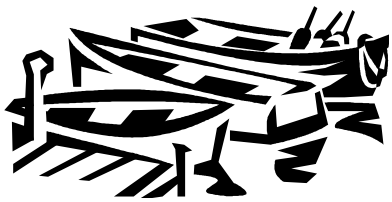
Water-Dependent Use Definitions: A Tool to Protect and Preserve Recreational and Commercial Working Waterfronts



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I. THE NATURE OF THE TOOL: THE IMPORTANCE OF WATER DEPENDENCY AND ITS RELATIONSHIP TO WATERFRONT

Clear and reasoned definitions regarding water dependency form important tools for preservation of recreational and commercial working waterfronts. Many communities, however, still lack a definition that leads to definitive results in reviews of proposed land uses. This policy tool sets out the importance of water dependency definitions, explains the reasoning behind definitions of water dependency, recommends terminology, and gives specific examples that will help communities tailor definitions and applications of water dependency to their specific visions for their waterfronts.

The phrase "water-dependent use" was first suggested in the Coastal Zone Management Act (CZMA).[1] While the Act does not specifically use the phrase, it does seek to ensure that

[1] 16 U.S.C.S. §§ 1451 *et seq.* (2000).

continued development on or adjacent to the water requires location on or adjacent to water.[2] In part to comply with CZMA requirements, many states participating in the federal government's CZMA program have established state-level definitions of "water-dependent use."[3] Often a regulatory or zoning system that includes a definition of water-dependent use may also incorporate levels of the associated need of uses for water: these are collectively referred to as water dependency requirements.

For many local jurisdictions, water dependency definitions have been incorporated into zoning regulations. In Florida, the Community Planning Act requires coastal communities to address coastal issues.[4] Numerous Florida communities possess historical working waterfronts, and maintaining the traditions and character of these communities is often a key concern of those who live in the communities. However, the interests of historical working waterfronts may conflict with water-enhanced businesses such as waterfront hotels or restaurants. Local governments might favor one or the other side of this conflict—either wishing to further the expressed interests of the preservation-minded or arguing that the dollars brought to the community by water-enhanced uses outweighs the economic value of a working waterfront. Water dependency definitions play a key role in how this debate plays out.

Review of existing definitions related to the water dependency of land uses indicates that general definitions of water dependent uses exhibit many similarities. Yet, both the examples contained within those general definitions and the applications of those definitions vary.

II. EXISTING DEFINITIONS

A. *The Federal Level: The Clean Water Act*

Each definition of water-dependent use is influenced by the context in which it is developed and used. At the federal level, the Federal Water Pollution Control Act[5] and the Rivers and Harbors Act[6] serve as authority for the U.S. Army Corps of Engineers to pass regulations that employ the term.[7] The regulations state that:

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[2] *Cf.* 16 U.S.C.S. § 1452(2)(D), (E) (2000). Section 16 U.S.C. 1452(2)(D) describes Congress' finding and declaration that "coastal-dependent" uses should be given priority in the development and management of the coastal zone by states, while 16 U.S.C. § 1452(2)(E) states the same for public access for recreation purposes.

[3] *See, e.g.*, Kenneth Walker and Matt Arnn, National Oceanic and Atmospheric Administration (NOAA), NOAA's Preserving Waterfronts for Water Dependent Uses 5-6 (1998), *available at* http://oceanservice.noaa.gov/websites/retiredsites/sotc_pdf/WDU.PDF.

[4] In 2005 the Florida legislature adopted new legislation modifying Florida Statutes, which now include the requirement that "the future land use plan element [of coastal counties] . . . include criteria [that e]ncourage preservation of recreational and commercial working waterfronts for water-dependent uses . . . ." Fl. Stat. § 163.3177(6)(a)(3)(c) (2012). The same legislation altered Fla. Stat. § 163.3178(2)(g) to indicate that the shoreline use component that identifies public access "must include the strategies that will be used to preserve recreational and commercial working waterfronts as defined in s. 342.07."

[5] 33 U.S.C.A. § 1251 *et seq.* Popularly know as the Clean Water Act.

[6] 33 U.S.C.A. § 401 (2000).

[7] 40 C.F.R. § 230.10(a)(3) (2014).

> Where [an] activity, [such as development activity,] associated with a discharge [of dredge or fill material] which is proposed for a special aquatic site does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependent"), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.[8]

Since the goal in this context is, at least in part, no net loss of wetlands due to dredge and fill activities, the definition focuses heavily on "practicable alternatives" and "discharge of pollutants" into waters of the United States. Water dependency in this case seeks to prevent the filling of wetlands by limiting the use of wetlands to activities that either require access or proximity to water, or are impracticable in any other location.[9]

B. *Coastal Zone Management Act: State Implications*

While it does not specifically use the term "water-dependent," the Coastal Zone Management Act[10] does imply a similar intent to ensure that continued development on or adjacent to the water requires location on or adjacent to water.[11] The Coastal Zone Management Act also encourages states to address what water-dependent use means. The following examples illustrate how states have defined water-dependent use and associated levels of water dependency.

New York[12]
Water-dependent uses are uses that can only be conducted on, in, over, or adjacent to the water; each involves, as an integral part of the use, direct access to and use of the water. *Water-enhanced uses*[13] do not require waterfront location to function, but are often essential to efficient functioning of water-dependent uses and can be essential to their economic activity. Water-enhanced uses increase the public's enjoyment of the waterfront.

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[8] *Id.*

[9] *Id.*

[10] 16 U.S.C.S. §§ 1451 *et seq.* (2000).

[11] *Cf.* 16 U.S.C.A. § 1452(2)(D), (E) (2000). Section 16 U.S.C. 1452(2)(D) describes Congress' finding and declaration that "coastal-dependent" uses should be given priority in the development and management of the coastal zone by states, and 16 U.S.C. § 1452(2)(E) states the same for public access for recreation purposes.

[12] Long Island South Shore Estuary Reserve Comprehensive Management Plan, *available at* http://www.dos.ny.gov/opd/programs/pdfs/SSERCMP.pdf.

[13] *Id.* at 50. Note that this definition is essentially the same as definitions of water-related use provided in Florida and other locales.

New Jersey[14]

"Water dependent" means development that cannot physically function without direct access to the body of water along which it is proposed. Uses, or portions of uses, that can function on sites not adjacent to the water are not considered water dependent regardless of the economic advantages that may be gained from a waterfront location. Maritime activity, commercial fishing, public waterfront recreation and marinas are examples of water dependent uses, but only the portion of the development requiring direct access to the water is water dependent. The test for water dependency shall assess both the need of the proposed use for access to the water and the capacity of the proposed water body to satisfy the requirements and absorb the impacts of the proposed use. A proposed use will not be considered water dependent if either the use can function away from the water or if the water body proposed is unsuitable for the use. For example, in a maritime operation, a dock or quay and associated unloading area would be water dependent, but an associated warehouse would not be water dependent.

> *1. Examples of water dependent uses include*: docks, piers, marina activities requiring access to the water, such as commissioning and decommissioning new and used boats, boat repairs and short term parking for boaters, storage for boats which are too large to be feasibly transported by car trailer (generally greater than 24 feet), rack systems for boat storage, industries such as fish processing plants and other commercial fishing operations, port activities requiring the loading and unloading of vessels, and water oriented recreation.
>
> *2. Water dependent uses exclude, for example*: housing, hotels, motels, restaurants, warehouses, manufacturing facilities (except for those which receive and quickly process raw materials by ship), dry boat storage for boats that can be transported by car trailer, long-term parking, parking for persons not participating in a water-dependent activity, boat sales, automobile junk yards, and non-water oriented recreation such as roller rinks and racquetball courts.
>
> *"Water oriented"*[15] means development that serves the general public and derives economic benefit from direct access to the water body along which it is proposed. (Industrial uses need not serve the general public.) **A hotel or restaurant, since it serves the public, could be water-oriented if it takes full advantage of a waterfront location**. An assembly plant could be water oriented if overland transportation is possible but water-borne receipt of raw materials and shipment of finished products is economically advantageous. **Housing is not water-oriented despite the economic premium placed on waterfront housing, because it only benefits those who can afford to buy or rent the housing units**.

[14] N.J. ADMIN. CODE 7:7E-1.8 (emphasis added).

[15] Note that, to a certain extent, this definition combines the meaning of water-related use with water-enhanced use, but also prohibits any residential use whatsoever.

Connecticut[16]

"Water-dependent uses" means those uses and facilities which require direct access to, or location in, marine or tidal waters and which therefore cannot be located inland, including but not limited to: Marinas, recreational and commercial fishing and boating facilities, finfish and shellfish processing plants, waterfront dock and port facilities, shipyards and boat building facilities, water-based recreational uses, navigation aides, basins and channels, industrial uses dependent upon water-borne transportation or requiring large volumes of cooling or process water which cannot reasonably be located or operated at an inland site and uses which provide general public access to marine or tidal waters . . . .

Louisiana[17]

Coastal water dependent uses are "those which must be carried out on, in or adjacent to the water body or wetland or requires the consumption, harvesting or other direct use of coastal resources, or requires the use of coastal water in the manufacturing or transportation of goods. Examples of uses meeting the terms of this definition include surface and subsurface mineral extration [sic], fishing, ports and necessary supporting commercial and industrial facilities, facilities for the construction, repair and maintenance of vessels, navigation projects, and fishery processing plants."

Massachusetts[18]

9.12: Determination of Water-Dependency

(1) Prior to issuance of the public notice, the Department shall classify the project as a water-dependent use project or as a nonwater-dependent use project. The Department shall classify as a water-dependent use project any project which consists entirely of:
(a) uses determined to be water-dependent in accordance with 310 CMR 9.12(2); and/or
(b) uses determined to be accessory to a water-dependent use, in accordance with 310 CMR 9.12(3).
Any other project shall be classified as a nonwater-dependent use project.

(2) The Department shall determine a use to be water-dependent upon a finding that said use requires direct access to or location in tidal or inland waters, and therefore cannot be located away from said waters. In making this determination, the Department shall act in accordance with the following provisions.
(a) The Department shall find to be water-dependent the following uses:

1. any use found to be water-dependent-industrial in accordance with 310 CMR 9.12(2)(b);
2. marinas, boat basins, channels, storage areas, and other commercial or recreational boating facilities;
3. facilities for fishing, swimming, diving, and other water-based recreational activities;

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[16] C.G.S.A. § 22a-93(16). Chapter 444 Coastal Management, sec. 22a-93(16), available at http://www.cga.ct.gov/2013/pub/chap_444.htm#sec_22a-93.

[17] *Pardue v. Stephens* 558 So.2d 1149, 1165 (La. App. 1st Cir. 1989).

[18] 310 Mass. Code Regs. 9.12 (2014) (emphasis added).

4. parks, esplanades, boardwalks, and other pedestrian facilities that promote use and enjoyment of the water by the general public and are located at or near the water's edge, including but not limited to any park adjacent to a waterway and created by a public agency;
5. aquariums and other education, research, or training facilities dedicated primarily to marine purposes;
6. aquaculture facilities;
7. beach nourishment;
8. waterborne passenger transportation facilities, such as those serving ferries, cruise ships, commuter and excursion boats, and water shuttles and taxis;
9. dredging for navigation channels, boat basins, and other water-dependent purposes, and subaqueous disposal of the dredged materials below the low water mark;
10. navigation aids, marine police and fire stations, and other facilities which promote public safety and law enforcement on the waterways;
11. shore protection structures, such as seawalls, bulkheads, revetments, dikes, breakwaters, and any associated fill which are necessary either to protect an existing structure from natural erosion or accretion, or to protect, construct, or expand a water-dependent use;
12. flood, water level, or tidal control facilities;
13. discharge pipes, outfalls, tunnels, and diffuser systems for conveyance of stormwater, wastewater, or other effluents to a receiving waterway;
14. facilities and activities undertaken or required by a public agency for purposes of decontamination, capping, or disposal of polluted aquatic sediments; and
15. wildlife refuges, bird sanctuaries, nesting areas, other wildlife habitats or an Ecological Restoration Project.

(b) The Department shall find to be water-dependent-industrial the following uses:

1. marine terminals and related facilities for the transfer between ship and shore, and the storage of, bulk materials or other goods transported in waterborne commerce;
2. facilities associated with commercial passenger vessel operations;
3. manufacturing facilities relying primarily on the bulk receipt or shipment of goods by waterborne transportation;

C. *Florida*

1. State-Level Definitions

Rules for the use of submerged lands owned and managed by the state of Florida under the public trust doctrine limit the use of such lands to water dependent activities,[19] defined as "an activity which can only be conducted on, in, over, or adjacent to water areas because the activity requires direct access to the water body or sovereign submerged lands for transportation,

[19] FLA. ADMIN. CODE. R. 18-21.004(1)(g) (2009).

recreation, energy production or transmission, or source of water, and where the use of the water or sovereign submerged lands is an integral part of the activity."[20]

In 2006 Florida substantially deviated from typical definitions of water-dependent use by appearing to designate hotels and motels as water-dependent uses.[21] Section 6 of 2006-220, Laws of Florida changed the definition of "recreational and commercial working waterfront" in Fla. Stat. § 342.07(2) to include "hotels and motels as defined in s. 509.242(1)" as examples of "water-dependent commercial activities." The meaning of this change has not yet been interpreted by the courts, but it appears to directly contradict virtually all other examples of "water-dependent use" either inside or outside of Florida. Analysis of the import of these changes appears in the following section on legal issues.

2. Florida Local Government Definitions

Duval County: "*Water-Dependent Uses* - 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."[22]

Volusia County: "Water Related Uses - 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."[23]

Lee County: *"Water-dependent uses* are land uses for which water access is essential and which could not exist without water access. *Water-related uses* are land uses that might be enhanced by proximity to the water but for which access is not essential."[24]

Citrus County: *Water-dependent land uses* are defined as activities which can be carried out in or adjacent to water areas because the use requires access to the water body for: waterborne transportation, recreation-access, electrical generating facilities, or water

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[20] FLA. ADMIN. CODE R. 18-21.003 (71) (2009).

[21] 2006 Fla. Laws ch. 220, sec. 6.

[22] City of Jacksonville, 2030 Comprehensive Plan, Conservation/Coastal Management Element, Definitions, page 89 (2011), available at http://www.coj.net/Departments/Planning+and+Development/Current+Planning/2010+Comprehensive+Plan.htm; Volusia County Comprehensive Plan, Chapter 20, page 25 (2008), http://www.volusia.org/core/fileparse.php/4600/urlt/Chapter20Definitions.pdf.

[23] Volusia County Comprehensive Plan, Chapter 20, page 25 (2008), http://www.volusia.org/core/fileparse.php/4600/urlt/Chapter20Definitions.pdf; Jacksonville, Duvall County Comprehensive Plan, 2030, City of Jacksonville, 2030 Comprehensive Plan, Conservation/Coastal Management Element, Definitions, page 89 (2011), http://www.coj.net/Departments/Planning+and+Development/Current+Planning/2010+Comprehensive+Plan.htm

[24] Lee County, Florida Comprehensive Plan (2009), *available at* http://www.lee-county.com/dcd1/leeplan/leeplan.pdf. Note that this definition essentially combines the definitions of "water-related use" and "water-enhanced use" teased out below in the synthesis.

supply. With Citrus County these include, but are not limited to, commercial marinas, boat ramps/docks, electrical generation plants, and fishing piers.[25] *Water-related land uses* are defined 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. These uses within Citrus County include, but are not limited to, commercial resorts, campgrounds, fish camps, seafood processing operations, dive ships, and bait and tackle stores.[26]

III. LEGAL ISSUES

A. *The Addition of Hotels and Motels as "Water-Dependent Uses" in 2006 Legislation*

The Florida Legislature's addition of hotels and motels to the statutory definition of recreational and commercial working waterfronts creates uncertainty about the water-dependent nature of hotels and motels. Hotels and motels are not water-dependent uses in the same way as docks or wharves. Yet, the law equates hotels and motels with "water-dependent commercial activities." At the same time, the concepts of "water-dependent use" and "recreational and commercial working waterfronts" both play a role in local government comprehensive planning.[27] Thus, local governments and the Florida Department of Economic Opportunity, as the reviewer of comprehensive plans, need to make sense of the new statutory definition of recreational and commercial working waterfronts.[28] Interpreting this definition by considering it in context results in the conclusion that the legislation makes sense only if hotels and motels are considered "water-dependent activities" in specific, defined situations. This analysis also leads to the conclusion that the statute has not pre-empted local government authority in this area and context; and thus allows local governments to define working waterfronts more narrowly, even potentially excluding hotels and motels from some or all of their working waterfronts.

The 2006 statutory amendments in section 6 of Laws of Florida, Chapter 2006-220 altered Florida Statute sections 342.07(1) and (2) to indicate the Legislature's recognition of the importance of recreational access to navigable waters and the importance of tourism to the state's economy. Modified Florida Statute section 342.07(1) includes "public lodging establishments" as an example of "water-dependent support facilities." Modified section 342.07(2) then states

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[25] Citrus County Comprehensive Plan, § II.B.2 (2012), http://www.bocc.citrus.fl.us/plandev/grcp/comp_plan/chapter_4.pdf.

[26] *Id.*

[27] Water-dependent use frequently appears as part of local planning and zoning requirements, and as part of Florida Statutes § 163.3177(6)(a)(3)(c) (2014) (The future land use element shall include criteria to be used to: … encourage preservation of recreational and commercial working waterfronts for water-dependent uses in coastal communities.") and § 163.3178(2)(g) (2012) (This requires a "shoreline use component that identifies public access to beach and shoreline areas and addresses the need for water-dependent and water-related facilities, including marinas, along shoreline areas. Such component must include the strategies that will be used to preserve recreational and commercial working waterfronts as defined in s. 342.07.").

[28] Florida statutes require local governments to review comprehensive plans and amendments every seven years to ensure it meets state requirements. *See* Fla. Stat. § 163.3167 (2014) and § 163.3191 (2012).

that "the term 'recreational and commercial working waterfront' means a parcel or parcels of real property that provide access for water-dependent commercial activities, *including hotels and motels* as defined in s. 509.242(1), or provide access for the public to the navigable waters of the state."[29]

Adding hotels and motels to the definition of water-dependent uses directly contradicts most definitions of water dependency at the federal level,[30] the state level in states other than Florida,[31] and the local level in Florida.[32] Thus, the change in the statute must receive careful scrutiny. The first step in a careful analysis begins by applying the plain language of the statutory change.[33]

The legislation states "'recreational and commercial working waterfront' means a parcel or parcels of real property that provide access for water-dependent commercial activities, including

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[29] 2006 Fla. Laws ch. 220, section 6 (modifying Florida Statutes section 342.07(2)) (emphasis added). The full text reads:

> *As used in this section, the term "recreational and commercial working waterfront" means a parcel or parcels of real property that provide access for water-dependent commercial activities, including hotels and motels as defined in s. 509.242(1), 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, commercial, research, or governmental vessels. These facilities include public lodging establishments, 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. As used in this section, the term "vessel" has the same meaning as in s. 327.02(27). Seaports are excluded from the definition.*

In 2014, the precise language of this law was replaced with an amended version; however, the changes are minor and insignificant for purposes of this analysis.

[30] *See, e.g.*, 40 C.F.R. § 230.10(a)(3).

[31] *See, e.g.*, N.J. ADMIN. CODE 7:7E-1.8(2) (2013) (specifically *excluding* hotels and motels from the definition of water-dependent use and only including them in "water oriented uses"); 310 MASS. CODE REGS. 9.12 (2)(f)(6) (2014) (providing that "hotels, motels, and other facilities for transient lodging" shall not be considered water-dependent).

[32] Monroe County, Florida, ordinance #017-2005, sec. 1 (creating Monroe County Florida Code of Ordinances, section 9.5-185(1)(g)) (providing that "'[w]ater-enhanced uses' shall mean activities that are not water dependent uses but benefits economically or aesthetically by its location adjacent to or on the waterfront. The term includes dock side bars restaurants hotels motels and residential uses."); Manatee County, Florida, ordinance 04-66, section 604.6.8.1.4.2 (stating that "[w]atercraft based hotels shall be prohibited [from the South Cortez waterfront]."") and section 604.6.8.1.4.4 (prohibiting "hotels, motels and other tourist-oriented uses" from the Cortez Fishing Village Historical and Archaeological Overlay). *But see* City of Daytona Beach, Florida, Comprehensive Plan, sec. 5 – Coastal Management Element, Policy 2.2.1 (providing that "[t]he City shall maintain a high priority for redevelopment projects on the waterfront to include resort hotels (and related uses) on the ocean and marinas (and related uses) on the river.").

[33] "When the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute itself must be given its plain and obvious meaning." C.S. and J.S. v. S.H and K.H., 671 So.2d 260, 268 (Fla. 4th DCA 1996) (quoting Arthur Young & Co. v. Mariner Corp., 630 So.2d 1199, 1202 (Fla. 4th DCA 1994).

hotels and motels as defined in s. 509.242(1), ***or*** provide access for the public to the navigable waters of the state."[34] The disjunctive "or" indicates that hotels and motels are being added to the definition of recreational and commercial working waterfronts as "water-dependent commercial activities," *not* as places that "provide public access for the public to the navigable waters of the state." The statute then points out that the "term [recreational and commercial working waterfront] 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, commercial, research, or governmental vessels."[35] This second part of the definition creates two types of uses that can be considered "recreational and working waterfronts": 1) Water-dependent facilities that are open to the public *and* which offer public access by vessels to the waters of the state, or 2) support facilities for recreational, commercial, research, or government vessels. Both parts of this definition retain the emphasis on boating and vessels contained in the 2005 legislation.

Does this change mean that *all* hotels and motels in the state now constitute "water-dependent commercial activities" or "support facilities for recreational, commercial, research, or governmental vessels," even if they are not located near the water? Or are hotels and motels now designated as water-dependent or support facilities only if they are next to the water? Must the water body be "navigable-in-fact" by recreational, commercial, research, or governmental vessels? Must a hotel or motel include facilities for the mooring, storage, or repair of vessels in the area in order to serve as "support facilities" or public access by vessel? Or does a hotel or motel's mere location on a waterfront automatically qualify it for inclusion in the definition of "water-dependent commercial activities?"

Concluding that the legislation intended to define *all* hotels and motels as recreational and commercial working waterfronts is a ridiculous conclusion. The Florida Legislature cannot, by fiat, alter the reality that many hotels and motels in Florida inherently fail to have the ability to be considered working *waterfronts* since many are not located near or adjacent to a waterfront or a navigable body of water. Due to the fact that the legislation's language does not lead to a clear and unambiguous meaning, the legislation should be examined beyond its plain language for an indication as to which hotels and motels should be eligible as recreational and commercial working waterfronts.

The statute amended in 2006 was originally enacted in 2005 and focused on protections for recreational and commercial working waterfronts. The Florida legislature in 2005 sought to protect access to the water for the public engaged in boating, as evidenced by the emphasis on vessels and boating-related facilities as well as the absence of any mention in the legislation of beaches, boardwalks, piers, or other non-boating-related forms of public access. In 2006 the justifications for adding hotels and motels included the economic impact of tourism. Does this then mean that any hotel *on a waterfront* is now a "recreational and working waterfront?"

It could be argued that the legislation's emphasis on the economic impact of tourism, combined with awareness that hotels/motels may benefit economically from a waterfront location, means

[34] 2006 Fla. Laws ch. 220, section 6 (modifying Florida Statute section 342.07(2)).

[35] *Id.* (emphasis added).

that *all* waterfront hotels/motels are "recreational and commercial working waterfronts." As noted above,[36] accepting such a conclusion conflicts with established precedent and the practice of the federal government, most state governments, and most local governments, including those of Florida. Absent a clear indication that the legislature envisioned such a drastic result, the legislative change should be construed within the context of the modified statute.

The analysis continues by returning to the breakdown of the definition of recreational and working waterfront from the statute. As noted above,[37] hotels and motels were incorporated into the definition of recreational and working waterfronts as "water-dependent commercial activities." The statute does not require the "water-dependent commercial activities" it provides as examples to be open to the public.[38] This illustrates that, while public access is an important concern in the statute, it is not the only concern. Access for boating-related activities, whether public or private, is the common thread running through all examples of recreational and working waterfronts in the statute. The statute indicates that recreational and commercial working waterfronts:

> include[] 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, commercial, research, or government vessels. These facilities include public lodging establishments, 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. As used in this section, the term "vessel" has the same meaning as in s. 327.02(39).[39]

This analysis indicates that interpreting 2006 legislative changes to include any waterfront hotel/motel as a "water-dependent commercial activit[y]" would cast a broader net than the rest of the statute.

Thus, since it appears over-broad and contradictory to established practice and precedent to construe the 2006 amendments to include either all hotels in the state or even all hotels on waterfronts, the statute's structure and purpose indicate that the addition of hotels and motels makes sense when qualified by hotel or motel status as "water-dependent support facilities that are open to the public and offer public access by vessels to the waters of the state"[40] or hotel or motel status as "support facilities for recreational, commercial, research, or government vessels."[41]

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[36] *See supra* notes 30 to 32 and accompanying text.

[37] *See supra* text accompanying note 29.

[38] 2006 Fla. Laws ch. 220, section 6 (modifying Florida Statute section 342.07(2), and indicating that commercial fishing facilities and boat construction facilities qualify as commercial working waterfronts, despite the fact these uses are not usually open to the public).

[39] *Id.*

[40] *Id.*

[41] *Id.*

One might argue that hotels and motels represent water-dependent uses because location on the water can promote the profitability of a hotel or motel. Statutory or administrative regimes addressing water dependency often explicitly address economic viability and point out that increased profitability due to a waterfront location *does not* make a use "water dependent."[42] A variant of this economically-water-dependent use argument has repeatedly failed to convince federal regulators: Developers have tried to meet the "water-dependent use" test for construction in wetlands by arguing that a proposed development is for "waterfront homes" or that the development is more valuable with the benefits associated with waterfront property.[43] In such cases, courts have agreed that the use is not water dependent.[44] Considering that well-known precedents find only absolute economic necessity—but not simple economic benefit—to result in the granting of the status of "water-dependent use," the Florida Legislature could have readily specified a different standard if it so chose. Absent legislative direction to the contrary, the 2006 legislation should not be interpreted so as to contradict the overwhelming practice and tradition in the definition of "water-dependent use," and should remain centered on the statute's concern with public and commercial access by vessels.

This indicates that the appropriate interpretation of the addition of hotels and motels to the definition of recreational and commercial working waterfronts should only include those hotels and motels that involve one of the other types of listed accesses for the public (i.e., boat ramp, marina, slips, etc.). Conversely, one might argue that the addition of tourism-supporting hotels and motels is intended to expand the notion of "public access" to include the "public" that normally uses upland hotel beach property to access the water when renting a catamaran, Jet Ski, kayak, or the like. Although the economic impact of tourism in Florida is enhanced by water access at a hotel or motel, such an interpretation of "water dependent use" differs from all of the previously-listed forms of public access, such as wet and dry marinas, boat ramps, and boat hauling and repair facilities. These sorts of public access points are typically open to the public and either free or accessible for a small fee that directly supports the infrastructure necessary to

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[42] *See, e.g.*, Monroe County, Florida, ordinance #017-2005, sec. 1 (creating Monroe County Florida Code of Ordinances, section 9.5-185(1)(g)) (providing that "'[w]ater-enhanced uses' shall mean activities that are not water dependent uses but benefit economically or aesthetically by its location adjacent to or on the waterfront. The term includes dock side bars, restaurants, hotels, motels, and residential uses."); N.J. ADMIN. CODE 7:7E-1.8 (providing that "'[w]ater oriented' means development that serves the general public and derives economic benefit from direct access to the water body along which it is proposed. (Industrial uses need not serve the general public.) A hotel or restaurant, since it serves the public, could be water-oriented if it takes full advantage of a waterfront location. An assembly plant could be water oriented if overland transportation is possible but water-borne receipt of raw materials and shipment of finished products is economically advantageous. Housing is not water-oriented despite the economic premium placed on waterfront housing, because it only benefits those who can afford to buy or rent the housing units.")**.**

[43] Korteweg v. Corps of Engineers of the United States Army, 650 F.Supp. 603, 605-06 (D.Conn.1986) (noting that even though "the ability to tie one's boat at an adjacent dock would make the [lots] more valuable ..., the docks are neither essential to the [lots] nor are they integral to their residential use."). *Cf. also* N.J. ADMIN. CODE 7:7E-1.8(2) (stating that "housing is not water-oriented despite the economic premium placed on waterfront housing . . . .").

[44] *See, e.g.*, Shoreline Associates v. Marsh, 555 F.Supp. 169, 179 (D.Md.1983), *aff'd*, 725 F.2d 677 (4th Cir.1984) (finding that a townhouse community that sought to include a boat storage area and launch is not a "water-dependent use" since the primary purpose, and reason for most of the wetlands impacts, of the development was the townhouse construction).

facilitate the public access. A hotel or motel differs from these uses in that a hotel or motel may limit access to only those members of the "public" that pay for a service (i.e., a room) that is not in itself directly related to access to the water. Furthermore, such an interpretation also contradicts the emphasis of the statute's definition on vessels.[45]

Thus, the only hotels and motels that should be included in the definition of recreational and commercial working waterfronts are those that also contain "water-dependent" or "water-dependent support facilities" such as docks, wharfs, lifts, slips, boat ramps, marinas, boat repair facilities, etc. This interpretation of the statute avoids a ridiculous conclusion and conforms to the statute's emphasis on vessels and the facilities that foment commercial and public access to navigable waters by vessels.

B. *Preemption and Conflict with State Law*

Despite the 2006 legislative amendment adding hotels and motels to the definition of recreational and commercial working waterfronts, do local jurisdictions retain the authority to exclude hotels or motels located on the water from the local jurisdiction's definition of water-dependent use?

In 2011, the former Community Local Government Comprehensive Planning and Land Development Regulation Act (Chapter 163) was redesignated as the Community Planning Act. Also, in 2011 Rule 9-J5 of the Florida Administrative Code was repealed and not replaced, thus resulting in a lack of guidance.[46] The Community Planning Act indicates it was meant to set minimum requirements. More specifically, it provides:

> [t]he provisions of this act in their interpretation and application are declared to be the minimum requirements necessary to accomplish the stated intent, purposes, and objectives of this act; to protect human, environmental, social, and economic resources; and to maintain, through orderly growth and development, the character and stability of present and future land use and development in this state.[47]

Thus, local governments maintain power to create their own definitions and the Community Planning Act should not be interpreted to limit this power.

In accordance with efforts in Florida to promote local government control wherever possible, the 2005 legislation granted local jurisdictions the discretion to determine "the type and location of working waterfront property" when local government seeks to preserve working waterfronts through property tax deferral.[48] Local governments also have the authority to define, within

[45] *E.g.*, 2006 Fla. Laws ch. 220, section 6 (modifying Florida Statute section 342.07(2)) (providing that "[t]he 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, commercial, research, or governmental *vessels*" (emphasis added).

[46] Rule 9J-5 provided further definitions for 'water dependent uses' and 'water related uses.'

[47] FLA. STAT. § 163.3161(8) (2011).

[48] 2005 Fla. Laws ch. 157, § 14 (codified at FLA. STAT. § 197.2524(2) (2011)) (allowing local governments enacting a property tax deferral ordinance for recreational and working waterfronts to establish the type and location of working waterfront property).

reason, water-dependent uses within its jurisdiction through local comprehensive plans, which are subject to review by the Department of Economic Opportunity. The question, then, for both the Department of Economic Opportunity and for local jurisdictions in Florida is how the addition of hotels and motels to the statutory definition affects the ability of local governments to define "water-dependent use." The answer to this question depends on whether, and to what extent, the 2006 legislation preempts local government authority to define "water-dependent use" and "recreational and commercial working waterfront."

Generally, counties and municipalities, under the authority of the Constitution of the State of Florida[49] and Florida Statutes,[50] possess extensive powers to enact ordinances and regulations, except when expressly prohibited by state law.[51] The authority of the state to regulate to the exclusion of local government is known as preemption.

The test for whether the state preempts local government first asks whether the state has expressly preempted the field from local government regulation.[52] Express preemption usually requires clear language noting preemption.[53] Yet, express preemption need not be explicit as long as the intent of the legislature to preempt the field of regulation is clear.[54] When express preemption is not explicit, it is referred to as "implied preemption." Implied preemption requires both a pervasive governmental scheme of regulation that demonstrates intent by the state to preempt the area *and* the existence of strong public policy reasons to find that the state preempted the area.[55] Implied preemption is not favored, and, when found, should be limited as much as possible to only the specific area in which the state demonstrated intent to preempt.[56]

In the case of water dependency, the Florida Legislature has not expressly preempted the field regarding the definition of working waterfronts or the definition of water-dependent use because the state's legislation does not clearly provide that it preempts local governments in the area, nor does the legislation constitute a pervasive scheme of governmental regulation. The legislation does not constitute a pervasive scheme of regulation because it explicitly grants some authority to local governments to define recreational and commercial working waterfronts for tax deferral purposes, fails to state that local governments may not continue to use their existing definitions

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[49] CONST. OF FLA., art. VIII, s.1; Const. of Fla., art. VIII, s.2.

[50] FLA. STAT. § 125.01(1) (2005); FLA. STAT. § 166.021(3) (2005).

[51] In addition, non-charter counties in Florida may not enforce county ordinances in a municipality with a conflicting ordinance. CONST. OF FLA., art. VIII, s.1(f).

[52] *Cf., e.g.*, Thomas v. State, 614 So.2d 468, 470 (Fla.1993) ("Florida's Municipal Home Rule Powers Act states that cities may not legislate in an area expressly preempted by state legislation.").

[53] City Of Hollywood v. Mulligan, 2006 WL 1837930, *3 (Fla.) (Fla. 2006) (finding that "[e]xpress preemption ... must be accomplished by clear language stating that intent" (Citing *Phantom of Clearwater, Inc*., v. *Pinellas County,* 894 So.2d 1011, 1018 (Fla. 2d DCA 2005)).).

[54] Barragan v. City of Miami, 545 So.2d 252, 254 (Fla.1989).

[55] Tallahassee Memorial Regional Medical Center, Inc. v. Tallahassee Medical Center, Inc, 681 So.2d 826, 831 (Fla. 1st DCA 1996).

[56] Tallahassee Memorial Regional Medical Center, Inc. v. Tallahassee Medical Center, Inc, 681 So.2d 826, 831 (Fla. 1st DCA 1996).

of "water-dependent use," nor does the legislation itself constitute a clear scheme of regulation. In fact, the legislation gives examples of uses that should be included in working waterfronts, but this list is not exhaustive or even very clear. For example, seaports are specifically excluded from the definition even as hotels and motels might qualify.[57]

If the state has not expressly preempted the field of regulation, the local government may regulate concurrently with the state as long as local regulations do not conflict with state statutes.[58] Assuming that hotels and motels that include some sort of water-dependent use constitute "recreational or commercial working waterfronts" as defined in Florida Statutes section 342.07, may local governments still define "water-dependent use" to exclude hotels and motels or would this conflict with section 342.07? For any program related to recreational and commercial working waterfronts, the answer appears to be "no." Section 342.07 defines recreational and commercial working waterfronts to include "a parcel or parcels of real property that provide access for water-dependent commercial activities, including hotels and motels as defined in s. 509.242(1) . . . ."[59] Failure to include hotels and motels that include a water-dependent use such as a dock, marina, or boat ramp would contradict the state statute. The one exception to this is a local government's discretion to determine "the percentage or amount of the deferral and the type and location of the property and may require the property to be located within a particular geographic area or areas . . ." including "the type of public lodging establishments that qualify."[60] This would allow local governments to not include *any* hotels or motels in a waterfronts tax deferral program if the local jurisdiction chooses to develop such a program.

As noted earlier, the definition of "recreational and commercial working waterfront" has relevance to comprehensive planning requirements of coastal jurisdictions. Nonetheless, Florida Statutes section 342.07 defines "recreational and commercial working waterfront," not "water-dependent use" generally. For purposes other than those directly related to recreational or commercial working waterfronts, such as general zoning or water-dependent use requirements for land not qualifying as a recreational or commercial working waterfront, local governments may exclude hotels and motels from the definition of water-dependent use. The best drafting option for a local government is to define "water-dependent use" based on the considerations below and simply add the caveat that the definition includes only those "hotels and motels which include 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, commercial, research, or governmental vessels." This language tracks the requirements of the 2006 legislation.

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[57] Note that the Florida Division of Administrative Hearings has found that the Community Planning Act "should be interpreted more broadly to encourage not only preservation, but also economic vitality through further development and redevelopment of waterfronts," referring specifically to section 163.3177(6)(a)(3). Pacetta, LLC v. Town of Ponce Inlet 2012 WL 993258, *7 (Fla. Div. Admin. Hrgs., 2012).

[58] City of Hollywood v. Mulligan 2006 WL 1837930, *3 (Fla. 2006) (funding that "[u]nder its broad home rule powers, a municipality may legislate concurrently with the Legislature on any subject which has not been expressly preempted to the State.").

[59] 2006 Fla. Laws ch. 220, section 6 (modifying Florida Statute section 342.07(2)).

[60] FLA. STAT. § 197.2524(3) (2011).

In conclusion, legislative changes in 2006 altered the definition of "recreational and commercial working waterfront." Poor drafting of the 2006 legislation has resulted in a lack of clarity as to the scope and impact of the changes. On its face, the change to the definition of recreational and commercial working waterfronts contradicts established fact by appearing to include all hotels and motels as recreational and working waterfronts. As working waterfronts, this would mean that all hotels and motels "require direct access to or a location on, over, or adjacent to a navigable body of water."[61] In reality, many hotels and motels operate without direct access to or a location on, over, or adjacent to a navigable body of water, and thus such an interpretation cannot be correct. Interpreting the meaning of the changed definition of recreational and commercial working waterfront in the context of the entire waterfronts law and legislative history leads to the conclusion that the change should be interpreted to mean only hotels and motels that include "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, commercial, research, or governmental vessels."[62]

IV. CRAFTING USEFUL DEFINITIONS

A. *Purpose Statements Supporting the Definition*

Enactment through local government comprehensive plans and land development regulations offers the most appropriate means to encourage water-dependent uses based on the above definitions.[63] Any waterfront program concerned with maintaining commercial and recreational working waterfronts should also incorporate "statements of purpose"[64] to which a reviewing body can turn to justify water-dependency decisions. For example, one jurisdiction justifies its water-dependency test "to ensure that the character and integrity of the community's maritime heritage will be maintained and enhanced," "to strengthen the economic base of the community by encouraging the traditional uses of the waterfront," and "to ensure that limited waterfront areas are reserved for the uses they are uniquely suited for and not preempted by uses that can more appropriately be located elsewhere."[65] Florida communities can use these phrases and others[66] to protect their existing traditional waterfronts and to limit future development to water-

[61] 2006 Fla. Laws ch. 220, section 6 (modifying Florida Statute section 342.07(2)).

[62] 2006 Fla. Laws ch. 220, section 6 (modifying Florida Statute section 342.07(2)).

[63] Elizabeth C. Davis, *Preserving Municipal Waterfronts in Maine for Water-Dependent Uses: Tax Incentives, Zoning, and the Balance of Growth and Preservation*, 6 OCEAN & COASTAL L.J. 141, 155 (2001).

[64] *See, e.g.*, South Shore Estuary Reserve Technical Report Series, *Zoning for Water Dependent Uses: Case Studies of Four South Shore Estuary Reserve Maritime Centers*, May 1999 [hereinafter SSER Technical Report], *available at* http://www.lisser.us/Final_Draft_HTML/Tech_Report_HTM/PDFs/Chap5/Zoning_Water.pdf.

[65] *Id.*

[66] Other statements of purpose included in the SSER Technical Report are: "to preserve, maintain, and encourage water dependent uses that have traditionally been associated with the waterfront and to accommodate water enhanced commercial uses that are compatible with water dependent uses," "to implement the provisions of the community's adopted Local Waterfront Revitalization Program and other waterfront plans," and "to control the uses and intensity of development so as to enhance the value of waterfront land for the intended purpose of retaining and encouraging commercial uses that depend on a waterfront location while protecting natural resources." *Id.*

dependent uses. Finally, zoning regulations can include specific uses which will be permitted as-of-right,[67] and those that may be allowed by special permit or exception,[68] along with the criteria for such exceptions.[69]

B. *Policy Considerations*

Before defining water dependency levels and adding concrete examples, a local government and the community should carefully examine a number of factors. These factors include:

1. the rationale and goals of limiting development to water-dependent uses; these may involve the economy and jobs, the culture of the community, the physical environment, access to the waterfront, and many other dimensions;
2. the uses or mix of uses the community wants to preserve (the "vision");
3. the area to be regulated;
4. the need to have an inventory of resources in order to make informed, rational policy choices regarding public and private needs;
5. the public trust doctrine and the responsibility of state officials.

1. Character of Place

Smaller communities often become alarmed when their coastal community is "discovered." Land values suddenly soar, often forcing fishing or other traditional marine activities out of the community due to increased property tax. Fishing, clamming, and other marine activities may seem a nuisance to newcomers. Waterfront owners may also decide to sell their land and abandon traditional marine activities simply to take advantage of the drastic increase in land values. Typically a combination of all these forces changes the character of the community.

In the face of such inexorable pressure, local governments must use all the tools at their disposal if they intend to preserve community character. A fishing village seeking to preserve its character should focus its definitions and examples of water dependency on the facilities necessary for traditional fishing. Definitions and examples should prevent incursion of the types of land uses that might otherwise displace facilities necessary for traditional fishing. For example, if condominiums displace fishing docks, the local government should consider creating an overlay district encompassing the waterfront that allows only water-dependent uses and specifically forbids new residential uses such as condominiums.

Waterfront communities should also, of course, develop their own "statements of purpose" that reflect their unique situation.

[67] According to the SSER Technical Report, as-of-right uses (water-dependent uses) can include commercial fishing operations, retail storage and sales of fuel and oil for boats, public/private boat launching facilities, and water excursion facilities. *Id.*

[68] According to the SSER Technical Report, special permit or exception uses (water-related/enhanced uses) can include restaurants, retail and wholesale of seafood, sale of boats and marine supplies, and boat storage.

[69] SSER Technical Report, *supra* note 64.

2. Public Access to the Water

Definitions often focus on whether the activity increases and promotes public access to the water[70] or, at a minimum, benefits the public generally.[71] In fact, some definitions explicitly exclude any residential uses from the definition of "water dependent" because residential development only benefits the private owners that can afford to purchase the residences.[72]

Business establishments that benefit from a location on or near water present a more difficult case since they may increase the utility or enjoyment of water-dependent uses by the public. While hotels might sound like they fit this description, zoning and regulations uniformly exclude hotels from definitions of water dependent use,[73] as well as most other businesses that are not inherently marine related and dependent on direct access to the water. Communities heavily dependent on certain types of resort tourism may, however, want to allow some new development or redevelopment of existing hotels on the water. As discussed below, this can best be accomplished through geographically limiting the application of the requirement of a water-dependent use rather than stretching the definition of water-dependent use to include hotels or resorts.

Consideration of hotels, however, leads to the need to address what type of public access a community wishes to promote—access for those that live in the community or for those that visit the community. The former may be called local public access and the latter general public access. A community should be conscious of the costs and benefits of each and make decisions based on this awareness. Promoting local public access often requires less parking, transportation infrastructure, or services (lodging, food, etc.) adjacent or as near to the water than does general public access.

Similarly, the community must seek to balance access to the water that is open to the public at no charge versus access that, in theory, is public, but only accessible to paying customers of a business. Some definitions of water dependency place great importance on whether or not use is open to the public, even if only to the public that pays for the services of the business with the

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[70] *Compare* 310 MASS. REGS. CODE § 9.12(2)(a)4 (2014) (finding "parks, esplanades, boardwalks, and other pedestrian facilities that promote use and enjoyment of the water by the general public" to be water-dependent uses) *with* 310 MASS. REGS. CODE § 9.12(2)(f)7 (2014) (finding "parks, esplanades, boardwalks, and other pedestrian facilities *other than those described in* 310 MASS. REGS. CODE § 9.12(2)(a)4" to *not* be water-dependent uses).

[71] *Cf.* N.J. ADMIN. CODE tit. 7, § 7E-1.8 (2013) (noting that a "hotel or restaurant, *since it serves the public*, could be water-oriented if it takes full advantage of a waterfront location) (emphasis added).

[72] N.J. ADMIN. CODE § 7E-1.8 (2005). Portland, Maine's city ordinance regulating development in the waterfront district presents a very limited exception to the general rule prohibiting residences in areas zoned for water-dependent uses. The city only allows the "primary" owner of a marine business to live in the upper story of a building under other strict conditions. Portland, ME, City Ordinance Sec. 14-308(b) (2012)., available at http://www.ci.portland.me.us/DocumentCenter/Home/View/1080.

[73] *See, e.g.,* 310, MASS. REGS. CODE §§ 9.12(2)(f)6 and 9.12(3)(b) (2014) (defining hotels as *not* water dependent); N.J. ADMIN. CODE tit. 7E-1.8 (2013) (defining hotels as "water oriented" and *not* water dependent); Portland, ME, City Ordinance Sec. 14-309(b) (2012). (listing "hotels, motels, or boatels" as prohibited uses in the waterfront district), available at http://www.ci.portland.me.us/DocumentCenter/Home/View/1080.

access to the water.[74] Other definitions make no distinction as to whether the access open to the public requires payment of a fee for services or not.[75]

3. Summary of Policy Considerations

A water-dependency test may emphasize public facilities and commercial land uses which are open to the public, whether free or by payment for services, or it may emphasize maintenance of character of a place by preserving traditional maritime activities. Rather than create a contest between these goals and other competing uses, definitions should first seek to promote both increased public access and preservation of traditional maritime activities by prohibiting uses that do not substantially further either one or both goals. Thus, promotion of maritime activities that cannot occur without water and ensuring public access to the waterfront should guide development and interpretation of the definitions and any example uses included in the definitions.

C. *Customizing Definitions Based on Local Concerns*

Even with well-drafted definitions of water dependency, certain proposed land uses will continue to present ambiguity. For example, some local governments might consider repair facilities for boats water-dependent while others would classify this as water-related. Sound policy could, for example, create distinctions for such facilities based on the size of the vessels the site services: if it only services boats easily transported by land, it is not a water-dependent use whereas a facility for larger vessels is water dependent. Such confusion about the boundaries between classifications indicates the wisdom of including example uses in the definitions of water dependency.

The best way to ensure certainty concerning the nature of a proposed use is to list representative uses within the definition.[76] Ideally, representative uses listed in each definition should address the most likely points of contention. Relevant points of contention in Florida may include waterfront resorts, private yacht clubs, and waterfront residences, such as condominiums. Public policy focused on both preservation of working waterfronts and public access might classify a waterfront resort as either water-dependent or water-related, or neither. After all, a resort without water access might simply be called a hotel. On the other hand, one could make the argument that a resort does not have to be located on the water and only gets an economic

[74] *See, e.g.*, N.J. ADMIN. CODE § 7E-1.8 (2013) (noting that a "hotel or restaurant, *since it serves the public*, could be water-oriented if it takes full advantage of a waterfront location) (emphasis added).

[75] *See, e.g.*, Baltimore City Revised Code, title 8, Overlay districts (2012) (providing that "water-dependent facilities include: … marinas and other boat-docking structures, public beaches and water-oriented recreation areas…").

[76] One overlay district in Florida goes so far as to use *only* examples of what are essentially water-dependent uses without using the phrase water-dependent use or defining it. The San Carlos Island Redevelopment Overlay District, Lee County Land Development Code §§ 34-1141 through 34-1143, available at http://www.municode.com/resources/gateway.asp?pid=12625&sid=9. Compliance with this overlay district is voluntary. *Id.* at § 34-1141(b).

advantage from a location on the water.[77] A community focused on preserving traditional commercial working waterfronts and the character that comes with it, may not want to list waterfront resorts as a water dependent use. Moreover, if the community also emphasizes public access to water, then resorts may not qualify since they only serve a limited portion of the public. On the other hand, a community may wish to allow some new resorts and hotels or allow redevelopment of existing resorts and hotels due to economics, existing development patterns, and other factors, especially since resorts and hotels, unlike private residences, do give access to the water to the paying public. Even when the community wishes to allow some resorts or hotels, the recommendation made here is to not include hotels or resorts as water-dependent uses. A better option is to geographically specify locations in which either the water-dependency tests do not apply or where resorts and hotels form an exception to the water-dependent use test. This allows the community greater control over where and how much waterfront can be used for a use unanimously agreed to not be water-dependent.

Regardless of how a community treats resorts, communities focused on the preservation of traditional working waterfronts and public access should clearly find private residences or condominiums to represent, at most, uses that simply benefit economically from a waterfront locations since, even if it can be argued that they promote recreational use of the water for the residents, this use comes at the expense of a concomitant loss of the public's access to the water.[78] With the above policy caveats in mind, some representative examples that a local government might choose to add to water dependency definitions follow.

1. Examples for Water-Dependent Uses

Water-dependent use could include: commercial fishing, public waterfront recreation (such as public parks or walkways promoting public use and enjoyment of the water), fishing piers, marinas, boat ramps, fuel sales for boats, facilities related to marine public safety and law enforcement or marine fire-fighting capabilities, marine transportation facilities (including docks and wharves but potentially not the associated warehouses), industrial uses requiring large amounts of cooling water (such as power generating facilities), fish-processing plants, terminal and warehouse buildings, bulk and liquid storage terminals, tank farms, multimodal transfer terminals, transshipment and receiving stations, , foreign trade zones, shipyards, industrial property, fishing and aquaculture structures, connecting channels and port landside transportation access routes, activities dependent on the use of resources found in coastal waters (e.g., fishing, mining of sand and gravel, mariculture activities), structures needed for navigational purposes (e.g., locks, dams, lighthouses), flood and erosion protection structures (e.g., breakwaters, bulkheads), facilities needed to store and service boats and shops (e.g., marinas, boat repair, boat

[77] While definitions of "water-dependent uses" universally exclude hotels and resorts, some definitions of "water-oriented uses" might actually permit resorts or restaurants, if they "take[] full advantage of" their waterfront location, since resorts and restaurants serve the public. N.J. ADMIN. CODE 7:7E-1.8. On the other hand, Massachusetts does not permit a finding that hotels are even "accessories" to water-dependent uses. 310 MASS. REGS. CODE § 9.12(3)(b) (2014).

[78] *See, e.g.,* N.J. ADMIN. CODE 7:7E-1.8 (included in text above) (limiting "water oriented" definitions to activities that serve the interests of the general public while deriving economic benefit from proximity to the water, thus excluding condominiums and private houses from this category).

construction yards),[79] uses that rely heavily on the waterborne transportation of raw materials or products which are difficult to transport on land, thereby making it critical that a site near to shipping facilities be maintained (e.g., coal export facilities, cement plants, quarries), uses which operate under such severe time constraints that proximity to shipping facilities becomes critical (e.g., firms processing perishable foods), scientific / educational activities which, by their nature, require access to coastal waters (e.g., certain meteorological and oceanographic activities).

2. Examples for Water-Related Uses and Policy Implications

In addition to definitions of water-dependent uses, many regulations include secondary classifications for water dependency. Terminology for the secondary category includes "water enhanced," "water related," "water oriented," and "accessory use." Substantively the definitions of these terms may vary by, for instance, whether or not they include hotels.[80] Yet the secondary category definitions of water dependency share a concern that the uses are subsidiary to water-dependent uses, thus excluding uses that are not necessary for the functioning of the water-dependent use or do not augment the public's enjoyment of the water-dependent use. The recommendation here is to use the phrase "water-related use" as it emphasizes that the use still relates to the water, even if indirectly. Definitions from selected jurisdictions appear below, followed by a more comprehensive list of examples of water-related uses to consider.

New York State defines "water-enhanced uses" as "uses [that] do not require a waterfront location to function, but are often essential to the efficient functioning of water-dependent uses and can be essential to their economic viability. Water-enhanced uses increase the public's enjoyment of the waterfront."[81]

Oregon defines "water-related uses" as those that are "not directly dependent upon access to a water body, but whose presence facilitates public access to and enjoyment of a water body"[82] and as those "uses which are not directly dependent upon access to a water body but which provide goods or services that are directly associated with water-dependent land or waterway use, and which, if not located adjacent to water, would result in a public loss of quality in the goods or services offered."[83] The regulations specify that, "[e]xcept as necessary for water-dependent or water-related uses or facilities, residences, parking lots, spoil and dump sites, roads and

[79] These might be limited to boats larger than approximately 24-26 feet since boats small than this may be transported by trailer. *See, e.g.*, N.J. ADMIN. CODE tit. 7, § 7E-1.8 (2013) (including in "water-dependent uses" storage of boats larger than 24 feet). However, if a shortage of boat ramps and associated parking exists, such an approach might still limit public access for smaller craft.

[80] *Compare, e.g.*, 310 MASS. REGS. CODE § 9.12(3) (2014) (excluding hotels from the category of "accessory use" to water-dependent uses), *with* N.J. ADMIN. CODE tit. 7, § 7E-1.8 (2013) (noting that a "hotel or restaurant, since it serves the public, could be water-oriented if it takes full advantage of a waterfront location).

[81] SOUTH SHORE ESTUARY RESERVE COUNCIL, LONG ISLAND SOUTH SHORE ESTUARY RESERVE COMPREHENSIVE MANAGEMENT PLAN 50, n.1 (2001), available at http://www.nyswaterfronts.com/final_draft_html/pdf/main_page_pdf.htm.

[82] OR. ADMIN. R. 350-081-0020(172) (2012).

[83] OR. ADMIN. R. 632-005-0020(o) (2005).

highways, restaurants, businesses, factories, and trailer parks are not generally considered dependent on or related to water location needs."[84]

Massachusetts delineates a category of uses "accessory to water-dependent" uses.[85] These uses, while not themselves water dependent, are "integral in function to the construction or operation of the water-dependent use . . . or provide related goods and services primarily to persons engaged in [water-dependent] uses."[86] Furthermore, the accessory must be "commensurate in scale with the operation of the water-dependent use."[87] Representative examples that might be accessory uses in the regulation include "access and interior roadways, parking facilities, administrative offices and other offices primarily providing services to water-dependent uses on the site, yacht clubhouses, restaurants and retail facilities primarily serving patrons of the water-dependent use on the site, bait shops, chandleries, boat sales, and other marine-oriented retail facilities."[88] However, "general residential facilities, hotels, general office facilities, and major retail establishments" may not be considered "accessory uses."[89] Accessory uses receive the same regulatory treatment as water-dependent uses in this scheme,[90] although most jurisdictions tend to treat this secondary category much differently than those uses defined as water dependent.

Thus, water-related uses might include: short-term parking needed to allow enjoyment of a water dependent use (such as that necessary for use of boat ramps), access roads, small shops (such as bait shops) or restaurants primarily serving those engaged in water-dependent uses, administrative office space necessary for water-dependent uses, fish canning/processing plants, retail and wholesale of seafood, storage associated with marine shipping, boat sales, marine supplies, and access roads.

Some amount of water-related uses should be allowed since some water-dependent uses, such as boat ramps, may not serve their purpose without commensurate water-related uses, such as parking for boat trailers. When water-related uses are permitted in the same zone as water-dependent uses, the zoning should limit the amount of space on each parcel that may be dedicated to these water-related uses. For example, Lee County in southeast Florida has waterfront areas where "ancillary commercial uses" may be developed in water-dependent use areas but only where this use is "clearly subordinate to the parcel's principal use" and the total area of ancillary uses does not exceed 15 percent of the parcel's area.[91] Due to varying

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[84] *Id.*

[85] 310 MASS. REGS. CODE § 9.12(3) (2014).

[86] *Id.* at § 9.12(3)(a).

[87] *Id.* at § 9.12(3)(b).

[88] *Id.*

[89] *Id.*

[90] *Id.* at § 9.12(1).

[91] Lee County Comp Plan, Part II, 12.1.1.5 (2011), available at http://www.leegov.com/gov/dept/dcd/Planning/Documents/LeePlan/Leeplantext.pdf.

circumstances, this percentage may be much higher in another area,[92] demonstrating how a community may tailor regulations to reflect either the existing nature of an area or uses to which an area is particularly well suited. Instead of using a percentage formula, a local government might choose to allow water-related uses as conditional uses within the zoning area restricted to water-dependent uses.[93] Conditional use status will give the local government the ability to establish a more searching review of the proposed use and establish criteria by which to determine whether the proposed conditional use may be developed.

3. Examples of Water-Enhanced Uses

In addition to specifying water-dependent and water-related uses, zoning regulations may be further strengthened, and interpretive challenges avoided, by including a phrase indicating that "water-enhanced uses" are not part of either water-dependent or water-related uses.[94] Water-enhanced uses could be defined as uses that are not inherently or physically dependent on access to the water but that may benefit economically from location on the waterfront. Residential homes, condominiums, hotels, restaurants, gifts shops, or other retail stores not essential to water-dependent uses are prime examples. A community that wishes to regulate these uses could do so by creating an overlay zone for water-dependent uses or by limiting the extent of any district that allows water-enhanced use. Still another option is to allow water-enhanced uses as conditional uses in limited areas and impose exactions that help offset the concomitant loss of public access and recreational and commercial working waterfronts potential.

Alaska statutes, instead of defining water-dependent use, simply stated that "the management of coastal land and water uses in such a manner that, generally, those uses which are economically or physically dependent on a coastal location are given higher priority when compared to uses which do not economically or physically require a coastal location."[95] It is better to avoid using economic factors as part of a definition for water-dependent uses as inclusion of economic considerations presents too much opportunity for creative interpretations of why uses that do not inherently require access to the water do economically require access to water.

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[92] *Id.* (noting that "at the foot of the Matanzas Pass Bridge, this percentage may be increased to twenty-five (25) percent so long as the resulting commercial use of land lying in the Industrial Development land use category does not exceed fifty (50) percent of all land in that category that is under unified ownership or control as of March 1, 1988").

[93] As an example of this, Portland, Maine uses conditional use zoning in its waterfront regulations to certain land uses unless they are an accessory to a water-dependent use. Elizabeth C. Davis, *Preserving Municipal Waterfronts in Maine for Water Dependent Uses: Tax Incentives, Zoning, and the Balance of Growth and Preservation,* 6 Ocean and Coastal L.J. 141, 167 (2001).

[94] Some communities may find areas of their waterfront where it may be appropriate to allow certain water-enhanced uses. In such cases, the community should strongly consider structuring zoning to permit the community to impose additional requirements on the water-enhanced use that will serve to further the policies of public access and maintenance of character of the area.

[95] ALASKA STAT. § 46.40.020(4) (2006) repealed 2011 by SLA 2005, ch. 31, § 18.

4. Expanding the Vision Beyond Water Dependency

Often a community's vision for its waterfront may be broad enough that it includes more than just water-dependent or water-related uses. When a community does decide to allow uses that extend beyond those defined as water-dependent or water-related uses, it should not do so by making the definition of water-dependent or water-related uses overbroad.

Typically hotels and resorts remain squarely outside of any definition of either water-dependent or water-related use. However, some communities, especially here in Florida where water-based tourism plays such a role, may wish to allow a limited amount of such use. If a community decides to allow some hotel or resort development on the waterfront, the best option is to do so by modifying the geographic applicability of where the water-dependent and water-related tests apply rather than trying to fit hotels or resorts into either limited category.

Some single-family housing may also form part of the existing character of a waterfront community. In such cases, residential may be allowed. As an example, one can look to the overlay district for Cortez in Manatee County, Florida.[96] Cortez wanted to preserve and promote existing historic structures and use of the area by commercial fishing families. The ordinance limits development in special areas to "water-dependent uses ***and*** the following additional uses: Commercial fish houses; boat building and repair; aeration/shellfish aquaculture; marine research and development; low intensity recreation; maritime museums; restaurants; residential development . . . ; RV Parks; small tourist cottages, compatible in size, intensity, and density to current development and set back from the water."[97] While some of these uses arguably already fit within the confines of "water-dependent use," rather than trying to stretch water-dependent and water-related use definitions to include them, the ordinance specifies that these uses *are in addition to* water-dependent uses. This approach preserves the integrity of the concept of water-dependent use.

If a community or local government identifies an area in which it wishes to allow uses that are neither water-dependent nor water-related, the better approach, as outlined above, is to either make geographic exceptions to any water-dependent use overlay zone or to make the uses conditional. Part of the more searching review of conditional uses could allow the local government to require further exactions in exchange for permitting the conditional use. Thus, in exchange for allowing a conditional use in an area otherwise limited to water-dependent uses, a local government could insist on additional public access to the water or an easement for public access.

In such a case, a local government would need to carefully design any exaction to ensure that the exaction contains a nexus with the reason for which the local government could reject the use. For example, if a purpose of the overlay district and limitation to water-dependent use is to promote public access and the conditional use is a condominium/private marina developed on the site of a private marina currently open to the public, the local government might require that the

[96] Cortez Fishing Village Historical and Archaeological Overlay District, Section 604.6.8.1.4.1 *et seq.*, Land Development Code, Manatee County, Fla. (current through 2014).

[97] *Id.* At 604.6.8.1.4.3 (emphasis added).

new condominium keep a high percentage of the slips in the marina open to leases by the public on a first-come, first-served basis. Similarly, any area that allows non-water dependent uses could include a requirement that projects affecting public trust doctrine lands include public access as part of the project design.[98] Boston has used this strategy to increase open space and public access along waterways.[99]

V. BEST POLICY PRACTICE

Most jurisdictions offer two defined levels of water dependency.[100] Our review of these definitions leads us to maintain two levels of water dependency followed by a clarifying exclusion. These definitions, when combined with special zoning districts for waterfronts or other policy tools, can provide a crucial means for communities to protect recreational and commercial working waterfronts and public access to the waterfront.

> Water-dependent Use: An activity that must physically be located in, on, over, or adjacent to water in order to conduct its primary purpose and which, therefore, cannot be located inland.
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> Water-related Use: An activity not dependent on direct access to water in order to conduct its primary purpose, but which provides goods or services directly related to water-dependent uses.
>
> Water-enhanced Use: An activity that benefits economically from being located on or near the water but that is neither dependent on direct access to water nor provides goods or services directly related to water-dependent uses. Water-enhanced uses are specifically excluded from definitions of both water-dependent and water-related uses.

VI. CONCLUSION

The concept of categorizing land uses according to their level of dependence on access to water arose in response to growing concerns about the limited nature of coastal resources and the need to prioritize use of coastal resources. Policies at the federal, state, and local levels have historically worked to exclude or severely limit land uses that do not inherently require access to the water. In Florida, the state and many local governments possess established definitions of

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[98] *See, e.g.*, 310 MASS. REGS. CODE § 9.52 (2014).

[99] Charles P. Lord, Eric Strauss & Aaron Toffler, *Natural Cities: Urban Ecology and the Restoration of Urban Ecosystems*, 21 VA. ENVTL. L.J. 317, 349-50 notes 155-61 and accompanying text (2003).

[100] One of the exceptions is the City of Jacksonville, Florida; it refers to water-dependent and water-related uses, but it does not define water enhanced. Jacksonville, Duvall County Comprehensive Plan, 2030, City of Jacksonville, 2030 Comprehensive Plan, Conservation/Coastal Management Element, Definitions, page 89-90 (2011), available at http://www.coj.net/departments/planning-and-development/docs/community-planning-division/2030-comp-plan-postings/post-as-of-march-5---2014/2030-conservation-coastal-management-element---jax.aspx

"water-dependent use." Recent legislative changes in Florida create ambiguity regarding the historical authority of local governments to define, within the minimum standards of state regulations, water-dependent uses in the local government's comprehensive planning process and zoning requirements. Analysis of ambiguous legislative changes suggests an interpretation that minimizes conflict with existing state and local definitions of water-dependent use and meshes with the focus of the altered section's emphasis on boating.

In line with the home-rule focus of Florida comprehensive planning, defining water-dependent and water-related uses and the geographic scope of their application offers local communities a valuable opportunity to consider and implement the community's vision for its waterfront. Before defining water-dependent and water-related uses, a community should determine its vision, consider how best to implement that vision, and then create sound definitions to promote the vision. Such definitions can be made more specific and sound by the inclusion of specific examples of land uses that a community's vision has specifically determined do or do not fall within the scope of water-dependent or water-enhanced use. In addition to the flexibility this gives a local community in its planning process, a community may also consider application of standards or differing standards depending on geographic location.