

Visual Access

I. Nature of the Tool

Visual access or view protection may be an element of a local government's design standards.¹ View protection ordinances are common in coastal and mountain areas and may also be included in local government's land development code to protect views of historical or dominant structures and buildings.² Visual access can be achieved through thoughtful site planning and design, including roadway layout, building siting and use of intrinsic characteristics of the site, such as natural grade changes and shoreline variations.

II. Relationship to Waterfronts

In the context of waterfront property, visual access is a limited right to an unobstructed view over the waters. At common law, visual access was an unlimited riparian right.³ Now, in Florida, under the rule established in *Hayes v. Bowman*, the common law right to has been modified such that the right only extends from the sidelines of the landowner's property to the foreshore (beach) across waters and "as near as practicable in the direction" of the channel.⁴ Common law has also been modified to reflect that the landowner's right to visual access is subject to the rights of the public to pass along the shoreline.⁵

The factual circumstances are critical in determining the scope of the right.⁶ The court must give consideration to the "lay of the upland shoreline, the direction of the channel and the co-relative rights of adjoining land owners – each of whom have riparian rights."⁷

The state of Florida acknowledged waterfront landowners' riparian right to view of the water in the state's Mangrove Trimming and Preservation Act.⁸ Section 403.9323(3) states:

It is the intent of the Legislature to provide waterfront property owners their riparian right of view, and other rights of riparian property ownership as recognized by s. 253.141 and any other provision of law, by allowing mangrove

¹ See *supra* discussion on Design Standards.

² See *e.g.* Town of Ponce Inlet Land Development Code, Article V, Land Use Density and Intensity, §5.6.4. Lighthouse View Protection:

In order to maintain over a broad area of land and water the visibility and dominance of the Ponce Inlet lighthouse, a unique and historic structure of major significance to the people of the community, no building or structure in the area south of Inlet Harbor Road shall be erected or constructed to exceed a height of thirty-five (35) feet.

³ See *supra* discussion on Riparian Rights.

⁴ 91 So. 2d 795, 801 (Fla. 1957); see *TIIF v. Madeira Beach*, 272 So. 2d 209 (Fla. 2d DCA, 1973).

⁵ *Madeira Beach*, 272 So. 2d at 214.

⁶ *Bowman*, 91 So. 2d at 801.

⁷ *Id.*

⁸ Fla. Stat. §§ 403.9321 through 403.9333.

trimming in riparian mangrove fringes without prior government approval when the trimming activities will not result in the removal, defoliation, or destruction of the mangroves.

III. Legal Issues

View protection or visual access ordinances in coastal and waterfront property are relatively common and have been challenged as exceeding a local government's powers to regulate⁹ and as "takings" or inverse condemnation¹⁰ under the 5th Amendment of the U.S. Constitution. The United States Supreme Court has stated that the protection of aesthetics is a legitimate function of the legislature¹¹ and that the preservation of visual access to the ocean is a legitimate public interest.¹² Visual access ordinances that restrict the height of buildings to prevent visual obstruction of the water are likely to be upheld by courts because the majority of courts support aesthetic regulation independent of any other human values.¹³ However, in the context of waterfront property the value of the land is often connected to a view of the water. At least one court found that the loss of a water vista substantially reduced the value of the property, thus entitling landowners to protection.¹⁴

IV. Pros & Cons

Visual access ordinances are useful regulatory means to ensure the character of waterfront areas continues to focus on the water. Continual focus on the visual environment, the water, promotes various derivative values such as tourism and environmental protection. Visual access ordinances are also useful in protecting the property values of the waterfront land.

View protection ordinances are not seen as useful by all interests, however. Developers and people with real estate interests are not likely to see the value in protecting existing structures' view of the water. New construction of larger, taller and higher density structures with a view of the water generates more money for the developers. Because of the money often involved in waterfront development, challenges to visual access ordinances may occur, though they are unlikely to succeed.

⁹ Local governments' lawmaking authority is limited to the general police powers of protecting the health and welfare of the community. Regulations must be fair and reasonable in content and must further a legitimate governmental interest. This is referred to as substantive due process.

¹⁰ Inverse condemnation is defined as an action brought by a property owner for compensation from a governmental entity that has taken the owner's property without bringing formal condemnation proceedings. BLACK'S LAW DICTIONARY (8th Ed. 2004).

¹¹ See *Berman v. Parker*, 348 U.S. 26, 32-33 (1954).

¹² *Dolan v. City of Tigard*, 512 U.S. 374, 386-387 (1994) (citing *Nollan v. California Coastal Com.*, 483 U.S. 825, 835 (1987)).

¹³ See *State Dept. of Ecology v. Pacesetter Const. Co., Inc.*, 571 P.2d 196 (Wash. 1977) (upholding height limitation of 35 feet on lakefront property to protect view of lake by nearby residents).

¹⁴ *Id.* at 201. Protecting the character of an area, protecting property values, protecting aesthetics including derivative human values related to the visual environment, have been held to be legitimate public purposes supporting height restrictions. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

V. Best Policy Practices

The City of Melbourne, Florida provides for the preservation of visual access in its Land Development Code. The general district requirements for the Indian River Lagoon district mandates that all development abutting the Indian River Lagoon be designed to maximize view and breezes.¹⁵ It further mandates that all new multi-story developments include a breezeway.¹⁶ The Development Code also provides requirements for the Olde Eau Gallie overlay district. The purpose of the requirements is to preserve the unique features of the Eau Gallie riverfront by restricting building height, establishing aesthetic design standards, and creating a common theme in the riverfront area.¹⁷ Working with the scale of the existing structures, the requirements mandate that new structures preserve the scenic views of the neighborhood.

The City of Ft. Myers, Florida provides comprehensive design standards for waterfront properties in its Code of Ordinances, including a special standard for visual access. Division 5, Waterfront Development Districts, sets the policy of the city to protect and preserve the special attributes of the waterfront.¹⁸ The division establishes the minimum setbacks for the districts; it requires that a variance to the setback incorporate a public access easement along the waterfront to preserve the view or enhance the aesthetics of the area.¹⁹ The division also establishes that no building, parking, solid fence shall be permitted in order to preserve the unobstructed view of the waterfront.²⁰

¹⁵ City of Melbourne Florida Land Development Code, Art. IV, General District Requirements.

¹⁶ *Id.* The elements of a breezeway are also detailed in the Code. A breezeway may include required building setbacks, buffer areas, landscape areas, surface parking lots, driveways, vehicular use areas, storm water retention areas, swimming pools, pool decks and uncovered patios. *Id.*

¹⁷ *Id.*

¹⁸ *See* City of Ft. Myers, Florida, Code of Ordinances, Division 5, §25-111.

¹⁹ *See* §25-112. Waterfront setback.

²⁰ *See* §25-114. Side yards.