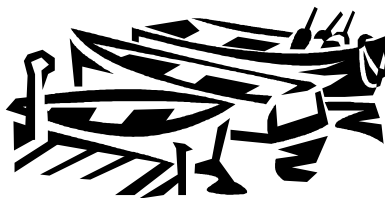


Regulatory Incentives and Criteria to Preserve Recreational and Working Waterfronts:

A Policy Menu for Florida's Waterfront Communities



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I. INTRODUCTION

Florida's peninsular shape has endowed the state with 1,197 statute miles of coastline. This extensive coastline created a history of communities focused on the waterfront and activities dependent on the water, such as Florida's marine industries and public access facilities. These form important components of Florida's working waterfronts; together they contribute over \$15 billion per year to the state's economy and over 200,000 jobs.¹ Florida is also the top state in the U.S. for boat registrations, which further illustrates the importance of public access to marinas and other working waterfront facilities.²

Working waterfronts also possess great historical significance for many towns in Florida; they represent the foundation that built many of these waterfront communities and allow many to operate today as they did generations ago. Increasingly, however, Florida's recreational and working waterfronts find themselves struggling for survival against powerful economic trends.

One of the most challenging trends confronting recreational working waterfronts and public access in general may be the conversion of public marinas into private marinas or private residences. One manifestation of this conversion has spawned the term "dockominium," which has become popular to describe the conversion of public marinas into private marinas that serve upland residential developments exclusively, or sell their vacant slips for as much as \$250,000 each.³ This price can be compared to some public marinas in North Florida which charge as little as \$3,600 per year. Converting working waterfronts into private marinas or dockominiums has an effect that is two-fold. First, it causes loss of public access to the waterways for the boating public, and second, it increases the fair market value of waterfront property, causing an increase in adjacent property taxes. In Florida, local governments assess property taxes based on "just value," which has been interpreted to mean fair market value. Such property tax increases may be the final straw driving owners of working waterfronts to sell their property for residential development.

Rising waterfront property values and taxes also make it increasingly difficult to replace lost waterfronts and access. This is a problem for working waterfronts because it is becoming more difficult to begin new working waterfront operations or expand existing operations due to the expense of acquiring land. Additionally, working waterfronts often need approval of federal, state, and local government officials before they can begin new operations or expand existing operations, and this can be expensive, confusing, and time

¹ FLORIDA SENATE INTERIM REPORT 2005-122, at 1 (2004).

² http://www.boatflorida.org/custom_page_2708/index.html

³ In addition to "dockominiums" we also now have "rackominiums." These are dry storage facilities where space is no longer rented to the public but rather each space is sold to private owners. *See, e.g.* Brian McCarthy, *Disappearing Public Access to the Waterways: Easing the Marina Squeeze* p. 24, *Marine Business Journal*, April 2006.

consuming.

Loss of recreational and working waterfront facilities and public access to the water causes problems for the marine recreation industry.⁴ The Florida Fish and Wildlife Conservation Commission estimates that approximately 8,000 boat ramps currently serve the state; only about 1,300 boat ramps—about 16% of the total—are explicitly open to the public.⁵ Data indicates a slight increase in the amount of boat ramps over the past 15 to 20 years, but the number of registered boats has increased at a much higher rate, leading to an overall decline in access.⁶ Boat ramps and other launching facilities have also experienced difficulty with launching capacity and parking for vehicles and trailers which further indicates the inadequacy of current facilities.⁷ Additionally, since 1987 there has been no change in the number of marinas in Florida even though the number of registered boats from 1987 to 2003 has increased over 50%.⁸

Florida's current population of approximately 17 million people will grow to about 26 million by 2030.⁹ With three-quarters of the population living on the coast and pressure for coastal residential development showing no signs of slowing down, traditional water-dependent uses such as commercial fishing and public access marine facilities look like endangered species.

a. 2005 Legislation

The Florida legislature responded to the challenges facing recreational and working waterfronts by passing Chapter 2005-157 of the Laws of Florida. This legislation defines “commercial working waterfront” to include a parcel or parcels of real property that provide access for water-dependent commercial activities and their support facilities.¹⁰ Some examples of commercial working waterfronts are commercial fishing off loading facilities, boat hauling and repair facilities, and boat construction facilities. The legislation also defines “recreational working waterfront” to encompass waterfront facilities that are open to the public and provide access to the navigable waterways of the state.¹¹ Some examples of recreational working waterfronts are wet and dry marinas, docks, and boat ramps.¹²

Among its other provisions aimed at public boater access and preservation of recreational and working waterfronts, the 2005 legislation also specifies that the future land use

⁴ See FLORIDA SENATE INTERIM REPORT 2005-122, at 1 (2004).

⁵ *Id.* at 3.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ http://edr.state.fl.us/conferences/population/fdec0602_popchange.pdf

¹⁰ 2005 Fla. Laws, ch. 157, sect. 9(b).

¹¹ 2005 Fla. Laws, ch. 157, sect. 13.

¹² *Id.*

element for coastal counties “must include, without limitation, regulatory incentives and criteria that encourage the preservation of recreational and commercial working waterfronts as defined in s. 342.07.”¹³ Furthermore, the legislation specifies that comprehensive plans with coastal elements must include in that element “the strategies that will be used to preserve recreational and commercial working waterfronts.”¹⁴ This policy menu introduces the reader to different policy tools local governments and waterfront communities have at their disposal to comply with these requirements of Chapter 2005-157 Laws of Florida.

b. 2006 Legislation

In 2006 the Florida Legislature again turned to the loss of recreational and working waterfronts in the state. The Legislature created Laws of Florida, 2006-220. Under this legislation, local governments with a coastal management element are encouraged to consider and adopt criteria for the protection of “working waterfronts and public access to the water, and recreation and economic demands.”¹⁵

The 2006 legislation also modified the legislative findings incorporated into the recreational and working waterfronts statutes by noting the importance of tourists, tourism, and public lodging establishments in Florida.¹⁶ The legislation also alters the definition of “recreational and working waterfronts” in Florida Statutes section 342.07(2) by adding “hotels and motels as defined in s. 590.242(1)” as an example of “water-dependent commercial activities.”¹⁷ The changes and additions to the definition represent a substantial departure from past concepts of “water-dependent use” at all government levels in Florida and nationally. In addition, the drafting of this portion of the 2006 legislation presents difficulties in interpretation.

Finally, the 2006 legislation modifies Florida Statute section 197.303—the property tax deferral provisions for recreational and working waterfronts—to include “public lodging establishments” in the types of recreational and working waterfronts that a local government may include for tax deferral.¹⁸

II. LEGAL CONTEXT

A. The Nature of Coastal Property Rights

¹³ 2005 Fla. Laws, ch.157, sec. 1

¹⁴ *Id.* at sect. 2.

¹⁵ 2006 Fla. Laws, ch. 220, sec. 2.

¹⁶ 2006 Fla. Laws, ch. 220, sec. 6.

¹⁷ *Id.*

¹⁸ 2006 Fla. Laws, ch. 220, sec. 4.

i. Background

The State of Florida, under the equal footing doctrine, obtained title to sovereign submerged lands below all tidally influenced waters and below navigable non-tidally influenced waters at statehood.¹⁹ The equal footing doctrine provides that all states admitted to the Union after 1789 enter with the same rights, sovereignty, and jurisdiction within its borders as did the original 13 states. Now, under Article X, section 11 of the Florida Constitution, submerged sovereign lands are limited to those below navigable waters.²⁰ The Governor and Cabinet, sitting as the Board of Trustees of the Internal Improvement Trust Fund (Trustees) are charged with managing the state's submerged sovereign lands.²¹

The sole requirement for sovereign lands is navigability, under which are two relevant subsets: tidal waters and non-tidal waters. The boundary line between state ownership and private ownership differs based on tidal influence. The Ordinary High Water Line forms the boundary between public and private ownership of non-tidal waterbodies, usually freshwater. For tidal waterbodies, or salt waterbodies, the boundary is formed by the Mean High Water Line or Mean High Tide Line.²² Thus, the area commonly referred to as the “beach” or “foreshore” belongs to the state because this area lies below the Mean High Water Line.²³ In both cases, if the water's edge changes gradually or indiscernibly, the boundary line moves with it; the upland owner gains property as the water's edge recedes and loses property as the water's edge encroaches over time. Sudden changes, as by flooding, do not cause the boundary line to change.

Sovereign submerged lands are excepted from the Marketable Record Title Act and are not subject to being extinguished by provisions of the act which might otherwise negate an interest for which no recorded evidence of ownership appears in the past 30 years. Further, sovereignty lands, like all other state lands, are not subject to adverse possession.²⁴

ii. Public Trust Doctrine

Generally, lands that fall within the public trust doctrine, public trust lands, are those lands for which title is held in trust by a state, because of its sovereignty, for the use and

¹⁹ Florida was admitted to into the Union on March 3, 1845. 28 Cong. Ch. 48, 5 Stat. 742 (1845). The court in *Broward v. Mabry*, 50 So. 826 (1909), described the change in ownership: “New states, including Florida, ‘admitted into the Union on equal footing with original states, in all respects whatsoever,’ have the same rights, prerogatives, and duties with respect to navigable waters and the lands thereunder as have the original thirteen states....”

²⁰ Art. X, §11 states: “The title to lands under navigable waters, within the boundaries of the state, 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.”

²¹ Fla. Stat. §253.02 and §253.03.

²² The terms are used interchangeably.

²³ See *Lipscomb v. Gialourakis*, 133 So. 104 (1931).

²⁴ *Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So. 2d 339 (Fla. 1986).

enjoyment of the people of the state. Originating in English common law, the public trust doctrine was twofold: fee ownership of the submerged land and a trusteeship for the benefit of the people, permitting use of the waters. *Illinois Central Railroad v. Illinois* laid the framework for the public trust doctrine in the United States.²⁵ In this and other cases, the court used the public trust doctrine to preserve public ownership of the submerged beds of navigable waterways. Traditionally, the doctrine and public ownership protect three uses: navigation, fishing and commerce. Protected uses have been expanded under case law to include things like bathing and the environment.

The common law doctrine was codified in Florida as a constitutional mandate that the Trustees keep the lands under navigable waters in trust for the public.²⁶ However, unlike the court the *Illinois Railroad*, Florida permits conveyance of public trust rights when such sale would be in the public interest.²⁷

iii. Riparian and Littoral Rights

If the sovereign, the state, owns the waterbody, the upland owner still retains riparian or littoral rights. Riparian rights attach to land fronting a river or a stream; littoral rights attach to land fronting an ocean, sea or lake. Although the terms are distinct, courts frequently use riparian rights as an all-encompassing term.

Florida statute defines riparian rights as follows:

[T]hose incident to land bordering upon navigable waters. They are rights of ingress, egress, boating, bathing and fishing and such others as may be or have been defined by law. Such rights are not of a proprietary nature. They are rights inuring to the owner of the riparian land but are not owned by him or her. They are appurtenant to and are inseparable from the riparian land. The land to which the owner holds title must extend to the ordinary high watermark of the navigable water in order that riparian rights may attach.²⁸

While statutorily defined now, riparian and littoral rights are common law rights vested in land owners prior to the statutory definition and thus cannot be constitutionally modified, limited, or restricted.²⁹ The Florida Supreme Court has defined the common law rights as follows:

Riparian and littoral property rights consist not only of the right to use the water shared by the public, but include the following vested rights: (1) the right to access to the water, including the right to have the property's contact with the

²⁵ 146 U.S. 387 (1892).

²⁶ Fla. Const. Art. X, §11.

²⁷ *Id.* See Coastal Petroleum, 492 So. 2d 339 (Fla. 1986).

²⁸ Fl. Stat. §253.141(1).

²⁹ State v. Florida National Properties, Inc., 338 So. 2d 113 (Fla. 1976).

water remain intact; (2) the right to use the water for navigational purposes; (3) the right to an unobstructed view of the water; and (4) the right to receive accretions and relictions to the property.³⁰

Riparian rights are not absolute, however. Because these are property rights, they may be regulated by law but may not be taken without just compensation.

b. Limitations on Regulation: Takings and the Bert Harris Act

1. Regulatory Takings: The Fifth Amendment to the U.S. Constitution³¹

The U.S. Constitution forbids the taking of private land for a public purpose without “just compensation.”³² The “taking” of private land for a public purpose includes not only the state exercising eminent domain powers to take title to land, but also “inverse condemnation,” or “takings” that occur through regulation of property. Takings jurisprudence has evolved to recognize two types of categorical takings within inverse condemnation:³³ 1) physical invasion of property, and 2) elimination of all economically viable use of land.

When the government “physically invades” or requires that a member of the public be allowed to enter the property, a taking will almost always be found, “no matter how minute the intrusion, and no matter how weighty the public purpose behind it.”³⁴ The second type of categorical taking is “where regulation denies all economically beneficial

³⁰ Board of Trustees for the Internal Improvement Trust Fund v. Sand Key Associates, Ltd., 512 So. 2d 934 (Fla. 1987).

³¹ U.S. Const. amend. V. The Fifth Amendment’s protection of property applies to the federal government, but its protections have been applied to the actions of state governments through the Fourteenth Amendment.

³² The prohibition on government taking of private property is not categorical. The government may take private property, but only under certain conditions. Chief among these is the need to provide for “due process of law.” U.S. Const. amends. V, XIV. In 1980 the U.S. Supreme Court noted that regulation of private property “effects a taking if the ordinance does not substantially advance legitimate state interests.” *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). This test is the same as for due process. Thus, the *Agins* decision confused questions of the legitimacy of a regulation as opposed to the effect of the regulation on private property. The U.S. Supreme Court finally eliminated this confusion in 2005 when, in the *Lingle v. Chevron* case, it abrogated the rule in the *Agins* case and held that the proper inquiry in *Agins* was a due process question as to the legitimacy of a regulation and not whether an invalid regulation effected a taking. *Lingle v. Chevron U.S.A. Inc.* 544 U.S. 528, 542-43 (2005).

³³ As defined by one land use planning expert, “[i]nverse condemnation is ‘a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.’” *Seminole County, City of Casselberry, Fla. V. Pinter Enterprises, Inc.*, F.Supp.2d 1203, 1209 (M.D. Fla. 2000) (citing D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 328 (1971)).

³⁴ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015. See also, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

or productive use of land.”³⁵ A loss of all economic viability caused by regulations justified by important public interests will result in a taking; but a loss of all economic viability will not give rise to a taking where the regulation is aimed at preventing a common law nuisance.³⁶ The U.S. Supreme Court has noted that most cases do not result in a loss of all economic viability.³⁷

Most takings cases involve regulations that affect a property owner’s exercise of certain sticks in the “bundle of rights” that comprise property ownership. As Justice Holmes stated in *Pennsylvania Coal Co. v. Mahon*: “[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”³⁸ However, the Supreme Court has not enunciated a clear, concise test for when regulations go “too far.” Instead, the Supreme Court has stated that it will engage in an *ad hoc* factual inquiry. This *ad hoc* factual inquiry first appeared in the case of *Penn Central Transportation Co. v. City of New York*.³⁹

In making its *ad hoc* inquiry, the Supreme Court has identified three factors of particular importance in determining whether government action works a taking: (1) the character of the government action; (2) the economic impact of the regulation; and (3) the extent to which the action interferes with reasonable investment-backed expectations.⁴⁰

If the government's action can be characterized as a physical invasion of the property, a court will be more likely to find a taking.⁴¹ If the action can be characterized as eliminating substantial rights held in property, such as the right to possess, use, and dispose of the property, and the right to exclude others, courts may also be more likely to find a taking.⁴²

In analyzing whether a regulation results in a taking, courts will also consider the impact of the action on the property owner’s reasonable investment-backed expectations.⁴³ Reasonable investment-backed expectation analysis looks at what property rights, both economic and non-economic, the regulation takes away. In *Penn Central*,⁴⁴ the U.S. Supreme Court held that because a New York City landmark law did not interfere with current uses of the parcel and allowed a reasonable return on the original investment made in the property, the law did not interfere with plaintiff's investment-backed

³⁵ Lucas, 505 U.S. at 1015.

³⁶ *Id.* at 1029-31.

³⁷ *Id.* at 1017.

³⁸ 260 U.S. 393, 415 (1922).

³⁹ 438 U.S. 14, 124 (1978).

⁴⁰ *Penn Central Transp. Co. V. City of New York*, 438 U.S. 104, 124 (1978).

⁴¹ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

⁴² *Loveladies Harbor, Inc. v. United States*, 15 Cl.Ct. 381, 391 (1988).

⁴³ 438 U.S. at 124.

⁴⁴ 438 U.S. 104 (1978).

expectations.⁴⁵ The Court also noted that the regulation's stated rationale would benefit the owners of the parcel in that the regulation “benefit[s] all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole.”⁴⁶

Thus, a taking does not necessarily occur simply because regulations do not permit a property holder the highest and best use of property if that use creates a public harm.⁴⁷ Furthermore, where a change to the natural condition of the land would injure others and would not be appropriate to the natural state of the land, a landowner does not have an absolute right to make the change.⁴⁸

This leaves the question as to how much loss of economic benefit of land must be lost before a compensable taking may be found; the case law is inconsistent on this point.

In the majority of cases, as long as regulations allow some economically beneficial use of the property, the regulation will not be found to result in a taking. The regulatory incentives and criteria suggested in this policy menu for recreational and working waterfronts, when properly implemented, should rarely result in a finding of a taking under the U.S. Constitution’s standards. In virtually all cases, the regulations may limit what would be the “highest and best” (i.e.—most financially lucrative) use of the land. The aim of most regulations to protect and promote commercial and working waterfronts, however, is to stimulate certain types of business, not environmental protection. Thus, most regulations will still allow economically viable uses of property that, in most cases, do not interfere with the “reasonable investment-backed expectations” of the owner.

2. The Bert J. Harris Act⁴⁹

In 1995, the Florida legislature adopted the Bert J. Harris, Jr., Private Property Rights Protection Act (Act),⁵⁰ which purports to create a new cause of action for landowners complaining of government interference with property rights. The Act provides that:

when a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property, the property owner of that real property is entitled to relief, which may include compensation for the actual loss to the fair market value of the property caused by the action of government, as provided in this section.⁵¹

⁴⁵ 438 U.S. at 136.

⁴⁶ *Id.* at 134-35.

⁴⁷ *Graham v. Estuary Properties*, 399 So. 2d 1374 (Fla. 1981).

⁴⁸ *Id.* at 1381-82.

⁴⁹ FLA. STAT. §§70.001-.80 (2005).

⁵⁰ FLA. STAT. §70.001 (2005).

⁵¹ *Id.* at § 70.001(4)(a).

As expressed in the Act, the intent of the legislature was to create “a separate and distinct cause of action from the law of takings,”⁵² and to provide “for relief, or payment of compensation, when a new law, rule, regulation, or ordinance...as applied, unfairly affects real property.”⁵³

If a court determines that an inordinate burden has been imposed on the landowner, the remedy “may include compensation for the actual loss to the fair market value of the real property” created by the government action.⁵⁴ The amount of compensation due is equal to the difference between the fair market value of the property prior to the government action, including the owner's reasonable investment-backed expectations, and the current fair market value after the government action, including the government's settlement offer and ripeness decision.⁵⁵

Settlement Procedure

The Act establishes a mandatory settlement procedure. At least 180 days before filing suit, a landowner must give the governmental entity notice, including a valid appraisal supporting the claim of an “inordinate burden,” and demonstrating the loss in fair market value to the property.⁵⁶ During the 180-day period, the governmental entity must make a written settlement offer which would resolve the claim,⁵⁷ along with a written “ripeness decision” detailing permitted uses of the property.⁵⁸ The landowner may file suit in circuit court after the ripeness decision has been issued or upon the expiration of the 180-day notice period.⁵⁹

The settlement offer may include the following changes:

- An adjustment of land development or permit standards or other provisions controlling the development or use of land.
- Increases or modifications in the density, intensity, or use of areas of development.
- The transfer of developmental rights.
- Land swaps or exchanges.

⁵² *Id.* §70.001(4)(a).

⁵³ *Id.* The Act excludes actions by the federal government, or actions by state or local governments "when exercising the powers of the United States or any of its agencies through a formal delegation of Federal authority." *Id.* at §70.001(3)(c).

⁵⁴ FLA. STAT. §70.001(2) (2005).

⁵⁵ *Id.* at § 70.001(6)(b).

⁵⁶ *Id.* at §70.001(4)(a). Landowners affected by government action which falls within the scope of the Act have one year in which to file suit. *Id.* §70.001(11). This one-year period does not begin to run until after any administrative appeals have been completed. *Id.*

⁵⁷ *Id.* at §70.001(4)(c).

⁵⁸ “Ripeness decision” in this context constitutes the “last prerequisite to judicial review.” *Id.* at §70.001(5)(a).

⁵⁹ *Id.*

- Mitigation, including payments in lieu of onsite mitigation.
- Location on the least sensitive portion of the property.
- Conditioning the amount of development or use permitted.
- A requirement that issues be addressed on a more comprehensive basis than a single proposed use or development.
- Issuance of the development order, a variance, special exception, or other extraordinary relief.
- No changes to the action of the governmental entity.⁶⁰

Creative use of these mitigating features in a recreational and working waterfronts program would reduce the likelihood of successful claims that the ordinance “inordinately burdens” a particular property. If the property owner rejects the government’s settlement offer and ripeness decision and files suit, the circuit court judge must examine the existing use of the property,⁶¹ and determine whether the owner has an additional vested right to a specific use of the property.⁶² Then, considering the proposed settlement offer and ripeness decision, the judge will decide whether the “action of the governmental entity”⁶³ has inordinately burdened the real property.

If the landowner accepts a settlement offer, this does not necessarily end the process. The governmental entity may implement the offer subject to certain conditions.⁶⁴ If the settlement offer “would have the effect of a modification, variance, or a special exception to the application of a rule, regulation, or ordinance as it would otherwise apply to the subject real property, the relief granted shall protect the public interest served by the regulations at issue and be the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property.”⁶⁵ Similarly, if a settlement agreement might contravene a relevant statute, the governmental entity and the property owner must file a joint action for circuit court approval of the settlement so that the circuit court can ensure that the public interest protected by the statute is still served by the settlement agreement.⁶⁶ No Florida case has yet addressed a settlement in which a court concluded that the settlement did not comply with state statutes.⁶⁷

⁶⁰ *Id.* at §70.001(4)(c).

⁶¹ "Existing use" means 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 activity or such reasonably foreseeable, non-speculative 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 §70.001(3)(b).

⁶² "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 §70.001(3)(a).

⁶³ "Action of a governmental entity" is a "specific action...which affects real property, including action on an application or permit." *Id.* at §70.001(3)(d).

⁶⁴ Fla. Stat. §70.001(4)(c), (d)1, (d)2.

⁶⁵ Fla. Stat. §70.001(4)(d)1.

⁶⁶ Fla. Stat. §70.001(4)(d)2.

Inordinate Burden

Relative to the adoption and implementation of a local government's recreational and working waterfronts program, the most significant issue raised by the Act is what constitutes an "inordinate burden." The statutory definition describes two types of "inordinate burdens." The first is an action which directly restricts or limits the use of real property to the extent that the owner is permanently unable to attain "reasonable investment-backed expectations" for an existing use or vested right to a specific use of the property as a whole.⁶⁸ The second inordinate burden is one in which the owner is left with "unreasonable existing or vested uses such that he bears permanently a disproportionate share of the burden imposed for the good of the public...."⁶⁹ Temporary impacts and governmental action to remediate a "public nuisance at common law or a noxious use of private property" are not included in the definition of "inordinate burden."⁷⁰

The primary question is what degree of regulation or what diminution of value will constitute an "inordinate burden" under the statute. While a number of claims have been filed under the Act, many have settled, and case law has not clarified the meaning of inordinate burden and how it may differ from the standards in the U.S. Constitution.⁷¹ Though the Act is intended to provide a separate cause of action from present takings jurisprudence,⁷² it is unlikely that courts will be able to draw a bright line between the new cause of action and takings jurisprudence. Given the history and logic of traditional takings analysis, courts hearing cases under the Act will find it difficult to ignore such precedents when determining whether property has been "inordinately burdened" by government regulations. Still, the development of the Bert Harris Act remains uncertain as Florida Statute section 70.001(9) notes that "[t]his section may not necessarily be construed under the case law regarding takings if the governmental action does not rise to the level of a taking."⁷³

⁶⁷ In *Parker v. St. Johns County*, 2002 WL 31846456 (Division of Administrative Hearings, December 17, 2002) the administrative law judge held that the petitioner had failed to carry her burden to demonstrate that a change to the St. Johns County Future Land Use Map, which was made pursuant to a settlement agreement under the Bert Harris Act, was contrary to the relevant provisions of the Local Government Comprehensive Planning and Land Development Regulation Act, Chapter 163, Part, II, Florida Statutes.

⁶⁸ *Id.* §70.001(3)(e).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Richard Grosso & Robert Hartsell, *Old McDonald Still Has a Farm: Agricultural Property Rights After the Veto of S.B. 171279*, MAR Fla. B.J. 41, 44 (2005); Susan L. Trevarthen, *Advising the Client Regarding Protection of Property Rights: Harris Act and Inverse Condemnation Claims*, 78-AUG Fla. B.J. 61 (2004). A Florida court of appeals recently remanded a case to the trial court because the trial court had failed to make the necessary findings required by the Act to support a finding of "inordinate burden." *Brevard County v. Stack*, 932 So.2d 1258, 1262 (Fla. 5th DCA 2006).

⁷² FLA. STAT. §70.001(1) (2005) ("...[S]ome laws, regulations, and ordinances of the state and political entities in the state, as applied, may inordinately burden, restrict, or limit private property rights without amounting to a taking....").

According to the Act, an “inordinate burden” is placed on private property whenever the owner is “permanently unable to attain the reasonable, investment-backed expectations” for the use of the property.⁷⁴ “Investment-backed expectations” was first introduced as a factor in takings jurisprudence by the United States Supreme Court in *Penn Central Transportation Co. v. New York City*.⁷⁵ However, the role this factor should play, and its relative importance, were never made clear. The Court's subsequent decision in *Keystone Bituminous Coal Association v. De Benedictis* focused primarily on whether the regulation advanced a legitimate state interest, and whether it denied the owner “economically viable use of his land.”⁷⁶ The Act also reflects some of the perspective in *Florida Rock Industries, Inc. v. U.S.*⁷⁷ that compensation may be required even when government action does not amount to a full diminution in value.⁷⁸

At this point in the interpretation of the Act it is impossible to predict whether every diminution in value of a property as a result of future government regulation will meet this test of inordinately burdening the use of property, or whether it will be possible for some regulation to “burden” the property without that burden becoming inordinate. Those advocating increased protection of property rights interpret the Act to provide relief beginning with the loss of the first dollar of fair market value.⁷⁹ However, this argument is opposed to the traditional state court evaluation of whether government action has resulted in a regulatory taking.⁸⁰ The *Florida Rock* case is somewhat illustrative, but the decision only acknowledged that something less than a complete diminution of value caused by government action could result in a compensable taking of private property. It did not determine exactly how much diminution is necessary in order to effect a taking.⁸¹ While the Act incorporates the concept of partial takings, there has been no judicial interpretation of how much diminution constitutes a compensable loss.

Existing Use

There are two types of “existing use” defined in the Act. The first is “an actual, present use or activity on the real property.”⁸² This includes “periods of inactivity which are normally associated with, or are incidental to, the nature or type of use or activity.”⁸³ The second includes land uses which are reasonably foreseeable and non-speculative, suitable

⁷³ FLA. STAT. §70.001(9).

⁷⁴ FLA. STAT. §70.001(3)(e).

⁷⁵ 438 U.S. 104, 124 (1978).

⁷⁶ 480 U.S. 470, 485 (1987).

⁷⁷ 18 F.3d 1560 (Fed. Cir. 1994).

⁷⁸ FLA. STAT. §70.001(1) (2005).

⁷⁹ See Robert C. Downie, II, *Property Rights: Will Exceptions Become the Rule?*, 69 FLA. B. J., Nov. 1995, at 71.

⁸⁰ *Id.*

⁸¹ 18 F.3d at 1570.

⁸² *Id.* §70.001(3)(b).

⁸³ *Id.*

for the subject real property, 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.⁸⁴

The second type of “existing use” defined above will likely be more contentious with regard to implementation of regulatory incentives and criteria to protect and promote recreational and working waterfronts. Despite the wording, this type of “existing use” includes possible future uses. Under this scenario, a claimant under Bert Harris might argue that refusal to grant a permit for high-value residential uses of coastal property fit the definition of an inordinate burden of “reasonably foreseeable and non-speculative [uses] which have created an existing fair market value in the property greater than the fair market value of the actual present use or activity.”⁸⁵ Such an argument, however, fails to address statutory language which requires that these second types of “existing use” also must meet tests of compatibility with adjacent land uses and for which the subject property is “suitable.”⁸⁶ The test for such suitability is not further defined in the statute. The best approach would be to focus on the issue of suitability of the subject property and argue that land development which would contribute to a continued loss of recreational and working waterfronts and public access means the property is not “suitable” development for the subject land. Such a reading properly gives the suitability test a meaning independent of the “reasonably foreseeable” requirement outlined below. In cases in which recreational and working still exist in an area, the local government could advance a strong argument that residential uses are not compatible with adjacent land uses; this argument holds particular weight in the context of industrial waterfront uses such as boat yards and fish houses or other uses involving noise, smells, and traffic.

The Act’s definitions of “reasonably foreseeable” and “non-speculative” uses were intended to incorporate concepts from eminent domain valuation law.⁸⁷ In this area of law, courts will sometimes accept appraisal testimony regarding highest and best use based in part on the appraiser’s determination of whether zoning changes or other land use changes were reasonably foreseeable. It is possible that land uses included in the future land use element of the local comprehensive plan may be sufficient to demonstrate that a proposed development proposal is reasonably foreseeable and not speculative, since the zoning would be expected to follow the plan. Thus, in certain cases, regardless of the inclusion of an area in recreational and working waterfronts program, if the future land use classification for that area is not compatible with the purposes of the recreational and working waterfronts program, a proposed use which matches the future land use classification may be found to be “reasonably foreseeable.” Thus, it is imperative in any program that the future land use classifications of the local comprehensive plan be altered to match any altered zoning plan.

⁸⁴ *Id.*

⁸⁵ Fla. Stat. §70.001(3)b.

⁸⁶ Fla. Stat. §70.001(3)b.

⁸⁷ *See*, David L. Powell, et al., *Florida's New Law to Protect Private Property Rights*, 69 FLA. B.J. 12, 17 (Oct. 1995).

Creative and integrated use of the policy tools outlined in the policy menu, especially the inclusion of conditional uses that include criteria mandating preservation or creation of public access, can temper the need for overly-stringent prohibitions on certain land uses. Additionally, inclusion of incentives to promote public access and recreational and working waterfronts (fee reductions/waiver; density bonuses; expedited permit approvals) can further temper applicable regulations and steer development towards the ends of preserving recreational and working waterfronts and public access to the waters.⁸⁸

III. STRUCTURE OF THE POLICY TOOLS

Each of the following sections highlights a policy tool available to local governments in their efforts to comply with statutory requirements and to preserve recreational and working waterfronts. Each policy tool begins with a brief introduction followed by a section detailing the relevance of the policy tool to waterfronts. Next come sections on legal issues and the pros and cons of each tool. While all of these sections may contain some legal citations, they are not intended as in-depth analyses, but rather as introductions to different ideas so that local government planners and other interested parties have a larger view of what is available in the policy toolbox. Finally, each policy tool illustrates the policy tool with a “best practice” section which gives an example of the policy tool in use. None of these policy tools represents a “silver bullet” that will stop the loss of recreational and commercial working waterfronts. Rather, they represent an array of tools that may be carefully integrated into a local governments efforts to maintain its waterfront.

⁸⁸ Property limitations agreed to by a former property owner will not support a finding of inordinate burden on future purchasers as the future purchasers have no reasonable expectation of contravening previous restrictions on the property. *Palm Beach Polo, Inc. v. The Village of Wellington*, 918 So.2d 988, 995 (Fla. 4th DCA 2006).