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LIABILITY FOR MODIFICATION OF LANDS UNDER NAVIGABLE WATERS IN FLORIDA

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This Article is intended to address the viability of an inverse condemnation, or "takings," claim under Florida law where the property at issue lies under navigable waters. As explained below, land under navigable waters is not private. Rather, it is "owned" by the State—the sovereign—for the public's exclusive use and benefit. Therefore, one might argue that such land cannot be the subject of an unconstitutional taking. Of course, still waters run deep and things are not always as they might appear.

This Article first discusses the elements of a takings claim by distinguishing an unconstitutional taking from mere property damage or impairment. Next, the Article explores the legal standing necessary for a claimant to advance an unconstitutional takings claim. Then, the Article considers the limitations imposed on riparian landowners' ability to physically access the edge of navigable waters abutting their land and boating rights upon those waters in the State of Florida. While access appears to be a compensable right giving rise to a takings claim, the riparian

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owner's ability to use such waters for purposes of boating most likely does not.

I. ESSENTIAL ELEMENTS OF INVERSE CONDEMNATION

Inverse condemnation—or a "taking" without just compensation—"is a cause of action by a property owner to recover the value of property that has been de facto taken by an agency having the power of eminent domain where no formal exercise of that power has been undertaken."[1] A claimant must show (1) an injury that the courts will deem severe enough to be a taking and (2) that this taking was committed by the government.[2] Meeting the first element has proven difficult for claimants because the showing of a temporary invasion of private property is insufficient to advance such a claim.[3] Rather, there must be a permanency to the invasion,[4] and it must constitute more than mere property damage or an impairment of the property's use.[5] In fact, some courts have concluded that a claimant must show an invasion that has *totally* destroyed all reasonable use of the private property at issue.[6]

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1. *Sarasota Welfare Home, Inc. v. City of Sarasota*, 666 So. 2d 171, 173 (Fla. 2d Dist. App. 1995) (citing *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 641 So. 2d 1377, 1384 (Fla. 4th Dist. App. 1994)).

2. *Rubano v. Dep't of Transp.*, 656 So. 2d 1264, 1266 (Fla. 1995).

3. *Poe v. State Rd. Dep't of Fla.*, 127 So. 2d 898, 900 (Fla. 1st Dist. App. 1961) (explaining that a taking is the "'entering upon private property for more than a momentary period and, under the warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such way as substantially to oust the owner and deprive him [or her] of all beneficial enjoyment thereof'") (quoting 12 Fla. Jur. *Eminent Domain* § 68).

4. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (stating that a taking "requires an owner to suffer a permanent physical invasion of . . . property"); *State of Fla. Dep't of Health and Rehabilitative Servs. v. Scott*, 418 So. 2d 1032, 1034 (Fla. 2d Dist. App. 1982) (rejecting a takings claim because invasion "did not amount to a permanent deprivation of the owners' use of their lands"); *S. Fla. Water Mgt. Dist. v. Basore of Fla., Inc.*, 723 So. 2d 287, 288 (Fla. 4th Dist. App. 1998) (noting a taking is "an actual, permanent invasion of the land").

5. *Village of Tequesta v. Jupiter Inlet Corp.*, 371 So. 2d 663, 669 (Fla. 1979) ("[T]he Florida Constitution does not expressly forbid 'damage' to property without just compensation.") (citing *Arundel Corp. v. Griffin*, 103 So. 422, 424 (Fla. 1925)); *Weir v. Palm Beach Co.*, 85 So. 2d 865, 867 (Fla. 1956) (holding that property damage did not support an inverse condemnation claim); *Schick v. Fla. Dep't of Agric.*, 504 So. 2d 1318, 1320 (Fla. 1st Dist. App. 1987) (distinguishing an impairment from a taking); *Kirkpatrick v. City of Jacksonville*, 312 So. 2d 487, 490 (Fla. 1st Dist. App. 1975) (finding that property damage did not support takings claim).

6. *E.g. Village of Tequesta*, 371 So. 2d at 670 ("It is incumbent upon [the plaintiff] to show, not only a taking, but also that a private property right has been destroyed by

Poe v. State Road Department of Florida illustrates the importance of proving the total destruction of property use in a Florida takings case. There, a farmer sued for inverse condemnation after the State redesigned drainage structures near his property that caused surface water to routinely accumulate and flood several acres of his farmlands after a rainfall.[7] Although the farmer demonstrated that the condition made it impossible to farm the affected land, the court rejected his takings claim because he could not show that he was "'substantially ousted and deprived of all beneficial use of the land affected.'"[8]

Decades later, the First District Court of Appeal again pointed to the requirement of showing the total destruction of one's property to establish a takings claim. In *State of Florida Department of Transportation v. Donahoo*, a landowner complained that state roadway contractors committed a taking by placing large equipment, piles of dirt, boundary markers, and right-of-way stakes on his property during their construction project.[9] The contractors also demolished a brick wall located on the property.[10] Despite this intrusion on the landowner's property, the court held that the landowner's proper legal remedy sounded in tort, as opposed to inverse condemnation, because the alleged injuries to his property (even those that were permanent) did not foreclose "all reasonable existing uses" of the property.[11]

Finally, as suggested above, a claim for inverse condemnation cannot possibly survive without proof that the taking was committed *by the government*.[12] That is, the conduct causing the taking must be that of the government or an agent of the government pursuant to a governmental plan or program.[13]

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governmental action."); *Game and Fresh Water Fish Comm. v. Lake Is., Ltd.*, 407 So. 2d 189, 193 (Fla. 1982) (holding that only total deprivation of access will support an inverse condemnation claim).

7. *Poe*, 127 So. 2d at 899.

8. *Id.* at 900–901 (quoting *Seldon v. City of Jacksonville*, 10 So. 457 (Fla. 1891)).

9. 412 So. 2d 400, 402 (Fla. 1st Dist. App. 1982).

10. *Id.*

11. *Id.* at 403.

12. *Rubano*, 656 So. 2d at 1266 ("Proof that the governmental body has effected a taking of the property is an essential element of an inverse condemnation action.").

13. *Schick*, 504 So. 2d at 1319.

II. STANDING REQUIRES A LEGALLY PROTECTED INTEREST IN THE "TAKEN" PROPERTY

To prevail on a claim for inverse condemnation, Florida law requires a claimant to show a legally protected interest in the private real property at issue. Where there is no legally protected interest, there can be no claim.[14] It is therefore axiomatic that "[t]he determinative question in an alleged taking is: What has the owner lost?"[15] The answer to the question is nothing, if the property at issue lies beneath a navigable waterway. That is because private property, which is susceptible to being "taken," ends where the State's sovereign property begins—at the waterway's Mean High Water Level (MHWL).[16] Governmental activities that change the floor of a waterway—even those that entirely preclude boating access to its channel—are therefore not actionable for inverse condemnation.

In *Walton County v. Stop the Beach Renourishment, Inc.*, the Supreme Court of Florida explained that "[t]he boundary between public lands and private uplands is the MHWL."[17] Owners of private uplands do not have a legally cognizable property interest in the lands below the MHWL because they are possessed exclusively by the State. This principle is well established under

14. *Pinellas Co. v. Brown*, 450 So. 2d 240, 242 (Fla. 2d Dist. App. 1984) (discussing how "[i]n order for [the claimant] to bring an action against the county to recover compensation for a taking, he [or she] must have an interest in the property entitling him to sue") (citing Fla. Const. art. X, § 6(a) and 21 Fla. Jur. 2d *Eminent Domain* § 154 (1980)); *see Mildenberger v. United States*, 643 F.3d 938, 948 (Fed. Cir. 2011) (applying Florida law and stating that "[t]o determine whether the Government is liable for a compensable taking, the 'court must determine whether the claimant has established a property interest'") (quoting *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004)).

15. *Scott*, 418 So. 2d at 1034.

16. *See Walton Co. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1109 (Fla. 2008) ("Under both the Florida Constitution and the common law, the State holds the lands seaward of the MHWL, including the beaches between the mean high and low water lines, in trust for the public for the purposes of bathing, fishing, and navigation."); *id.* ("The title to lands under navigable waters, within the boundaries of the [S]tate, which have not been alienated, including beaches below mean high water lines, is held by the [S]tate, by virtue of its sovereignty, in trust for all the people.") (quoting Fla. Const. art. X, § 11).

17. *Walton Co.*, 998 So. 2d at 1113. The Court observed that the MHWL represents an average water level as measured over the course of a nineteen-year period, which is codified in Florida Statutes Section 177.27, a provision of the Florida Coastal Mapping Act of 1974. *Id.*

Florida law.[18] Indeed, the sovereignty of lands under navigable waterways is *guaranteed* by Article X, Section 11 of Florida's Constitution, which states that "[t]he title to lands under navigable waters, within the boundaries of the [S]tate, which have not been alienated, including beaches below mean high water lines, is held by the [S]tate, by virtue of its sovereignty, in trust for all the people." Therefore, owners of lands abutting navigable waterways lack standing to pursue inverse condemnation claims (or any other causes of action) for the government's harm of or modifications to sovereign lands beneath the MHWL of navigable waters.

Sarasota County Anglers Club, Inc. v. Burns[19] underscores this standing precept. In *Sarasota County Anglers Club*, a private citizen and an anglers club sued a township for inverse condemnation after it approved a dredging project that filled land under navigable waters.[20] The plaintiffs argued that the project created a nuisance and prevented their use of and access to the water for boating.[21]

Unmoved, the district court in *Sarasota Anglers Club* reiterated the trial court's conclusion that:

> . . . title to public bottoms is vested in the [S]tate as a public trust to be held for the benefit of all the people. The trust, however, does not go to the extent of requiring that every part of public bottoms must be forever maintained in a state of nature for use in that condition by any citizen who would prefer that no change be made. If this were true no docks could be built, no piers constructed and no bridges (except suspen-

18. *See e.g. Pembroke v. Peninsular Terminal Co.*, 146 So. 249, 253 (Fla. 1933) (explaining that lands under navigable waters, including shore lands, are property of the State in its sovereign capacity for use of the public); *Deering v. Martin*, 116 So. 54, 61 (Fla. 1928) (lands under navigable waters are property of the State in its sovereign capacity); *State of Fla. Dep't of Nat. Resources v. Contemporary Land Sales, Inc.*, 400 So. 2d 488, 491 (Fla. 5th Dist. App. 1981) ("Florida . . . by virtue of its sovereignty . . . became the owner of all the land under navigable bodies of water within the state. These lands are called sovereignty lands."); *Lobean v. Trustees of the Internal Improvement Fund*, 118 So. 2d 226, 227 (Fla. 1st Dist. App. 1960) (submerged lands are sovereignty lands); *Walton Co.*, 998 So. 2d at 1125–1126 (Lewis, J., dissenting) ("As the Sovereign, the State owns *the foreshore* in trust for the public, which is the land *between the MHWL and the low-water mark*, while, in contrast, the littoral-upland holder's ownership *continues until, and includes, the MHWL*.") (citing *White v. Hughes*, 190 So. 446, 449 (Fla. 1939)).

19. 193 So. 2d 691 (Fla. 1st Dist. App. 1967).

20. *Id.* at 692.

21. *Id.*

> sion bridges) erected over any public bottoms. The economic development of the state public health and safe navigation often require the draining of marshes, the dredging of channels[,] and the filling of some areas to produce firm land. It is quite obvious that the public interest demands that there be some impairment of the individual citizen's right to enjoy absolute freedom in the use of public bottoms.[22]

Given the rationale that the State may make changes to land it owns for the benefit of the public, the court determined that the private citizen and the anglers club were "not in position to maintain [the] action."[23]

As discussed more fully below, the Florida Supreme Court in *Walton County* announced that the State may effectively cut the physical connection between a riparian owner's property and the water's edge by "filling in" lands that previously may have been submerged under the MHWL.[24] It follows that lands located under the MHWL of navigable waters are owned by the State and cannot be susceptible to a takings claim in Florida—even if the water abutting riparian lands completely receded and dried out.

III. BOATING IS NOT A COMPENSABLE RIPARIAN RIGHT

A takings claim may only be asserted when a *compensable* riparian right has been taken. "Riparian" and "littoral" landowners are provided a host of riparian rights.[25] Those rights that are exclusive are "compensable." Those that are shared in common with the public are not. As discussed in greater detail below, certain noncompensable rights—such as the rights of ingress, egress, boating, bathing, and fishing—are set out by statute.[26] Compensable riparian rights, however, derive from Florida's common law. Compensable riparian rights include the right to

22. *Id.* at 693.

23. *Id.* at 694.

24. *Walton Co.*, 998 So. 2d at 1117, 1120–1121.

25. The term "'[r]iparian' generally refers to land touching a river or stream, and 'littoral' generally refers to land touching the ocean, a sea, or a lake; however, our case law and the Florida Statutes often use the terms interchangeably." *Id.* at 1122, n. 18 (Lewis, J., dissenting). "At common law lands which were bounded by and extended to the high-water mark of waters in which the tide ebbed and flowed were *riparian* or *littoral* to such waters." *Thiesen v. Gulf, Fla. & Ala. Ry. Co.*, 78 So. 491, 500 (1917) (emphasis added).

26. Fla. Stat. § 161.201 (2005).

access and view the water,[27] along with the ability "to wharf out" into navigable waters.[28] Riparian landowners also enjoy the compensable right to claim title to "accreted" land.[29] Although the ability to use navigable waterways for boating purposes is indeed a riparian "right," Florida law does not entitle riparian landowners to compensation where the government has "taken" that right away from them. Unless one of these *compensable* riparian rights is at stake, there can be no taking under Florida law.

This much was confirmed by the Federal Circuit Court of Appeals in *Mildenberger v. United States*, where the plaintiffs alleged that the government committed a taking of their riparian rights by discharging pollutants from Lake Okeechobee into the St. Lucie River, which abutted their property.[30] Specifically, the plaintiffs claimed that the government "took [their] 'riparian right to use and enjoy the water in the St. Lucie River free from pollution,' including their rights to swim, *boat*, fish, and use the water for recreation."[31] The trial court rejected their claims.[32] It reasoned that the "alleged riparian rights of fishing, swimming, boating, and recreation were not compensable rights because those rights are held in common with the public."[33] The court also determined that even if such rights were compensable, the plaintiffs' claims "were barred because the [government's project] and the discharge of water . . . were exercises of its dominant navigational servitude."[34] On appeal, the Federal Circuit upheld the trial court's judgment in favor of the government.[35] It likewise concluded that the plaintiffs' riparian rights to fish, navigate,

27. *Walton Co.*, 998 So. 2d at 1111; *Hayes v. Bowman*, 91 So. 2d 795, 801 (Fla. 1957); *Lee Co. v. Kiesel*, 705 So. 2d 1013, 1015 (Fla. 2d Dist. App. 1998).

28. *Belvedere Dev. Corp. v. Dep't of Transp., Div. of Administration*, 476 So. 2d 649, 651 (Fla. 1985); *Shore Village Prop. Owners' Ass'n, Inc. v. State of Fla. Dep't of Envt'l Protec.*, 824 So. 2d 208, 211 (Fla. 4th Dist. App. 2002).

29. "'Accretion' means the gradual and imperceptible accumulation of land along the shore or bank of a body of water. 'Reliction' . . . is an increase of the land by a gradual and imperceptible withdrawal of any body of water." *Walton Co.*, 998 So. 2d at 1113 (quoting *Trustees of the Internal Improvement Fund v. Sand Key Assoc., Ltd.*, 512 So. 2d 934, 936 (Fla. 1987)).

30. 643 F.3d at 943.

31. *Id.* (emphasis added).

32. *Id.* at 944.

33. *Id.*

34. *Id.*

35. *Id.* at 941.

swim, or view the waters adjacent to their properties were not compensable property rights under Florida law.[36]

Citing to the Florida Supreme Court's opinion in *Walton County*, the Federal Circuit accurately explained that Florida law accords riparian owners only four "compensable" and "exclusive common law . . . rights."[37] As stated above, these compensable rights are the rights to accretion, access to the water, an unobstructed view, and reasonable use of the water.[38] The Federal Circuit determined that withholding any one of these rights from a riparian owner creates a compensable, unconstitutional taking.[39] Conversely, depriving the riparian owner of the right to navigate, boat, swim, or fish does not create a taking because those privileges are "'only concurrent with that of other inhabitants of the state,'" and thus not exclusively held by the riparian landowner.[40]

The Federal Circuit in *Mildenberger* rejected the plaintiffs' argument that the number of exclusive riparian rights had been increased by Florida caselaw and state statutes.[41] For instance, while the plaintiffs relied on *Board of Trustees of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc.*[42] to show that regulations prohibiting boating "'may . . . constitute a taking with respect to a riparian,'"[43] the court observed that *Medeira Beach Nominee* "was about the well-established riparian owner's right to accretion and did not set forth any new riparian rights analogous to the ones asserted by [the plaintiffs]."[44]

The Federal Circuit also criticized the plaintiffs' reliance on *Ferry Pass Inspectors' & Shippers' Association v. White's River Inspectors' & Shippers' Association*[45] and *Harrell v. Hess Oil &*

36. *Id.* at 948–949.

37. *Id.* at 948.

38. *Id.* Notably, the court also recognized that even the riparian right of access granted to Floridians "refers to physical access to the edge of the water, not access to its full potential, including swimming and viewing wildlife." *Id.*

39. *Id.*

40. *Id.* (quoting *Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n*, 48 So. 643, 645 (Fla. 1909)).

41. *Id.* at 949.

42. 272 So. 2d 209, 214 (Fla. 2d Dist. App. 1973).

43. *Mildenberger*, 643 F.3d at 949 (quoting *Medeira Beach Nominee*, 272 So. 2d at 214).

44. *Id.*

45. 48 So. 643 (Fla. 1909).

Chemical Corp.,[46] considering neither of those cases even concerned a taking.[47] Rather, the *Ferry Pass* opinion addressed a landowner's commercial use of the shoreline and merely mentioned in dicta a list of riparian "'common-law rights.'"[48] *Harrell* was likewise considered inapposite. According to the court in *Mildenberger*, *Harrell* dealt with the pleading standards applicable to class action lawsuits and whether the plaintiffs' complaint stated a claim *for damages* caused by "the discharge of sand and silt into the navigable creek."[49]

Finally, the Federal Circuit in *Mildenberger* dismissed the plaintiffs' contention that Florida Statutes Section 253.141(1) somehow increased the number of "compensable" riparian rights in Florida by including in its text the right to "'boating, bathing, and fishing.'"[50] The court noted the Florida Supreme Court's treatment of the statute as "a tax law," as well as the Court's announcement that "'[n]o case has ever held [that section] applicable as property law to riparian rights.'"[51]

In light of *Mildenberger*, *Sarasota Anglers Club*, and the foregoing binding precedent of the Florida Supreme Court, a takings claim cannot be advanced even if governmental action completely precludes boating activities, as boating access is not a right that is held exclusively by riparian landowners. Rather, it is a right that is shared with the public at large and therefore cannot support a takings claim under Florida law.

IV. RIPARIAN RIGHT OF ACCESS DOES NOT INCLUDE CONTACT WITH WATER

A riparian owner's right of access to the water (as opposed to *boating* access) is compensable.[52] However, it does not guarantee that an owner's land will remain in contact with the navigable waters it may overlook in perpetuity.[53] Rather, the right of access

46. 287 So. 2d 291 (Fla. 1973).
47. *Mildenberger*, 643 F.3d at 949.
48. *Id.* (quoting *Ferry Pass*, 48 So. at 645).
49. *Id.* (citing *Harrell*, 287 So. 2d at 295).
50. *Id.* (quoting Fla. Stat. § 253.141(1)).
51. *Id.* (quoting *Belvedere*, 476 So. 2d at 652–653).
52. *Hayes*, 91 So. 2d at 801; *Ferry Pass*, 48 So. at 646.
53. *Walton Co.*, 998 So. 2d at 1115.

merely protects the landowner's physical ability to reach the edge of the water.[54]

In *Walton County*, the Florida Supreme Court announced for the first time that the owner of land abutting navigable waters does not have a compensable right to maintain a connection between his or her land and the water.[55] A group of beachfront owners complained that a state-sponsored beach restoration project resulted in a taking because the legislation that authorized the project, the Beach and Shore Preservation Act, gave the State title over the restored portions of the beach.[56] In essence, the plaintiffs contended that the restoration project severed their property from the ocean.[57]

The Court rejected the plaintiffs' claim.[58] It explained that the MHWL boundary is "dynamic" because it is subject to accretion, reliction, and avulsion—events that either extend or erode the shoreline.[59] While Florida law may permit a waterfront owner to claim ownership of lands added to his property by *accretion*, the same is not true as to those lands added by *avulsion*.[60] Rather, the boundary of the owner's property remains the MHWL after a sudden, avulsive event.[61]

Reasoning that the restoration project constituted an avulsive event, the Florida Supreme Court determined that title to the restored portions of the beach properly resided with the government.[62] In the Court's view, the restoration project itself simply allowed the State to "reclaim" its property because the lands that were restored were previously located beneath the MHWL.[63] The Court was unimpressed by plaintiffs' argument that the restoration project ultimately severed the connection

54. *Id.*; *Mildenberger*, 643 F.3d at 948.

55. *Walton Co.*, 998 So. 2d at 1115.

56. *Id.* at 1105. Notably, the Florida Supreme Court construed the lawsuit as a challenge to the constitutionality of the Act. *Id.*

57. *Id.* at 1107.

58. *Id.* at 1121.

59. *Id.* at 1112–1114. The Court explained that "'[r]eliction' . . . is an increase of the land by a gradual and imperceptible withdrawal of any body of water. 'Avulsion' is the sudden or perceptible loss of or addition to land by the action of the water or a sudden change in the bed of a lake or the course of a stream." *Id.* at 1113.

60. *Id.* at 1113–1114.

61. *Id.* at 1114.

62. *Id.* at 1117.

63. *Id.* at 1116.

that previously existed between their property and the ocean.[64] Instead, the Court pointed out that "under Florida common law, there is no independent right of contact with the water."[65]

Ultimately, an access claim involving changes to lands under navigable waters does not implicate a taking of private property or a compensable property right. Rather, as in *Walton County*, *Mildenberger*, and *Sarasota Anglers Club*, such a claim constitutes only a noncompensable objection concerning the government's use of its own sovereign property.

V. RIPARIAN RIGHT OF ACCESS IS SUBSERVIENT TO THE PUBLIC'S RIGHT

As previously noted, a riparian owner's right of access to navigable waters is no greater than that given to the public.[66] In fact, the public's right of access for navigational purposes is *superior* to the riparian owner's use of or improvements to any lands located under the high water mark of a waterway.[67]

The superiority of the public's right to navigation is well illustrated in *Intracoastal North Condominium Association, Inc. v. Palm Beach County*.[68] There, a group of condominium owners sued the county for violating their right of boating access to the channel of an intracoastal waterway abutting their land.[69] Specifically, the plaintiffs alleged that the county's dredging and bridge construction project created changes in the current of the intracoastal, which precluded their use and enjoyment of docks that previously accommodated the mooring of several boats on the intracoastal.[70] The parties in that case stipulated that, as a result of such changes, a recreational boater could not safely moor or maneuver a vessel toward the channel of the waterway except

64. *Id.* at 1119.
65. *Id.*
66. *Ferry Pass*, 48 So. at 645.
67. *See Thiesen*, 78 So. at 503 ("[O]wners of riparian lands in many instances have exercised the privilege of constructing wharves or piers to the navigable waters. Such structures, however, are none the less purprestures in law or nuisances if they amount to a damage to the port or navigation, and cannot be considered as a right appurtenant to the upland.").
68. 698 So. 2d 384 (Fla. 4th Dist. App. 1997).
69. *Id.* at 384.
70. *Id.* at 384–385.

during slack tide, which stilled the waters during tide changes for a period of "approximately thirty minutes, four times per day."[71]

The trial court rejected the plaintiffs' takings claim.[72] It found that the alleged conditions "constituted, at most, a diminution in the . . . use of [the] docks."[73] Pointing to *Ferry Pass*, the trial court also reasoned that "the Association's riparian right of access was subject to the superior right of the public as to navigation and commerce on the Intracoastal."[74] The Fourth District affirmed, agreeing that the plaintiffs' "riparian right of access was subservient to the superior right of the public to safe navigation . . . such that [their] diminished access to the Intracoastal did not constitute a compensable taking."[75] The court also found that the plaintiffs' reliance on *Palm Beach County v. Tessler*[76] and other road construction cases was misplaced, stating that

> [e]ven if we removed from consideration the superior right of the public to safe navigation, a principle unique to cases involving riparian rights, we do not agree . . . that the trial judge found the [plaintiffs'] access to the Intracoastal was 'substantially diminished' as that concept is defined in *Tessler*.[77]

Ultimately, it appears that under Florida law, changes to lands under navigable waters cannot form the basis of an inverse condemnation or takings claim against the government. Riparian landowners who require access to the channels of navigable waters for boating purposes may not even have standing to advance an unconstitutional takings claim. This disquieting reality could bring new meaning to the term "waterfront property."

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71. *Id.*
72. *Id.* at 385.
73. *Id.*
74. *Id.*
75. *Id.*
76. 538 So. 2d 846 (Fla. 1989).
77. *Intracoastal N. Condo. Ass'n*, 698 So. 2d at 385.