterfront property based on current use."

²³ FLA. STAT. § 342.07(2) (2010); See 2005-157 Fla. Laws, and 2006-220 Fla. Laws. Initially, commercial and working waterfront were defined as

A parcel or parcels of real property that provide access for water-dependent commercial activities or provide access for the public to the navigable waters of the state. Recreational and commercial working waterfronts require direct access to or a location on, over, or adjacent to a navigable body of water. The term includes water-dependent facilities that are open to the public and offer public access by vessels to the waters of the state or that are support facilities for recreational,

governments to address the growing loss of public access to waterways through the recreation and open space element of their comprehensive (comp) plans.²⁴ Next, the legislature required coastal counties and municipalities to incorporate "strategies" to preserve recreational and commercial working waterfronts in the coastal element of their comp plans.²⁵ Finally, coastal counties were required to create "regulatory incentives and criteria" to encourage preservation in the future land use element of their comp plans.²⁶ Concurrently, the legislature mandated that the Board of Trustees of the Internal Improvement Trust Fund (BOTIITF)²⁷ "shall encourage the use of sovereign submerged lands for water-dependent uses and public access."²⁸

III. RESPONDING TO ACCESS LOSS THROUGH LAND USE PLANNING

A. History

A brief historical understanding of the development and application of basic land use regulation and planning is helpful to understand the constraints under which governments operate.

1. Land Regulation Authority

The rights of property consist of more than mere possession of land. It includes additional rights such as the right to exclude others, the right to sell the land, to build something

commercial, research, or governmental vessels. These facilities include docks, wharfs, lifts, wet and dry marinas, boat ramps, boat hauling and repair facilities, commercial fishing facilities, boat construction facilities, and other support structures over the water.

The definition was modified in 2006 to include hotels and motels. Presumably this expanded definition refers to public lodging establishments that are directly associated with boat slips or ramps that are open to the public on a "first come, first serve" basis.

²⁴ Fla. Stat. § 163.3177(6) (e) (2010).

²⁵ Fla. Stat. § 163.3178(2) (g) (2010).

²⁶ Fla. Stat. § 163.3177(6) (a) (2010).

²⁷ The Board is composed of the Governor and Cabinet. Fla. Stat. § 253.02(1) (2010).

²⁸ Fla. Stat. § 253.03(15) (2010) codifying 2005-157 Fla. Laws 5.

on it, that is, the right to use it.²⁹ A completely unrestricted use of land would allow conflicts to develop between adjacent landowners or between a landowner and the public at large. In response to these conflicts, the common law system developed the doctrines of private and public nuisance to establish that certain types of activities and land use are inappropriate in certain locations³⁰ and thus a certain amount of land use regulation is justified.³¹ Property use can be deemed a public nuisance if the activity interferes with the health, safety, welfare or morals of the public at large.³² Nuisance actions are common law remedies that are still used to address land use conflicts.³³ However, there are major drawbacks to regulating land use through nuisance actions alone since determining whether an activity constitutes a nuisance is a reactive determination based on the site-specific conditions and is only decided after the harm has occurred.³⁴ This is a sub-optimal outcome for both the individual harmed and for the individual restrained from continuing an activity that they expected was allowed.

A forward-looking means of land use regulation increases judicial efficiency and reduces the harms experienced from a nuisance activity by predetermining where certain types of development and activity can occur. Although various municipalities had historically³⁵ performed some land use

²⁹ 42 FLA. JUR. 2d Property § 1 (2010).

³⁰ As observed by Justice Sutherland in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926), "A nuisance may be merely a right thing in the wrong place, -- like a pig in the parlor instead of the barnyard."

³¹ See, e.g., *Bove v. Donner-Hanna Coke Corp.*, 236 A.D. 37, 39, 258 N.Y.S. 229 (1932).

³² See Restatement (Second) of Torts § 821B (1979).

³³ See generally 19 Fla. Prac., Florida Real Estate § 40:2 (2009-2010 ed.).

³⁴ *Id.*

³⁵ The history of proscriptive land use controls in North America can be traced as far back as the decision by the Massachusetts Bay Colony that gunpowder mills should not be located in the center of town. JAMES METZENBAUM, *THE LAW OF ZONING* 1 (Baker, Voorhis & Co. 1955) (1930).

regulation under the auspices of their police powers,³⁶ the codification of this type of regulation occurred in the 1920's through the Standard State Zoning Enabling Act (SZEA).³⁷ In 1926, the U. S. Supreme Court decided the seminal land use regulation case of *Village of Euclid v. Ambler Realty Company*³⁸ where, in response to a facial challenge on the constitutionality³⁹ of the zoning restrictions enacted by the Village of Euclid, the Court recognized that the increasing density of population required governmental exercise of the police powers in ways that would have previously been unacceptable.⁴⁰ The Court held that "the ordinance in its general scope and dominant features...is a valid exercise of authority."⁴¹ Following *Euclid*, zoning enabling statutes enacted by the states, and implemented through zoning codes developed in local communities, firmly established the use of the police power through zoning as the prevailing means of land use regulation.

While unrestricted development is not permitted in the State of Florida, the unrestricted use of the police powers to control development is not permitted either. The rights of property owners in Florida are protected by the Federal

³⁶ Police powers are those powers retained by the states and exercised for the health, safety, welfare or morals of the public. U.S. CONST. amend. X. The exercise of certain aspects of the police powers of the state can be delegated to local governmental bodies such as counties and municipalities. See 1 Am. Law. Zoning § 2:10 (5th ed.).

³⁷ Produced by the United States Dept. of Commerce, Advisory Committee on City Planning and Zoning. The Government Printing Office published the first printed edition in May 1924, and a revised edition in 1926.

³⁸ *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

³⁹ *Ambler Realty Company* brought a facial challenge under the 14th Amendment claiming a taking of property without due process and equal protection. To be successful, a facial challenge requires that the Court reach the conclusion that there is no use of the challenged regulation that could be constitutionally valid. An "as-applied" challenge would have required the Court to determine if the manner in which the regulation was applied to the *Ambler Realty Company*, in that specific instance, had been unconstitutional. *Id.*

⁴⁰ *Id.* at 386-387.

⁴¹ *Id.* at 397.

Constitution⁴² the State constitution,⁴³ and by statutory protections for private property.⁴⁴ Governments have the authority to enact land use laws and regulations in the best interests of the community so long as the constitutional rights of individuals are not abridged.⁴⁵ However, there are limits to the degree of regulation.

The use of the police power to regulate is distinct from the exercise of eminent domain, where land is taken from a private owner for a public purpose. A physical taking of property by eminent domain, even temporarily,⁴⁶ requires that fair compensation be paid to the owner.⁴⁷

In 1922, the United States Supreme Court created the doctrine of "regulatory takings" in the case of *Pennsylvania Coal v. Mahon*.⁴⁸ A "regulatory taking" occurs somewhere between a non-compensable police power regulation and a compensable taking through eminent domain.⁴⁹ These distinctions are often contentious and lead to litigation over land use regulation decisions. The Supreme Court has held that "while property may be regulated to a certain extent, if regulation goes too far it

⁴² Under the 14th Amendment, a state shall not "deprive any person of...property, without due process of law". Additionally, under portions of the 5th Amendment, as incorporated and applied to the states through the 14th Amendment, no person shall "be deprived of...property without due process of law; nor shall private property be taken for public use, without just compensation."

⁴³ FLA. CONST. art. I, § 9.

⁴⁴ See Bert J. Harris, Jr., Private Property Rights Protection Act (Fla. Stat. §70).

⁴⁵ See *Berman v. Parker*, 348 U.S. 26 (1954); *Miami Beach v. 8701 Collins Ave.*, 77 So. 2d 428 (Fla. 1955); *Miami Beach v. State ex rel. Lear*, 128 Fla. 750, 755; 175 So. 537, 539 (1937) (holding that for a zoning "ordinance to be declared unconstitutional it must affirmatively appear that the restriction is clearly arbitrary and unreasonable and has not any substantial relation to the public safety, health, morals, comfort, or general welfare.")

⁴⁶ See e.g., *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951).

⁴⁷ *Kelo v. City of New London*, 545 U.S. 469 (2005).

⁴⁸ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

⁴⁹ See generally 27 AM. JUR. 2d Eminent Domain § 746

will be recognized as a taking.”⁵⁰ Regulations which deny all economic use and render the property “valueless” will be deemed a *per se* taking unless the state authority could reach the same effect under common law nuisance proceedings.⁵¹ A *per se* taking also occurs where a fundamental aspect of property rights is destroyed such as where a regulation requires the owner to allow permanent physical invasion of private property for public purposes, thereby destroying the property right to exclude trespassers.⁵²

In the 1980’s, a national focus on private property rights developed in counterpoise to the increasing impacts of land use and environmental regulations on property owners.⁵³ In 1995, Florida enacted legislation which provided for private property rights protection.⁵⁴ Chapter 70 Part 1, the Bert Harris Act, provides a cause of action for a landowner whose property has been “inordinately burdened” —a lower, and, as of yet, unsettled, standard than that required under the U.S. Constitution’s takings doctrine— by a governmental action.⁵⁵ The action must inordinately burden an existing use or a vested right to a specific use of real property.⁵⁶ The statute defines

⁵⁰ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); In *Penn Central Station*, the Court further determined how far was “too far” by using an ad hoc balancing of 1) the economic impact of the regulation on claimant; 2) claimant’s reasonable investment-backed expectations; and 3) the character of the governmental action. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

⁵¹ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). See also *Dade City v. Yumbo*, 348 So. 2d 392 (Fla. 3d DCA 1977) (holding that land use restrictions that leave any reasonable use of one’s property are not *per se* acts of governmental taking).

⁵² *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 415 (1982) (holding that the government required installation of CATV cables on plaintiff’s building was a *per se* physical taking).

⁵³ Ronald L. Weaver & Joni Coffey, *Private Property Rights Protection Legislation: Statutory Claims for Relief from Governmental Regulation*, Fla. Bar 30.3-2 (2007).

⁵⁴ FLA. STAT. § 70.001 (2010).

⁵⁵ *Id.*

⁵⁶ An inordinate burden exists where “the property owner is permanently unable to attain the reasonable, investment-backed expectation” for the existing use

"existing use" to mean "an actual, present use or 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..."⁵⁷ The principles of equitable estoppel, substantive due process under common law, or state statutory law are used to determine whether a vested right exists in a particular instance.⁵⁸

The Act requires the government party to negotiate in good faith to resolve a Bert Harris challenge to its action.⁵⁹ Successful plaintiffs in an action where the government failed to negotiate in good faith can recover litigation fees,⁶⁰ a potential outcome that local governments can ill afford and which informs decision making.

2. Land Use Planning in Florida

Early developments in planning and zoning in Florida recognized a need for zoning regulations to be "in accordance with" a larger comprehensive plan⁶¹ but the explicit linkage of zoning to comprehensive planning did not occur until Florida's Local Government Comprehensive Planning and Land Development Regulation Act of 1975 (Growth Management Act).⁶² The Act mandated that local governments—counties and municipalities—create and update a comprehensive plan (comp plan) for future development.⁶³ "The plan is likened to a constitution for all future development within the governmental boundary."⁶⁴ Specific land use regulations must then fit within the broadly stated

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." FLA. STAT. § 70.001(2) (2010).

⁵⁷ FLA. STAT. § 70.001(3)(b) (2010).

⁵⁸ FLA. STAT. § 70.001(3)(a) (2010).

⁵⁹ FLA. STAT. § 70.001(4)(c)(1) (2010).

⁶⁰ FLA. STAT. § 70.001(6)(c)(1) (2010).

⁶¹ Brian M. Seymour, *Land Use Planning and Zoning in Florida: An Overview*; Fla. Bar 25.1-7 (2008).

⁶² FLA. STAT. § 163.3161 *et seq.* (2010).

⁶³ *Id.*

⁶⁴ *Machado v. Musgrove*, 519 So.2d 629, 632 (Fla. 3d DCA 1987).

goals, objectives and policies of the comp plan.⁶⁵ The comp plan is a textual document normally accompanied by a Future Land Use Map (FLUM) which graphically illustrates the future planned development of the community. Specific elements must be addressed in the comp plan; those elements must be internally consistent as well as consistent with each other, and, land development regulations, such as zoning and permitting decisions,⁶⁶ must then be consistent with the comp plan and its future land use map.⁶⁷ Government bodies involved in land use decisions include planning commissions, zoning commissions, permitting departments, city commissions, county commissions, and regional planning councils, to name a few.⁶⁸ The comp plan and the FLUM are amendable documents⁶⁹ and the Department of Community Affairs (DCA) is the state land planning agency charged with reviewing proposed changes for compliance.⁷⁰ Because their future development decisions will be analyzed within the framework of their comp plan, local governments attempt to develop the language of their plans with an eye towards maximizing flexibility.⁷¹

As related to working waterfronts, a local government must use data and analysis in the development of the coastal management element of its comp plan.⁷² Existing land uses must be inventoried and an estimate of the needs for water-dependent and water-related development must be developed.⁷³ Public access

⁶⁵ Florida courts have firmly upheld the requirements of consistency under FLA. STAT. § 163.3177(2), See *Machado v. Musgrove*, 519 So.2d 629 (Fla. 3d DCA 1987), *rev. den.* 529 So.2d 694 (Fla. 1988).

⁶⁶ Brian M. Seymour, *Land Use Planning and Zoning in Florida: An Overview*; Fla. Bar 25.1-14 (2008).

⁶⁷ *Id.* at 25.1-15-18.

⁶⁸ See FLA. STAT. § 163.3174 (2010).

⁶⁹ See FLA. STAT. § 163.3187 (2010).

⁷⁰ Florida Department of Community Affairs, <http://www.dca.state.fl.us/fdcp/DCP/>.

⁷¹ See Richard Grosso, *Florida's Growth Management Act: How Far We Have Come, and How Far We Have Yet to Go*, 20 NOVA L. REV. 589, 597 (1996); See e.g., Dep't of Cmty. Affairs, *Objections, Recommendations and Comments For Lee County Amendment 10-1 5* (2009).

⁷² FLA. ADMIN. CODE r. 9J-5.012(2) (2010).

⁷³ FLA. ADMIN. CODE r. 9J-5.012(2) (a) (2010).

facilities, including marinas, boat ramps, and public docks, must also be inventoried and the current capacity and projected need of these facilities must be analyzed.⁷⁴ Based upon the data and analysis performed, local governments are then able to employ a number of planning tools in their strategies to preserve and increase public access.

B. Development of Land Use Regulation and Planning Tools

Local land development regulations (LDRs) are the means by which the vision of the comp plan is implemented. The planning and regulation tools briefly described below can provide local governments with the means to address public access loss at the local level. However, while the DCA reviews comp plans for compliance, there is no similar systematic review of LDRs⁷⁵ to ensure that they actually implement the comp plan. This continues to be a weak link in the planning/regulating process.⁷⁶

1. Zoning

Zoning is an LDR that identifies and designates the type of development that will be allowed on a particular property and thus prevents the vesting of development rights that do not conform to the zoning. Zoning is a discretionary power within the boundaries established through the comp plan.⁷⁷ After adoption of the comp plan, "all development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such plan" must be consistent with that plan.⁷⁸ Changes to current zoning must conform to the uses allowed by the plan and the FLUM.

Enacting zoning regulations that group similar land uses together and provides transitional zones between dissimilar land

⁷⁴ FLA. ADMIN. CODE r. 9J-5.012(2)(g) (2010).

⁷⁵ Grosso, *supra* note 70, at 636.

⁷⁶ *Id.*

⁷⁷ A zoning regulation that is not in accordance with the comprehensive plan is an unlawful exercise of power. See *Machado*, 519 So.2d at 632; *Citrus County v. Halls River Development*, 8 So.3d 413, 417 (Fla. 5th DCA 2009).

⁷⁸ *Halls River*, 8 So.3d at 421. See also FLA. STAT. § 163.3194(1)(a); FLA. STAT. § 163.3164(7).

uses such as industrial and residential, allows for orderly and coherent development.⁷⁹ Zoning can address multiple aspects of development such as type of use, density and intensity, lot coverage, setback requirements, etc.⁸⁰

Zoning normally identifies permitted uses, prohibited uses, and conditional uses.⁸¹ Permitted uses are those specified uses which are clearly appropriate for the zone and are considered "permitted by right." Prohibited uses are clearly inappropriate and will not be allowed on that site unless the owner is successful in a rezoning request. A conditional use is a use that would generally be in keeping with the zoning category but requires a site specific analysis to ensure compatibility.⁸²

In the context of zoning to ensure public access through recreational and commercial working waterfronts, zoning categories specifically focused on recreational and commercial water-dependent uses could be employed. Requirements and restrictions for this category would disallow any non water-dependent use and prevent any residential development within the zone. Another zoning category could allow for both water-dependent and water-related uses.⁸³ Comp plan restrictions requiring the inclusion of additional parcels of comparable land into the zoning category prior to allowing any of the currently designated parcels to be re-zoned would function as a "no net loss" requirement for that zoning category.⁸⁴

2. Incentive Zoning

Incentive zoning provisions relax zoning restrictions by providing opportunities for the developer to build in a way that

⁷⁹ See 83 AM. JUR. 2d Zoning and Planning § 2.

⁸⁰ 1 Am. Law. Zoning Ch. 9 (5th ed.) (2009).

⁸¹ See 83 AM. JUR. 2d Zoning and Planning § 156 (2010).

⁸² For an example of the process for approving a conditional use, *See, e.g. Clearwater Beach Community Church v. City of Clearwater*, Case No. 89-0111, 1989 WL 644272 at 4-5 (Fla. Div. of Admin. Hrgs, July 12, 1989).

⁸³ For example, see Martin County Florida Comprehensive Plan, Chapter 4; Martin County ordinance, no. 803. Available at Municode.com <http://library.municode.com/index.aspx?clientId=13591&stateId=9&stateName=Florida>

⁸⁴ *Id.*

is not normally permitted as of right. This allowance is in exchange for a public benefit that would not otherwise be required.⁸⁵ Incentive zoning was first used in the late 1950's.⁸⁶ Although voluntary by design, it has not been without legal challenge.⁸⁷ However, so long as the goals and definitions regarding the specific public amenities desired and the types of development involved are clearly laid out in the ordinance implementing the incentive zoning scheme, the legality of this type of land use regulation is generally upheld.⁸⁸

Incentive zoning can be applied in the context of developing or maintaining public access to the waterway where waterfront land use is subject to conversion to multi-family residential use, i.e. condominiums. By establishing allowable density levels at a moderate level, higher density development can then be granted in exchange for some public benefit offered by the developer. This public benefit, such as public access, could allow for continuing access to the waterway at the site, or, the benefit could be supplied by a new access nearby.

3. Zoning Overlay District

Overlay zoning districts are districts where additional regulations are imposed as performance standards over and above the standard development regulations of the underlying district.⁸⁹ Preexisting zoning categories allow for the various types of land use identified in those categories. The zoning overlay then adds additional restrictions that apply across the underlying categories in order to protect a particular feature

⁸⁵ MARYA MORRIS, *INCENTIVE ZONING: MEETING URBAN DESIGN AND AFFORDABLE HOUSING OBJECTIVES*, 3-5 (APA 2001).

⁸⁶ Chicago first used incentive zoning in 1957 to stimulate skyscraper construction. In 1961, New York implemented incentive zoning to create more public spaces and for conservation of historical buildings. *Id.*

⁸⁷ See generally, *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (U.S. 1978), *Gillmor v. Thomas*, 490 F.3d 791 (10th Cir. 2007), and *Holmdel Builders Ass'n v. Holmdel*, 121 N.J. 550 (N.J. 1990).

⁸⁸ Use of incentive zoning is specifically mention in FLA. STAT. § 163.3202(3) (2010) ("encourag[ing] the use of innovative land development regulations which include provisions such as transfer of development rights, incentive and inclusionary zoning...").

⁸⁹ 3 Rathkopf's *The Law of Zoning and Planning* § 61:15 (4th ed.) (2010).

or promote a particular type of development.⁹⁰ This tool is applicable for waterfront development. The local government has a degree of discretion as to where to draw the boundaries of the district but must then ensure that similarly-situated properties are treated similarly.⁹¹ Thus, a "waterfront district" composed of properties of various zoning categories may have an overlying zoning regulation requiring that the uses on the properties be water-dependant.

4. Moratoria

A development moratorium is a period during which authorization for a particular type of development is suspended.⁹² This temporary suspension allows time for the local government to analyze current development conditions and determine appropriate actions to address problematic issues. New land development regulations can then be developed and implemented.⁹³ The moratorium is then lifted and development is allowed to proceed under the terms and conditions of the newly implemented regulations.

In 1987, the U.S. Supreme Court held in *First English*⁹⁴ that a landowner could raise a claim for just compensation for a regulatory taking that was temporary in nature.⁹⁵ However, the Court stopped short of making a determination as to whether the moratorium at issue actually constituted a regulatory taking.⁹⁶ Subsequently, the Court directly ruled on the moratorium issue

⁹⁰ See *A-S-P Associates v. City of Raleigh*, 258 S.E.2d 444 (N.C. 1979).

⁹¹ *Id.* at 452.

⁹² See 1 Am. Law. Zoning § 6:24 (5th ed.) (2009); 4 Am. Law. Zoning § 34:3 (5th ed.) (2009).

⁹³ 4 Am. Law. Zoning § 34:3 (5th ed.) (2009).

⁹⁴ *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, Cal., 482 U.S. 304 (1987).

⁹⁵ *Id.*; Notice the contrast between this doctrine under federal takings and Florida's Bert J. Harris Act. A compensable claim under Bert J. Harris requires that the government action permanently burden the property; temporary burdens, such as a moratorium with a clearly defined duration, are presumably not subject to claims under Burt Harris. See FLA. STAT. § 70.001.

⁹⁶ On remand, the California Supreme Court held that the moratorium was a valid exercise of the police power because its purpose was to protect public safety. *First English II*, 258 Cal. Rptr. 893 (Cal. App. 1989).

in *Tahoe-Sierra*.⁹⁷ Here, the Court noted the importance of moratoria in the planning process and held that the *ad hoc* takings test identified in *Penn Central*⁹⁸ was the appropriate test to use in takings cases.⁹⁹ While not clearly defining the limits of moratoria use, the Court suggested that a duration exceeding one year may be suspect.¹⁰⁰ Along with a clear, limited duration, the ordinance establishing a moratorium should specify the development problem necessitating the temporary suspension of development activity.¹⁰¹

In sum, a moratorium provides planning time during which development is suspended. In the absence of a moratorium, the local government cannot delay consideration of permit applications that might conflict with proposed or anticipated changes to the comp plan and FLUM.¹⁰² In the context of working waterfronts, a moratorium is a relatively quick and efficient means of temporarily maintaining the status quo in response to a rush to convert and it provides the time for a planned response to the loss of access.

5. Exactions, Dedications, Impact Fees

The use of exactions is a means to require that new development pay for its share of the cost of the current and future public infrastructure that it will use.¹⁰³ Exactions are an agreement by the developer to surrender certain property rights in exchange for the rights to develop.¹⁰⁴ The property

⁹⁷ *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

⁹⁸ *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104 (1978). See note 49 *supra*.

⁹⁹ 535 U.S. 302, at 321.

¹⁰⁰ *Id.* at 341. Although the Court states that "it may be true that a moratorium lasting more than a year should be viewed with special skepticism," the Court goes on to find that, based on the facts in the instant case, a 32-month moratorium was not unconstitutional.

¹⁰¹ See 535 U.S. 302.

¹⁰² *Gardens Country Club, Inc. v. Palm Beach County*, 590 So.2d 488 (4th DCA 1991).

¹⁰³ See 2 Am. Law. Zoning § 16:8 (5th ed.) (2009).

¹⁰⁴ *Id.*

surrendered can be real property or a cash payment,¹⁰⁵ commonly referred to as an "impact fee."

The improper exaction of property concessions from subdivision developers will constitute a regulatory taking.¹⁰⁶ Relevant Florida case law regarding exactions holds that dedication or impact fees are valid so long as there is a rational nexus between "the need for additional capital facilities and the growth in population generated by the subdivision" and a rational nexus "between expenditures of the funds collected and the benefits accruing to the subdivision."¹⁰⁷ In the context of working waterfronts, exactions can be used to provide the public facilities for waterfront access needs that the new development creates. Thus, recreational access may be addressed through exactions but exactions for commercial working waterfronts would likely be challenged.

6. Concurrency

One of the fundamental requirements of Florida's comprehensive planning regime, concurrency exists where "the necessary public facilities and services to maintain the adopted level of service standards are available when the impacts of development occur."¹⁰⁸ A "Concurrency Management System" is "the procedures and/or process that the local government will utilize to assure that development orders and permits are not issued unless the necessary facilities and services are available concurrent with the impacts of development."¹⁰⁹ The public facilities and services subject to the requirements of

¹⁰⁵ FLA. ADMIN. CODE r. 9J-5.0055(9) (2010).

¹⁰⁶ *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834 (1987) (holding that there must be a nexus between the condition of a regulation and the public interest purpose that the regulation is supposed to serve).

¹⁰⁷ *Hollywood, Inc. v. Broward County*, 431 So.2d 606, 611-12 (1983); *In Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994), the U.S. Supreme Court held that the exaction must have a "nexus" between the government interest and the property right given in consideration and that there be a "rough proportionality" between the property surrendered and the impact of the proposed development.

¹⁰⁸ FLA. ADMIN. CODE r. 9J-5.003(25) (2010).

¹⁰⁹ FLA. ADMIN. CODE r. 9J-5.003(26) (2010).

concurrency are: "Sanitary sewer, solid waste, drainage, potable water, parks and recreation, schools, and transportation facilities, including mass transit."¹¹⁰ As noted in section I c. above, the legislature directed that the loss of public access to waterways be addressed, in part, through the recreation and open space element.¹¹¹ This element deals with parks and recreation facilities. Concurrency requirements mandate that the acreage for parks and recreation facilities to serve new development "shall be dedicated or be acquired by the local government prior to issuance by the local government of a certificate of occupancy..., or funds in the amount of the developer's fair share shall be committed no later than the local government's approval to commence construction."¹¹² If a broad concept of concurrency is applied to the amount of parks and recreation facilities available, then an acre is an acre. If concurrency is specifically applied to the various types of parks and recreation facilities available, then all acreage is not created equal, especially acreage that gives access to the water. Discriminating between the types of parks and recreation facilities available would hold new development responsible for the increasing demand for public access to the water.

7. Level of Service Standards (LOSS)

In order to determine whether there is sufficient public facilities and services to meet the demands of new development, an ongoing inventory and assessment of surplus must be maintained and gauged against the size of new demands. A certain level of quality is necessary for the service or good to be effective. These issues are addressed by identifying a level of service standard (LOSS) for the particular public infrastructure. Level of service (LOS) is "an indicator of the extent or degree of service provided by, or proposed to be provided by, a facility based on and related to the operational

¹¹⁰ FLA. STAT. § 163.3180(1)(a) (2010).

¹¹¹ 2005-157 Fla. Laws 1-4.

¹¹² FLA. STAT. § 163.3180(1)(b) (2010).

characteristics of the facility. Level of service shall indicate the capacity per unit of demand for each public facility.”¹¹³

The Concurrency Management System set forth in Florida Administrative Rule 9J-5.0055 requires local governments to adopt LOSS for public facilities and services.¹¹⁴ These LOSS are then used to guide decisions regarding the issuance of development orders and development permits.¹¹⁵ The rule cross-references to other rules in 9J-5 that give specific guidance for the public facilities and services for which LOSS must be adopted.¹¹⁶ These include: roads, sanitary sewer, solid waste, drainage, potable water, and parks and recreation.¹¹⁷ The cross-referenced rule pertaining to parks and recreation has been deleted from the code¹¹⁸ based on analysis by the DCA that determined “this language was unnecessary in rule because the requirement is adequately addressed in section 163.3177(6)(e), F.S.”¹¹⁹ The referenced statute states in relevant part: “[T]he comprehensive plan shall include the following elements: *** A recreation and open space element indicating a comprehensive system of public and private sites for recreation, including, but not limited to, natural reservations, parks and playgrounds, parkways, beaches and *public access to beaches*, open spaces, *waterways*, and other recreational facilities”¹²⁰ (emphasis added). It is unclear whether a LOSS for Parks and Recreation as mandated under Rule 9J-5.0055 is to be based upon the aggregate¹²¹ number of acres or for each of the individual

¹¹³ FLA. ADMIN. CODE r. 9J-5.003(62) (2010).

¹¹⁴ FLA. ADMIN. CODE r. 9J-5.0055(1) (2010).

¹¹⁵ FLA. ADMIN. CODE r. 9J-5.0055(2)(a) (2010).

¹¹⁶ *Id.*

¹¹⁷ FLA. ADMIN. CODE r. 9J-5.0055(2)(a)6. (2010) Refers to FLA. ADMIN. CODE r. 9J-5.014(3)(c)4., regarding Parks and Recreation.

¹¹⁸ In 2007, a Notice of Deletion was sent to the federal Office of Ocean and Coastal Resource Management’s (OCRM) for approval of the inclusion of the changes to FLA. ADMIN. CODE r. 9J-5 into the approved Florida Coastal Program (FCMP). Copy of Notice on file with author.

¹¹⁹ *Id.*

¹²⁰ FLA. STAT. § 163.3177(6)(e) (2010).

¹²¹ For an example of a Comprehensive Plan Recreation and Open Space Element that calculates LOS by looking at the aggregate number of acres classified

categories of the enumerated items in 163.3177(6) (e), F.S. Elsewhere, Florida Administrative Rule 9J-5.005(3) provides that "Level of service standards shall be set for each individual facility or facility type and not on a systemwide basis,"¹²² so it is arguable that LOSS must be set for each of the enumerated categories. However, current practice is to set the LOSS for Parks and Recreation as a number of undistinguished acres per unit of population.¹²³ Additionally, the term "waterways"¹²⁴ is particularly vague and, even though the insertion of the term was specifically done by the 2005 legislation "to encourage the preservation of recreational and commercial working waterfronts; including public access to waterways",¹²⁵ it remains unclear whether specific LOSS for publicly-provided boat ramps, or marina slips, are mandated by statute or rule. Given the level of guidance provided for developing LOSS for the other public facilities and services listed in rule 9J-5.0055, further guidance regarding LOSS for public access is warranted.

IV. RESPONDING TO ACCESS LOSS THROUGH SOVEREIGNTY SUBMERGED LANDS (SSL) LEASING POLICIES¹²⁶

When considering an access point between land and water, the nature of the title and the regulation of the use of the land beneath the water should be taken into account.

under the categories enumerated 163.3177(6) (e) per 1,000 residents, see Pinellas County Comprehensive Plan Recreation and Open Space Element available at <http://www.pinellascounty.org/Plan/compplanguide.htm>

¹²² FLA. ADMIN. CODE r. 9J-5.005(3) (2010).

¹²³ See, e.g., Escambia County Code of Ordinances Policy 12.A.4.9: Level of Service Standards, Available at [Municode.com](http://library.municode.com/index.aspx?clientId=13591&stateId=9&stateName=Florida)

¹²⁴ The term is not defined under the definitions provided in FLA. ADMIN. CODE r. 9J-5.003 (2010).

¹²⁵ 2005-157 Fla. Laws 1&4.

¹²⁶ Sovereignty submerged lands are statutorily defined as "...lands waterward of the ordinary or mean high water line, beneath navigable fresh water or beneath tidally-influenced waters, to which the State of Florida acquired title on March 3, 1845, by virtue of statehood, and which have not been heretofore conveyed or alienated." FLA. ADMIN. CODE r. 18-21.003(61) (2010).

The title to lands under navigable waters... which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest. Private use of portions of such lands may be authorized by law, but only when not contrary to the public interest.¹²⁷

While many government entities hold title to public lands, only the state holds title to sovereign lands (any portions that are alienated are no longer referred to as sovereign).¹²⁸ Florida obtained title to sovereign submerged lands (SSL), less those Spanish land grants¹²⁹ specifically ratified by the Treaty of Cession,¹³⁰ as part of its sovereign political rights under the Equal Footing Doctrine¹³¹ when it was admitted to statehood in 1845. Prior to the development of roads and other infrastructure, the value and importance of the state's navigable waters for transportation, commerce, and marine industry was a significant and necessary public good.¹³²

¹²⁷ FLA. CONST. art. X, § 11.

¹²⁸ The Florida Supreme Court highlighted the special status of sovereign submerged lands compared to other publicly owned lands, in that "Sovereignty lands are for public use, 'not for the purpose of sale or conversion into other values, or reduction into several or individual ownerships.'" Coastal Petroleum Company v. American Cyanamid Company, 492 So. 2d 339, 342 (Fla. 1986).

¹²⁹ For example, the city of St. Augustine holds title to submerged lands under a Spanish land grant. However, this is exceptional and not the general rule with sovereignty submerged lands title.

¹³⁰ Adams-Onís Treaty of 1819; formally titled the Treaty of Amity, Settlement, and Limits Between the United States of America and His Catholic Majesty; sometimes referred to as the Florida Purchase Treaty.

¹³¹ See Pollard's Lessee v. Hagan, 44 U.S. 3 How. 212 (1845) (holding that "the shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the [original] States respectively" and therefore, under Article IV Section 3 Clause 1 of the U.S. Constitution, "new States have the same rights, sovereignty, and jurisdiction over this subject as the original States").

¹³²

[I]t is well settled in Florida that the State holds title to lands under tidal navigable waters and the foreshore thereof

The title to SSL is held in public trust and the use of the trust property is managed by the Governor and Cabinet sitting as the Board of Trustees of the Internal Improvement Trust Fund (BOTIITF).¹³³ It is this authority that determines whether a use of SSL, through lease or conveyance, will be allowed.¹³⁴ Where applicable, the Board of Trustees has delegated certain aspects of review and decision-making authority to the Secretary of the Department of Environmental Protection (DEP), the Commissioner of Agriculture, and the Governing Boards of four out of the five Water Management Districts.¹³⁵ However, this authority is specifically limited when dealing with the permitting of docking facilities.¹³⁶ Docking facilities with more than 50 slips or 50,000 sq.ft., and certain expansions of existing facilities, are beyond the authority delegated.¹³⁷ Additionally, any application for an exception to the limits on the amount of sovereignty submerged lands that a private residential multi-family dock (i.e. condominium) can preempt,¹³⁸ as limited under the management policies applicable to activities on sovereignty

(land between high and low water marks). As at common law, this title is held in trust for the people for purposes of navigation, fishing, bathing and similar uses. Such title is not held primarily for purposes of sale or conversion into money. Basically it is trust property and should be devoted to the fulfillment of the purposes of the trust, to wit: the service of the people.

Hayes v. Bowman, 91 So.2d 795, 799 (Fla. 1957).

¹³³ FLA. STAT. § 253.03 (2010).

¹³⁴ There is a strong public policy presumption against the implied conveyance of SSL. See *Coastal*, 492 So. 2d at 343.

¹³⁵ FLA. ADMIN. CODE r. 18-21.0051(1)&(2) (2010) delegates the authority to review and take final agency action on applications to use sovereignty submerged lands when the application involves an activity for which that agency has permitting responsibility. The Northwest Florida Water Management District is the only WMD not granted this authority over sovereignty submerged land leases.

¹³⁶ FLA. ADMIN. CODE r. 18-21.0051(2) (a), (b), & (e) (2010).

¹³⁷ FLA. ADMIN. CODE r. 18-21.0051(2) (a), (b) (2010).

¹³⁸ "Preempted area means the area of sovereignty submerged lands from which any traditional public uses have been or will be excluded by an activity, such as the area occupied by docks, piers, and other structures..." FLA. ADMIN. CODE r. 18-21.003 (2010).

submerged lands,¹³⁹ is not within the delegated authority of the agencies and remains under the direct authority of the BOTIITF.¹⁴⁰ Furthermore, the administrative code identifies five conditions required for the approval of this type of exemption.¹⁴¹ With regard to public access, the final condition required by the rule is that the applicant provide "a net positive public benefit" to offset the additional preemption.¹⁴² The acceptability of the proposed benefit is determined by the Board of Trustees.¹⁴³ The rule then specifically lists suggested "positive benefits" including increased public access to sovereignty submerged lands by offering a number of "first come, first served" boat slips, establishing a public boat ramp, expanding an existing boat ramp, or "other similar public benefits that serve to maintain or increase public access to sovereignty submerged lands."¹⁴⁴

The legislature has emphasized its intent that the BOTIITF "shall encourage the use of sovereign submerged lands for water-dependent uses and public access."¹⁴⁵ This is accomplished through a lands management program that includes a leasing framework.¹⁴⁶ While some waterfront owners can preempt a defined amount of SSL without requiring a lease,¹⁴⁷ larger structures will require a lease.¹⁴⁸ Leases for the use of SSL are of limited term¹⁴⁹ and are charged an annual rate.¹⁵⁰ A marina can receive

¹³⁹ FLA. ADMIN. CODE r. 18-21.004(4) (2010).

¹⁴⁰ FLA. ADMIN. CODE r. 18-21.0051(2) (e) (2010).

¹⁴¹ FLA. ADMIN. CODE r. 18-21.004(4) (b) (2) (2010).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ FLA. ADMIN. CODE r. 18-21.004(4) (b) (2) (e) (2010).

¹⁴⁵ FLA. STAT. § 253.03(15) (2010) codifying 2005-157 Fla. Laws 5.

¹⁴⁶ FLA. ADMIN. CODE r. 18-21 (2010).

¹⁴⁷ FLA. ADMIN. CODE r. 18-21.005 (2010). Non-revenue generating uses may qualify for consent by rule or a letter of consent based upon factors such as the type of use and the size of the construction compared to the linear footage of the waterfront owned. *Id.*

¹⁴⁸ *Id.* Docks, piers, boat ramps, etc. that preempt more than 10 square feet of SSL per linear foot of waterfront (riparian) shoreline are not eligible for consent by rule or letter of consent and will require a lease.

¹⁴⁹ FLA. ADMIN. CODE r. 18-21.008(1), (2) (a) (2010). A standard lease is for 5 years, but a marina that provides at least 90 percent of its slips to the

substantial discounts on its lease fees by providing at least 90 percent of its slips to the public on a "first come, first serve" basis¹⁵¹ and for being designated as a "clean marina".¹⁵² Significantly, the sovereignty submerged lands management program identifies the category of "private residential multi-family dock or pier"¹⁵³ in its leasing structure and provides for a one-time premium charge¹⁵⁴ to be levied against them. The premium is calculated by multiplying the standard annual lease rate by a value of three.¹⁵⁵

V. RESPONDING TO ACCESS LOSS THROUGH PROPERTY TAX DEFERRAL

The 2005 legislation provided a means for ad valorem tax relief for owners of recreational and commercial working waterfront property.¹⁵⁶ The tax deferral program is voluntarily implemented by counties or municipalities that decide to participate.¹⁵⁷ Participating local governments must adopt an ordinance defining "the percentage or amount of the deferral and the type and location of working waterfront property...for which deferrals may be granted."¹⁵⁸ Governments implementing the ordinance are only authorized to defer the taxes they would ordinarily collect; they cannot authorize the deferral of taxes owed to another taxing authority.¹⁵⁹

public on a "first come, first served" basis is given a standard lease of 10 years. An extended term lease for up to 25 years is available under certain circumstances.

¹⁵⁰ FLA. ADMIN. CODE r. 18-21.011(1)(a)&(b) (2010). Effective March 1, 2007, the annual rate charged is six percent of annual income, the base fee of \$0.1413 per square foot of preempted area, or the minimum annual fee of \$423.89, whichever is greater.

¹⁵¹ FLA. ADMIN. CODE r. 18-21.011(1)(b)(2) (2010). Thirty percent discount provided.

¹⁵² FLA. ADMIN. CODE r. 18-21.011(1)(b)(13) (2010).

¹⁵³ FLA. ADMIN. CODE r. 18-21.003 (47) (2010).

¹⁵⁴ FLA. ADMIN. CODE r. 18-21.011(1)(c) (2010).

¹⁵⁵ *Id.*

¹⁵⁶ 2005-157 Fla. Laws 9-14; codified at FLA. STAT. § 197.303-197.3047 (2010).

¹⁵⁷ FLA. STAT. § 197.303(1) (2010).

¹⁵⁸ FLA. STAT. § 197.303(3) (2010).

¹⁵⁹ FLA. STAT. § 197.303(4) (2010).

A property owner applying for the tax deferral must annually file an application for the deferral with the county tax collector.¹⁶⁰ Upon approval, the amount of tax allowed to be deferred is not collected from the property owner.¹⁶¹ The deferred tax from that year, and successive years, accumulates against the property. Interest accrues against the deferred taxes.¹⁶² If property ownership changes, or the type of property use changes in a manner that no longer allows the owner to qualify for the deferment program, the total amount of deferred taxes and interest for all previous years becomes due and payable.¹⁶³ Additionally, if "the total amount of deferred taxes, interest, and all other unsatisfied liens on the property exceeds 85 percent"¹⁶⁴ of the property's assessed value, the amount of debt over 85 percent of the assessed value is "due and payable within 30 days after... notice."¹⁶⁵ Property owners failing to pay the amount due will become delinquent for "the total amount of deferred taxes and interest."¹⁶⁶ Finally, the deferred tax and interest constitutes a prior lien on the property and will be collected as any other tax lien.¹⁶⁷ This puts the local government's claim for payment of the deferred taxes superior to other liens such as a mortgage.

By the spring of 2010, only two counties and three municipalities had enacted tax deferral ordinances for recreational and commercial working waterfront properties.¹⁶⁸

¹⁶⁰ FLA. STAT. § 197.304(1) (2010).

¹⁶¹ FLA. STAT. § 197.304(2) (2010).

¹⁶² FLA. STAT. § 197.304(4) (2010).

¹⁶³ FLA. STAT. § 197.3043(1) (2010).

¹⁶⁴ FLA. STAT. § 197.3043(3) (2010).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ FLA. STAT. § 197.304(5) (2010).

¹⁶⁸ A statewide cross-code search on Municode conducted on March 22, 2010 revealed that ordinances had been adopted by Palm Beach and Manatee counties and the municipalities of Ponce Inlet, Clearwater, and Islamorada. Municode is an online repository for municipal codes and is available at <http://www.municode.com/>

Neither Palm Beach County¹⁶⁹ nor Volusia County had received any applications to the program.¹⁷⁰ Manatee County had two working waterfront properties apply for the deferral in the 2006 tax year. Both were approved. However, the mortgage companies discovered the unpaid, deferred taxes, and required the property owners to immediately pay the taxes.¹⁷¹

VI. RESPONDING TO ACCESS LOSS THROUGH CONSTITUTIONAL AMENDMENT TO REDUCE TAX BURDEN

The most recent action to provide tax relief to owners of working waterfront property came in the form of a constitutional amendment in November of 2008. The assessment of value for taxation purposes is conducted in accordance with regulations¹⁷² promulgated by the state's Department of Revenue (DOR). The DOR is charged with securing a just valuation of all property for the purpose of ad valorem taxation.¹⁷³ Article VII of the state constitution has recognized certain types of property that will be assessed solely on its character or current use¹⁷⁴ in contrast to its "highest and best" use.¹⁷⁵ The state had previously recognized agricultural land,¹⁷⁶ conservation land,¹⁷⁷ and historic property¹⁷⁸ as lands that should be assessed based upon character or current use. This lower tax burden reduces the pressure for premature conversion of these types of property.

¹⁶⁹ Per phone conversation with Steve Letson, director of commercial appraisal services, Palm Beach County, on March 23, 2010.

¹⁷⁰ Email from Sally Bruner, Revenue Tax Manager, Volusia County. Email on file with the author.

¹⁷¹ Email from Susan D. Profant, Delinquent Collections Department, Tax Collector, Manatee County, Florida. Email on file with the author.

¹⁷² FLA. CONST. art. VII, § 4.

¹⁷³ FLA. STAT. § 193.011 (2010).

¹⁷⁴ FLA. CONST. art. VII, § 4.

¹⁷⁵ FLA. STAT. § 193.011 (2) (2010).

¹⁷⁶ FLA. CONST. art. VII, § 4(a).

¹⁷⁷ FLA. CONST. art. VII, § 4(b).

¹⁷⁸ FLA. CONST. art. VII, § 4(e).

The state's Taxation and Budget Reform Commission¹⁷⁹ proposed the inclusion of working waterfronts in the types of property assessed on current use. Subsequently, amendment 6 –Assessment of Working Waterfront Property Based Upon Current Use– was passed with over 70 percent of voter support.¹⁸⁰

The terms of the amendment apply to the tax year beginning January 1, 2010.¹⁸¹ Although the amendment uses the term "working waterfront properties," the enumerated properties to which the amendment applies are a subset of those properties defined as recreational and commercial working waterfronts in Florida Statute § 342.07(2).¹⁸² The properties for which current use appraisal shall apply include waterfront properties which: are predominantly used for commercial fishing;¹⁸³ are accessible to the public for launching boats;¹⁸⁴ consist of marinas or drystack storage facilities that are open to the public;¹⁸⁵ or are water-dependent marine manufacturing or boat construction and maintenance facilities.¹⁸⁶ Upland restaurants and hotels are not included in the list.

Local tax assessors are awaiting legislative and DOR guidance for calculating "current use" assessments. The 2009 legislative session produced bills which died at the end of session.¹⁸⁷ Currently, four bills have been introduced to the house and senate.¹⁸⁸ When a final bill is passed, it will apply

¹⁷⁹ FLA. CONST. art. XI, § 6, "Beginning in 2007 and each twentieth year thereafter there shall be established a taxation and budget reform commission."

¹⁸⁰ Fla. Dept. of State, election results, <http://election.dos.state.fl.us/elections/resultsarchive/Index.asp?ElectionDate=11/4/2008> (last visited Mar. 30, 2010).

¹⁸¹ FLA. CONST. art. XII, § 30.

¹⁸² *Supra* note 23.

¹⁸³ FLA. CONST. art. VII, § 4(j)(1)a.

¹⁸⁴ FLA. CONST. art. VII, § 4(j)(1)b.

¹⁸⁵ FLA. CONST. art. VII, § 4(j)(1)c.

¹⁸⁶ FLA. CONST. art. VII, § 4(j)(1)d.

¹⁸⁷ H.B. 825, 2009 Leg., Reg. Sess. (Fl. 2009) and S.B. 1468, 2009 Leg., Reg. Sess. (Fl. 2009).

¹⁸⁸ C.S. for S.B. 346, 2010 Leg., Reg. Sess. (Fl. 2010) introduced by Committee on Community Affairs; S.B. 1408, 2010 Leg., Reg. Sess. (Fl. 2010) introduced

retroactively to January 1, 2010. The Revenue Estimating Committee has estimated that the provisions of senate bill SB 1408 will "reduce local government revenues (including schools) by \$44.2 million in FY 2010-11 and by \$44.7 million in FY 2011-12."¹⁸⁹ The estimated loss of revenue under HB 7127 would be slightly less at \$37.4 million in FY 2010-11 and by \$37.8 million in FY 2011-12.¹⁹⁰ The estimates assume maintaining current millage rates.¹⁹¹

All four of the proposed bills would create a new statutory section in Chapter 193 of Title XIV, Taxation and Finance.¹⁹² The Senate bill, 1408, would include a statement on legislative intent. The intent statement recognizes the impact that conversion to private access has on both restricting public access and on increasing the tax burden on nearby waterfront properties still engaged in public access uses.¹⁹³ The bill defines terms relevant to the provision, provides that the income approach to value method should be used to assess the property or, if that method is inappropriate, the present cash value at current use should be used to value the property.¹⁹⁴ To receive the benefit of current use valuation assessment, qualifying property owners must submit an application to be classified as a working waterfront property.¹⁹⁵ A new application must be submitted whenever the ownership or use of the property changes.¹⁹⁶ Finally, where a parcel contains uses that are eligible for classification as working waterfront as well as uses that are not eligible for the classification, the portions of the property that are not eligible for the classification must be separately assessed under just valuation methods.¹⁹⁷

by Finance and Tax; H.B. 73, 2010 Leg., Reg. Sess. (Fl. 2010); H.B. 7127, 2010 Leg., Reg. Sess. (Fl. 2010) introduced by the Finance & Tax Council.

¹⁸⁹ Staff Analysis Report on H.B. 7127, 2010 Leg., Reg. Sess. (Fl. 2010).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Bills would create FLA. STAT. § 193.704.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

VII. DISCUSSION

The disposition of waterfront property with public access has at least four interested parties: the owner/potential seller, the potential buyer, the local taxing authority, and the general public, whose interest is in the access to the waters over the adjacent sovereign submerged lands. Of these four parties, the general public as represented by the BOTIITF¹⁹⁸ is, arguably, the most powerful, and yet, the most removed. Private property rights place the owner/seller and potential buyer in a preferential position in determining the disposition of the property. To prevent access loss on privately-owned property requires either restrictive regulation or reducing the economic appeal of a conversion that disrupts public access.

The loss of public access is often presented in monolithic terms. However, the discrete components of the public access problem may need to be addressed through different policy options. The loss of access to boat ramps is categorically different from the loss of publicly-available wet slip storage that occurs when a marina is converted to a "dockominium."¹⁹⁹ Likewise, other water-dependant commercial enterprises such as boat building and repair represent something more of a service and support to members of the public than a general public access point. Finally, commercial fishing, while an important traditional waterfront use that should arguably be preserved, does not normally provide actual access to and from the water to the general public.

1. Boat Ramps

Addressing the need for boat ramp access is likely within the capacity and interests of the local taxing authority. Boat

¹⁹⁸ Authority for authorization and review of sovereign submerged lands permitting has been delegated by the BOTIITF to the Florida Department of Environmental Protection and the various Water Management Districts. The DEP and the Management Districts operate under an Operating Agreement that defines which agency will review various projects.

¹⁹⁹ A dockominium consists of a multi-slip dock where each of the slips are privately owned. The Dockominium Group, <http://www.thedockominiumgroup.com/faqs.1.html>.

ramps are comparatively passive infrastructure; they are often publicly owned and have a comparatively lower overhead cost to operate than a publicly-owned marina. Level of service standards (LOSS) addressing the need for boat ramps are often set by local governments in the capital improvement element of their comp plan as non-mandatory "guidelines".²⁰⁰ Of course, the planning authority should have a high level of control over the disposition of any privately-owned boat ramp facility that is used to calculate a LOS. Otherwise, loss of a ramp due to increasing property values will cause a decreased LOS at the very time that replacement properties are priced beyond the local government's financial reach. The control could be in the form of a less than fee simple interest such as an easement or a contractual agreement. For publicly-owned boat ramps and marinas, local governments should at least employ a strict no net-loss policy.

2. Marinas

The statutory and regulatory requirements that coastal counties and municipalities incorporate "strategies" to preserve recreational and commercial working waterfronts in the coastal element of their comp plans,²⁰¹ and for coastal counties to create "regulatory incentives and criteria" to encourage preservation²⁰² are all attempts by the state to have the local taxing/governing authority develop the means to offset the market incentive which is driving the conversion from public to private access.

Trying to establish a level of service for marinas is problematic because it is improper to apply LOSS and concurrency requirements where the majority of the facilities are privately owned. As previously discussed, concurrency requirements associated with LOSS operate to prevent *new* development from occurring where *public* infrastructure cannot support it. The requirement is not structured to deny a change in use of private

²⁰⁰ Panama City Mun. Code Chap. 103-3. (Setting a guideline of 1 ramp per 5,000 people).

²⁰¹ FLA. STAT. § 163.3178(2)(g) (2010).

²⁰² FLA. STAT. § 163.3178(6)(a) (2010).

property in order to maintain a certain availability of services for a given population. The duty to provide infrastructure that meets the LOSS is on the local government, not the private individual. Thus, use of LOSS and concurrency requirements to prevent loss of public access through conversion of private property is unavailable.

Land use regulation tools are available that, if cohesively and creatively used in support of specific comp plan policies, can militate against conversion while avoiding the unconstitutional taking of property. Prohibiting the residential development of working waterfronts through zoning is a direct approach. Unless the property owner has expended money or made improvements in reliance on current zoning, there is no property right to the continuation of existing zoning²⁰³ and a zoning change will not support a takings claim. It is not clear whether a successful Bert Harris claim could be brought against a specific downzoning since the statutory definition of "existing use" includes "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."²⁰⁴ Regardless, the prevention of conversion to residential development through zoning does not ensure public access will be maintained. Privatization of marina access can still occur, and attempts to directly mandate public access through zoning could raise *per se* takings issues if it destroys the property right to exclude others.²⁰⁵

Although zoning is a potentially powerful tool, there is a perverse incentive for the local taxing authority to be ineffective at the task of preserving existing working waterfronts. Waterfront property has some of the very highest property value and a conflict of interest arises when the taxing authority is expected to prevent a conversion that is

²⁰³ See *Smith v. City of Clearwater*, 383 So.2d 681 (Fla. 2nd DCA 1980).

²⁰⁴ FLA. STAT. § 70.001(3)(b) (2010).

²⁰⁵ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 415 (1982).

financially beneficial to the seller, the buyer, and, as evidenced by the projected revenue loss under the current use assessment process, to the taxing authority itself. Thus, there is constant pressure on local government to allow the conversion. Other pressures leading to conversion are the costs associated with developing new dock spaces. Initial development of a marina has a high regulatory and startup cost.²⁰⁶ Siting, permitting, dock construction, etc. must all be complete prior to operation. Consequently, a developer is attracted to an established site where many, if not all, of the regulatory hurdles have already been overcome.²⁰⁷

To prevent the conversion of marinas, it needs to be cheaper to develop a new site than to convert the existing one. This involves either reducing the cost to develop elsewhere or increasing the cost of conversion. The value of the property is determined by the market, but the value of the sovereign submerged land lease is determined by rules established by the DEP under the authority of the BOTIITF. Although waterfront owners do have basic riparian rights,²⁰⁸ they do not have any vested interest or right in the use of SSL. Thus, the costs and conditions placed upon SSL leases could effectively preserve public access while avoiding takings issues.

A 2008 senate report by the Committee on Environmental Preservation and Conservation²⁰⁹ found that "roughly half (1347 leases or 51.01 percent) of all current SSL leases are issued to private entities with no public access." The structure of the lease program should allow private use, multi-family docks to be developed in previously undeveloped and appropriate locations. However, the conversion to private use of a SSL lease currently allowing public access should come at a higher premium; a

²⁰⁶ See Interim Summary Report of the Committee on Community Affairs, S. 2005-122, Reg. Sess. (Fla. 2004).

²⁰⁷ *Id.*

²⁰⁸ Riparian rights include "rights of ingress, egress, boating, bathing, and fishing and such others as may be or have been defined by law." FLA. STAT. § 253.141(1) (2010).

²⁰⁹ Interim Report of the Committee on Environmental Preservation and Conservation, S. 2009-112, Reg. Sess. (Fla. 2008).

premium that will help offset the costs of development that the conversion process has previously avoided. The premium should reflect the value of the location and not just the size of the lease. These steps would remove some of the incentive from the buyer to buy.

In the current economic climate there is a reduction in the *incentive* to sell but property taxes may continue to exert *pressure* to sell. The working waterfront property tax amendment reduces pressure to sell due to high tax burden but will not remove the incentive to sell due to high property value once the market recovers. Instead of reducing the development potential to match the current use of the property, the amendment allows the existing zoning to remain in place while allowing owners to receive a "classification" of "working waterfront" for assessment purposes.

Now is the opportune time to link the lower tax burden classification to restrictions on future conversion. This can be accomplished by linking the "working waterfront" designation needed for the "current use" tax break to the condition that the property is restricted from other development "as of right." As land owners apply for and are designated as meeting the use conditions applicable for the classification, future land use restrictions should be employed under the various tools of local land development regulation that, essentially, only recognize and allow for working waterfront uses as of right. Thus, in exchange for the tax reduction, the use of the property would be specifically and legitimately constrained by local regulation. The property owner could still petition for a zoning change in the future but would not be able to develop vested rights in conflict with working waterfront preservation under the current zoning. However, such tight restriction may be a step too far. The example of the tax deferral program serves as a stark reminder of the law of unintended consequences. Rigid future use control may upset current financial strategies and thereby pressure the owner to convert regardless of the availability of a lower tax classification.

Finally, to address projected increases in public access needs, local governments should be required to develop marina siting plans. Previously, boat facility siting plans have been required for the purpose of manatee protection and were

developed with the focus on such protection. Currently, development of these plans is merely "encouraged" under the coastal management section of the Growth Management Act.²¹⁰ An update to siting plans should focus on the long term retention and development of public access for boating purposes. A recently released, comprehensive inventory and analysis of recreational boating needs has been issued by the Florida Fish and Wildlife Conservation Commission.²¹¹ The results of this study, along with other appropriate modeling tools, should be used to identify optimal siting of future maritime infrastructure components that provide public access to Florida's waters.

3. Water-Dependant Facilities and Commercial Fishing

Apart from the sovereign submerged lands issue, much of the discussion regarding marinas is applicable to these categories of water-dependant uses. Because these other uses are more business oriented and do not have a true "public access" aspect to their use, charging a large conversion premium for the SSL lease would create a policy favoring one type of water-dependant business interest over another where the interests of the public trust are not as easily recognized and defined. Land development regulation that restricts residential development from these sites remains the best policy option.

VIII. CONCLUSION

Although known as the Sunshine State, Florida is just as readily defined by its waters. The attraction of the waterfront has led to ever higher population densities. The ease of access by the public to the waterfront or shoreline and onto the water itself has become constricted and contested. Recognizing the importance of recreational access to the quality of life of the

²¹⁰ FLA. STAT. § 163.3178(6) (2010).

²¹¹ Florida Fish and Wildlife Commission, Florida Boating Access Facilities Inventory and Economic Study (2009) *available at* http://www.fwc.state.fl.us/RECREATION/boat_index.htm last visited Mar. 30, 2010).

residents and recognizing the historical and continuing importance of commercial working waterfronts to the state, the Legislature has manifested its intent to preserve and provide these types of waterfront uses.

Effective strategies to preserve and create access will vary. However, certain broad directions exist for the various waterfront use types. For access through the use of boat ramps, firm level of service standards coupled with land development regulations may prove sufficient. To preserve marinas, and similar facilities that provide high levels of public access, application of the submerged lands lease program to charge a compensating premium for the process of conversion to private access should be implemented. Consideration should also be given to a strategy whereby all properties that receive designation as "working waterfront" for the purpose of tax assessment on a "current use" basis are identified and classified under local land use regulations in a manner that prevents the vesting of any development right not in keeping with working waterfront uses. Finally, all local governments should develop marina siting plans that identify and designate optimal future sites for facilities that allow public access. In this way, *all* future Floridians may yet hope to have the means to make their way onto the water.