

# EROSION OF RIPARIAN RIGHTS ALONG FLORIDA'S COAST

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## I. INTRODUCTION AND BRIEF HISTORY

In Florida, there are more than 8,460 miles of tidal shoreline, over 1,800 miles of coastline, and in excess of 1,100 miles of sandy beaches.<sup>1</sup> In 2003, Florida was home to over 16.3 million people<sup>2</sup> and more than 74.5 million visitors.<sup>3</sup> Based on these numbers, it is easy to see why defining the rights held by those who own<sup>4</sup> land on the coasts of Florida is so important to the state's economy. It is also apparent why these rights are in a continuous battle with the state - which holds in trust the foreshore and navigable waters, the public - who wants to enjoy the beaches and swim in the ocean, and the

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1. Information from the Public Relations and Research Department of Visit Florida for 2002 (Sept. 9, 2003), *available at* <http://www.visitflorida.org/index.cfm?fla=web&webpageid=206&mid=479> (last visited May 23, 2004).

2. American Community Survey Profile for Florida provided by the U.S. Census Bureau, *available at* <http://www.census.gov/acs/www/Products/Profiles/Single/2002/ACS/Tabular/040/04000US121.htm> (last visited Nov. 24, 2003).

3. Information from the Public Relations and Research Department of Visit Florida for 2002, *available at* <http://www.visitflorida.org/index.cfm?fla=web&webpageid=206&mid=479> (last visited May 23, 2004). In 2002, the population estimate was 16,318,656 in comparison to the 1990 population of 12,937,929, which is almost a twenty-one percent increase in twelve years. Table 16, U.S. Census Population Table for 1790-1990, *available at* <http://www.census.gov/population/censusdata/table-16.pdf> (last visited Nov. 24, 2003).

4. This paper will not discuss the rights held by those that rent or lease property along Florida's coast.

private property owners — who want to preserve their property. Florida has a long and unique history with this fight, and has never really come to a solution that would appease the public, protect the environment, and control development, while at the same time preserve private property rights.

In the first year of law school, everyone learns that ownership of private property includes certain rights, often described as a “bundle of sticks.” Within this bundle, each stick is representative of owners’ rights, including the right to possess, use, transfer, exclude, encumber, and enjoy.<sup>5</sup> However, owning coastal property is different.<sup>6</sup> The Florida Supreme Court has recognized that “[t]he beaches of Florida are of such a character as to use and potential development as to require separate consideration from other lands with respect to the elements and consequences of title.”<sup>7</sup> When one owns property that entitles him to riparian rights, his ownership may not create a full bundle, simply because some of the sticks are stripped away by the police power held by the state, the navigable servitude, and the doctrine of public trust.

To understand fully the history of this struggle and its complex nature, one would have to start with the proclamation of Florida as a Spanish territory in 1513.<sup>8</sup> The realm of this paper does not require a complete examination of Florida’s history; however, one major occurrence needs to be discussed — Florida’s entry into the Union. In 1845, Florida was admitted into the Union,<sup>9</sup> and through the equal footing doctrine,<sup>10</sup> was granted title to all the lands under navigable waters.<sup>11</sup> Historically, it has been the Board of Trustees of the Internal Improvement Trust Fund (Trustees)<sup>12</sup> that holds title to these lands in trust for the public. Subject to the limits of Florida’s Constitution,<sup>13</sup> the Trustees have the right to dictate who

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5. Robert J. Goldstein, *Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law*, 25 B.C. ENVTL. AFF. L. REV. 347, 375 (1998).

6. *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 77 (Fla. 1974).

7. *Id.*

8. FRANK E. MALONEY, *FLORIDA WATER LAW* 674 (1980).

9. Florida was admitted into the Union on March 3, 1845. 28 Cong. Ch. 48, 5 Stat. 742 (1845); see also *Broward v. Mabry*, 50 So. 826, 830 (1909).

10. The court in *Broward* described this bit of history: “New states, including Florida, admitted ‘into the Union on equal footing with the original states, in all respects whatsoever,’ have the same rights, prerogatives, and duties with respect to the navigable waters and the lands thereunder within their borders as have the original thirteen states of the American Union.” 50 So. at 829-30.

11. See generally, MALONEY, *supra* note 8, at 683. In 1850, Florida received title to all the swamp and overflow lands, which totaled over twenty million acres. *Id.*

12. FLA. STAT. § 253.03 (2002). Prior to the early 1900’s, the Florida Legislature controlled sovereignty lands. See *Coastal Petroleum Co. v. Am. Cyanamid Co.*, 492 So. 2d 339, 342 (Fla. 1986).

13. FLA. CONST. art. X, § 11.

owns and uses<sup>14</sup> these lands through common law public trust.<sup>15</sup> The focus of both the power and the limitation are, however, on the public's rights; and it is therefore private riparian rights that are often limited and destroyed.<sup>16</sup>

Article X, Section 11, of the Florida Constitution defines the power the Trustees hold over the "lands under navigable waters:"

The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust<sup>17</sup> for all the people. Sale of such lands may be authorized by law, but only when in the public interest. Private use of portions of such lands may be authorized by law, but only when not contrary to the public interest.<sup>18</sup>

Not only does this declaration specify what can be done with sovereignty lands, but it also defines the boundary of these lands<sup>19</sup> as being the mean high tide line.<sup>20</sup> To determine exactly where this line is, look to the "intersection of the tidal plane of mean high water<sup>21</sup> with the shore."<sup>22</sup> This boundary is legally significant because it is the "[m]ean high-water line [which runs] along the shores of land immediately bordering on navigable waters [that] is

14. There are many limits placed on the Trustees' ability to sell sovereignty land, such as the requirement that any such sale must be in the public's interest. FLA. ADMIN. CODE ANN. r. 18-21.004(1)(a) (2002); *see also* FLA. ADMIN. CODE ANN. r. 18-21.013(1) (2002) (providing that "[a]pplications to purchase lands riparian to uplands may be made by the riparian owners only").

15. FLA. STAT. § 253.001 (2002). This provision reads, "[a]ll lands held in the name of the board of trustees shall continue to be held in trust for the use and benefit of the people of the state pursuant to s. 7, Art. II, and s. 11, Art. X of the State Constitution." *Id.*

16. *See* discussion *infra* Part III.C.

17. The Trustees manage, administer, and control the trust. FLA. STAT. § 253.03 (2002).

18. FLA. CONST. art. X, § 11.

19. *See* Lee v. Williams, 711 So. 2d 57, 63 (Fla. 5th DCA 1998) (finding the definition of sovereignty lands to be in the Florida Constitution as those "lands under navigable waters").

20. *See* Miller v. Bay to Gulf, Inc., 193 So. 425, 427-28 (Fla. 1940) (looking at the definition of "ordinary high tide" and determining that it was based on the phases of the moon). This has been criticized, but has not been overruled by the court. *See* 4-112 FLA. REAL ESTATE TRANSACTIONS *Interests Related to Estates* § 112.20 (2003) [hereinafter REAL ESTATE].

21. Under section 177.27(14), Florida Statutes,

Mean high water" means the average height of the high waters over a 19-year period. For shorter periods of observation, "mean high water" means the average height of the high waters after corrections are applied to eliminate known variations and to reduce the result to the equivalent of a mean 19-year value.

22. FLA. STAT. § 177.27(15) (2002).

recognized and declared to be the boundary between the foreshore owned by the state in its sovereign capacity and upland subject to private ownership.”<sup>23</sup>

Additionally, this dividing line is significant in a discussion of the extent of riparian rights and the erosion of those rights mainly because it represents the clash between private property owners and those that have the power to limit private property rights. Therefore, defining riparian rights is of the utmost importance. Riparian rights have historically been derived from common law; however, the legislature has codified those rights, along with some controversial limitations in a statute,<sup>24</sup> the importance of which is undetermined. Some may view riparian rights as being very extensive, but the courts in Florida have defined them narrowly.<sup>25</sup> This is especially true in light of the powers held by the federal government, the state government, and local governments to find private property rights subordinate to other rights.

The purpose of this article is to analyze what riparian rights property owners have today, and compare those rights with those held in common law, and those that may be held in the future. Part II of this article will provide a definition of riparian rights in the common and statutory law. Some basic rights and how the statutory law compares will also be discussed. Part III of this article will lay out how various exercises of police power are eroding common law riparian rights. Accompanying this is a detailed analysis of how the state and local governments use the police power to regulate riparian rights in ways that such governments find in the interests of public health, morals, safety, and welfare. How police power relates to the takings issue under both the federal and state constitutions will be discussed, as well. Furthermore, an analysis of the impacts that the navigational servitude and the doctrine of public trust have on riparian rights will be provided. Finally, Part IV contains a conclusion on current riparian rights compared to those that were recognized under Florida common law.

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23. *Id.* § 177.28. This has been called the “zone of ambiguity.” Joseph W. Jacobs & Alan B. Fields, *Sovereignty Lands in Florida: Lost in a Swamp of Ambiguity*, 38 FLA. L. REV. 347, 380 (1986).

24. FLA. STAT. § 253.141(1) (2002).

25. *Tewksbury v. City of Deerfield Beach*, 763 So. 2d 1071, 1071-72 (Fla. 4th DCA 1999).

## II. CHARACTERISTICS OF RIPARIAN RIGHTS

A. *Who is Entitled to Riparian Rights?*

Defining riparian rights is the first and most important step in outlining who is entitled to such private property rights. Strictly speaking,

[R]iparian rights . . . are such as follow or are connected with the ownership of banks and streams or rivers. Those whose lands border upon tide waters are called "littoral" proprietors, and there appears to be no word or phrase of sufficiently broad meaning to include both riparian and littoral. Such rights, riparian and littoral, depend upon the ownership of land contiguous to the waters . . . .<sup>26</sup>

Even though this distinction is well established, it is commonly ignored. In *Legendary, Inc. v. Destin Yacht Club Owners Assoc., Inc.*,<sup>27</sup> the court took notice that "[t]he parties apparently agreed to use the term 'riparian' while recognizing that the technically correct term is littoral."<sup>28</sup> Additionally, the Florida Supreme Court recognized that "[c]ases and statutes . . . have used 'riparian owner' broadly to describe all waterfront owners."<sup>29</sup> This article, like those cases and statutes, will use the commonly accepted, but incorrect, term in this analysis.

Under Florida law, a property owner who is entitled to riparian rights must own land "bordering upon navigable waters."<sup>30</sup> Even though this definition appears simple and straight forward, defining navigable waters can be quite a task. The issue of which waters are navigable, and which are not, has a unique history because it is an area of Florida law that has been heavily litigated.<sup>31</sup> When Florida received title to the land below all the navigable waters in the state, the grant was general and in no way defined what waters were navigable.<sup>32</sup> Litigation that attempted to define navigability sprung

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26. *Johnson v. McCowen*, 348 So. 2d 357, 360 (Fla. 1st DCA 1977); *see also Kester v. Tewksbury*, 701 So. 2d 443, 444 n.2 (Fla. 4th DCA 1997).

27. 724 So. 2d 623 (Fla. 1st DCA 1998).

28. *Id.* at 624 n.1.

29. *Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assocs., Ltd.*, 512 So. 2d 934, 936 (Fla. 1987).

30. FLA. STAT. § 253.141(1) (2002).

31. Melissa Gross-Arnold, *Public Trust Doctrine Trims the Butler Act: City of West Palm Beach v. Board of Trustees of the Internal Improvement Trust Fund*, 51 FLA. L. REV. 529, 537-38 n.60 (1999).

32. *See Pollard v. Hagan*, 44 U.S. 212 (1845); *Barney v. Keokuk*, 94 U.S. 324 (1876).

up relatively shortly after Florida entered the Union<sup>33</sup> and by 1909, the minimum standard was set to include only those waters that were navigable-in-fact.<sup>34</sup>

In subsequent years, the courts limited the navigable-in-fact<sup>35</sup> test in two areas. First, in *Clement v. Watson*,<sup>36</sup> the court rejected the ebb and flow test stating, “[w]aters are not under our law regarded as navigable merely because they are affected by the tides.”<sup>37</sup> Many have critiqued this restriction, but it has never been overruled<sup>38</sup> and is still followed today.<sup>39</sup> Second, the court in *Clement* limited the definition of navigable waters by excluding those waters that did not become navigable until after the land was already privately owned.<sup>40</sup> This restricts state owned sovereignty lands to those “immediately border[ing] on the navigable waters.”<sup>41</sup> Likewise, the courts follow this restriction. For example, in *Florida Board of Trustees of Internal Improvement Trust Fund v. Wakulla Silver Springs Co.*,<sup>42</sup> for example, the court reaffirmed the rule from *Clement* in finding that “[i]n Florida, the subsequent dredging of a navigable channel across a non-navigable body of water does not render that body of water navigable.”<sup>43</sup>

Once a determination has been made that an upland owner has riparian rights due to the character of his or her property, the nature and extent of that owner’s rights must be defined in order to fully understand how riparian rights are being eroded away. There

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33. MALONEY, *supra* note 8, at 696. As early as 1889, the Florida Supreme Court stated: Where the tide ebbs and flows in a river the common law regarded it as a navigable stream, in which the public had a right of way, and in this country all rivers, without regard to the ebb and flow of the tide, are generally regarded as navigable as far up as they may be conveniently used at all seasons of the year with vessels, boats, barges, or other water craft, for purposes of commerce; and others are regarded as navigable when so declared by statute.

*Bucki v. Cone*, 6 So. 160, 161 (1889).

34. MALONEY, *supra* note 8, at 700. The Florida test has been said to be “similar, if not identical, to the federal title test.” *Odom v. Deltona Corp.*, 341 So. 2d 977, 988 (Fla. 1977).

35. *See Baker v. State*, 87 So. 2d 497, 498 (Fla. 1956) (en banc).

36. 58 So. 25 (Fla. 1912).

37. *Id.* at 26.

38. *See Lee*, 711 So. 2d at 61 (reasoning that “it is pure conjecture whether Justice Whitfield believed *Clement* to have been wrongly decided. Certainly he never said so. In any event, it is beside the point what one justice on the *Clement* court may have later concluded.”).

39. *See, e.g., id.*

40. The waters in dispute here lie within a cove along the shores of a navigable water body. The present owners’ predecessors dredged out the cove to make it navigable. The Watson’s land extends to the cove. *Clement*, 58 So. at 26.

41. *Id.*

42. *Bd. of Trs. of Internal Improvement Trust Fund v. Wakulla Silver Springs Co.*, 362 So. 2d 706 (Fla. 3d DCA 1978).

43. *Id.* at 711.

are two areas of law to examine in order to define all the rights a riparian owner is entitled to: common law and statutory law.

### B. Common Law Riparian Rights

As early as 1909, the courts in Florida have recognized that riparian owners hold many common law rights in common with the public, including the “rights of navigation, commerce, fishing, boating, etc.”<sup>44</sup> Holding these rights in common with the public has serious consequences for owners of upland property, because once those owners are in the water, the law treats them as the public.<sup>45</sup> As a result, an upland owner’s right to navigate or to conduct commerce is not protected anymore than the public’s right to do so.<sup>46</sup> In *Ferry Pass Shippers’ & Inspectors’ Ass’n v. Whites River Inspectors’ & Shippers’ Ass’n*,<sup>47</sup> for example, the court recognized that “[a]s to mere navigation in and commerce upon the public waters, riparian owners as such have no rights superior to other inhabitants of the State.”<sup>48</sup> Therefore, the court held that a riparian owner does not have the right to exclusive use of the waters that border his property; he only has the right not to be totally deprived of his rights to navigation and commerce.<sup>49</sup> Other owners have come to the court to request relief from interference with their rights of navigation and have received similar news with even more serious consequences.<sup>50</sup> The court in *Central & Southern Florida Flood Control District v. Griffith*,<sup>51</sup> looked at the issue of whether a flood control district could dam off a canal, thereby blocking property

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44. *Broward v. Mabry*, 50 So. 826, 830 (1909).

45. *Ferry Pass Shippers’ & Inspectors’ Ass’n v. Whites River Inspectors’ & Shippers’ Ass’n*, 48 So. 643, 644 (1909).

46. *Id.* at 645 (recognizing that “[r]iparian owners have no exclusive rights to navigation in or commerce upon a navigable stream opposite the riparian holdings, and have no right to use the water or land under it as to obstruct or unreasonably impede lawful navigation and commerce by others, as so as to unlawfully burden or monopolize navigation or commerce.”).

47. 48 So. 643 (1909). In this case, a business that inspected and shipped timber on a river located itself across the river from a competing businessperson. *Id.* at 644.

48. *Id.* at 645.

49. The court concluded:

[T]he prayer of the bill of complaint appears to contemplate the enforcement of an exclusive right of the complainant to the use of the waters and shore opposite its land for the conduct of its business; and, as the complainant has no such exclusive right, the particular and entire relief as prayed should not be granted.

*Id.* at 646.

50. See *James v. Cent. & S. Fla. Flood Control Dist.*, 281 So. 2d 402, 404 (Fla. 3d DCA 1973); see also *Carmazi v. Bd. of County Comm’rs of Dade County*, 108 So. 2d 318 (Fla. 3d DCA 1959), *overruled in part by Game & Fresh Water Fish Comm’n v. Lake Islands, Ltd.*, 407 So. 2d 189 (Fla. 1981).

51. 119 So. 2d 423 (Fla. 3d DCA 1960).

owners from access to Biscayne Bay.<sup>52</sup> The court found that this did not cause a loss of property or any property rights, reasoning that the right of navigation that this property owner enjoyed did not require constitutional protection because the owner was just like a member of the public.<sup>53</sup>

In addition to those rights held in common with the public, riparian owners have rights that they do not share with the public — their “status as riparian owners . . . has historically entitled them to greater rights, with respect to the waters which border their land, than inure to the public generally.”<sup>54</sup> The first of these rights is the right to access the water from their property. The court in *Board of Trustees of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc.*<sup>55</sup> recognized this right by finding that riparian owners “have the exclusive right of access over their own property to the water.”<sup>56</sup> Second, beachfront property owners have “the right to an unobstructed view over the waters subject to the rights of the public to pass along the shore.”<sup>57</sup> A third right is to wharf-out, which includes the qualified right “to erect wharves or piers or docks in front of the riparian holdings to facilitate access to and the use of the navigable waters, subject to lawful state regulation and to the dominant powers of Congress.”<sup>58</sup> Finally, riparian rights include the common law right to make access to navigable waters publicly available in a commercial context.<sup>59</sup>

Another category of rights held by coastal property owners are those that attach because these common law rights are characterized as property interests.<sup>60</sup> In *Broward v. Mabry*,<sup>61</sup> the court held that “these special rights . . . are property rights that may be regulated by law, but may not be taken without just

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52. *Id.* at 424.

53. *Id.* at 425-26. Florida courts have reached similar results in other cases as well. See *James*, 281 So. 2d at 404 (holding that “[t]he impairment of the riparian right of navigation to the Bay, being one of those riparian rights held in common with the public in general is not compensable”); see also *Carmazi*, 108 So. 2d at 323-24.

54. *Bd. of Trs. of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc.*, 272 So. 2d 209, 214 (Fla. 2d DCA 1973).

55. *Id.* at 209.

56. *Id.* at 214. This inherently means that the public cannot cross privately owned land.

57. *Id.*; *Padgett v. Cent. & S. Fla. Flood Control Dist.*, 178 So. 2d 900, 904 (Fla. 2d DCA 1965); *Thiesen v. Gulf, Fla. & Ala. Ry. Co.*, 78 So. 491, 501 (Fla. 1919); *Lee County v. Kiesel*, 705 So. 2d 1013, 1015 (Fla. 2d DCA 1998).

58. *Freed v. Miami Beach Pier Corp.*, 112 So. 841, 844-45 (Fla. 1927).

59. See *Medeira Beach Nominee*, 272 So. 2d at 214 (citing *Webb v. Giddens*, 82 So. 2d 743 (Fla. 1955) (holding that owner of riparian property used for commercial business of renting boats had a right to access the main body of the lake from his property)).

60. *Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assocs., Ltd.*, 512 So. 2d 934, 936 (Fla. 1987).

61. 50 So. 826 (1909).

compensation and due process of law.”<sup>62</sup> Additionally, such a property owner may more easily qualify as having a special injury for a nuisance suit if, for example, their view is obstructed, or if the state, through its police power, prohibits swimming, fishing, or navigation.<sup>63</sup>

The final category of common law rights is the right to receive title in lands added to coastal property by accretions and relictions.<sup>64</sup> Accretion is the “gradual and imperceptible accumulation of land along the shore or bank of a body of water[,]” and “[r]eliction... is an increase of the land by a gradual and imperceptible withdrawal of any body of water.”<sup>65</sup> This right is based on the idea that,

Almost all jurists and legislators . . . both ancient and modern, have agreed that the owner of the [waterfront property] . . . is entitled to these additions. By some the rule has been vindicated on the principle of natural justice, that he who sustains the burden of losses and of repairs, imposed by the contiguity of waters, ought to receive whatever benefits they may bring by accretion; by others it is derived from the principle of public policy, that it is the interest of the community that all land should have an owner, and most convenient, that insensible additions to the shore should follow the title to the shore itself.<sup>66</sup>

On the other hand, riparian owners do not have a common law right to lands added to their property through avulsion, which “is the sudden or perceptible loss of or addition to land by the action of the water or a sudden change . . . .”<sup>67</sup> Additionally, when lands are added to coastal property through the owners own doing, title to that land does not vest in the owner.<sup>68</sup>

All of these rights, those in common with the public, those stemming from the classification of riparian rights as property, and

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62. *Id.* at 830; *see also Padgett*, 178 So. 2d at 904.

63. *Webb v. Giddens*, 82 So. 2d 743 (Fla. 1955). In *Webb*, the court affirmed the chancellor’s finding that a property owner on Lake Jackson has “legal right to free access by boats of the type and kind usually operated upon said lake to and from the main body of said lake for purposes of fishing, hunting and boating.” *Id.* at 744. This finding rejected the idea that the owner’s riparian rights ended “when he has reached the water from his uplands.” *Id.*

64. *See Sand Key Assocs.*, 512 So. 2d at 936-37.

65. *Id.* at 936.

66. *Id.* at 937 (quoting *Banks v. Ogden*, 69 U.S. 57, 67 (1864)).

67. *Sand Key Assocs.*, 512 So. 2d at 936.

68. *Id.* at 937.

those rights to the title of land that is added through gradual and imperceptible means, are embedded in Florida's common law. The courts recognize these rights as those inuring to coastal property owners, and did so long before the Florida Legislature codified such rights. However, with the enactment of the statutory definition of riparian rights, the common law principles giving riparian owners specific property rights are obscured and confused.<sup>69</sup>

### C. Statutorily Defined Riparian Rights

The Florida legislature has codified many of the riparian rights that were well established in Florida's common law. Under section 253.141(1), Florida Statutes, "[r]iparian rights are those incident to land bordering upon navigable waters." Furthermore, "[t]he land to which the owner holds title must extend to the ordinary high watermark<sup>70</sup> of the navigable water in order that riparian rights may attach."<sup>71</sup> This definition goes on to define the rights in adjacent waters protected by statute as being the "rights of ingress, egress, boating, bathing, and fishing and such others as may be or have been defined by law."<sup>72</sup> Furthermore, all of these rights are found to be apparent to the upland.

Even though this statute does codify some riparian rights, more importantly, it seems to confuse private riparian rights and those held in common with the public. It also places limits on the nature of riparian rights that Florida's common law did not recognize.<sup>73</sup> The uncertainty surrounding the statutory definition of riparian rights may lead to a significant narrowing of those rights. If riparian rights are found to be something less than property rights, the outcome of future litigation may turn more in favor of limiting those rights. Even from this discussion of basic riparian rights, it is apparent that the courts may question those rights that were once well established.

## III. EROSION OF RIPARIAN RIGHTS

Riparian rights are not absolute. Such rights are subject to regulation by law, but "may not be taken without just compensation and due process of law."<sup>74</sup> It is the unique character of upland

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69. See FLA. STAT. § 112.21 (2002).

70. In other statutes, the line is defined as the mean high water line. See FLA. STAT. § 177.27(15) (2002).

71. FLA. STAT. § 253.141(1) (2002).

72. *Id.*

73. See, e.g., *Belvedere Dev. Corp. v. Dep't of Transp.*, 476 So. 2d 649 (Fla. 1985).

74. *Broward v. Mabry*, 50 So. 826, 830 (1909).

coastal property, and its boundary with state lands, that make the regulation of riparian rights more like a battle between private property owners and the state. There are several foundations upon which the power of the state and the federal government can base the right to erode riparian rights, including the police power, the navigational servitude, and the doctrine of public trust.<sup>75</sup>

### A. Police Power

#### 1. What is the Police Power?

One of the most expansive powers that the state holds is the police power.<sup>76</sup> This power was reserved to the states in the Tenth Amendment of the United States Constitution, which provides,

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75. There are other state actions not specifically discussed here that limit riparian rights, such as the leasing of oyster or clam beds off upland property. Under section 253.68, Florida Statutes, the Trustees have the right to lease submerged lands for aquaculture in compliance with chapter 597, Florida Statutes (the "Florida Aquaculture Policy Act"). There is no mention of what rights an upland owner has when the lands off his or her property are going to be leased under the Florida Aquaculture Policy Act. However, rule 18-21.004 of the *Florida Administrative Code* requires that,

The area to be leased shall comply with the following standards and criteria: a. Riparian rights shall not be unreasonably infringed upon. When reviewing an application from a nonriparian applicant the Department shall consider water depth, location of navigation channels, distance from shore and the width of the waterbody. An aquaculture lease area for a nonriparian applicant can be approved greater than or equal to 100 feet waterward of mean or ordinary high water or greater than or equal to 100 feet waterward of existing structures on sovereignty lands only if the applicant obtains a letter of permission from the upland owner, a greater setback may be required to protect riparian rights.

FLA. ADMIN. CODE ANN. r. 18-21.004(2)(m)(8) (2004).

76. See *Hunter v. Green*, 194 So. 379, 380 (Fla. 1940) (recognizing that "[t]he expression 'police power,' in a broad sense, included all legislation and almost every function of civil government."). This analysis focuses on ownership allocation of property rights held by those who own land bordering navigable waters that are held in trust by the state. The police power and federal Commerce Clause, however, allow the state and federal government to reach even privately owned waters and regulate activities such as dredging and wharfing-out. In *Odom v. Deltona Corp.*, for example, the court noted that,

It is historically recognized in this country that the state and federal governments can regulate uses of both land and water areas in such matters as zoning, safety regulations and other uses of property. Specifically, the State of Florida has the inherent police power to enact such standards and regulations as may be necessary for the public interest relating to the use and development of all public and private water areas within the State of Florida, subject to such authority as may be specifically reserved in the federal government. The state may require private owners to secure permits for modifications of lake bottoms and contiguous areas which may be required for the public interest according to reasonable and uniform standards. It is equally well recognized that this state regulation must be accomplished in a constitutionally permissible manner.

341 So. 2d 977, 987 (Fla. 1976).

“[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>77</sup> However, the court in *McInerney v. Ervin*<sup>78</sup> makes it clear that,

[The police power] was inherent in the people long before the constitution was promulgated and the makers of the constitution declined to meddle with it. It was recognized as a power outside the constitution limited by the concept of common sense and reason. It was one of the powers reserved to the States by Article 10 of the Federal Constitution.<sup>79</sup>

The nature of the police power makes it difficult to define, as was recognized by that same court when it found,

The police power was born with and is a necessary concomitant of civilized government. It is an essential of sovereignty and was possessed by every state before the union was formed. It has been many times held that the constitution concedes the pre-existence of the police power. While no limitations have circumscribed its use, and it is not susceptible of satisfactory definition, the very existence of government depends on it. It has been held to be the very essence of government and that all other powers are incidental to it. It stems from the maxim, *sic utere tuo ut alienum non leadas* (use your own property in such a manner as not to injure that of another). Blackstone attempted to define it before the Revolution and supported his theory of it by the maxim, *salus populi est supreme lex* (the welfare of the people is the supreme law).<sup>80</sup>

In that case, the court also remarked on the amorphous nature of the power, stating “[i]t is in [a] constant state of evolution in order that it meet the calls for its exercise to secure the peace, welfare, good order, health and morals of the people.”<sup>81</sup>

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77. U.S. CONST. amend. X.

78. 46 So. 2d 458 (Fla. 1950).

79. *Id.* at 463.

80. *Id.*

81. *Id.*

Even though “[i]t is difficult and practically impossible to give an exact definition of the police power,”<sup>82</sup> the courts recognize that it may be exercised in the interests of public health, morals, safety, and welfare.<sup>83</sup> These interests are the core, but not the limits of the police power.<sup>84</sup> The only limits recognized are those “applicable provisions of the federal and state Constitutions designed to protect private rights from arbitrary and oppressive governmental action.”<sup>85</sup> Therefore, the state can use this power to impose reasonable restrictions on all forms of property, including riparian rights.<sup>86</sup>

As supported in the United States Constitution, the police power is an inherent power of the state.<sup>87</sup> Additionally, under the Florida Constitution, municipalities are delegated police power based on the language in Article VIII, Section 2, subsection (b), which reads: “Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes *except as otherwise provided by law*.”<sup>88</sup> Along these same lines, charter counties<sup>89</sup> have such powers under the Article VIII, Section 1, subsection (g) of the Florida Constitution, which provides: “Counties operating under county charters shall have all powers of local self-government *not inconsistent* with general law, or with special law approved by vote of the electors.”<sup>90</sup> These constitutional provisions give the state,

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82. Hunter v. Green, 194 So. 379, 380 (Fla. 1940).

83. See Miami Beach v. Ocean & Inland Co., 3 So. 2d 364, 366 (1941) (en banc) (stating that “[i]t is fundamental that one may not be deprived of his property without due process of law, but it is also well established that he may be restricted in the use of it when that is necessary to the common good.”).

84. 3-38 FLA. REAL ESTATE TRANSACTIONS *Land Use and Environmental Regulation* § 38.01 (2003).

85. Everglades Sugar & Land Co. v. Bryan, 87 So. 68, 107 (Fla. 1921) (finding that even though certain swamp and over flowed lands were purchased from the state, the rights of the owners “cannot stay the exercise by the state of its sovereign governmental powers to assess the lands for special purposes that are beneficial to the lands and conserve the general welfare.”).

86. See Metro. Dade County Fair Hous. & Employment Appeals Bd. v. Sunrise Vill. Mobile Home Park, Inc., 511 So. 2d 962, 965 (Fla. 1987) (holding that through the police power, Dade County could enact an ordinance prohibiting age discrimination in housing even if that ordinance “interfere[s] with otherwise protected rights so long as the interference bears a reasonable relationship to the public need served.”).

87. U.S. CONST. amend. X.

88. FLA. CONST. art. VIII, § 2(b) (emphasis added).

89. Counties can adopt a charter under the procedure laid out in chapter 125 of the Florida Statutes. However, if a county does not operate under a charter, the board of county commissioners only has those powers provided in general or special law. FLA. CONST. art. VIII, § 1(f); see also Townley v. Marion County, 343 So. 2d 1312, 1313 (Fla. 1st DCA 1977) (holding that a non-charter county cannot enact zoning ordinances inconsistent with chapter 163, part II, Florida Statutes).

90. FLA. CONST. art. VIII, § 1(g) (emphasis added).

municipalities, and charter counties the power to enact statutes, regulations, and ordinances for the protection of the public health, safety, welfare, or morals of the people of the state or the local communities.<sup>91</sup>

Most of Florida is “two coasts back to back,’ [so] arguably, the entire state is in the coastal zone.”<sup>92</sup> Based on this uniqueness, the interest that the state has in its coastal areas is great. This interest has led to the exercise of the police power over coastal property in many ways, including the codification of a definition of riparian rights and several statutory structures that regulate coastal management by requiring consistency with federal, state, regional, and local cooperation. Specifically, the growth management regulations on Florida’s coast that affect riparian rights are the Beach and Shore Preservation Act<sup>93</sup> and Florida’s comprehensive plan.<sup>94</sup>

Through these statutes and comprehensive schemes, the coastal zone in Florida has become the most strictly regulated area in Florida.<sup>95</sup> Excessive regulation has affected, and sometimes stripped away coastal property owner’s riparian rights, especially the right to wharf-out. In the extreme, “a private property interest thought to exist may be defined out of existence.”<sup>96</sup>

## 2. *Defining Riparian Rights Through Statutory Codification*

The police power, held as an inherent power by Florida, includes “all legislation and almost every function of civil government.”<sup>97</sup> This broad power encompasses at its most basic level the right of the legislature to supervise matters that involve the common welfare of the state through legislation.<sup>98</sup> It was through the use of police power that a definition of riparian rights was codified in what is today section 253.141, Florida Statutes. This statute reads,

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91. See *Sunrise Vill. Mobile Home Park*, 511 So. 2d at 965 (discussing the power of local governments to pass ordinances); see also *Newman v. Carson*, 280 So. 2d 426, 428 (Fla. 1973) (finding that “[p]olice power is the sovereign right of the state to enact laws for the protection of lives, health, morals, comfort and general welfare.”).

92. Thomas G. Pelham et al., *Managing Florida’s Growth: Toward an Integrated State, Regional, and Local Comprehensive Planning Process*, 13 FLA. ST. L. REV. 515, 594-95 (1985).

93. FLA. STAT. §§ 161.011-.58 (2002).

94. See FLA. STAT. ch. 161 (2002 & Supp. 2003).

95. Kenneth E. Spahn, *The Beach and Shore Preservation Act: Regulating Coastal Construction in Florida*, 24 STETSON L. REV. 353, 360 (1995).

96. JOSEPH J. KALO ET AL., *COASTAL AND OCEAN LAW* 2 (2d ed. 2002).

97. *Hunter v. Green*, 194 So. 379, 380 (Fla. 1940).

98. See *id.*

Riparian rights are those incident to land bordering upon navigable waters. They are rights of ingress, egress, boating, bathing, and fishing and such others as may be or have been defined by law. Such rights are not of a proprietary nature. They are rights inuring to the owner of the riparian land but are not owned by him or her. They are appurtenant to and are inseparable from the riparian land. The land to which the owner holds title must extend to the ordinary high watermark<sup>99</sup> of the navigable water in order that riparian rights may attach. Conveyance of title to or lease of the riparian land entitles the grantee to the riparian rights running therewith whether or not mentioned in the deed or lease of the upland.<sup>100</sup>

The history of this statute, specifically its location in the Florida Statutes, has guided courts in determining the effect its provisions have on riparian rights.

In 1953, section 192.61(1), Florida Statutes, defined riparian rights as part of the Statutes pertaining to Taxation and Finance.<sup>101</sup> The statutory language of that section was the same as it reads today.<sup>102</sup> Unlike the techniques used by courts to interpret the Florida Constitution,<sup>103</sup> Florida courts have looked at the location of this statute as an indication that the legislature intended the definition to apply as a beneficial guide to tax assessors.<sup>104</sup> In *Webb v. Giddens*,<sup>105</sup> the court, without commenting on the statute's applicability in the case before it, did find that the 1953 version of the statute was a "partial codification of the common law on the subject,"<sup>106</sup> specifically with respect to the riparian rights defined. The court noted that those common law rights included "the right of ingress and egress to and from the lot over the waters of the bay, . . . that of unobstructed view over the waters, and in common with the public the right of navigating, bathing, and fishing."<sup>107</sup> However,

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99. Other statutes define this dividing line as the mean high water line. See discussion *infra*; see *supra* note 21 and accompanying text.

100. FLA. STAT. § 253.141(1) (2002).

101. *McDowell v. Bd. of Trs. of the Internal Improvement Fund*, 90 So. 2d 715, 717 (Fla. 1956).

102. FLA. STAT. § 192.61(1) (1953).

103. FLA. CONST. art. X, § 12(h) (reading "Titles and subtitles shall not be used in construction").

104. *McDowell*, 90 So. 2d at 717.

105. 82 So. 2d 743 (Fla. 1955).

106. *Id.* at 745.

107. *Id.* (quoting *Thiesen v. Gulf, Fla. & Ala. Ry. Co.*, 78 So. 491, 501 (Fla. 1917)).

the court did not comment on any other portions of that subsection. In 1955, section 192.61, Florida Statutes, was split up into two separate statutes. The statute numbered 192.61, Florida Statutes,<sup>108</sup> was limited to only deal with the assessments of riparian rights, and the definition portion was moved to section 271.09, Florida Statutes, under the “Public Lands and Property” title. There is no indication in the legislative history as to why this change was made, it seems to have just been split up and transferred by the reviser.<sup>109</sup> During this period, only one opinion recognized this change in location, but because at the time of the opinion the transfer was not official, the court did not discuss the implications of the new position.<sup>110</sup> Other courts looked at the definition to determine issues such as whether riparian rights included any more of a right to navigation than was held in common with the public,<sup>111</sup> but did not discuss any other aspect of the definition.

Then in 1971, section 271.09, Florida Statutes, was transferred back to the statutory chapter on taxation and finance by the reviser without any explanation. The Laws of Florida do not reference this transfer; it is only noted in the relevant statutory volume. In subsequent years the riparian rights statute was moved around the taxation and finance chapter, but it remained a tax law until 1985. The relevance of its placement in the statutes is that courts in Florida have continuously held that because of this location, “[r]iparian rights exist . . . as a matter of constitutional rights and property law and are not dependent on [the statutory definition] . . . which merely attempts to define them for tax purposes.”<sup>112</sup> As a result of this classification as a tax law and not a property law, Florida courts have found that the limitations codified within the statute were not applicable to riparian rights.<sup>113</sup>

However, in 1985, section 197.228 was renumbered as section 253.141, Florida Statutes, and moved back under Title XVIII, “Public Lands and Property.” What is the real effect of this move? The law that transferred this section, chapter 85-342, Laws of

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108. 1965 Fla. Laws ch. 239, 242; 1970 Fla. Laws ch. 709, 740 (this section dealing only with assessments of riparian rights was again transferred in 1969 and was then repealed in 1970).

109. Interview with Edith Pollitz, Statutory Revision Head (Nov. 7, 2003). Ms. Pollitz said that in the past, the revisers would just move things around in the Florida Statutes with no explanation or reason.

110. *McDowell v. Bd. of Trs. of the Internal Improvement Fund*, 90 So. 2d 715, 717 (Fla. 1956).

111. *Carmazi v. Bd. of County Comm'rs of Dade County*, 108 So. 2d 318, 322 (Fla. 3d DCA 1959), *overruled in part by Game & Fresh Water Fish Comm'n v. Lake Islands, Ltd.*, 407 So. 2d 189 (Fla. 1981).

112. *Feller v. Eau Gallie Yacht Basin, Inc.*, 397 So. 2d 1155, 1157 (Fla. 5th DCA 1981).

113. *Belvedere Dev. Corp. v. Dep't of Transp.*, 476 So. 2d 649, 653 (Fla. 1985); *McDowell*, 90 So. 2d at 717; *Webb*, 82 So. 2d at 743.

Florida, made no changes, it merely stated “[s]ection 197.228, Florida Statutes, is transferred to section 253.141, Florida Statutes.”<sup>114</sup> The legislative history that accompanies the transfer has no further explanation. Actually, the Legislative Analysis of the Senate Bill does not even mention this change.<sup>115</sup> The absence of an explanation as to why the riparian rights statute has been transferred around is consistent throughout the statute’s history.

As previously discussed in Part II, the statute codifies many common law rights, including the right to access, those rights in common with the public, and that riparian rights are appurtenant to riparian land. Additionally, two limitations not recognized in the common law are also codified here; it is these that were held inapplicable by the courts in relation to the 1985 statute when it was under the taxation and finance title.<sup>116</sup> If these limits are held to be applicable, they will place restrictions on the rights of riparian owners that, prior to 1985, were described as being “inconsistent with generally accepted property doctrines and contrary to established case law in the state of Florida.”<sup>117</sup>

The first controversial limitation in section 253.141(1), Florida Statutes, states that riparian rights are “not of a proprietary nature . . . [t]hey are rights inuring to the owner of the riparian land but are not owned by him or her.” Black’s Law Dictionary defines proprietary interests as “[t]he interest held by a property owner together with all appurtenant rights.”<sup>118</sup> This definition does not help define the term in this context; rather, it begs the question because the courts have repeatedly found that riparian rights are property at common law.<sup>119</sup> What else could this mean other than riparian rights are not property interests that are recognized by statutory law. One possible explanation is that riparian rights are not property in the traditional sense of the term. In *Belvedere Development Corp. v. Department of Transportation*,<sup>120</sup> for example, the court recognized this characteristic of riparian rights when it stated, “[a]lthough riparian rights are property, they are unique in character. The source of those rights is not found within the interest itself, but rather they are found in, and are defined in terms of the riparian upland.”<sup>121</sup> As mentioned in the beginning of this analysis,

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114. 1985 Fla. Laws ch. 2007, 2124.

115. Fla. S. Comm. on Tax Admin., CS for SB 1176 (1985) Staff Analysis 1-10 (May 13, 1985) (available at the Fla. State Legislative Archives, Tallahassee, Fla.).

116. See, e.g., *Belvedere*, 476 So. 2d at 652.

117. *Id.*

118. BLACK’S LAW DICTIONARY 816-17 (7th ed. 1999).

119. *Thiesen*, 78 So. 491 at 507; *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909).

120. 476 So. 2d 649 (Fla. 1985).

121. *Id.* at 652.

property rights are often described as a “bundle of sticks, with one of those sticks being the right to exclude.<sup>122</sup> Along this line of reasoning, the courts have often held that by the very nature of the rights listed in section 253.141, Florida Statutes, the upland owner’s property interests in “ingress, egress, boating, bathing, [or] fishing” are not superior to the rights shared by the public.<sup>123</sup> Under the Public Trust Doctrine, a riparian upland owner cannot exclude the public from exercising these same rights.<sup>124</sup> Therefore, in a sense, this statute confuses the distinction between riparian rights and those rights held by the public and in no way helps define riparian rights.<sup>125</sup>

The courts recognition of this limitation may carry with it severe implications. If the upland property owner does not own these riparian rights, the state may be allowed to take these rights without paying just compensation.<sup>126</sup> Therefore, what must be focused on is whether this limitation is a change in property rights, and as a result could be classified as a violation of the Fifth Amendment.<sup>127</sup> As of yet, no Florida courts have discussed the implications of this change, so the meaning of the language is still unclear.<sup>128</sup>

The second limitation in section 253.141, Florida Statutes, is that the riparian rights held by owners of qualifying property are inseparable. Making riparian rights inseparable from the upland property is not consistent with Florida common law<sup>129</sup> and opens up the question of whether this change in the placement of the statute overrules the common law. Based on common law, the courts refuse to hold that riparian rights are never severable from the upland property. As early as 1940, the courts in Florida were recognizing this right to sever.<sup>130</sup> Likewise, in a later decision, the court in

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122. Goldstein, *supra* note 5, at 375.

123. Cent. & S. Fla. Flood Control Dist. v. Griffith, 119 So. 2d 423, 425 (Fla. 3d DCA 1960).

124. See Krieter v. Chiles, 595 So. 2d 111 (Fla. 3d DCA 1992) (finding the rights of the public superior to those of a property owner).

125. See REAL ESTATE, *supra* note 20 § 112.21(1)(a) (2003).

126. Riparian owners are still able to maintain a takings claim under common law. In *Tewksbury v. City of Deerfield Beach*, for example, it was proper for a property owner to bring suit to define her riparian rights, even if those rights were narrowly defined. 763 So. 2d 1071, 1071-72 (Fla. 4th DCA 1999).

127. *Kendry v. State Rd. Dep’t.*, 213 So. 2d 23, 28 (Fla. 4th DCA 1968).

128. REAL ESTATE, *supra* note 20 § 112.21(1)(b).

129. See *Belvedere*, 476 So. 2d 649 (Fla. 1985); see also *Legendary Inc. v. Destin Yacht Club Owners Ass’n*, 724 So. 2d 623, 624 (Fla. 1st DCA 1998).

130. See *Caples v. Taliaferro*, 197 So. 861, 862 (1940) (interpreting a deed and recognizing that “[i]t is settled law in this country that a riparian owner may separate his uplands from his submerged lands and convey both to different grantees, or he may sell one and withhold the other.”).

*Belvedere*<sup>131</sup> distinguished the condemnation issue before it from a situation where parties to a real estate transaction may choose to sever the riparian rights from the upland property, and then give the riparian right holder a means to benefit from those rights.<sup>132</sup> When there is mutual agreement to sever riparian rights, the court in *Belvedere* suggested, although in dicta, that common law or statutory law would not disallow such an agreement where the limiting definition of riparian rights was a tax law.<sup>133</sup> Up to as recently as 1997, the courts were still recognizing that “[i]t is generally held that riparian rights may be separated from the ownership of the land to which they are appurtenant, either by a grant of such rights to another, or by a reservation thereof in the conveyance of the land.”<sup>134</sup>

There have been no cases since 1985 that discuss how these aspects of section 253.141, Florida Statutes, affect the common law.<sup>135</sup> Even though the relevance of this new location has not been fleshed out by the courts as of yet, this does not dismiss the significance of its new location, which may have the affect of overruling the common law.<sup>136</sup> There are other sections of the Florida Statutes that also affect riparian rights; however, the limitations imposed by statutes that attempt to manage the coast of Florida mostly focus on limiting the right to wharf-out, which is not statutorily protected.

### 3. *Regulating Florida’s Coast*

By “its very nature, the exercise of police power clashes with the full enjoyment of property by its owner”;<sup>137</sup> however, in many cases it is more than enjoyment that has been taken away by this power. Under two wide-ranging legislative schemes, the Florida Legislature has set goals to protect Florida’s beaches, and to manage Florida’s coastal region under a comprehensive plan that requires local, state, and federal cooperation. Even though the Beach and Shores Preservation Act and the comprehensive plan may at first glance only affect upland property, a more complete analysis finds that riparian rights are also affected.

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131. 476 So. 2d at 652.

132. *Id.*

133. *Id.* at 652-53.

134. *Legendary*, 724 So. 2d at 624 (quoting 78 Am Jur. 2d *Waters* § 278). The court did not even mention the statute.

135. *See Haynes v. Carbonell*, 532 So. 2d 746 (Fla. 3d DCA 1988).

136. *See REAL ESTATE*, *supra* note 20 § 112.21.

137. 10A FLA. JUR. 2D *Constitutional Law* § 253 (2004).

a. *The Beach and Shores Preservation Act*

The Beach and Shore Preservation Act (Act)<sup>138</sup> is the “the primary regulatory scheme for the protection of coastal areas of Florida.”<sup>139</sup> The Florida Legislature enacted the Act because it recognized that “it is in the public interest to preserve and protect [these areas] from imprudent construction which can jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection to upland structures, endanger adjacent properties, or interfere with public beach access.”<sup>140</sup> To protect these interests, the Act mainly focuses on establishing two zones of regulation along the sandy beaches of the Atlantic Ocean, the Gulf of Mexico, and the Straits of Florida:<sup>141</sup> the coastal construction control lines and the thirty-year erosion line, both of which aid the state in regulating construction seaward of the established lines.

The establishment of coastal construction control lines (control lines) is based on a determination of what portion of the beach system would be affected by the “100-year storm surge, storm waves, or other predictable weather conditions.”<sup>142</sup> Additional segments may be found further landward if it is necessary to protect dune systems that are more landward than the “100-year storm surge.”<sup>143</sup> The Department of Environmental Protection (DEP) establishes the control lines, but only after it concludes that the establishment of such line is necessary<sup>144</sup> through the use of comprehensive engineering, topographic, and hydrographic surveys.<sup>145</sup> There are public hearing requirements that must be met prior to the control lines becoming effective.<sup>146</sup> Any riparian owner that “feels that such line as established is unduly restricted or prevents a legitimate use of the owner’s property” has standing to contest such lines with DEP.<sup>147</sup> After DEP has established the control lines, coastal construction seaward of that line is prohibited unless the construction falls under a statutory exception.<sup>148</sup> Coastal construction is defined as “includ[ing] any work or activity which is

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138. FLA. STAT. §§ 161.011-161.45 (2002).

139. Pelham, *supra* note 92, at 580.

140. FLA. STAT. § 161.053(1)(a) (2002).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* § 161.053(2)(a).

145. Spahn, *supra* note 95, at 362.

146. FLA. STAT. § 161.053(2)(a) (2002).

147. *Id.*

148. *Id.*

likely to have a material physical effect on existing coastal conditions or natural shore and inlet processes.”<sup>149</sup>

The Act also requires that DEP consider long-term effects<sup>150</sup> by mandating that no DEP permits shall be issued for the construction of any structure, the location of which is seaward of the thirty-year erosion line.<sup>151</sup> These lines are determined on a case-by-case basis depending on the location of where the “seasonal high-water line [will be] within 30 years after the date of application for [a] permit.”<sup>152</sup> Because this line is not preset, as with the control line, there are “inconsistent results and uncertainty among landowners and developers.”<sup>153</sup> Even though this line fluctuates, DEP cannot include within the area seaward of this line “any areas landward of a coastal construction control line.”<sup>154</sup> The only structures exempt from this limitation are “coastal or shore protection structure[s], minor structure[s], or pier[s], meeting the requirements of this part, . . . intake and discharge structures for a facility sited pursuant to part II of chapter 403,” and single-family dwellings that meet specific statutory requirements.<sup>155</sup>

Under the Act, almost any construction seaward of either line requires a DEP permit.<sup>156</sup> Because permitting is a licensing activity, the party requesting a permit must follow the procedures set forth in chapters 63B-33, 62B-34, and 62B-41 of the Florida Administrative Code. Under this authority, DEP can impose strict requirements upon anyone applying for a permit seaward of the control line.<sup>157</sup> The burden is on the party requesting a permit to provide DEP with “sufficient information pertaining to the proposed project to show that any impacts associated with the construction have been minimized and that the construction will not result in a significant adverse impact.”<sup>158</sup> Many factors must be taken into consideration when reviewing a permit request, including engineering data concerning shoreline stability and topography, design features of proposed construction,<sup>159</sup> and potential impacts on

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149. *Id.* § 161.021(6) (2002).

150. FLA. ADMIN. CODE ANN. r. 62B-33.024 (2002) (provides the rules for the thirty-year erosion projection procedure).

151. FLA. STAT. § 161.053(6)(b) (2002).

152. *Id.*

153. Spahn, *supra* note 95, at 362.

154. FLA. STAT. § 161.053(6)(b) (2002).

155. *Id.*

156. *Id.* § 161.053(5); Spahn, *supra* note 95, at 373.

157. *See* FLA. ADMIN. CODE ANN. r. 62B-33.007 (2002).

158. FLA. ADMIN. CODE ANN. r. 62B-33.005(2) (2002) (placing the burden of proving these facts and circumstances on the applicant); *see* Woodholly Assocs. v. Dep't of Natural Res., 451 So. 2d 1002, 1003 (Fla. 1st DCA 1984).

159. DEP may require “such engineering certifications as necessary to assure the adequacy

the beach-dune system.<sup>160</sup> Additionally, there are factors that DEP may take into consideration based on the location of the requested permit, such as the nesting and hatching of sea turtles and interference with public access.<sup>161</sup> However, there is no guidance in the Act as to which factors are to be given more weight than others. Therefore, DEP has a lot of discretion when reviewing permit applications, such as the power to grant permits for construction seaward of control lines under certain circumstances.<sup>162</sup>

Most of the case law surrounding the Act deals with challenges to the way DEP has interpreted the language of a statute or a regulation, challenges to some aspect of the establishment of the control lines, and challenges to denied permits.<sup>163</sup> Generally, Florida courts show a great amount of deference to the decisions made by DEP or one of its predecessor agencies that are within its delegated authority.<sup>164</sup> In *Island Harbor Beach Club, Ltd. v. Department of Natural Resources*,<sup>165</sup> for example, Beach Club challenged an amendment proposed by a predecessor department of DEP to reestablish the control line in Charlotte County, Florida.<sup>166</sup> The court found that the department acted under its statutorily delegated authority and discretion in applying the selected methodologies consistent with the purpose of the Act.<sup>167</sup> Furthermore, because competent and substantial evidence supported the amendment, an order upholding it was affirmed.<sup>168</sup> The court recognized that this change will affect the Beach Club's "right to use and erect structures upon the land they privately own [, and] may be seriously circumscribed in many of the areas covered by the amended rule."<sup>169</sup> The court went on to say that an "[e]valuation of the economic, environmental, and geophysical concerns underlying the wisdom and desirability of so regulating

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of the design and construction of permitted projects." FLA. STAT. § 161.053(5)(d) (2002).

160. *Id.* § 161.053(5)(a) (2002).

161. *Id.* §§ 161.053(5)(c), (e).

162. *Id.* § 161.053(5)(b).

163. Spahn, *supra* note 95, at 380.

164. *Id.* The generalization made here simplifies the issue of standard of review of agency decisions, which will not be addressed in detail. However, it should be noted that if an agency acts outside its delegated authority, there is no deference given to the decision. *See Dep't of Natural Res. v. Wingfield Dev. Co.*, 581 So. 2d 193, 198 (Fla. 1st DCA 1991) (finding that because the statute did "not authorize DNR to determine whether a structure remains under construction or whether construction is abandoned after that date," a rule giving such authorization is not a valid exercise of legislative authority). *See also State v. Day Cruise Ass'n, Inc.*, 794 So. 2d 696, 700 (Fla. 1st DCA 2001).

165. 495 So. 2d 209 (Fla. 1st DCA 1986).

166. *Id.* at 211.

167. *Id.* at 223.

168. *Id.* at 224.

169. *Id.* at 223-24.

land use along Florida beaches is, however, a political matter for determination by the legislature, not this court.”<sup>170</sup> As this case illustrates, even with standing to challenge DEP decisions, deference to the agency provides riparian landowners no real protection.

*b. Florida’s Comprehensive Plan Legislation*

Prior to the 1980s, Florida did not have a successful and enforceable comprehensive plan system set up in the state so that it could adequately “manage the state’s phenomenal growth.”<sup>171</sup> The dire need for such a plan was recognized, and by 1985, Florida had established a “statutory framework for an integrated state, regional, and local comprehensive planning process.”<sup>172</sup> Through innovative legislation,

Florida has created a pyramidal planning hierarchy. At the top of the hierarchy is the State Comprehensive Plan, at middle level are comprehensive regional policy plans, and at the foundation are local comprehensive plans. The three planning levels are integrated through consistency requirements. The goals and policies of the State Comprehensive Plan must be implemented through the regional policy plans that are consistent with the state plan and through local plans that are consistent with both the state and regional plans. Local comprehensive plans must be implemented through land development regulations and development orders that are consistent with the local plan.<sup>173</sup>

At the top of this pyramid is the State Comprehensive Plan. Under Chapter 187, Florida Statutes, this plan provides “long-range policy guidance for the orderly social, economic, and physical growth of the state.”<sup>174</sup> Because the plan is only a “direction-setting document,” other legislation is required for the implementation of the stated policies and goals,<sup>175</sup> which include everything from

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170. *Id.* at 224.

171. Pelham, *supra* note 95, at 517.

172. Thomas A. Pelham, *Adequate Public Facilities Requirements: Reflections on Florida’s Concurrency System for Managing Growth*, 19 FLA. ST. U. L. REV. 973, 1001 (1992) [hereinafter Pelham II].

173. *Id.* at 1002.

174. FLA. STAT. § 187.101(1) (2002).

175. *Id.* § 187.101(2).

coastal and marine resources,<sup>176</sup> to property rights,<sup>177</sup> to land use.<sup>178</sup> The plan further orders legislation to apply “[t]he goals and policies contained in the State Comprehensive Plan . . . reasonably . . . where they are economically and environmentally feasible, not contrary to the public interest, and consistent with the protection of private property rights.”<sup>179</sup>

In the middle of this pyramid, the eleven regions in Florida<sup>180</sup> are required under the Florida Regional Planning Council Act<sup>181</sup> to adopt a regional policy plan.<sup>182</sup> These plans must contain “regional goals and policies . . . [such as] affordable housing, economic development, emergency preparedness, natural resources of regional significance, and regional transportation, and . . . any other subject which relates to the particular needs and circumstances of the comprehensive planning district.”<sup>183</sup> Additionally, all regional plans must be “consistent with the state comprehensive plan.”<sup>184</sup>

Of most importance to the issue of riparian rights is the local aspect of this newly renovated legislation, specifically the Local Government Comprehensive Planning and Land Development Regulation Act (LGCPA).<sup>185</sup> Under the LGCPA, all local governments in Florida had to adopt a local comprehensive plan that met the requirements as established in this act.<sup>186</sup> These requirements were to act as a “blueprint for the future development of [each] community”<sup>187</sup> and “for the orderly and balanced future economic, social, physical, environmental, and fiscal development of the area.”<sup>188</sup>

The LGCPA identifies certain elements that the local comprehensive plan in each area must include.<sup>189</sup> The coastal management element is one of the mandatory elements in areas within the coastal zone in Florida.<sup>190</sup> The statutes define this area as lands “abutting the Gulf of Mexico or the Atlantic Ocean, or which include or are contiguous to waters of the state where marine

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176. *Id.* § 187.201(8).

177. *Id.* § 187.201(14).

178. *Id.* § 187.201(15).

179. FLA. STAT. § 187.101(3) (2002).

180. Pelham II, *supra* note 172, at 1003.

181. FLA. STAT. § 186.501 (2002).

182. *Id.* § 186.508.

183. *Id.* § 186.507(1).

184. *Id.*

185. FLA. STAT. §§ 163.3161-163.3215 (2002 & Supp. 2003).

186. *Id.* § 163.3167(2).

187. Pelham II, *supra* note 172, at 1004.

188. FLA. STAT. § 163.3177(1) (2002 & Supp. 2003).

189. *Id.* §§ 163.3177(3), (4), (6).

190. *Id.* § 163.3177(6)(g).

species of vegetation listed by rule as ratified in s. 373.4211 constitute the dominant plant community.”<sup>191</sup> With the inclusion of this mandatory element, the Florida Legislature recognized that,

There is significant interest in the resources of the coastal zone of the state. Further, the Legislature recognizes that, in the event of a natural disaster, the state may provide financial assistance to local governments for the reconstruction of roads, sewer systems, and other public facilities. Therefore, it is the intent of the Legislature that local government comprehensive plans restrict development activities where such activities would damage or destroy coastal resources, and that such plans protect human life and limit public expenditures in areas that are subject to destruction by natural disaster.<sup>192</sup>

In 1985, when the LGCPA was strengthened, this element was largely rewritten<sup>193</sup> with an emphasis that illustrates the “legislature's desire to protect Florida's coast.”<sup>194</sup> The coastal element was expanded to include a much broader range of objectives, including the “limitation of public expenditures which subsidize development in high-hazard coastal areas, protection against natural disasters, orderly development and use of ports, and preservation of historic and archaeological resources.”<sup>195</sup> To accomplish these new objectives, local comprehensive plans in the coastal zone must include:

Policies that shall guide the local government's decisions and program implementation with respect to the following objectives:

1. Maintenance, restoration, and enhancement of the overall quality of the coastal zone environment, including, but not limited to, its amenities and aesthetic values.

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191. *Id.* § 380.24. SECTION 163.3177(6)(g), Fla. Stat. states that only “units of local government identified in s. 380.24” must include a coastal element.

192. *Id.* § 163.3178(1).

193. 1985 Fla. Laws ch. 207, 215 (amending FLA. STAT. § 163.3177(6)(g) (1983)).

194. Pelham, *supra* note 92, at 547.

195. *Id.*

2. Continued existence of viable populations of all species of wildlife and marine life.
3. The orderly and balanced utilization and preservation, consistent with sound conservation principles, of all living and nonliving coastal zone resources.
4. Avoidance of irreversible and irretrievable loss of coastal zone resources.
5. Ecological planning principles and assumptions to be used in the determination of suitability and extent of permitted development.
6. Proposed management and regulatory techniques.
7. Limitation of public expenditures that subsidize development in high-hazard coastal areas.
8. Protection of human life against the effects of natural disasters.
9. The orderly development, maintenance, and use of ports identified in s. 403.021(9) to facilitate deepwater commercial navigation and other related activities.
10. Preservation, including sensitive adaptive use of historic and archaeological resources.<sup>196</sup>

These minimum requirements provide a strong basis for the management of Florida's coastal areas, but it is recognized that "[t]he key will be in successful implementation of the plans."<sup>197</sup>

The best means to illustrate the ways in which local governments use this element to limit riparian rights is to look at some adopted comprehensive plans implemented pursuant to the LGCPA. The City of Marathon, Florida,<sup>198</sup> for example, has adopted

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196. FLA. STAT. § 163.3177(6)(g) (2002).

197. Donna R. Christie, *Growth Management in Florida: Focus on the Coast*, 3 FLA. ST. U. J. LAND USE & ENVTL. L. 33, 40 (1987).

198. Marathon, Fla., Coastal Element, available at <http://www.ci.marathon.fl.us/>

an objective that requires the city to “protect, conserve and enhance coastal and marine resources.”<sup>199</sup> In order to carry out this plan, the city adopted a policy that specifically regulates docks, only allowing them to be one hundred feet in length from the mean low water line.<sup>200</sup> Another example is from the Walton County, Florida, coastal zone conservation element of the adopted comprehensive plan. This element limits shoreline land uses as one of its primary objectives.<sup>201</sup> Specifically,

During the development review process for all new development and redevelopment along shoreline areas, a shoreline use will not be approved if it decreases the amount of legal public access to beaches, lakes, bay and rivers, open waters and shorelines. Shoreline land uses shall not be allowed unless they ensure protection of wetlands, lakes, rivers and bay, endangered species and their associated habitat, grassbeds, oysterbeds, recreational and commercial fisheries, and improving or maintaining estuarine, surface and groundwater quality.<sup>202</sup>

Walton County is to carry out this objective through multiple policies, one of which lists a set of requirements that new development or redevelopment must meet.<sup>203</sup> The list of allowed uses includes a requirement that the use must be on an upland area — this alone could be used to disallow any dock to be built. However, there are indications that Walton County would allow docks to be built under certain circumstances.<sup>204</sup>

In one way or another, most coastal counties in Florida regulate when and how docks can be built in their local comprehensive plans.<sup>205</sup> Even though the state and local governments can heavily

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site%20documents/Comp%20Plan/Chapter%205.doc (last visited Nov. 24, 2003).

199. *Id.* at Objective 5-1.3.

200. *Id.* at Policy 5-1.3.11.

201. Walton County, Fla., Future Land Use Element Policies, at Objective C-4.1, *available at* <http://www.co.walton.fl.us/pdf/countygrowthmanagement/Walton%20County%20Comprehensive%20Plan.pdf> (last visited Nov. 24, 2003).

202. *Id.* at Objective C-4.1.

203. *Id.* at Policy C-4.1.2.

204. *Id.* at Policy L-1.1.1 (implements objective L-1.1(B)(9)(f) by allowing docks to be built as a recreation use only in the Coastal Village mixed use district); *but see id.* at Policy C-3.1.2 (disallowing docks “located over submerged land which is vegetated with seagrasses except as necessary to reach” in the Choctawhatchee Bay).

205. *See, e.g.*, Volusia County, Fla., Coastal Mgmt. Element, *available at* <http://volusia.org/growth/coast.pdf> (last visited Nov. 24, 2003).

regulate the right to wharf-out, the government cannot totally take away this common law right through statutes, rules, ordinances, or regulations without just compensation.<sup>206</sup> The police power has limits, in that regulations cannot be arbitrarily abrogated where there is no governmental purpose;<sup>207</sup> however, it often seems that private property rights are the last on the list of priorities, with the public's interest at the top.<sup>208</sup>

#### 4. *The Impact of Florida's Police Power on Riparian Rights*

It has been observed that "[t]he relationship of the sovereign police power to private property has been marked by the steady erosion of private property's sanctity in the face of the sovereign police power's growth."<sup>209</sup> Therefore, even though it may be true that "[n]o growth management program would be complete without close attention to Florida's coast,"<sup>210</sup> expansive regulation has a serious impact on the riparian rights held by those that own coastal property. Some of the negative impacts of over-regulation include expense,<sup>211</sup> uncertainty,<sup>212</sup> and limited possibility of review.<sup>213</sup> This battle has been fought on many fronts, but there are two areas that are the most illustrative and pervasive: the right to wharf-out, and the regulatory takings issue.<sup>214</sup>

##### a. *The Right to Wharf-out*

It has been long been recognized that the right to wharf-out is a qualified right "to erect wharves or piers or docks in front of riparian holdings to facilitate access to and the use of the navigable waters, subject to lawful state regulation and dominant powers of

206. See 85-47 Fla. Op. Att'y Gen. 47 (1990) (finding that a county could not take away the common law right of ingress and egress without just compensation).

207. 90-37 Fla. Op. Att'y Gen. 37 (1990).

208. *Krieter v. Chiles*, 595 So. 2d 111, 112 (Fla. 3rd DCA 1992) (finding that "[t]he Trustees have the authority to preclude the construction of private docks when it is in the public interest to do so").

209. See Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 668 (1986).

210. Pelham, *supra* note 92, at 594-95.

211. See, e.g., *id.* at 596. The author recognized that,

As for the private sector, persons wishing to develop or build structures on coastal barriers may incur some increased costs due to the construction standards mandated in the bill. [.] Further, private developers who build in coastal areas may now be required by a local government to pay for most, if not all, infrastructure costs.

*Id.*

212. See, e.g., Spahn, *supra* note 95, at 389-90.

213. See also, *id.* at 390.

214. See Lazarus, *supra* note 209, at 668.

Congress.”<sup>215</sup> However, since the court in *Freed v. Miami Beach Pier Corp.*<sup>216</sup> remarked on this qualified right, the numbers of regulations that govern the building of a dock have increased substantially.<sup>217</sup> Building docks is one of the most regulated and limited riparian rights for many reasons, including the fact that docks are located on sovereignty lands owned by the state, they obstruct navigation, and they impede the public’s enjoyment of the beach.<sup>218</sup> For these reasons, in order for a riparian owner to build a dock, he or she will have to go through many levels of regulation and permitting even before breaking ground.

As discussed above, the state, municipalities, and charter counties have the authority to regulate riparian rights through the general police power and those powers reserved in the Florida Constitution.<sup>219</sup> Therefore, as long as the regulations serve a valid purpose, and the paramount power of the state to regulate sovereignty lands is not violated, the right to wharf-out can be, and is, regulated.<sup>220</sup> There are many hoops that a riparian owner has to jump through to get approval to build a dock. Primarily, the owner has to get permission to use the sovereignty lands. Under section 253.77(1), Florida Statutes,

A person may not commence any excavation, construction, or other activity involving the use of sovereign or other lands of the state, the title to which is vested in the board of trustees of the Internal Improvement Trust Fund under this chapter, until the person has received the required lease, license, easement, or other form of consent authorizing the proposed use.

Under this provision, a permit will not be granted unless all the necessary information is provided, this includes the information required to receive a dredge and fill permit, a coastal construction permit under 161.041, a coastal construction line permit under 161.053, and any variance or set back as required by 161.052.<sup>221</sup> Additionally, even though the Trustees hold title to sovereignty

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215. *Freed v. Miami Beach Pier Corp.*, 112 So. 841, 844-45 (Fla. 1927).

216. *Id.* at 841.

217. *See, e.g.*, Marine Mammal Protection Act, 16 U.S.C. §§ 1361–1389 (2002). Under this Act, a permit cannot be approved if there will be even one marine mammal taken. *Id.* § 1371(a).

218. *See* A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 3:74 (1988).

219. *See* discussion *infra* Part III.A.1.

220. *See* 90-37 Fla. Op. Att’y Gen. 37 (1990).

221. FLA. STAT. § 253.77 (2002).

lands under navigable waters, permission to build a dock may come from the Department of Environmental Protection and the request water management district,<sup>222</sup> especially if the property is also classified as a wetland.<sup>223</sup>

After a riparian owner has complied with all of these statutes and rules, he or she must then make sure they comply with all the requirements of local ordinances and regulations. In Treasure Island, Florida, for example,

No seawall, groin, jetty, dock, or boat lift, or any part thereof, or any projection of any kind into the waterways of Boca Ciega Bay shall hereafter be built or constructed except in conformity with the provisions of this article, nor shall the same be razed, altered, moved, extended or built upon in any manner that would be in violation with the provisions of this article unless by a licensed marine or general contractor as required by state statutes. No project which is likely to negatively impact any existing marine sea grass bed shall be permitted. All projects which are likely to inhibit tidal circulation shall include mitigation measures to maintain tidal circulation and flushing. All dredge and fill activities in Boca Ciega Bay are restricted under, and subject to, the provisions of F.S. § 258.396 (Boca Ciega Bay Aquatic Preserve) and the permitting requirements and criteria of the Pinellas County Water and Navigation Control Authority (Sections 166-356 through 358, Pinellas County Code). Seawalls shall be prohibited on the Gulf of Mexico, and when existing seawalls on the Gulf of Mexico are damaged, they shall not be replaced.<sup>224</sup>

As this ordinance illustrates, local governments have the power to restrict the right to wharf-out, but this right cannot be totally taken away through such regulation without just compensation.<sup>225</sup>

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222. See discussion *infra* Part III.A.3.a.

223. See FLA. ADMIN. CODE ANN. r. 62-312 (2002).

224. TREASURE ISLAND, FLA., ORDINANCE 69-31 (2003), available at <http://sun6.dms.state.fl.us/treasure-island/dock-ord.html> (last visited Nov. 24, 2003).

225. The courts in Florida still recognize the right to wharf-out. In *Shore Vill. Prop. Owners' Ass'n, Inc. v. Fla. Dep't of Env'tl. Prot.*, for example, the court recognized that this issue had been previously addressed by multiple district courts and stated "riparian rights include the building of a dock to have access to navigable waters." 824 So. 2d 208, 211 (Fla. 4th DCA 2002); see also *Cartish v. Soper*, 157 So. 2d 150, 153-54 (Fla. 2d DCA 1973) (finding that "[j]ust

*b. Regulatory Takings*

In a recent United States Supreme Court decision, the Court discussed the issue of regulatory takings under the Fifth Amendment. The question presented in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,<sup>226</sup> was whether “a [thirty-two month] moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a per se taking of property requiring compensation under the Takings Clause of the United States Constitution.”<sup>227</sup> On the way to finding that it does not, the Court engaged in expansive dicta that “led it to be hailed as a major victory for land-use regulators.”<sup>228</sup>

This decision, which “represents the first clear victory for pro-regulation forces in fifteen years,”<sup>229</sup> interpreted *Lucas v. South Carolina Coastal Council*<sup>230</sup> to be a mere “footnote in the history of regulatory takings law.”<sup>231</sup> The rule out of *Lucas* was that when the government through regulation deprives a property owner of all economically beneficial value and use, a taking has occurred that requires the government pay just compensation.<sup>232</sup> This is unless the state can prove that the regulations placed on the property do not restrict the use of that property any more than those restrictions that could be imposed under background principles of property and nuisance law.<sup>233</sup> The Court in *Tahoe-Sierra* stated that its holding in *Lucas* “was limited to ‘the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted’.”<sup>234</sup> This meant “that the categorical rule would not apply if the diminution in value were 95% instead of 100% . . . [because] [a]nything less than a ‘complete elimination of value,’ or a ‘total loss,’ the Court acknowledged, would require the kind of analysis applied in *Penn Central*.”<sup>235</sup> As a result, under the *Tahoe-Sierra* rule, it is logically impossible for a fee simple owner to successfully claim a temporary or permanent taking under *Lucas* for a regulation that limits riparian rights, but leaves the land with

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as accreted land would necessarily be burdened by the easement as a necessary implication of the reservation, so too the right to build a dock to facilitate access to the waters is implied”).

226. 535 U.S. 302 (2002).

227. *Id.* at 306.

228. TAKING SIDES ON TAKINGS ISSUES: THE IMPACT OF TAHOE-SIERRA 18 (Thomas E. Roberts ed., 2003) [hereinafter TAKING SIDES].

229. *Id.* (citing *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987)).

230. 505 U.S. 1003 (1992).

231. TAKING SIDES, *supra* note 228, at 60.

232. *Lucas*, 505 U.S. at 1027-28.

233. *Id.* at 1028-29.

234. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 330 (2002) (quoting *Lucas*, 505 U.S. at 1017).

235. *Tahoe-Sierra*, 535 U.S. at 330 (quoting *Lucas*, 505 U.S. at 1019-20).

substantial value.<sup>236</sup> A landowner in such a situation will therefore have to rely on a balancing of the factors from *Penn Central Transportation Co. v. City of New York*.<sup>237</sup>

In *Tahoe-Sierra*, the Court said that if there is not a total taking of the entire piece of property, the three-part test from *Penn Central* is the polestar to be applied in regulatory takings claims.<sup>238</sup> The three factors to take into consideration are (1) “economic impact of the regulation on the claimant;” (2) “the extent to which the regulation has interfered with distinct investment-backed expectations;” and (3) “the character of the governmental action.”<sup>239</sup> These factors are to be applied by the finder of fact and law within a fact specific, ad hoc, and subjective analysis,<sup>240</sup> and therefore, the facts surrounding the specific issue will drive the decision.<sup>241</sup>

The prohibition in the Fifth Amendment of the United States Constitution against taking private property for public use without compensation, also applies to the states through the Fourteenth Amendment.<sup>242</sup> Therefore, this prohibition binds the state of Florida and all the local governments within Florida.<sup>243</sup> Local landowners have brought many takings claims to the Florida courts; however, the court has never decided a case involving the regulatory taking of riparian rights.<sup>244</sup> The court, on the other hand, has been confronted with physical takings cases. In *Belvedere*,<sup>245</sup> for example, the court was asked to determine whether Florida law allows riparian rights to be separated from riparian land.<sup>246</sup> Commenting that “[a]lthough riparian rights are property, they are unique in character . . . [t]he source of those rights is not found within the interest itself, but rather they are found in, and are defined in terms of the riparian upland,” the court found that indeed riparian rights

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236. TAKING SIDES, *supra* note 228, at 40. See also *Tahoe-Sierra*, 535 U.S. at 332 (finding that “[l]ogically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted”). The right to exclude is treated differently. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 & n.12 (1982) (recognizing that “[t]he permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude”).

237. 438 U.S. 104 (1978).

238. *Tahoe-Sierra*, 535 U.S. at 327 n.23.

239. *Penn Central*, 438 U.S. at 124.

240. *Tahoe-Sierra*, 535 U.S. at 322.

241. See, e.g., *Lost Tree Vill. Corp. v. City of Vero Beach*, 838 So. 2d 561, 569-70 (Fla. 4th DCA 2002).

242. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980).

243. *Id.* at 160 (applying this analysis to Seminole County, Florida).

244. The only Florida case that has even mentioned *Tahoe-Sierra* is a takings case dealing with development of coastal land. See *Lost Tree Village*, 838 So. 2d at 572.

245. 476 So. 2d 649 (Fla. 1985).

246. *Id.* at 650.

could be separated.<sup>247</sup> Because riparian rights are property rights, the court held that “the act of condemning petitioners’ lands without compensating them for their riparian property rights . . . was an unconstitutional taking.”<sup>248</sup>

The court in *Board. of Trustees of the Internal Improvement Trust Fund v. Sand Key Assocs., Ltd.*<sup>249</sup> also recognized that “property rights . . . may be regulated by law, but may not be taken without just compensation and due process of law.”<sup>250</sup> In *Sand Key*, the district court certified a question of great public importance to the Florida Supreme Court and asked under section 161.051, Florida Statutes,<sup>251</sup> whether land added to riparian uplands through accretions or relictions was property of the upland owner when he did not cause the additions.<sup>252</sup> The court recognized the common law right to such lands, and thereby answered the question in the affirmative.<sup>253</sup> A finding that the property was the state’s “would have a disastrous effect on many unsuspecting waterfront owners and would necessitate a finding that this is a taking by the state of vested riparian and littoral rights without compensation.”<sup>254</sup>

As the law of takings illustrates at both the state and federal level, even though riparian rights are recognized and protected by common law, statutory law, and constitutional law, these rights are very often found to be secondary to the rights of others, such as the

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247. *Id.* at 652.

248. *Id.*

249. 512 So. 2d 934 (Fla. 1987).

250. *Id.* at 936 (quoting *Brickell v. Trammel*, 82 So. 221, 227 (Fla. 1919)). Regulation is not the only way that the government can take property; it can also be taken through condemnation or appropriation. See *Loretto*, 458 U.S. at 421.

251. This section reads:

Coastal construction by persons, firms, corporations, or local authorities.-- Where any person, firm, corporation, county, municipality, township, special district, or any public agency shall construct and install projects when permits have been properly issued, such works and improvements shall be the property of said person, firm, corporation, county, municipality, township, special district, or any public agency where located, and shall thereafter be maintained by and at the expense of said person, firm, corporation, county, municipality, township, special district, or other public agency. No grant under this section shall affect title of the state to any lands below the mean high-water mark, and any additions or accretions to the upland caused by erection of such works or improvement shall remain the property of the state if not previously conveyed. The state shall in no way be liable for any damages as a result of erections of such works and improvements, or for any damages arising out of construction, reconstruction, maintenance, or repair thereof, or otherwise arising on account of such works or improvements.

FLA. STAT. § 161.051 (2002).

252. *Sand Key Assocs., Ltd.*, 512 So. 2d at 938.

253. *Id.* at 941.

254. *Id.* at 939.

federal, state, or local governments. Under this structure, if a regulatory taking of riparian rights does not satisfy the test from *Penn Central*, there may not be a taking and just compensation may not be due.<sup>255</sup> This is a strong blow against private property owners in all parts of the state, not just along the coast. However, when coupled with the navigational servitude and the public trust doctrine, a riparian owner may never receive compensation for lost property.

### B. Navigational Servitude

The property rights of a riparian owner are not supreme. An excellent illustration of this is how the law surrounding takings has evolved in a way that compensates riparian owners less and less for the losses they may encounter because of an action by the federal government. As discussed above, when the government takes private property for public use, under the Fifth Amendment of the United States Constitution, just compensation must be paid.<sup>256</sup> However, the federal government has a navigational servitude that may overshadow this right. Under the Commerce Clause, Congress may “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>257</sup> Because Congress has this power over commerce, the court in *Gibbons v. Ogden*<sup>258</sup> found that Congress also had power over navigation; and from this power stems the power over navigable waters.<sup>259</sup>

Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable

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255. Cf. FLA. STAT. § 70.001 (2002) (the “Bert J. Harris, Jr., Private Property Rights Protection Act”). This statute reads, in part:

The Legislature recognizes that some laws, regulations, and ordinances of the state and political entities in the state, as applied, may inordinately burden, restrict, or limit private property rights without amounting to a taking under the State Constitution or the United States Constitution. The Legislature determines that there is an important state interest in protecting the interests of private property owners from such inordinate burdens. Therefore, it is the intent of the Legislature that, as a separate and distinct cause of action from the law of takings, the Legislature herein provides for relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity in the state, as applied, unfairly affects real property.

*Id.* § 70.001(1).

256. See *United States v. 30.54 Acres of Land*, 90 F.3d 790, 793 (3d Cir. 1996).

257. U.S. CONST. art. I, § 8, cl. 3.

258. 22 U.S. 1 (1824).

259. Genevieve Pisarski, *Testing the Limits of the Federal Navigational Servitude*, 2 OCEAN & COASTAL L.J. 313, 322 (1997).

waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all requisite legislation by Congress.<sup>260</sup>

The navigational servitude has been defined as a dominant servitude with which the federal government can regulate, control, and improve navigable waters.<sup>261</sup> This power “necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist.”<sup>262</sup> When the federal government exercises this power, it does not have to compensate an upland owner for the economic losses that result because of the taking of riparian rights.<sup>263</sup> The reasoning behind this is that once riparian owners are in the water, their rights are like those of the public,<sup>264</sup> and therefore “damage sustained does not result from taking property . . . but from the lawful exercise of a power to which the interests of riparian owners have always been subject.”<sup>265</sup> In *Bonelli Cattle Co. v. Arizona*,<sup>266</sup> for example, even though the Supreme Court was faced with a land takings issue, it noted that

In the exercise of its navigational servitude, the . . . Federal Government may decrease the value of riparian property without compensation because the property is held subject to the exercise of that servitude. The government may, without paying compensation, deprive a riparian owner of his common-law right to use flowing [water] or to build a wharf over the water. We have held that the [government] may deprive the owner of the riparian

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260. *Gilman v. City of Philadelphia*, 70 U.S. 713, 724-25 (1865) (citing *Gibbons*, 22 U.S. at 1).

261. *Palm Beach Isles Associated v. United States*, 208 F.3d 1374, 1382 (Fed. Cir. 2000) (citing *United States v. Rands*, 389 U.S. 121, 122-23 (1967)); Mark Cheung, Comment, *Dockminiums: An Expansion of Riparian Rights that Violates the Public Trust Doctrine*, 16 B.C. ENVTL. AFF. L. REV. 821, 842 (1989).

262. *Gilman*, 70 U.S. at 725.

263. *United States v. 30.54 Acres of Land*, 90 F.3d 790, 793 (3d Cir. 1996).

264. Even though owners of coastal property have no more of a right to navigation than the general public, such owners do have standing to challenge an action that takes away this right if they have been subject to special injury. See *Game & Fresh Water Fish Comm'n v. Lake Islands, Ltd.*, 407 So. 2d 189, 192-93 (1981) (discussing the special injury held by owners of island property as a result of a rule that prohibit the use of motorboats during part of the year, which had the effect of taking away the only reasonable means of transportation to the property).

265. *Rands*, 389 U.S. at 123.

266. 414 U.S. 313 (1973).

character of his property in the exercise of its navigational servitude.<sup>267</sup>

There are two requirements that must be met for the government to successfully use its navigational servitude: that the property is located within navigable waters and that it is only used when there will be either a navigable purpose or effect.<sup>268</sup> Under federal law, determining whether a water body is navigable requires that it be “navigable in fact.”<sup>269</sup> Water bodies are found to be navigable in fact when

They are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.<sup>270</sup>

Under this first requirement, there is also a geographic boundary — the mean high water mark — land above this line does not qualify as part of the government’s navigational servitude.<sup>271</sup> In utilizing this servitude, the government must also show a navigational purpose or effect behind its actions.<sup>272</sup> In most cases, the general theme is that governmental “action to keep the channels of commerce free of obstructions has long been understood to lie near the core of the police power, and claims for compensation when property has been damaged by such efforts have been uniformly rejected.”<sup>273</sup>

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267. *Id.* at 331 (citations omitted).

268. Pisarski, *supra* note 259, at 325. This article suggests that there are actually six, including (1) authority, (2) commerce clause purpose, (3) congressional intent, (4) easement, (5) government act is within navigable waters, and (6) “[p]ositive relationship between the governmental activity and navigation.” *Id.* at 325-36.

269. *The Daniel Ball*, 77 U.S. 557, 563 (1870).

270. *Id.*

271. *Applegate v. United States*, 35 Fed. Cl. 406, 414-15 (1996).

272. *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1384 (Fed. Cir. 2000).

273. DAVID A. DANA & THOMAS W. MERRILL, *PROPERTY: TAKINGS*, 117-18 (Foundation Press

Even when the federal government can successfully claim that an action falls under the navigation servitude, a riparian owner's rights to compensation are not totally destroyed. As a rule, the navigation servitude extends to the mean high water mark.<sup>274</sup> Therefore, when an action of the federal government destroys or devalues upland property above the mean high water mark, just compensation is due.<sup>275</sup> Nevertheless, there is a twist — the courts have consistently held that when the determination is made as to what amount of compensation is just, property is not valued the way one would normally value coastal property. In *United States v. Rands*,<sup>276</sup> the court recognized that “just as the navigational privilege permits the Government to reduce the value of riparian lands by denying the riparian owner access . . . without compensation,” that same navigational privilege “permits the Government to disregard the value arising from this same fact of riparian location in compensating the owner when . . . [uplands] are appropriated.”<sup>277</sup>

Under this doctrine, if the government has the right to take riparian rights and devalue coastal property, the government may never have to pay. In addition, even if the effects cross the mean high water mark, the amount received by the property owner may fall short of the actual value of the property lost. This doctrine is especially harsh due to the unique nature of coastal property, the sometimes outrageous price tags attached, and the importance of riparian rights to the land value. However, just as the federal government may hold navigation above private property rights, the state government may hold the rights of the public as superior.<sup>278</sup>

### C. Public Trust Doctrine

The final and most well known doctrine that plays a major role in the erosion of riparian rights is the Public Trust Doctrine, under which states hold in trust for the public all the lands under navigable waterways.<sup>279</sup> This doctrine traces its roots back to Roman

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2002).

274. *Applegate*, 35 Fed. Cl. 406, 414-15 (1996).

275. *See* *United States v. Rands*, 389 U.S. 121, 123 (1967).

276. 389 U.S. 121 (1967).

277. *Id.* at 123-24 (quoting *U.S. v. Virginia Elec. & Power Co.*, 365 U.S. 624, 629 (1961)).

278. *Id.* at 126.

279. “Traditionally, the scope of the public trust was confined to navigable lakes and streams, submerged lands, and the foreshore (the area between high and low tides) . . . [but, i]n some states, court decisions and statutes have extended the trust doctrine to nonnavigable water, state parks, wildlife, groundwater, air and other natural resources.” Carter H. Strickland, Jr., *The Scope of Authority of Natural Resource Trustees*, 20 COLUM. J. ENVTL. L. 301, 313-14 (1995).

law and English common law.<sup>280</sup> Under the Roman natural law, it was thought, “the sea belonged to no one, that use rights in it, and on its shores, were common to all.”<sup>281</sup> This concept was lost in Europe through the Middle Ages, but then reemerged thanks to Sir Matthew Hale’s treatise, *De Jure Maris* (1670).<sup>282</sup> It is well recognized that “Hale’s treatise laid the groundwork for the English common law rule that title to lands over which the tide ebbed and flowed was *prima facie* in the Crown and held by it in a sort of trust for the public.”<sup>283</sup> From this foundation, the law in the United States and in Florida has evolved into a doctrine that has crept beyond its customary boundaries landward.

No discussion of the Public Trust Doctrine would be complete without a mention of the leading United States Supreme Court decisions that laid the framework for the public trust, *Illinois Central Railroad v. Illinois*.<sup>284</sup> In *Illinois Central*, the Court held that

The soil under navigable waters being held by the people of the state in trust for the common use and as a portion of their inherent sovereignty, any act of legislation concerning their use affects the public welfare. It is therefore appropriately within the exercise of the police power of the state.<sup>285</sup>

Even though *Illinois Central* deals with what right a state has to grant control of a harbor, it has set the groundwork for much of public trust law in Florida.<sup>286</sup>

In Florida, the common law doctrine of public trust<sup>287</sup> has been codified into a constitutional mandate that the Trustees<sup>288</sup> keep in trust “[t]he title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines.”<sup>289</sup> Traditionally, through the public trust, the state protects public benefits such as fishing, navigation, and commerce; however, in some states the public trust

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280. KALO, *supra* note 96, at 3.

281. *Id.*

282. *Id.* at 4.

283. *Id.*

284. 146 U.S. 387 (1892).

285. *Id.* at 459.

286. Gross-Arnold, *supra* note 31, at 535. See Hayes v. Boyman, 91 So. 2d 795, 799-800 (Fla. 1957) (containing a historical analysis of this doctrine’s common law development in Florida).

287. See Broward v. Mabry, 50 So. 826, 830 (Fla. 1909).

288. See FLA. STAT. § 253.03(1)(B) (2002).

289. FLA. CONST. art. X, § 11.

has been expanded “to include protection of the air, water, wildlife, aesthetic values, public access, and recreational uses such as boating, swimming, and bathing.”<sup>290</sup> In Florida, the public trust includes the public’s right to use the lands under navigable waters and the foreshore for navigation, fishing, bathing, and similar uses.<sup>291</sup> However, the court has recognized that “[i]t is difficult, indeed to imagine a general and public right of fishing in the sea, and from the shore, unaccompanied by a general right to bathe there, and of access thereto over the foreshore for that purpose.”<sup>292</sup>

Riparian owners property rights are interfered with, and sometime destroyed in the name of public interest, especially with regard to the right to wharf-out.<sup>293</sup> One of the best illustrations of this is the court’s decision in *Krieter v. Chiles*.<sup>294</sup> The court in *Krieter* recognized that “[a]lthough the riparian right of ingress and egress is an appurtenance to the ownership of private upland property, it is a qualified right which must give way to the rights of the state’s people.”<sup>295</sup> Based on this concept of the superiority of the public’s rights over a private property owner’s rights, the court found that the denial of an application to build a private single-family dock was not a taking.<sup>296</sup> The court reasoned, “the Public Trust Doctrine dictates that there be some impairment of a citizen’s right to enjoy absolute freedom before allowing a citizen the use of public submerged land.”<sup>297</sup> The coastal property owner could not show that the only way of ingress and egress to her property was by way of a dock, therefore, without such necessity this claim could not be held as superior to that of the public.<sup>298</sup> Because of this decision, this property owner could only reach her property by way of a public road and not from the water.<sup>299</sup>

It has been argued that this doctrine is not necessary in the face of the modern police power. One commentator has written,

Today, the extent of sovereign authority does not turn on such strained fictions of property law, which are all contemporaries of the public trust doctrine. It is now well settled that the police power is the most

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290. Strickland, *supra* note 279, at 314.

291. *Hayes*, 91 So. 2d at 799.

292. *White v. Hughes*, 190 So. 446, 449 (Fla. 1939).

293. *See* 57 FLA. JUR. 2D *Wharves* § 11 (2004).

294. 595 So. 2d 111 (Fla. 1st DCA 1992).

295. *Id.* at 112 (citation omitted).

296. *Id.*

297. *Id.*

298. *Krieter*, 595 So. 2d at 112.

299. *Id.* at 112-13.

fundamental source of governmental authority to prevent needless environmental harm and related risks to human health and welfare. To be sure, the 'police power' too could be described as a legal fiction, but unlike the trust doctrine, the police power is a live fiction that reflects current legal analysis and social values. The extent of police power authority does not depend on the application of formalistic categories of property law, but ultimately on the precise nature of both the governmental interest and the private property expectations at odds in a particular case.<sup>300</sup>

The author concluded that takings law has evolved so that the courts would allow a taking without requiring just compensation being paid in situations where the public trust could be exercised;<sup>301</sup> however, this conclusion was reached prior to the United States Supreme Court decision in *Lucas v. South Carolina Coastal Council*.<sup>302</sup> But, what it did not mention was that when the state exercises the Public Trust Doctrine, there is no taking of private property that requires just compensation be paid. As *Krieter* illustrates, this aspect of the doctrine will keep the public trust alive. It totally shields governments from paying private property owners just compensation for the destruction or devaluation of their land<sup>303</sup> — even the modern police power is not this strong.

#### IV. CONCLUSION

At common law, riparian rights attached to upland property and the courts held them out to be property themselves. Even though this classification is not dependant on the state constitution or the statutory law, these rights can be limited just as any common law rights can. The "rights" that today may be at best a priority for coastal owners include rights of navigation, commerce, boating, and fishing, along with the right to ingress and egress, the right to an unobstructed view, and the right to wharf-out. However, as the statutory and regulatory law has evolved, all of these rights have become qualified, and many have become nothing more than a right commonly shared with the public. Therefore, currently, the surviving rights that a riparian owner can still exercise in Florida

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300. See Lazarus, *supra* note 209, at 665 (citations omitted).

301. See *id.* at 668-74.

302. 505 U.S. 1003 (1992).

303. *Kreiter*, 595 So.2d at 112-13.

in a way where they will be compensated for a loss, actually only include those that do not interfere with the state's use of sovereignty lands, the federal government's use of the navigational servitude, or the public trust.

