VACATIONS FOR SALE: THE CASE FOR POLICY CHANGE IN VACATING RIGHTS OF WAY AND OTHER PUBLIC EASEMENTS IN FLORIDA

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Florida's Constitution states "[n]o private property shall be taken except for a public purpose and with full compensation,"[1] but what about a public property vacated for a private purpose?

I. INTRODUCTION

Vacating, abandoning, discontinuing, or otherwise terminating road rights of way or other public easements can help spur redevelopment, increase public safety, and increase property values.[2] However, these vacations may come at a cost to the

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1. FLA. CONST. art. X, § 6(a).

2. *See, e.g.*, Modern, Inc. v. Florida, No. 6:03-cv-718-Orl-31KRS, 2006 U.S. Dist. LEXIS 37764, at *16 (M.D. Fla. June 8, 2006), *aff'd*, 308 F. App'x 330 (11th Cir. 2009) (discussing the "willingness by the governmental entities to 'sign away,' [by vacating] for purposes of clearing title, property rights that neither actually possessed due to a lack of dedication or acceptance"); First Baptist Church v. City of Mauldin, 417 S.E.2d 592, 494 (S.C. 1992) (vacating a dangerous road for daycare expansion was in the public interest); Romi White, *Multi-Story Resort Planned for U.S. 98 in Navarre*, S. SANTA ROSA NEWS (Sept. 8, 2022), https://ssrnews.com/multi-story-resort-planned-for-u-s-98-in-navarre/ ("As part of the development plans, Benaquis is requesting for Santa Rosa County Commissioners to vacate a portion of Luneta Street from U.S. 98 to Esplande Street"); Cliff Williams, *Fox Creek Road Could Be Closed Permanently by Tallapoosa County*, OUTLOOK (June 28, 2023), https://www.alexcityoutlook.com/news/fox-creek-road-could-be-closed-permanently-by-tallapoosa-county/article_cfd0f2b8-15bd-11ee-b4c8-bf1c9bdfd9e0.htmlhttps://www.news-journal.com/fox-creek-road-could-be-closed-permanently-by-tallapoosa-county/article_2d3ae2a5-6820-52e3-9c68-32bd8cffba09.html; Michael D. Bates, *County*

general public for whom these easements are held in trust.[3] The closing of road rights of way and other easements may cause more traffic,[4] flooding,[5] and other unforeseen consequences.[6] With that said, vacations are only permissible when done in the interest of the general welfare[7]—but conflict arises in caselaw and public sentiment as the meaning of and society's expectations surrounding the general welfare, what constitutes public interest, and the role of government changes over time.[8]

Commissioners Deny Finegan's Road Request, CITRUS CNTY. CHRON. (May 23, 2023), https://www.chronicleonline.com/news/local/county-commissioners-deny-finegan-s-road-request/article_48a2a004-9e8e-578e-9efe-58e206f1133c.html ("Neighbor Hank Brooks said the vacation request would have only benefited the Finegans and increase their property values at the expense of their neighbors"); Dusy Ellis, *Homeowners Concerned by Proposed Abandonment of Cox Lane,* CONCHO VALLEY HOMEPAGE (Jan. 18, 2023), https://www.conchovalleyhomepage.com/news/local-news/homeowners-concerned-by-proposed-abandonment-of-cox-lane/.

3. Frisby v. Schultz, 487 U.S. 474, 481 (1988); Roney Inv. Co. v. City of Miami Beach, 174 So. 26, 29 (Fla. 1937); Fla. Cent. & Peninsular R.R. Co. v. Ocala St. & Suburban R.R. Co., 22 So. 692, 696 (Fla. 1897); Sun Oil Co. v. Gerstein, 206 So. 2d 439, 441 (Fla. 3d Dist. Ct. App. 1968).

4. *See, e.g.*, Bates, *supra* note 2 ("Neighbors said the reconfigured road pattern would shift traffic onto their properties.").

5. *See, e.g.*, Modern, Inc. v. Florida, No. 6:03-cv-718-Orl-31KRS, 2007 U.S. Dist. LEXIS 96016, at *34–38 (M.D. Fla. Jan. 28, 2007) (affirmed by Modern, Inc. v. Florida, 308 F. App'x 330 (11th Cir. 2009)); Ralph v. McLaughlin, 856 S.E.2d 154, 157 (S.C. 2021); Zoie Henry, *Century-Old Pipes Causing Present-Day Drainage Problems in Columbia*, NEWS19 (Sept. 23, 2022, 8:41 PM), https://www.wltx.com/article/news/local/cherokee-street-drainage-columbia/101-1f985f1a-28c5-4e5e-8dea-3cbd1e23830e.

6. *See, e.g.*, Kyle Harris, *Referred Question 2O: The One About Ending Park Hill Golf Course's Conservation Easement and Building a Massive Development on It*, DENVERITE (Mar. 7, 2023, 4:02 AM), https://denverite.com/2023/03/07/referred-question-2o-park-hill-golf-course-conservation-land-easement-explainer/; John Flesher, *Company Defies Michigan Governor's Order to Close Pipeline*, ASSOCIATED PRESS (May 12, 2021, 8:04 PM), https://apnews.com/article/michigan-business-environment-and-nature-23c6e149428f0035bd7ef7ca144716f2.

7. *See Roney Inv. Co.*, 174 So. at 27; City of Naples v. Miller, 243 So. 2d 608, 608 (Fla. 2d Dist. Ct. App. 1971), *cert. denied*, 249 So. 2d 688 (Fla. 1971); *Gerstein*, 206 So. 2d at 441.

8. *Compare* Lutterloh v. Town of Cedar Keys, 15 Fla. 306, 307–08 (Fla. 1875), *Fla. Cent. & Peninsular R.R. Co.*, 22 So. at 695, *Roney Inv. Co.*, 174 So. at 27, Authority of Local Government Neighborhood Improvement District to Privatize and Maintain Streets, 1990-62 Fla. Op. Att'y Gen. (Aug. 7, 1990), *and* Vacation of Streets and Roads—Rights of Property Owners, 1978-125 Fla. Op. Att'y (Oct. 24, 1978), *with* Herr v. St. Petersburg, 114 So. 2d 171, 174 (Fla. 1959), City of Temple Terrace v. Tozier, 903 So. 2d 970, 974 (Fla. 2d Dist. Ct. App. 2005), *Gerstein*, 206 So. 2d at 441, *and* Cent. & S. Fla. Flood Control Dist. v. Scott, 169 So. 2d 368, 372 (Fla. 2d Dist. Ct. App. 1964). *See, e.g.*, Peter Drucker, *The Age of Social Transformation*, ATL. MONTHLY (Nov. 1994), https://www.theatlantic.com/past/docs/issues/95dec/chilearn/drucker.htm; Stephen Moore, *The Growth of Government in America*, FOUND. FOR ECON. EDUC. (Apr. 1, 1993), https://fee.org/articles/the-growth-of-government-in-america/.

This Article seeks to provide both practical and historical background on right of way vacations, discuss shifts in practice and public policy over time, and finally propose a legal framework to vacations that resolves inconsistencies in traditional law with the realities of modern society and legal practice. Please note that while governmental processes for vacating, abandoning, discontinuing, closing, or otherwise terminating an easement are largely similar amongst the various types of easements (road rights of way, platted roadways, platted easements, and easements granted by separate instrument), this Article will focus on local government road right of way vacations with the understanding that the ultimate proposed policies will likely apply to all such easement vacations (e.g., drainage, conservation, utility, etc.). Further, although legal concepts from around the United States will be discussed, this Article will primarily address Florida law and assumes its practitioners as its audience.

II. PRACTICAL AND HISTORICAL BACKGROUND ON RIGHT OF WAY AND EASEMENT VACATIONS

This Part will first address the practical background regarding vacations—the processes that exist in Florida Statutes for vacating rights of way as well as some basic suppositions and inconsistencies that practitioners utilize and wrestle with. Then this Part will provide some historical anecdotes and background on vacations that will serve as the foundation of this Article's goal of highlighting the inconsistencies of vacation law and suggesting policy changes for the state legislature and judiciary to consider and adopt.

A. What Are Rights of Way?

Rights of way may be viewed as a hierarchy of easements bundled together providing the public with means of ingress, egress, and necessary municipal services: access easement; roadway (and sidewalk) easement; water and sewer easements (underneath); drainage easement (piped underneath or adjacent swale); slope easements; and to a lesser extent, public utility easements (when not in conflict with and subordinate to the

aforementioned easements, and with license or franchise from the local jurisdiction that holds the right of way in trust).[9] In the very least, the courts have long defined rights of way as streets or roads granting the public "the benefit of light and air, as well as a passage way."[10] Although rights of way may include railways and waterways, these are generally considered specific types of rights of way with their own nuances, fact-specific circumstances, and caselaw.[11]

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9. *See* Fleming v. Napili Kai, Ltd., 430 P.2d 316, 318 (Haw. 1967) ("Courts have held that a grant or reservation of an easement of right of way in general terms should be construed as creating a general right of way for all reasonable purposes."); Weir v. Palm Beach County, 85 So. 2d 865, 869 (Fla. 1956) ("[T]he public [has a right] to have the [right of] way improved to meet the demands of public convenience and necessity."); Dickson v. St. Lucie County, 67 So. 2d 662, 665 (Fla. 1953) ("The modern right of way is much wider than the actual pavement and provides for slopes, ditches, landscaping, beautification, and public utilities which do not interfere with the use of the right of way for highway purposes."); Anderson v. Fuller, 41 So. 684, 688 (Fla. 1906) ("[S]treets and public ways for lawful purposes, such as railroad tracks, poles, wires, gas and water pipes, such rights are at all times held in subordination to the superior rights of the public."); *see also* Eyde Bros. Dev. Co. v. Eaton Cnty. Drain Comm'r, 398 N.W.2d 297, 310 (Mich. 1986) (holding that a highway easement includes "not only the right to surface transportation, but also access to the subsurface for those uses, such as sewers, that are adopted by public agencies for the benefit of the public and are implemented through authorized agents"); Joynt v. Orange County, 701 So. 2d 1249, 1250 (Fla. 5th Dist. Ct. App. 1997) ("[L]egislature recognized that the term 'right-of-way' has an all-inclusive definition."); Travis Co. v. Coral Gables, 153 So. 2d 750, 751–52 (Fla. 3d Dist. Ct. App. 1963) ("[W]e find no reason to hold that a right of way for a canal should be treated differently from a right of way for a street."); FLA. STAT. § 73.071(4) (2023) (codifying eminent domain provisions using an expansive definition of right of way to include "road, canal, levee, or water control facility right-of-way"). *But see* Modern, Inc. v. Florida, No. 6:03-cv-718-Orl-31KRS, 2006 U.S. Dist. LEXIS 37764, at *21 (M.D. Fla. June 8, 2006), *aff'd*, 308 F. App'x 330 (11th Cir. 2009) (outlining how the court is reluctant to interpret road written on the plat to mean more than just road for the sake of summary judgment). *But see* Crutchfield v. F. A. Sebring Realty Co., 69 So. 2d 328, 330 (Fla. 1954) ("It is held as to easements arising in sales by reference to a plat, that 'the effect of filing a map showing streets laid out therein, and the sale of lots, abutting therein, is simply to give a private right of way over the streets in favor of the grantees, and does not authorize the laying of water pipes in the streets by such grantees.'") (citations omitted);Motoramp Garage Co. v. Tacoma, 1241 P. 16, 17 (Wash. 1925) (providing for a list of caselaw (including *Lutterloh*, 15 Fla. at 308) (restraining "municipalities, as well as individuals, from attempting to make use of streets and highways for purposes not connected with transportation," including a drainage ditch, bridge over an ally, and other public uses)).

10. Winter v. Payne, 15 So. 211, 213 (Fla. 1894).

11. Regarding railways, see Fla. S. Ry. Co. v. Brown, 1 So. 512, 515 (Fla. 1887) (distinguishing a right of way as available to use by the public from a railway as available to use only by the railroad companies). *See also* Seaboard Air Line Ry. v. S. Inv. Co., 44 So. 351, 355 (Fla. 1907). For canals, the law of waters, riparian rights, and other legal issues manifest see, e.g., Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1111 (Fla. 2008) (delineating a common law treatise on littoral rights); Game & Fresh Water

The public (and/or the government, on its behalf) obtains rights of way through prescription (common law presumption of prior grant or adverse possession),[12] statutory authority (statutory adverse possession or operation of law),[13] and express common law dedication of rights of way by a fee simple owner with the public's acceptance.[14] Rights of way may also be acquired through purchase (in both fee simple or as an easement) or condemned/taken through eminent domain proceedings.[15] Based on the aforementioned method of acquisition, rights of way are conveyed, granted, obtained by, or otherwise dedicated to the public by various means, such as, but not limited to: road maps, dedicated tracts or easements on plats, fee simple deeds, easement granted by separate instrument, and less-and-excepted or public use reservations within real property private conveyances.

Dedications of rights of way to the public (e.g., on a plat or through reservation for public use on a warranty deed) are merely

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Fish Comm'n v. Lake Islands, 407 So. 2d 189, 191 (Fla. 1981) (outlining a common law treatise on riparian rights); Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n, 48 So. 643, 644 (Fla. 1909) (proffering a common law treatise on water law); Lamb v. Dade County, 159 So. 2d 477, 479 (Fla. 3d Dist. Ct. App. 1964).

12. *See* Downing v. Bird, 100 So. 2d 57, 64 (Fla. 1958); Levering v. City of Tarpon Springs, 92 So. 2d 638, 640 (Fla. 1957); Couture v. Dade County, 112 So. 75, 79 (Fla. 1927); Hollywood, Inc. v. Zinkil, 403 So. 2d 528, 535 (Fla. 4th Dist. Ct. App. 1981) ("[I]t is well-settled that a public entity may obtain fee simple title by adverse possession."). Adverse possession is also known as squatters' rights. Bank of Am., N.A. v. Eastridge, 253 So. 3d 722, 723 (Fla. 5th Dist. Ct. App. 2018); Brian Gardiner, *Squatters' Rights and Adverse Possession: A Search for Equitable Application of Property Laws*, 8 IND. INT'L & COMP. L. REV. 119, 123 (1997).

13. *See* FLA. STAT. § 95.361.

14. City of Miami v. Fla. E. Coast Ry. Co., 84 So. 726, 729 (Fla. 1920). *See generally* 14 Powell on Real Property § 84.01; John S. Burton & Herbert J. Jones, *Dedication: Rights under Misuser and Alienation of Lands Dedicated for Specific Municipal Purposes*, 7 U. FLA. L. REV. 82, 83–84 (1954) ("Acceptance of a common law dedication does not pass the fee in land. The interest acquired by the municipality is generally held to be in the nature of an easement, with the public having a right of user and nothing more. The dedicator retains the fee simple title, and it is subject to the easement only as long as there is compliance with the terms of the dedication.") (also quoted in *Hollywood, Inc.*, 403 So. 2d at 537).

15. FLA. STAT. ch. 73. *See generally* City of Coral Gables v. Old Cutler Bay Homeowners Corp., 529 So. 2d 1188, 1190 (Fla. 3d Dist. Ct. App. 1988) ("[A] governmental entity which possesses fee simple title to property may convert the property to nonpublic uses even where the property had been originally acquired through eminent domain. . . . [O]nce fee simple title to property taken by governmental entity, whether through condemnation, purchase, or donation, public use of property may be abandoned and property converted to different use without impairment of title. However, the rule advanced by the City does not pertain to property acquired through dedication." (citation omitted) (citing Mainer v. Canal Auth., 467 So. 2d 989, 992–93 (Fla. 1985)).

revocable offers requiring acceptance, long established and restated by *City of Miami v. Florida East Coast Ry. Co.*:

> The platting of land and the sale of lots pursuant thereto creates as between the grantor and the purchasers of the lots a private right to have the space marked upon the plat as streets, alleys, parks, etc., remain open for ingress and egress and the uses indicated by the designation, but that so far as the public is concerned such acts amount to a mere offer of dedication which must be accepted before there is a revocation to complete the dedication. To constitute a dedication at common law there must be an intention on the part of the proprietor of the land to dedicate the same to public use; there must be an acceptance by the public; and the proof of these facts must be clear, satisfactory and unequivocal. One who makes a plat of his land showing strips of land for streets and alleys and places for public parks, and who causes the plat to be recorded in the public records of the county where the land lies, and who offers lots for sale according to such map or plat, thereby making a tender to the public of such strip and parcels of land indicated on the plat as streets, alleys, and parks for such purpose, and before the public accepts such offer he may revoke the same. Acceptance of such an offer of dedication may be by formal resolution of the proper authorities or by public user. The burden of proving acceptance of an offer to the public to dedicate lands for streets, alleys and parks is upon the county or municipality asserting it. No dedication is complete until acceptance by the public.[16]

The rules set forth in *City of Miami*, along with additional relevant caselaw,[17] were recently applied in *Stephens v. Walton County*, which offers a robust analysis of common law dedication that serves as a guide for practitioners applying the caselaw to fact specific scenarios.[18]

It should also be noted that plats are construed like contracts, and "[i]f the document is ambiguous, the construction must be

16. Fla. E. Coast Ry. Co., 84 So. at 729 (citations omitted).

17. *See, e.g.*, Kirkland v. City of Tampa, 78 So. 17, 21 (Fla. 1918) ("[T]he burden of proving acceptance of an offer to dedicate is on the municipality alleging it.").

18. Stephens v. Walton County, No. 3:20-cv-1465-AW-HTC, 2022 U.S. Dist. LEXIS 93519, at *6 (N.D. Fla. Jan. 3, 2022); *see also* Vacation of Dedicated Street Without County Approval, 1976-12 Fla. Op. Att'y Gen. (Jan. 8, 1976).

against the dedicator and in favor of the public."[19] This is done in congruence with the principle that ambiguous deeds are interpreted in a manner most adverse to the grantor, "[f]or the principle of self interest will make men sufficiently careful not to prejudice themselves by using words of too extensive a meaning . . . deceit is hereby avoided in deeds; for people would always affect ambiguous expressions if they were afterwards at liberty to put their own construction on them." [20]

And while public interests are created through platting, "when lots are sold with reference to a recorded subdivision plat, the purchasers acquire a private easement in the public places described in the plat" because such public places may have induced the purchasers into buying the platted lands.[21] Thus, when individually platted lots abut a publicly dedicated park, those lots also acquire a private easement interest in addition to the local government's interest held in trust on behalf of the public generally.[22]

B. Vacating Rights of Way

In Florida, local governments have had the power to discontinue roads "found useless, burthensome, and inconvenient" since becoming a Territory of the United States.[23] Currently, vacating platted right of way (and other platted easements) is governed by Florida Statutes Section 177.101. Counties are otherwise authorized to vacate rights of way through the processes outlined in Florida Statutes Sections 336.09–.125 (the current

19. Fla. E. Coast Ry. Co. v. Worley, 38 So. 618, 622 (Fla. 1905).

20. *Id.*

21. City of Tampa v. Hickey, 502 So. 2d 1254, 1256 (Fla. 2d Dist. Ct. App. 1986) (citing Flowers v. Seagrove Beach, Inc., 479 So. 2d 841, 844 (Fla. 1st Dist. Ct. App. 1985)).

22. *See Hickey*, 502 So. 2d at 1256–57*; see also* Lakeland v. Lakeland Junior Chamber of Com., 47 So. 2d 536, 537 (Fla. 1950) ("[S]pecific contractual rights accrued immediately upon the lots being sold according to said plat."). *But see* Kumick v. City of St. Petersburg, 136 So. 2d 5, 6 (Fla. 2d Dist. Ct. App. 1961) (discussing alienation of park land and statutory evolution to allow such, viz *Ocean Beach Realty Co. v. City of Miami Beach*, 143 So. 301 (Fla. 1932) and *Kramer v. City of Lakeland*, 38 So. 2d 126, 126 (Fla. 1948)).

23. *See* An Act Concerning Roads, Highways and Ferries, Acts of the Legislative Council of the Territory of Florida, 1822 Sess. (1822), http://edocs.dlis.state.fl.us/fldocs/leg/actterritory/1822.pdf (restating and amending relevant portions regarding this Article in 1829).

statutory framework adopted in 1947).[24] Municipalities are understood to have the same authorities conferred to counties under these statutes (in non-chartered counties) through *in pari materia* construction of Florida Statutes section 166.042 and Chapters 177 and 336, as well as through the Home Rule Powers Act.[25] Despite the statutory schemes for vacating roads and plats, there are practical common law and statutory considerations that are not widely understood.

1. Platted Right of Way Tracts are Easements

The courts have long held that platted rights of way, often depicted as individual tracts, are actually easements, and the adjacent fee simple owners abutting the said rights of way own the fee simple of the underlying lands up to the right of way's centerline (unless a reversionary interest has been overtly and clearly stated otherwise on the plat, or the underlying fee to the tract conveyed separately).[26] Florida Statutes Section 336.12 insomuch memorializes the case law by stating:

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24. The language found in section 336.09 was first substantially adopted by Chapter 23963, Laws of Florida 1947 (No. 349), Senate Bill No. 50; then restated in 1955 by Section 49, Chapter 29965, Laws of Florida (1955). FLA. STAT. § 336.09 (2023).

25. Vacation of Dedicated Street Without County Approval, 1976-12 Fla. Op. Att'y Gen. (Jan. 8, 1976); Procedure for Vacating Streets, 75-171 Fla. Op. Att'y Gen. (Jun. 13, 1976) ("Chapter 167, F. S. 1971, including s. 167.09, was repealed by Ch. 73-129, Laws of Florida, the Municipal Home Rule Powers Act (Ch. 166, F. S.). However, s. 5 of Ch. 73-129 (now s. 166.042, F. S.) provides that the repeal of the chapters of the Florida Statutes enumerated therein, including Ch. 167, 'shall not be interpreted to limit or restrict the powers of municipal officials,' and that it is the legislative intent that 'municipalities continue to exercise all the powers heretofore conferred on municipalities by the chapters enumerated above, but shall hereafter exercise those powers at their own discretion, subject only to the terms and conditions which they choose to prescribe.'"). *But see* Haines City v. Certain Lands, etc., 178 So. 143, 145 (Fla. 1937) ("The doctrines are well established in the State relating to municipal corporations that the existence of authority for a municipality to act cannot be assumed. If a reasonable doubt exists as to a particular power, it should be resolved against the city. When a proper function of government appertaining to the duties of a city is apparent, the presumption of the city's power may obtain. Any ambiguity or doubt as to the extent of a power attempted to be exercised by a city out of the usual range or which may affect the common law right of a citizen should be resolved against the city." (quoting Loeb v. Jacksonville, 134 So. 205, 208 (Fla. 1931)).

26. S*ee, e.g.*, Fla. S. Ry. Co. v. Brown, 1 So. 512, 512 (Fla. 1887); Garnett v. City of Jacksonville, St. Augustine & Halifax River Ry. Co., 20 Fla. 889, 905 (1884); *see also* United States v. 16.33 Acres of Land, 342 So. 2d 476, 480 (Fla. 1977) (citing Smith v. Horn, 70 So. 435, 436 (Fla. 1915) (stating fee ownership of property adjacent to a right of way extends to

> The act of any commissioners in closing or abandoning any such road, or in renouncing or disclaiming any rights in any land delineated on any recorded map as a road, shall abrogate the easement theretofore owned, held, claimed or used by or on behalf of the public and the title of fee owners shall be freed and released therefrom; and if the fee of road space has been vested in the county, same will be thereby surrendered and will vest in the abutting fee owners to the extent and in the same manner as in case of termination of an easement for road purposes.[27]

However, in *Winder Park Pines Development Co. v. Kohloss*, the Fourth District Court of Appeals gave Florida Statutes section 336.12 literal effect with a draconian and absurd result.[28] A parcel of land was subdivided, and along the subdivision's edge was platted Ranger Boulevard (located wholly within the subdivision).[29] When Ranger Boulevard was vacated, the court ruled that Florida law required half of the road be vested to an adjacent property owner *outside* of the subdivision.[30] Judge Hon. Spencer C. Cross dissented, writing:

> It is a general rule of the common law that the fee of the land over which a highway passes is owned equally by the owners of the adjoining ground. This rule, however, is not artificial and of positive institution, but is founded on the presumption in the absence of proof that the highway was originally granted by the adjoining proprietors over their land in equal proportion. This is not a presumptio juris et de jure, but a reasonable presumption based on probability. Where it appears, however, that the highway was laid wholly over the land of one person, the presumption is annulled, and to hold by inference against fact that the fee of one person should be extended beyond his land and of the other, restrained to narrower limits because he had dedicated his land for a road would be a most inequitable fiction.[31]

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the centerline of said right of way, absent contrary intent)); UNIF. TITLE STANDARDS, 11.3–11.4 (FLA. BAR 2012).

27. FLA. STAT. § 336.12 (2023).

28. Winter Park Pines Dev. Co. v. Kohloss, 244 So. 2d 493, 493 (Fla. 4th Dist. Ct. App. 1971).

29. *Id.* at 493 (Cross, J., dissenting).

30. *Id.*

31. *Id.* at 495 (Cross, J., dissenting).

When right of way is laid wholly over one person's land, then subsequently vacated, the fee should revert entirely back to the original owner, not be divided to grant an inequitable interest to an adjacent property owner as the *Kohloss* Court ruled.[32]

2. Ambiguity and Conflict Exists in Florida Statutes and Common Law

Although the statutes restate and harmonize caselaw, the differences in process between Chapter 177 (plats) and Chapter 336 (roads) are not insignificant, and the ambiguity raises important questions of law.[33]

Although the premise and outcome of vacating rights of way are shared by the two chapters (177 and 336) of the Florida Statutes, ambiguity exists as to which controls when vacating right of way and whether the two chapters are to be adhered to in tandem or to the exclusion of one another based on whether the roadway is platted.[34] For example, Section 177.101 requires the person or entity petitioning for the vacation of roadway to be a fee simple owner of the platted lands, whereas Section 336.09 allows local governments to vacate right of way on their own motion or upon any person's request.[35] Local governments cannot vacate portions of plats on their own motion and must own the fee simple to platted lands in order to vacate them—including rights of way and other such easements.[36] Despite this, it is difficult to ignore the clear statutory authority granted to counties to "[r]enounce and disclaim any right of the county and the public in and to land . . . delineated on any recorded map or *plat* as a street,

32. *Id.* at 493.

33. *See* 44 C.J. *Municipal Corporations* § 3614 (1926) ("Conflicting statutes. A statute providing the procedure for the vacation of a plat by the owners of land which has been platted and the plat recorded does not by implication repeal powers conferred upon the municipal authorities as to the vacation of streets." (citing Chrisman v. Brandes, 112 N.W. 833 (Iowa 1907)).

34. FLA. STAT. ch. 177 (2023); FLA. STAT. ch. 336 (2023).

35. FLA. STAT. § 177.101 (2023); FLA. STAT. § 336.09 (2023); *see* Blair Nurseries, Inc. v. Baker County, 199 So. 3d 534, 537 (Fla. 1st Dist. Ct. App. 2016) ("A county is powerless to vacate a subdivision plat absent compliance with the statute, which requires an application from the landowner.").

36. *See Blair*, 199 So. 3d at 537 ("A county is powerless to vacate a subdivision plat absent compliance with the statute, which requires an application from the landowner."); Vacation of Portion of Plat Dedication to Public, 2005-11 Fla. Op. Att'y Gen. (Feb. 9, 2005).

alleyway, road or highway"—presumably absent any fee simple ownership interest.[37] Afterall, the courts have long ruled, incompatibly, that roadways shown on such maps are easements.[38] Therefore, it stands to reason that the courts would require property owned by the government be an adjacent lot or tract to said right of way in order for the government to vacate that right of way on its own motion.[39] Further complicating this is that platted rights of way are still public or private rights of way contemplated by Chapter 336 and are considered part of a county's roadway system.[40]

Additionally, Section 177.101 requires two published advertisements, whereas section 336.10 requires one published advertisement before the public hearing and a notice of adoption published following adoption. Providing some harmony between Section 177.101 and 336.10 is Section 177.101(5), that states:

> Every such [vacation] resolution by the governing body shall have the effect of vacating all streets and alleys which have not become highways necessary for use by the traveling public. Such vacation shall not become effective until a certified copy of such resolution has been filed in the offices of the circuit court clerk and duly recorded in the public records of said county.[41]

37. FLA. STAT. § 336.09(1)(c) (2023) (emphasis added).

38. *See* Servando Bldg. Co. v. Zimmerman, 91 So. 2d 289, 293 (Fla. 1956) ("[T]he general rule [is] that one purchasing a lot according to a plat gets title to the center of the street subject to the easement."); Smith v. Horn, 70 So. 435, 436 (Fla. 1915); Jacksonville, Tampa & Key W. Ry. Co. v. Lockwood, 15 So. 327, 329 (Fla. 1894) ("The abutting proprietor is prima facie owner of the soil to the middle of the highway, subject to the easement in favor of the public; the rule being founded on the presumption that the ground was originally taken from such proprietors, and for the sole purpose of being used as a highway.").

39. *See Blair*, 199 So. 3d at 537 ("A county is powerless to vacate a subdivision plat absent compliance with the statute, which requires an application from the landowner."); Vacation of Portion of Plat Dedication to Public, 2005-11 Fla. Op. Att'y Gen. (Feb. 9, 2005).

40. Florida Statutes section 336.01 designates "[t]he county road system . . . as defined in s. 334.03(8)," which defines "County road system" to "mean[] all collector roads in the unincorporated areas of a county and all extensions of such collector roads into and through any incorporated areas, all local roads in the unincorporated areas, and all urban minor arterial roads not in the State Highway System."

41. FLA. STAT. § 177.101(5) (2023).

However, exempted from this Section are "highways necessary for use by the traveling public," which may be vacated (provided they are not under state or federal control) by Section 336.09(1)(a).[42]

With that said, the Florida Second District Court of Appeal held in *Cosentino v. Sarasota County* that strict adherence to the advertising requirements prescribed by Florida Statutes is not fatal to a vacation resolution, provided basic due process was afforded.[43] But other courts may not be as forgiving. For example, the Florida Fourth District Court of Appeal invalidated an ordinance that was adopted after being continued from an advertised meeting, based on a strict and literal interpretation of Florida Statutes and despite longstanding statewide practice and understanding to the contrary.[44]

C. Brief Historical Background of Platting in Florida

Since 1497, Florida was colonized by the Spanish, then colonized and subsequently abandoned by the British (including a mass exodus of colonists), and recolonized by the Spanish—leaving a storied history, established forts and towns, and emergent plats, plans, and towns.[45] The subject of cartography, mapping, and its evolution to surveying the new world is rooted in a style of mapping depicting land ownership dating back to at least 1540.[46]

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42. *Id.*

43. Cosentino v. Sarasota County, 324 So. 3d 964, 967 (Fla. 2d Dist. Ct. App. 2021) ("[S]o long as due process has been afforded, strict compliance [with Florida Statutes' notice requirements] is unnecessary.") (citing Bouldin v. Okaloosa County, 580 So. 2d 205, 209 (Fla. 1st Dist. Ct. App. 1991)).

44. Testa v. Town of Jupiter Island, 360 So. 3d 722, 730 (Fla. 4th Dist. Ct. App. 2023); *see also id.* at 735 (On Appellees' Motion for Certification, Gerber, J., concurring).

45. CHARLES VIGNOLES, OBSERVATIONS UPON THE FLORIDAS, 17-27, 148 (E. Blis & E. White 1823), https://www.loc.gov/item/01006876/.

46. Anthony P. Mullan & John R. Hébert, *The Luso-Hispanic World in Maps: A Selective Guide to Manuscript Maps to 1900 in the Collections of the Library of Congress*, HATHITRUST (July 3, 2023, 10:35 AM), https://babel.hathitrust.org/cgi/pt?id=nyp.33433089447779&seq=3; *see also* VIGNOLES, *supra* note 45; John R. Hébert & Anthony P. Mullen, *The Luso-Hispanic World in Maps: A Selective Guide to Manuscript Maps to*, LIBR. OF CONG., https://www.loc.gov/rr/geogmap/luso/usflorida.html#florida (last visited Apr. 3, 2024) (providing an internet-friendly showcase of various maps).

With the establishment of the Public Land Surveying System through the Land Ordinance of 1785,[47] and the Adams-Onis Treaty transferring power of Florida to the United States in 1821, the federal and territorial governments began the decades-long process of determining claims of land, affirming or denying land grants, and surveying the lands of territorial Florida.[48] Although more sophisticated surveys and town plans had been drawn by Surveyor General of Spanish West Florida Vicente Sebastián Pintado in the early 1800s, the territory essentially began from scratch. This is evidenced by Territory Governor Andrew Jackson's letter to Secretary John Quincy Adams in 1821 complaining "[t]here are no original grants, Surveys, Maps, or even a plat of [Pensacola]," and James G. Forbes's letter to Adams explaining that Pintado viewed the maps as private property for sale.[49] Therefore, existing cities like Apalachicola, "already having considerable population and a large and growing trade and commerce," were legally established by the territorial legislature and had their town plans laid out.[50]

By 1838, Floridians voted in favor of statehood and approved a state Constitution[51]—and statehood was granted in 1845.[52] The new state delegated to its counties control over roads in December

47. United States v. Estate of Laverne St. Clair, 819 F.3d 1254, 1256–57 (10th Cir. 2016); C. ALBERT WHITE, U.S. DEP'T OF THE INTERIOR BUREAU OF LAND MGMT., A HISTORY OF THE RECTANGULAR SURVEY SYSTEM 11–16 (1983), https://www.blm.gov/sites/blm.gov/files/histrect.pdf; *see also* PAUL WALLACE GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT, 59–74 (1968).

48. SIDNEY JOHNSTON & MYLES BLAND, THE WEST AUGUSTINE HISTORIC DIST. ASSESSMENT SURVEY, CITY OF ST. AUGUSTINE, ST. JOHNS CNTY., FLA., 3-6 to 3-11 (June 2008), http://www.sjcfl.us/Environmental/media/WAugustineHistoricDistSurvey.pdf.

49. John R. Hébert, *Vicente Sebastián Pintado, Surveyor General of Spanish West Florida, 1805-17. The Man and His Maps*, 39 IMAGO MUNDI 50, 50 (1987).

50. City of Apalachicola v. Apalachicola Land Co., 9 Fla. 340, 347 (Fla. 1861). This case begins with "the Apalachicola [Land] Company, being proprietors of a large tract of land" laying out the town plan for the City of Apalachicola in 1836. *Id.* The plan was approved by city council, filed appropriately, lithographed, and ultimately relied upon by citizens and the city. *Id.* The next year, the President of the Apalachicola Land Company went to the map and drew extensions to wharf (docking) properties across existing streets/municipal lands. *Id.* at 342. The company took possession of the property, building wharfs and charging rents, and the City of Apalachicola sued—winning an action of ejectment twelve years later in federal court. *Id.* at 342–43.

51. FLA. CONST. of 1838, art. I, para. 1 (State Archives of Florida, Florida Memory, https://www.floridamemory.com/items/show/189087?id=1).

52. Iowa-Florida Act, 28th Cong., 2d Sess. (1845) (enacted), https://www.loc.gov/resource/gdcwdl.wdl_03938/.

1845, allowing counties "to discontinue such Public Roads, as now are or shall hereafter be found useless, burdensome, and inconvenient."[53] The following legislative session during the winter of 1846–47 saw Florida's first law regulating plats as part of its "General Law in respect to Corporations" when "lay[ing] out a town in [Florida], or an addition or sub-division of out lots."[54] This law required that the "plat or map shall particularly describe and set forth all the streets, alleys, commons or public grounds, and all in and out lots, or fractional lots, within, adjoining or adjacent to said town, giving the names, widths, corners, boundaries and extent of all such streets and alleys," as well as requiring the lots be progressively numbered, measured, limited to ten acres or less, monuments installed, having certifications, approval by the Board of County Commissioners and subsequent filing with the clerk.[55] This law mirrored Illinois's 1833 platting statute, also used by the Territory of Wiskonsan [sic] in 1839.[56]

Subsequently, the legislature enacted special laws for counties allowing for the platting and subdividing of private land, requiring a legal description, scale, certificate of ownership, certificate and attestation by surveyor or civil engineer, and professional seal.[57] During the Florida land boom of the 1920s,[58] recognizing the need to universally regulate the subdivision of land, the legislature adopted Chapter 10275, Laws of Florida in 1925—the first legislative effort to regulate the filing for record of maps and plats

53. An Act Concerning Roads and Highways, ch. 53, No. 26, § 1, 1st Gen. Assemb., Adjourned Sess. (Fla. 1845), http://edocs.dlis.state.fl.us/fldocs/leg/actsflorida/1845/1845adjourned.pdf.

54. General Law in Respect to Corporations, ch. 84, No. 14, § 17, Gen. Assemb., 2d Sess. (Fla. 1846), http://edocs.dlis.state.fl.us/fldocs/leg/actsflorida/1846-47/1846-47.pdf.

55. *Id.*

56. City of Bellevile v. Stookey, 23 Ill. 441, 441 (Ill. 1860) (describing Illinois 1833 platting law that is substantially the same as Florida's 1847 law); An Act to Provide for Recording Town Plots, §§ 1–14, Leg. Assemb. (Wis. Territory 1839), https://www.google.com/books/edition/Laws_of_Wiskonsan_Territory_Passed_by_th/X7EwAQAAMAAJ?hl=en&gbpv=1.

57. *See, e.g.*, An Act to Regulate the Making and Recording of Maps of Plats of Land Sub-divisions in Orange County, Florida, ch. 6624, No. 204, § 1, 1913 Leg., 14th Reg. Sess. (Fla. 1913).

58. *See* Homer B. Vanderblue, *The Florida Land Boom*, 3 J. LAND & PUB. UTIL. ECON. 113, 113–31 (1927); *see also* Henry M. Brown & Rebecca E. Brown, *Murphy Deed Right-of-Way Reservations: A 1930s Taxpayer Bailout Yields Right-of-Way Cost Savings*, 87 FLA. BAR J. 20 (July/Aug. 2009).

in Florida.[59] Despite ensuring a higher quality of plat with less errors causing title problems and litigation,[60] these provisions did not include standards for vacating plats or portions of plats.[61]

For the next 49 years, the legislature granted counties ad-hoc authority to additionally regulate and/or vacate plats and portions thereof through a patchwork of special laws,[62] until ultimately adopting Florida's current platting statutes in 1971—which notably included Florida Statutes Section 177.101, vacation and annulment of plats subdividing land.[63]

D. Replatting Versus Vacating

Florida Statutes Section 177.101 provides the statutory process for vacating a plat or a portion thereof, which includes advertising, fee simple ownership, and that the vacation "will not affect the ownership or right of convenience access of persons owning other parts of the subdivision." Separate and distinct from this process is the process of replatting, which is partially defined by Florida Statutes Section 177.031(14): "'Plat or replat' means a map or delineated representation of the subdivision of lands, being a complete exact representation of the subdivision and other information in compliance with the requirement of all applicable sections of this part and of any local ordinances."

And further discussed by Florida Statutes Section 177.05(2):

> Any change in a plat, except as provided in s. 177.141, shall be labeled a "replat," and a replat must conform with this part. After the effective date of this act, the terms "amended plat,"

59. An Act to Regulate the Making of Surveys and Filing for Record of Maps and Plats in the Statute of Florida, ch. 10275, No. 253, 20th Reg. Sess. (Fla. 1925); *see* Approval of Subdivision Plats, 71-307 Fla. Op. Att'y Gen. (Sept. 30, 1971).

60. FLORIDA REAL PROPERTY SALES TRANSACTIONS, § 8.3.D.2b (FLA. BAR, 9th ed. 2018) ("It is rare for a plat prepared by a land surveyor registered in Florida in the last several decades to contain an error. Inaccuracies are generally found in older subdivision plats, causing title problems and litigation.").

61. Fla. 20th Reg. Sess.; *see* Approval of Subdivision Plats, 71-307 Fla. Op. Att'y Gen. (Sept. 30, 1971).

62. *See, e.g.*, H.B. 519, ch. 59-1296, 37th Leg., Reg. Sess. (Fla. 1959) (codifying a Franklin County special law to approve changes, additions, corrections or revision to plats); H.B. 1092, ch. 28946, 34th Leg., Reg. Sess. (Fla. 1953) (platting rules for Broward County).

63. H.B. 1154, ch. 71-339, 2d Leg. (Fla. 1971); *see* FLA. STAT. §§ 177.011–0.151 (2023).

> "revised plat," "corrected plat," and "resubdivision" may not be used to describe the process by which a plat is changed.

And finally, as part of the last significant change to Florida's platting statute in 1998[64] was an amendment to Florida Statutes Section 177.101(2), which (among other things) clarified that the act of replatting effectively vacates and annuls the underlying lands:

> The approval of a replat by the governing body of a local government, which encompasses lands embraced in all or part of a prior plat filed of public record shall, upon recordation of the replat, automatically and simultaneously vacate and annul all of the prior plat encompassed by the replat.

However, ambiguity exists not just in the differences in process in vacations and replats (raising due process and property interest concerns),[65] but whether replats vacated and annulled their previous plats recorded between 1971 and 1998, and likely beforehand. Before the 1998 amendment, replatting was more akin to wallpapering over wallpaper—with the underlying, original plat not being vacated, but rather supplanted.

There exists additional requirements required by common law in vacating property that should therefore apply to a replat and should be included in the statute, such as a requirement that all easement interest owners consent to the replatting.[66] Additionally, that the replat be considered stand alone, or otherwise de novo and not have to rely on the underlying (now vacated) plat for its legal

64. H.B. 3223, ch. 98-20, 30th Reg. Sess. (Fla. 1998).

65. FLA. STAT. § 177.101. Vacation and annulment of plats, including the automatic vacation and annulment of a prior plat when replatted, possesses requirements and restrictions, including public notice advertising. FLA. STAT. § 177.101. Whereas the act of replatting is substantially the same as platting without the need to adhere to any of the vacation requirements. FLA. STAT. § 177.101(2) ("The approval of a replat by the governing body of a local government . . . upon recordation of the replat, automatically and simultaneously vacate and annul all of the prior plat encompassed by the replat."). "In an action to vacate a plat, due process requires that all affected parties be given notice." 4 ANTIEAU ON LOC. GOV'T L. § 59.10 (2d ed.) (LEXIS 2023) (citing Batinich v. Harvey, 277 N.W.2d 355, 359 (Minn. 1979)) (stating that "affected parties" can constitute all landowners within the platted area).

66 Crutchfield v. F. A. Sebring Realty Co., 69 So. 2d 328, 330 (Fla. 1954).

description or muniments of title (such as plat restrictions[67]) would bring clarity to the platting process.

1. Special Vacation Laws Supplanted by Chapter 71–339, Laws of Florida (1971)[68]

After the 1925 platting statute, the Florida legislature passed a number of additional, and often conflicting (or at least differently worded), special laws for counties to create additional platting regulations and authority, including conferring the power to vacate plats and the automatic vacation of a prior plat when replatting.[69]

Florida's Constitution allows the legislature to enact legislation by way of general law or special law.[70] General laws are applied universally across the state. A local law is a type of special law "relating to, or designed to operate only in, a specifically

67. *See, e.g.*, Sunshine Vistas Homeowners Ass'n v. Caruana, 623 So. 2d 490, 491–92 (Fla. 1993) ("[R]eference to a plat in the description of a deed incorporates the plat's terms").

68. This Section was inspired by a legal memo authored by my mentor and Managing Assistant County Attorney Heidi F. Ashton-Cicko, Esq., whose debt in I will forever remain. Memorandum from Heidi F. Ashton-Cicko on Vacation of Plats via Replats (Jun. 27, 1995) (on file with author). To that effect, I would also like to thank County Attorney Jeffrey A. Klatzkow and all of my colleagues at the County Attorney's Office: Scott R. Teach, Colleen M. Greene, Sally A. Ashkar, Ronald T. Tomasko, Carly J. Sanseverino, Kathynell Crotteau, and Nancy Bradley, for their professional support and encouragement. Next, I would like to thank Zachary W. Lombardo, Amy Patterson, Trinity Scott, Jamie French, Jaime Cook, Marcus Berman, Francesca L. Passidomo, Richard D. Yovanovich, Christopher O. Scott, and Scott A. Stone for helping to inspire this article. Finally, I would like to thank my wife Nicole and our two children Ethan and Liv for their love, grace, and patience.

69. *Compare* H.B. 1244, ch. 29130, 37th Leg., Reg. Sess. (Fla. 1953) (outlining a Hillsborough County special law requiring resolution or municipal ordinance to vacate a plat, but stating "[n]othing herein contained shall be deemed to prevent a replatting of platted lands and the recording of a plat thereof, if the same be accomplished in accordance with law."), H.B. 519, ch. 59-1296, 37th Leg., Reg. Sess. (Fla. 1959) (approving, in Franklin County special law, changes, additions, corrections or revisions to plats), *and* H.B. 2137, ch. 59-1316, 37th Leg., Reg. Sess. (Fla. 1959) (codifying a Gulf County special law for the revision or superseding of existing plats), *with* H.B. 679, ch. 59-1190, 37th Leg., Reg. Sess. (Fla. 1959) (promulgating a Collier County special law providing for the automatic vacation of the underlying plat when replatting).

70. *See* FLA. CONST. art. III, § 10. Although Florida adopted its sixth Constitution in 1968, superseding its fifth 1885 Constitution, the provisions governing special or local laws are similar enough for this Article to consider them together whilst traversing history. *Compare* FLA. CONST. art. III, §§ 20–21 (amended 1968), http://library.law.fsu.edu/Digital-Collections/CRC/CRC-1998/conhist/1885con.html, *with* FLA. CONST. art. III, §§ 10–11, http://www.leg.state.fl.us/statutes/index.cfm?submenu=3#A3S10.

indicated part of the state."[71] Those laws that regulated plats and vacations for specific counties are special laws, whereas Florida Statutes Section 177.101 is a general law.

The general rule is that when "the general act is an overall revision or general restatement of the law on the same subject, the special act will be presumed to have been superseded and repealed."[72] Thus, when the Chapter 71–339, Laws of Florida (1971) established Florida Statutes Section 177.101's plat vacation general law, it superseded and repealed the various special laws—including some jurisdiction's automatic vacation of underlying plats when replatting. Therefore, it remains an open question as to whether the dedications, muniments of title, and easement interests created by a plat were extinguished via replat between 1971 and 1998.[73]

And even now, the question as to whether the dedications, muniments of title,[74] and easement interests created by a plat are

71. Dep't of Bus. Reg. v. Classic Mile, 541 So. 2d 1155, 1157 (Fla. 1989) (quoting State *ex rel.* Landis v. Harris, 163 So. 237, 240 (Fla. 1934)); *see* Fla. Dep't of Health v. Florigrown, LLC, 317 So. 3d 1101, 1116 (Fla. 2021) (citations omitted); State *ex rel.* Gray v. Stoutamire, 179 So. 730, 733 (Fla. 1938) ("[A] statute relating to particular subdivisions or portions of the State or to particular places of classified localities, is a local law.").

72. Zedalis v. Foster, 343 So. 2d 849, 850 (Fla. 2d Dist. Ct. App. 1976) ("[T]he general act is an overall revision or general restatement of the law on the same subject, the special act will be presumed to have been superseded and repealed.") (citing Town of Palm Beach v. Palm Beach Local 1866, I.A.F.F., 275 So. 2d 247, 249 (Fla. 1973)); *see* Oldham v. Rooks, 361 So. 2d 140, 143 (Fla. 1978) ("[W]hen the legislature makes a complete revision of a subject it serves as an implied repeal of earlier acts dealing with the same subject unless an intent to the contrary is shown.").

73. The time between the adoption of Chapter 71-339, Laws of Florida (1971)'s general law superseding the legislature's special laws for county plat vacations and Chapter 98-20, Laws of Florida (1998)'s addition of the automatic vacation via replat. It should also be noted that many counties did not have automatic vacation via replat special laws, indicating that replatting absent a separate vacation resolution may just wallpaper the replat over the prior plat. H.B. 1154, ch. 71-229, 2d Leg. (Fla. 1971); H.B. 3223, ch. 98-20, 30th Reg. Sess. (Fla. 1998).

74. Muniments of title are "instruments of writing and written evidences which the owner of lands, possessions, or inheritances has, by which [one] is entitled to defend the title." Sunshine Vistas Homeowners Ass'n v. Caruana, 623 So. 2d 490, 491 n.2 (Fla. 1993) (quoting *Muniments of title*, BLACK'S LAW DICTIONARY (6th ed. 1990)). Additionally, wholesale automatic vacation may have unforeseen consequences with warranty deeds with such muniments of title and/or restrictions, causing absurd results. *See id.*; *see also* Volunteer Sec. Co. v. Dowl, 33 So. 2d 150, 151 (Fla. 1947) (quoting Hall v. Snavely, 112 So. 551 (Fla. 1927)); UNIF. TITLE STANDARDS, 11.6 (FLA. BAR 2012).

extinguished when replatting, based on the absurdity doctrine.[75] For example, many replats utilize an abbreviated legal description based on the prior plat, such as "Tract 1, ABC Subdivision, as recorded in Plat Book X, Pages Y–Z, in the Public Records of Florida County, Florida."[76] Theoretically, if vacated and annulled, such legal description would no longer be valid because the legal effect of annulment is to cancel, make void, destroy, and "deprive it of all force and operation, either ab initio or prospectively as to future transactions."[77] Worse, replats may show easements dedicated on prior plats, labeled as such to avoid rededicating and consent of the underlying easement interest holders (when the easement is not changing, but merely being shown by the replat).[78] Holding that such reference to a previously platted and dedicated easement is void because the replat wholesale vacated the prior plat's easements and muniments of title for such easement holders would be absurd.[79] Further, burdening property owners making

75. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2388, n.3 (2003). At the heart of this issue is that replats operationally rely on their underlying plat, and the way that the law is structured, there is an indiscriminate rewrite upon replatting that illogically and completely invalidates the underlying plat—and for reasons herein, at least some aspects of the original plat should be legally preserved (such as legal description, monuments of title, etc.). *See* FLA. STAT. § 177.091(16) (2023) ("The approval of a replat by the governing body of a local government, which encompasses lands embraced in all or part of a prior plat filed of public record shall, upon recordation of the replat, automatically and simultaneously vacate and annul all of the prior plat encompassed by the replat.").

76. It is common practice for a replat that is replatting a certain tract of an existing plat to use that tract's simple legal description. *See, e.g.*, Wellington Green, a MUPD/PUD, Re-Plat No. 4, OFF. REC. OF PALM BEACH CNTY., FLA., Plat Bk. 130, pp. 3–13; Bornino Commercial, OFF. REC. OF LEON CNTY., FLA, Plat Bk. 24, p. 91; Sunrise Preserve, Phase 4, OFF. REC. OF SARASOTA CNTY., Plat Bk. 55, pp. 145–48.

77. *Annul*, BLACK'S LAW DICTIONARY (6th ed. 1990) ("To cancel; destroy; abrogate. To annul a judgment or judicial proceeding is to deprive it of all force and operation, either *ab initio* or prospectively as to future transactions."); *see also* Woodson v. Skinner, 22 Mo. 13, 24 (Mo. 1855) ("'Annul' is not a technical word. There is nothing which prevents the idea conveyed by it from being expressed in equivalent words."); Wait v. Wait, 4 Barb. 192, 208 (N.Y. Gen. Term 1848) (stating to "annul" is to "make void").

78. *See* Crutchfield v. F. A. Sebring Realty Co., 69 So. 2d 328, 330 (Fla. 1954); FLA. STAT. § 177.091(16) (2023).

79. No specific requirement exists in Florida Statutes Chapter 177 requiring replats or vacations not to abridge or destroy any of the rights or privileges of the existing plat or easement's interest holders. *Compare* ch. 177, *with* 765 ILL. COMP. STAT. 205/7 (2023) ("Any part of a plat may be vacated in the manner provided in the preceding section, and subject to the conditions therein prescribed: Provided, such vacation shall not abridge or destroy any of the rights or privileges of other proprietors in such plat: And, provided, further, that nothing contained in this section shall authorize the closing or obstructing of any public highway laid out according to law.").

application for replat with obtaining consent by certain prior-plat easement interest holders who are not having their easements affected, absent the automatic vacation provision of Florida Statutes Section 177.101(2), would also be absurd and ripe for applicant extortion.[80]

No statutory scheme regarding replatting exists in the context of the status of the underlying plats, but perhaps the legislature ought to consider devising language that ensures a better process in replatting; making certain that underlying property rights are not supplanted by the replat (through consensus or authorization), or allowing muniment of title from the original plat to survive the replatting if explicitly shown or indicated on the replat—such as showing an easement and labeling it with the original plat book and page.

III. LOCAL GOVERNMENTS CANNOT SELL OR BARTER RIGHTS OF WAY

It is long settled common law that governments[81] may not "vacat[e] public properties, which they hold in trust, for the private

80. *See* Little River Invest., Inc. v. Fowler, 266 So. 2d 68, 70 (Fla. 3d DCA 1972), *cert. denied*, 270 So. 2d 14 (Fla. 1972) (voiding a replat for failing to follow local notice provisions for subservient easement interest holder); § 177.101(2) (2023); *see also Crutchfield*, 69 So. 2d at 330.

81. The term local government is intentionally used interchangeably and in lieu of county, municipality, municipal corporation, and any other such terms. Although the Author understands that there are specific and different definitions for the various forms of local government (in both a practical and academic sense), the available caselaw and secondary sources vary wildly in time and application. *See* John S. Burton & Herbert J. Jones, *Dedication: Rights under Misuser and Alienation of Lands Dedicated for Specific Municipal Purposes*, 7 U. FLA. L. REV. 82, n.* (1954) ("Many of the principles discussed herein involving a municipality's interest in dedication are applicable to counties and states."). However, for the sake of this Article, (absent an unknown special law or charter where the legislature grants specific authority to barter or sell right of way easements), the term local government, and the relevant law, is understood to affect counties, municipalities, and municipal corporations the same, with the understanding that Florida Statutes Chapter 336 applies to counties but as aforementioned is also applied to cities through interpretation and home rule power. *See* Fla. E. Coast Ry. Co. v. Worley, 49 Fla. 297, 308 (Fla. 1905); *see, e.g.*, State *ex rel.* Milton v. Dickenson, 33 So. 514, 519 (Fla. 1902) (Mabry, J. dissenting) ("[T]he distinction between cities and towns, or municipal corporations proper, and involuntary quasi corporations, such as counties, is very clearly drawn, it is said 'a county organization is created almost exclusively with a view to the policy of the State at large for purposes of political organization and civil administration in

use of individuals and corporations"[82] nor "sell or barter the streets and alleys which it holds in trust for the benefit of the public and cannot vacate a street for the benefit of a purely private interest."[83] Florida's Attorney General affirmed this sentiment in 1978, opining:

> [A] municipality possesses neither statutory nor constitutional authority to exact payment for or otherwise interfere with the property rights of landowners whose property abuts a public street as conditions to or in exchange for the exercise of its power to vacate streets no longer required for public use. [. . .] Clearly the attempt by a municipality to usurp private property rights or property interests or to barter or sell such property rights as conditions to or in exchange for the exercise of its legislative power to vacate streets no longer required for public use, does not constitute a municipal purpose and is outside the scope of municipal home rule powers.[84]

The Illinois Supreme Court gave a scathing critique of the practice:

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matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for general administration of justice. With scarcely an exception all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the State, and are in fact but a branch of the general administration of that policy.'" (quoting Bd. of Comm'rs v. Mighels, 7 Ohio St. 109, 118–19 (1857)).

82. City of St. Petersburg v. Atl. Coast Line R.R. Co., 132 F.2d 675, 677 (5th Cir. 1943) (citations omitted); *see* 4 EUGENE MCQUILLIN, MUN. CORP. § 1520, 347 (Frank D. Moore ed., Callaghan & Co. rev. 2d ed. 1943), https://babel.hathitrust.org/cgi/pt?id=uc1.b3340559&seq=376.

83. Roney Inv. Co. v. City of Miami Beach, 174 So. 26, 29 (Fla. 1937); Fla. Cent. & Peninsular R.R. Co. v. Ocala St. & Suburban R.R. Co., 22 So. 692, 696 (Fla. 1897) ("It is a fundamental principle that the powers of a municipal corporation in respect to the control of its streets are held in trust for the benefit of the public, and cannot, unless clearly authorized by a valid legislative enactment, be surrendered or delivered up by contract to private persons or other corporations."); *see, e.g.*, Lerch v. Short, 185 N.W. 129, 130 (Iowa 1921). "Municipalities have no rights to profit from their streets, unless specifically authorized by the state." Gardner F. Gillespie, *Rights-of-Way Redux: Municipal Fees on Telecommunications Companies and Cable Operators*, 107 DICK. L. REV. 209, 215 (Fall 2002) (citations omitted). *C.f.* William Malone, *Municipalities' Right to Full Compensation for Telecommunications Providers' Uses of the Public Rights-of-Way*, 107 DICK. L. REV. 623, 625–26 (Winter 2003) (critiquing Rights-of-Way Redux); Gardner F. Gillespie & Paul A. Werner III, *Rights-of-Way Redux . . . Redux*, 107 DICK. L. REV. 877 (Spring 2003) (replying to Malone's Article).

84. Municipalities, Vacations of Streets and Roads, 78-125 Fla. Op. Att'y Gen. (Oct. 24, 1978).

> Whether the alley was no longer needed for public use and whether the public interest would be subserved by its vacation could not be made to depend on how much the city could get for its action. The legislative powers of a city must be exercised for the public benefit, but that does not authorize a municipality to sell or bargain legislation as a means of obtaining revenue. It would be a novel proposition to hold that a city, as a condition precedent to the exercise of its lawful power and authority to vacate a street or alley no longer needed for public use, could demand and receive from private parties a sum of money for its action. Such a holding would be dangerous in principle, contrary to good morals and against public policy.[85]

After all, rights of way are generally easements,[86] and the act of vacating an easement is not a conveyance or assignment of that easement, but instead only termination in that right of easement that the local government holds in trust on behalf of the public.[87] According to McQuillin, "[a] municipality is not entitled to compensation for loss of a public easement in streets in which it does not own the fee," and *McCutcheon v. Terminal Station Communication* confirms this assertion:

> The only right the public has in such cases is the right to use such street for street purposes, and this right principally is the right to pass over them, and this right is vested, not in the municipality as a corporation, but in the people of the state at large. If any compensation for the closing of such streets were to be made it should go, not to the city, but to the state, or to the people at large, to whom the right belongs, unless the legislature has, by some statute, expressly provided otherwise.[88]

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85. Lockwood & Strickland Co. v. City of Chicago, 117 N.E. 81, 83 (Ill. 1917).

86. *See generally supra* pt. II.A. Alternatively, a government may own property used as right of way in fee simple. *See id.*

87. *See* FLA. STAT. § 336.09(1)(a) ("[V]acate, abandon, discontinue and close any existing public or private street, alleyway, road, highway, or other place used for travel, or any portion thereof, other than a state or federal highway, and to renounce and disclaim any right of the county and the public in and to any land in connection therewith"). *But see infra* pts. IV.A, IV.B.

88. McCutcheon v. Terminal Station Comm'n, 88 Misc. 148, 181 (N.Y. Equity Term 1914); *see also* MCQUILLIN, *supra* note 82. *But see* County of Sarpy v. United States, 386

Florida's most modern restatement of the doctrine is: "[W]here lands have been dedicated to a municipality the municipality holds the title in trust for the public and has no power, unless specially authorized by the legislature, to sell or appropriate such lands for the use and benefit of private interests."[89]

A. Florida's Emerging Right of Way Common Law

Florida's caselaw on the subject best begins in 1875 with *Lutterloh v. Cedar Keys*, where the City of Cedar Keys attempted to build "a market-house, public pound and jail" in existing right of way.[90] The landmark ruling, without citing another case or treatise, stated:

> The corporation of the town has no more right to erect such an obstruction in the highway than has any private citizen. The right of occupancy of the street by the public is a mere easement or right of passage. The rights of owners of adjacent lots fronting on the street are greater than this; they have also a private right and interest. The purchasers of town lots have generally located their houses and invested their money with reference to the streets, and their property is necessarily affected by the permanent closing or partial closing of these avenues; and upon various considerations, if special injury be threatened, they may demand that their property be protected against injury by such permanent obstructions and nuisances.[91]

F.2d 453, 460 (Ct. Cl. 1967) ("The test is what is reasonable under all the circumstances to restore the county to substantially as good a position as it was in prior to the taking, not what the county would prefer to have for long-range planning purposes, or what would be the most desirable improvement.").

89. City of Daytona Beach v. Tuttle, 630 So. 2d 586, 589 (Fla. 5th Dist. Ct. App. 1993) (citing Kramer v. City of Lakeland, 38 So. 2d 126 (Fla. 1948)); City of Coral Gables v. Old Cutler Bay Homeowners Corp., 529 So. 2d 1188 (Fla. 3d Dist. Ct. App. 1988).

90. Lutterloh v. Town of Cedar Keys, 15 Fla. 306, 307 (Fla. 1875) ("The market place is designed to be used for the sale of meat, vegetables, fish, &c.; the pound for the shutting up of hogs and other animals, and the jail for the confinement of disorderly people and criminals.").

91. *Id.* at 308.

The legacy of *Lutterloh v. Cedar Keys* primarily rests as a landmark ruling for public nuisance common law[92] where "any person whose property rights are specially injured by an unlawful obstruction in a public highway may have the aid of a court of equity in removing the obstruction when the remedy at law is inadequate."[93] However, it also helped give rise to a body of nationally evolving caselaw restraining "municipalities, as well as individuals, from attempting to make use of streets and highways for purposes not connected with transportation" (in such a way that causes special damages upon an adjacent property owner),[94] to wit:

> The fact that the construction proposed by the city in this case might be a convenience to the public is not persuasive argument that the public has a right to devote a portion of the street to that purpose. Numerous instances of conveniences immediately occur to anyone considering the matter which the public might enjoy using upon the public streets, but the fact that they are convenient and might be generally used by the public gives no

92. *See, e.g.*, Nat'l Container Corp. v. State *ex rel.* Stockton, 189 So. 4, 10 (Fla. 1939); Marion County. v. Ray, 107 Fla. 715, 719 (Fla. 1932); Pompano Horse Club, Inc. v. State *ex rel.* Bryan, 111 So. 801, 816 (Fla. 1927); Brown v. Fla. Chautauqua Ass'n, 52 So. 802, 804 (Fla. 1910); Robbins v. White, 42 So. 841, 844 (Fla. 1906) ("The obstruction of a public street is a public nuisance, but it may also constitute a private nuisance. An individual cannot enjoin the obstruction of a public street unless some special damage to his property or injury to him differing not only in degree but in kind from the damage sustained by the community at large threatened."). *Lutterloh*, 15 Fla. at 306, was also cited by the Supreme Courts of Kansas and New Hampshire in decisions denying special injury to property owners of vacated roadways. *See* Heller v. Atchison, T. & S. F. R. Co., 28 Kan. 625, 630 (Kan. 1882); Cram v. Laconia, 51 A. 635, 638–39 (N.H. 1901) (citations omitted).

93. Marion County v. Ray, 144 So. 845, 846–47 (Fla. 1932) (citing *Lutterloh*, 15 Fla. at 308).

94. Motoramp Garage Co. v. City of Tacoma, 241 P. 16, 17 (Wash. 1925) (citations omitted) (citing 23 cases restricting the following uses in rights of way: public scales, public market, bridge over an alley, lunch wagon, water stand pipe, electric light plant, water tank, voting booth, moving café, street vendor's stand, well to sprinkle road, carriage stand, drainage ditch, gas station, market house, pound, fruit stand, produce stand, carriage stand, wagon stand, and carter's stand.). It must be noted that the various cases offered by *Motoramp Garage Co.* are fact-specific and nuanced—for example, the "water stand pipe" case was a water tower built in the right of way, and its blocking of light was compensatory. *Id.* (citing Barrows v. Sycamore, 37 N.E. 1096, 1098 (Ill. 1894)). *See* Rawls v. Tallahassee Hotel Co., 31 So. 237, 239 (1901) ("An abutting proprietor owning to the centre of the street has the right to use the soil thereunder for all purposes consistent with the full enjoyment of the public easement. This right follows as a necessary incident of the ownership, and extends to any lawful use, so long as such use is consistent with the rights or necessities of the public.") (citations omitted).

> right to impress that use upon the fee owned by the abutting owner without compensation to him.[95]

In addition to the public and private interests herein established, it was soon thereafter recognized that "[t]he Legislature has undoubtedly supervision and control of highways and streets . . . result[ing] from the dominant power which the State possesses over all its highways, and it may [control them] without the consent of municipal authorities,"[96] and subsequently that "[t]he Legislature has always under our system of government had plenary control of all public highways whether they be public county roads or streets in cities and towns."[97]

Further shaping Florida's emerging common law regarding rights of way was an 1897 dispute between Florida Central and Peninsular Railroad Company ("Florida Central") and the Ocala Street and Suburban Railroad Company ("Ocala St. & Suburban R.R. Co."), where the City of Ocala in 1889 granted through ordinance to the Ocala St. & Suburban R.R. Co. the exclusive right to build railways "upon all the streets, lanes and alleys in the city of Ocala as then laid out, or thereafter to be opened, for a period of ten years."[98] Two years later, Florida Central's train station burned down and was rebuilt about thirty yards east from where it was, on Magnolia Street.[99] As part of the redevelopment, the City of Ocala vacated a portion of Magnolia Street (north of Sixth Street) in favor of Florida Central (and granting a fee simple conveyance)—where Ocala St. & Suburban R.R. Co. had facilities (and connected to Florida Central's station).[100] Florida Central demanded the removal of Ocala St. & Suburban R.R. Co.'s facilities from the vacated portion of Magnolia Street, to which Ocala St. & Suburban R.R. Co. believed it had a vested right to such portion of

95. *Motoramp Garage Co.*, 241 P. at 17.

96. State *ex rel.* Jacksonville v. Jacksonville S. R. Co., 10 So. 590, 593 (Fla. 1892) (citations omitted).

97. Comm'rs of Duval Cnty. v. City of Jacksonville, 18 So. 339, 343 (Fla. 1895) (citations omitted). This caselaw affirms the implied state power expressed through statutes since territorial Florida, as previously discussed herein. *See supra* pt. II.B.

98. Fla. Cent. & Peninsular R.R. Co. v. Ocala St. & Suburban R.R. Co., 22 So. 692, 695–96 (Fla. 1897).

99. *Id.* at 692–95 (stating prior history).

100. *Id.*

the street based on its contract with the City of Ocala.[101] The parties went to litigation thereafter when unable to resolve the dispute privately.[102]

The court ruled in favor of Florida Central, voiding the City of Ocala's ordinance granting exclusive rights to Ocala St. & Suburban R.R. Co. over the city's rights of way, stating:

> We discover no authority in this provision for the municipality to surrender its control over the streets of the city, or to tie up its hands by an exclusive contract so as to preclude a subsequent council from exercising the trust vested in it over the streets for the benefit of the public . . . Express power to alter streets is conferred upon municipal corporations by the provision of the statute mentioned, and, in our judgment, a municipality can alter a street by abandoning a portion of it when done in the reasonable exercise of the powers conferred for the public benefit.[103]

The court essentially reversed this line of thinking by 1936, after motor vehicles and the like drove a change in public policy allowing private industry to obtain various permissions, licenses, and franchises for right of way use.[104] Notably, for the sake of this

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101. *Id.*

102. *Id.*

103. *Id.* at 695–96.; *cf.* Lease of Municipal Land, Fla. Op. Att'y Gen. 77-27 (1977) (citing 63 C.J.S. *Municipal Corporations* § 964 (1950) ("Municipal corporations may lease its property to others when no longer required for its own purposes. . . .")).

104. *See, e.g.*, Jarrell v. Orlando Transit Co., 167 So. 664, 666–67 (Fla. 1936) (citations omitted) ("The right to use the streets and highways of a municipality for the conduct of a strictly private business is not inherent, it can be acquired by permission or license from the city, whose power to withhold or grant it in the manner and to the extent it may see fit is an essential prerogative of municipal government. . . . The theory underlying these decisions and many others not included is that the streets and highways are constructed at public expense for the convenience, comfort, and use of the public. If they are permitted to be preempted and appropriated for private enterprise then their very purpose is defeated and those who bear the burden of their construction are deprived of the objective they set out to accomplish. There is then no such thing as a natural right to use the public highways for commercial purposes. Such limited right as the public may grant to use them for private business is merely a privilege that may be restricted or withdrawn at the discretion of the granting power. Whether the grant is by license, permit, or franchise is immaterial, the power to do so is plenary and may extend to absolute prohibition. The right may be granted to one and withheld from others or it may be withheld from all without transgressing any State or Federal constitutional guaranty. . . . The reason for a franchise or permit in such cases, whether it be exclusive or limited, is to secure for the public an efficient, safe, and

Article however, the *Ocala St. & Suburban R.R. Co.* Court also opined:

> It is proper to state in reaching this conclusion that no question is presented as to the rights of abutting property owners in the abandoned portion of the street, nor, as against the alleged vested right of appellee under the ordinance, is there any question of abuse or wrong exercise of power in altering the street, and nothing is decided as to such matters. In *Gray vs. Iowa Land Co.*, it was decided that a municipality could, under a delegated power to vacate streets, rightfully order the vacation of a street, and the exercise of such power, when discreetly exercised and with due regard to individual rights, would not be restrained at the instance of a citizen claiming that, as a land owner, he was interested in keeping open the public streets.[105]

This makes a subtle yet important distinction in this case (to be punctuated later in this Article) regarding *what* was decided—that the city was not entitled to delegate the ownership of the streets for railways *exclusively* to a private entity because privity between the enacting city council and a subsequent one could not be sustained.[106]

Further, the court disclaims that it is ruling on the act of vacating, but cites *Gray v. Iowa Land Co.*, where Iowa's Supreme Court decided that local governments had plenary authority to vacate rights of way.[107] In its decision, it stated two interesting principles distinguished from relevant common law previously discussed, first that:

> The fee [of a platted street] passes to the public as completely in that case as though the plat was made, acknowledged and recorded by and at the instance of an individual proprietor. The

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dependable service by requiring bonded operators if necessary to avoid ruinous competition, to require the use of first-class standard equipment, and to enforce such other regulations as may be deemed advisable in the interest of the public. . . . The rationale of these cases is that the public is entitled to be served economically and efficiently by the best equipped facilities obtainable, that it have a reliable and dependable service, and be freed from the vices and discomforts incident to cut rate competition.").

105. *Fla. Cent. & Peninsular R.R. Co.*, 22 So. at 697 (citations omitted).

106. *Id.*

107. *Id.* (citing Gray v. Iowa Land Co., 26 Iowa 387 (Iowa 1868)).

> vacation, in either instance, puts an end to the fee, as also to the public use.

And second, upholding a vacation of right of way where the Town of Clinton bartered a vacation of some streets for a replacement street and extension of three avenues,[108] finding that local government "has the power to vacate, and that in this case it seems to have wisely, discreetly and safely exercised it, no one, and least of all, the appellant, being materially injured."[109] *Gray* also distinguished itself from *Warren v. Mayor of Lyons City*,[110] a case where a city attempted to subdivide and sell a public square for money against the original grantor's wishes. Also, material to subsequent discussion and this Article is an interesting point made in *Lyons City*—that the subdivision and sale of the public square is not what the court took issue with, but rather that the city's vacation went against the grantor's intent (where the grantor was opposed to and litigating against the vacation), stating:

> Nothing can be clearer than that if a grant [of land (in this case a public square)] is made for a specific, limited and defined purpose, the subject of the grant cannot be used for another [purpose], and that the grantor retains still such an interest therein as entitles [them] in a court of equity to insist upon the execution of the trust as originally declared and accepted.[111]

As an aside, the courts have recently upheld other such reverter provisions on both statutory and public policy grounds.[112] For example, Florida Statutes Section 689.18 generally places time restrictions on the enforceability of such reverters,[113] but specifically exempts these restrictions on conveyances made to

108. Gray v. Iowa Land Co., 26 Iowa 387, 389 (Iowa 1868) ("The mayor and recorder accordingly made a quitclaim deed for the streets, etc., so vacated, and the company granted and conveyed the ground for the new street, and the extension of said three avenues.").

109. *Gray*, 26 Iowa at 390–92.

110. Warren v. Mayor of Lyons Cnty., 22 Iowa 351, 356–58 (Iowa 1867).

111. *Id.* at 355.

112. *See, e.g.*, 1000 Brickell, Ltd. v. City of Miami, 339 So. 3d 1091, 1096 (Fla. 3d Dist. Ct. App. 2022).

113. FLA. STAT. §§ 689.18(4)–(4) (2023).

governments and other public facing and charitable entities.[114] In *1000 Brickell, Ltd. v. City of Miami*, the court wrote that the statute "encourage[es] philanthropic grantors to convey their real property to be used for a public purpose without concern that the reverter provision will be rendered unenforceable" at a later date.[115] This fact emphasizes that the *Lyons City* Court was right to focus upon the reverter, and absent the reversionary interest, may have upheld Lyons City's vacation akin to *Gray*.[116]

In sum, Florida's emergent common law on right of way vacations started down a path of disallowing governments to vacate public easement rights in favor of public/private interests but were largely fact-based and muddled by a lack of local government home rule power and reversionary interests in the subject properties.[117]

B. Roney, Corpus Juris, and Condition Precedent

The heart of this Article wrestles with the existential ambiguity and implied necessity in offering a vacation right of way for an equitable exchange with the fee owners making application for a myriad of public policy reasons to be subsequently discussed.[118] With the prior historical background and common law as a basis, this Article now turns to the Florida case that raised this question and remains the keystone in the argument against the use of condition precedent in vacating right of way: 1937's *Roney Investment Company and Twenty-Third Street Realty Corporation v. City of Miami Beach*.[119]

The crux of the dispute was the City of Miami Beach attempting to enjoin Roney Investment Company from obstructing certain rights of way (with a long-built hotel and tourist attraction)

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114. FLA. STAT. § 689.18(5) (2023) ("Any and all conveyances of real property in this state heretofore or hereafter made to any governmental, educational, literary, scientific, religious, public utility, public transportation, charitable or nonprofit corporation or association are hereby excepted from the provisions of this section.").

115. *1000 Brickell, Ltd.*, 339 So. 3d at 1096.

116. *Compare Warren*, 22 Iowa at 356–58, *with* Florida Cent. & Peninsular R.R Co. v. Ocala St. & Suburban R.R. Co., 22 So. 692 (Fla. 1897).

117. *Infra* pt. III.A.

118. *Infra* pt. III.

119. Roney Inv. Co. v. City of Miami Beach, 174 So. 26, 29 (Fla. 1937).

previously vacated by the since-superseded Town of Miami Beach.[120] Roney Investment Company lost a motion to dismiss and appealed.[121] Here, the court affirmed the trial court's decision because "[t]he bills of complaint involved here, however, both sufficiently charge an abuse of discretion in the passage of the ordinances and that the discretion of the officials in the adoption of the ordinances was exercised arbitrarily and without regard to the rights and necessities of the public" (remanding the case to the circuit court for a finding of facts).[122] However, before arriving at this decision, the court cited Corpus Juris and Ruling Case Law (legal encyclopedias) in providing the following dicta:

> While it is true that authority, as hereinbefore stated, is vested in the town council it is equally true that courts may review the exercise of such power where it has occurred arbitrarily and without regard to the rights and necessities of the public. The exercise of the discretionary power of the municipality to whom the power has been delegated to vacate streets is not ordinarily subject to judicial review unless there has been an abuse of discretion, fraud or glaring informality or illegality in the proceedings or an absence of jurisdiction. Also, it is recognized that a city has no power to sell or barter the streets and alleys which it holds in trust for the benefit of the public and cannot vacate a street for the benefit of a purely private interest.[123]

It is here in *Roney* that a "[local government] has no power to sell or barter the streets and alleys which it holds in trust for the benefit of the public and cannot vacate a street for the benefit of a purely private interest" entered Florida's common law.[124] This statement is attributed to Corpus Juris, whose specific provision states:

> Private and Public Interest. As has already been noted, a city has no power to sell or barter the streets and alleys which it holds in trust for the benefit of the public, and cannot vacate a

120. *Id.* at 27.
121. *Id.* at 26.

122. *Id.* at 29.
123. *Id.* (citations omitted) (citing 44 C.J. §§ 3625–26, p. 896 and 13 R.C.L. 69, § 62).
124. *Id.*

> street for the benefit of a purely private interest, although it receives a consideration therefor, and the question of whether the public interest is subserved cannot be made to depend upon how much the city will get by reason of its action. On the other hand, the fact that some private interest may be served does not render the vacation of a street or alley void, nor the fact that, while some private interests are benefited, others are incidentally damaged, where it does not appear that no consideration of public interest can have led to such vacation. Further, decisions to effect that it is against public policy for a municipality to demand and receive compensation as a condition precedent to the exercise of its power to vacate a street or alley no longer needed for public use are controlled by a statue authorizing such action on the part of the city, and an ordinance vacating a street or alley may be conditioned upon the payment of compensation by benefited property owners.[125]

A principal case cited in this conclusion is *People v. Los Angeles*, whose relevant portion actually quotes 1894 Michigan Supreme Court Case *Horton v. Williams*:

> The advantage which the public derives from the discontinuance of a way must arise from the vacation itself, rather than from the use to which the property is put, or from the fact that the city, through a deal with the individual specially interested, is to have an interest in the property acquired by such vacation. A city cannot barter away streets and alleys, nor can it do indirectly, by invoking its power of vacating ways, what it cannot do directly. Streets and alleys are not to be vacated at the instance of individuals interested only in the acquisition of the vacated property, and the exercise of legislative discretion in such matters must, at least upon the face of the record, be free from affirmative evidence that such discretion was invoked for individual gain, and its exercise influenced by an offer to divide the property acquired.[126]

In its reasoning, the court relied on precedential wisdom that "great mischief and wrong might be done by uniting several different schemes" in vacating right of way for the inducement of

125. 44 C.J. *Municipal Corporations* §§ 3625–26 (1926).

126. People v. Los Angeles, 62 Cal. App. 781, 789 (Dist. Ct. App. 1923); Horton v. Williams, 58 N.W. 369, 371 (Mich. 1894).

acquiring valuable property for free—"[t]he same motive might suggest the vacation of any street."[127] Many states followed suit in citing *Horton* when voiding "[t]he diversion of public property to private use [because it] is generally considered an abuse of power by those who are custodians of the rights of the public,"[128] and a body of caselaw establishing "the rule prohibiting cities from vacating public properties, which they hold in trust, for the private use of individuals and corporations."[129]

As an aside, another reason Florida practitioners may shy from the idea from vacations with consideration or condition precedent in favor of a private purpose is Article VII, Section 10 of the Florida Constitution,[130] which states (in part): "Neither the state nor any county, school district, municipality, special district, or agency of any of them, shall become a joint owner with, or stockholder of, or give, lend or use its taxing power or credit to aid any corporation, association, partnership or person."[131] However, such caution is not persuasive given the liberal authority granted to local governments in determining whether their actions are lawful. For example, *West Palm Beach v. Williams* found that Florida law expressed there was a valid public purpose in the

127. *Horton*, 58 N.W. at 371.

128. Lindauer v. Hill, 262 P.2d 697, 700 (Okla. 1953); *see, e.g.*, Van Witson v. Gutman, 79 Md. 405, 409 (Md. 1894) ("It is believed that no one will contend that [streets] can be taken for private use on any terms whatsoever."); People *ex rel.* Webb v. San Rafael, 95 Cal. App. 733, 740 (1st Dist. Ct. App. 1928) ("And it has been held that the advantage coming to the public from vacating a street must arise from the vacation itself, and not from the future use to which the vacated property is put."); Walker v. Des Moines, 142 N.W. 51, 53 (Iowa 1913).

129. City of St. Petersburg v. Atl. Coast Line R.R. Co., 132 F.2d 675, 677 (5th Cir. 1943).

130. *See, e.g.*, Bannon v. Port of Palm Beach Dist., 246 So. 2d 737, 741 (Fla. 1971) ("Section 10, Article VII, Florida Constitution of 1968, acts to protect public funds and resources from being exploited in assisting or promoting private ventures when the public would be at most only incidentally benefited."). *But see* Special Districts, Public Funds, Fla. Op. Att'y Gen. 12-26 (2012) ("[I]f the expenditure primarily or substantially serves a public purpose . . . the fact that the expenditure may also incidentally benefit private individuals does not violate Article VII, section 10) (citing State v. Hous. Fin. Authority of Polk Cnty., 376 So. 2d 1158, 1160 (Fla. 1979)); Orange Cnty. Indus. Dev. Auth. v. State, 427 So. 2d 174 (Fla. 1983); Linscott v. Orange Cnty. Indus. Dev. Auth., 443 So. 2d 97 (1983); *see also* City of Coral Gables v. Coral Gables, Inc., 160 So. 476, 478 (1935) (discussing the at-the-time equivalent Section 7 of Article IX of the Florida Constitution and stating "[w]hether in the form of ordinances or resolutions the acts of municipal corporations may be looked into by the courts to determine whether they were legally exercised, or whether the purpose accomplished by them was within the scope of its power, or whether they were in fact consummated through fraud or overreaching").

131. FLA. CONST. art. VII, § 10 (1968).

leasing of public lands for private use and that "such a finding should not be disturbed absent a showing that it is arbitrary and unfounded."[132] The court also opined that "it would be beneficial in many instances to lease surplus public property for non-public purposes so that the citizens and taxpayers would realize some tax relief resulting from the income" and that "it is not the function of the Court to pass upon the wisdom of the City officials, or to substitute its opinion for theirs, but only to determine if their action was unlawful."[133]

The involvement of private parties in a public improvement or plan of acquisition by a local government is constitutional provided a valid public purpose is effectuated,[134] and that such private benefit is "incidental to the main public purpose."[135] Although there does not appear to have been a constitutional challenge or common law argument against vacating right of way for consideration or condition precedent, the existing common law public purpose requirements for vacations short circuit any such contest of constitutionality.[136]

132. City of West Palm Beach v. Williams, 291 So. 2d 572, 578 (Fla. 1974) (citing State v. Daytona Beach Racing & Rec. Fac. Dist., 89 So. 2d 34, 37 (Fla. 1956)).

133. *Id.*; *see also* MCI Metro Access Transmission Servs. v. City of St. Louis, 941 S.W.2d 634, 642 (Mo. Ct. App. 1997) (discussing a telecommunications company that used city pipes to route cables for over 100 years). *But see* Colen v. Sunhaven Homes, Inc., 98 So. 2d 501, 503–04 (Fla. 1957) (citations omitted) ("It is also well settled that a county or municipality has no power to grant an exclusive franchise to a public service corporation to use the streets, unless, 'the power not only to grant a franchise but also to grant an exclusive franchise has been delegated to it by the Legislature either expressly or by necessary implication'." It is also generally held that the strict rules of statutory construction greatly limit if not exclude, an inferred authority to grant an exclusive franchise. The Supreme Court of the United States in the case of Freeport Water Co. v. City of Freeport, Ill., 180 U.S. 587, 21 S. Ct. 493, 497, 45 L. Ed. 679, held: 'The power of a municipal corporation to grant exclusive privileges must be conferred by explicit terms. If inferred from other powers, it is not enough that the power is convenient to other powers; it must be indispensable to them.'").

134. State *ex rel.* Ervin v. Cotney, 104 So. 2d 346, 348 (Fla. 1958).

135. State v. Clay Cnty. Dev. Auth., 140 So. 2d 576, 582 (Fla. 1962) ("[P]rivate purpose . . . served was purely incidental to the main public purpose").

136. *See supra* pt. III.

IV. JUDICIAL SHIFTS IN INTERPRETATION AND EVOLVING CASELAW

Even as the aforementioned common law prohibiting right of way vacations for private use promulgated throughout American courts, the inherent conflict was well known and acknowledged insomuch by Ruling Case Law in 1916:

> There is a conflict of authority as to whether a municipality has authority to vacate a street and then devote the land to private purposes. Some courts hold that the validity of the proceedings is not affected by the fact that they are had with the intention of devoting the land to such purposes, or at the instance and request and primarily for the benefit of property owners whose property will be benefited thereby. Others take the position that a highway cannot lawfully be vacated for the benefit of a private individual or corporation. It is sometimes held that express statutory authority is necessary to authorize a vacation for purely private purposes, and that the right to do so is not conferred by general charter power to vacate streets.[137]

A. *City of St. Petersburg v. Atlantic Coast Line Railroad Co.*, McQuillin's Municipal Corporations, and Practical Realities

This conflict manifested itself in Florida caselaw through the Fifth Circuit decision *City of St. Petersburg v. Atlantic Coast Line Railroad Co.*,[138] which specifically distinguished itself from *Lutterloh*,[139] *Ocala St.*,[140] and *Roney Investment Co.*,[141] through the expansion of the court's acknowledgement and understanding of public benefit where vacations of right of way are concerned.[142] Similar to the City of Miami in *Roney*, St. Petersburg had vacatur's remorse for a portion of street long since vacated in favor of an

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138. City of St. Petersburg v. Atl. Coast Line R.R. Co., 132 F.2d 675, 677 (5th Cir. 1943).

139. Lutterloh v. Town of Cedar Keys, 15 Fla. 306 (Fla. 1875).

140. Fla. Cent. & Peninsular R.R Co. v. Ocala St. & Suburban R.R. Co., 22 So. 692 (Fla. 1897).

141. Roney Inv. Co. v. City of Miami Beach, 174 So. 26, 27 (Fla. 1937).

142. *City of St. Petersburg*, 132 F.2d at 676–77.

Atlantic Coast Line Railroad Company train depot.[143] The freight and passenger depot was completed in 1905; but by 1913, another depot was constructed and challenged in court.[144] The court dismissed the action because the plaintiffs had other street access and there was no special injury—and the Florida Supreme Court upheld the decision.[145] Then in 1935, St. Petersburg passed an ordinance repealing the aforementioned vacating ordinances and authorizing its staff to seek remedy, after which the subject lawsuit was filed.[146]

Most salient to this Article, St. Petersburg argued that the vacation "was for the benefit of a private corporation, and therefore unauthorized and void."[147] Unacknowledged by St. Petersburg was the fact that the company, a railroad, was a public utility and its depot built for the benefit of the city and its residents.[148] The court washed its hands of the existing caselaw,[149] stating:

> The railroad company accepted the benefit of the ordinances and lived up to its obligations, and built a new passenger depot at the old location and a new freight depot at the agreed location on Eighth Street. It cannot be doubted that development of the freight and passenger transportation facilities to and from St. Petersburg played no small part in the progress and development of the City through the past thirty-five years. The case at bar does not fall within the rule prohibiting cities from

143. *Id.* at 675 ("By Ordinance 88, approved February 24, 1905, the City further authorized the railroad to occupy the vacated portion of Eighth Street described in Ordinance 73, 'for the purpose of constructing and maintaining a freight depot thereon.'").

144. *Id.* at 676 (citing Bozeman v. City of St. Petersburg, 76 So. 894, 897 (Fla. 1917)).

145. Bozeman v. City of St. Petersburg, 76 So. 894, 897 (Fla. 1917) ("[I]t is the settled law here and elsewhere that an individual cannot recover damages at law, or have relief in equity, against even an admitted public nuisance unless he makes a case of special and particular injury to himself . . . it is clear we think that the damage sustained by the complainants because of such obstruction, is not different in kind from the damage sustained by the community at large. It is true that complainants are denied the use of the street so obstructed . . . the remedy is through the proper public authorities.").

146. *City of St. Petersburg*, 132 F.2d at 676.

147. *Id.*

148. *Id.*

149. Roney Inv. Co. v. City of Miami Beach, 174 So. 26, 27 (Fla. 1937); Fla. Cent. & Peninsular R.R. Co. v. Ocala St. & Suburban R.R. Co., 22 So. 692, 696 (Fla. 1897); Lutterloh v. Cedar Keys, 15 Fla. 306 (Fla. 1875).

> vacating public properties, which they hold in trust, for the private use of individuals and corporations.[150]

In its departure, the circuit court rests upon Eugene McQuillin's legal treatise *The Law of Municipal Corporations*, Second Edition, which wrestles with what lawful "[g]rounds, motives and purpose[s] of vacation" are, much like this Article, beginning with the rules of settled and dated case law, and then evolving into a more contemporary framework; for example, Section 1520 begins:

> The first rule is that a street or alley cannot be vacated for a private use, i.e., for the purpose of devoting it to the exclusive use and benefit of a private person or corporation; but it may only be vacated to promote the public welfare. This so-called first rule is not, however, universal, for in some jurisdictions the city may vacate a street or alley for the purpose of conveying it to a purely private purpose or interest. The reason for the minority rule is that the right of the public is divested by the vacation of the street, and it thereby becomes private property.[151]

The treatise also restates the rule that "there is no power . . . to vacate a street or alley on payment of a cash consideration by an abutter."[152]

But, as is inevitable when compiling vacation case law, the treatise states "[t]hese . . . rules do not always harmonize, however, and as a result there is a considerable conflict in the decisions as to when the vacation of a street can be said to be for a private purpose."[153]

Finally, the treatise concedes:

> The true rule seems to be that a municipality cannot vacate a street or a part thereof for the sole purpose of benefiting an

150. *City of St. Petersburg*, 132 F.2d at 676–77.

151. MCQUILLIN, *supra* note 82, § 1520, at 347.

152. *Id.* at 346; *see* Titusville Amusement Co. v. Titusville Iron Works Co., 134 A. 481, 483 (Pa. 1926) ("The city could not irrevocably bargain away the right and duty to vacate, when occasion required it, even for a valuable consideration, any more than it could, under like circumstances, barter away its power to open streets.").

153. MCQUILLIN, *supra* note 82, § 1520, at 347.

> abutting owner, and that the power to vacate streets cannot be exercised in an arbitrary manner, without regard to the interest and convenience of the public or individual rights; but that the municipality may vacate a street on the petition of an abutter for his benefit where the vacation is also for the benefit of the municipality at large, i.e., where the use to which the vacated part of the street is to be put is of more benefit to the community than the retention of such land as a way for a street. As to what are public as distinguished from private purposes, an eminent legal author has said: 'The abolition of grade crossings, the construction or improvement of railroad depots and terminals, and the rearrangement of streets to secure a more regular and harmonious system, are public purposes for which the power of vacation may properly be exercised. So where the vacation is for public or quasi public buildings or grounds.'[154]

Therefore, given the conflicts in caselaw coupled with the court's pragmatic approach to settling the dispute, the finding of public benefit in the vacation dispelled the notion that the local government's action was inherently unlawful merely because private benefit existed.[155] It must be noted that this ruling can be construed not as weighing the public versus private benefit, but dispelling impropriety at the mere finding of public benefit—without consideration to the degree or gratuitousness of the private benefit in comparison to the public benefit.[156]

And perhaps this is not a departure from previous rules at all, as the court wrote in *Florida Central*, "a municipality can alter a street by abandoning a portion of it when done in the reasonable exercise of the powers conferred for the public benefit."[157] And read along with other U.S. and Florida Supreme Court decisions that concluded local governments' power to regulate streets allows

154. *Id.* § 1520, at 349–50 (citations omitted).

155. *City of St. Petersburg*, 132 F.2d at 677 ("The contested portion of Eighth Street was vacated; at great cost new depots were erected and switching facilities were constructed. These improvements did not enure alone to the benefit of the railroad, the City of St. Petersburg and its citizens were benefited by such improvements throughout all these years.").

156. *Id.*; *see also* Barth v. City of Louisville, 449 S.W.2d 24, 26 (Ky. 1969) ("[I]t is no bar to the closing of a street or alley that a private person will receive special benefit, so long as a public purpose is served by the closing.").

157. Fla. Cent. & Peninsular R.R. Co. v. Ocala St. & Suburban R.R., 22 So. 692, 696 (Fla. 1897).

them to permit private companies to operate on public right of way through lease,[158] nuance may be found in lawfully permissible outcomes. What becomes clear at this point is that a vacation of right of way vesting the underlying fee to the abutting owners for a private benefit that also provides a public benefit is lawful, whereas taking that underlying fee and providing it to a private third party (and not the abutting owners) is unlawful regardless of public benefit.[159]

However, the City of Lexington, Kentucky, in 1906 crafted a law allowing the latter through a framework converting public right of way to private ownership through the comingling of vacation and eminent domain processes, allowing for portions of roadways to be vacated and granted to private enterprises providing for a public benefit with compensatory damages paid to the abutting landowners.[160] This helps alleviate the issue with the common law proposition that the right of way is an easement held in trust on behalf of the public, and that should it be vacated, the easement is extinguished and the fee is assumed by the adjacent owner, as the underlying fee is simultaneously condemned.

However, there has been statutory reconsideration of the proposition that the right of way easement cannot be conveyed by a local government that holds the easement on behalf of the public. Prior to 2002, local governments were not believed to have the right to convey right of way easements.[161] Since 2002, local

158. *See* City of Owensboro v. Cumberland Tel. & Tel. Co., 230 U.S. 58, 69 (1913) ("That the power to 'regulate' embraces power to grant to such companies the right to place and maintain their poles upon the streets has been generally held."); City of West Palm Beach v. Williams, 291 So. 2d 572, 578 (Fla. 1974) ("The lease of public lands for private uses is a valid public purpose and such a finding should not be disturbed absent a showing that it is arbitrary and unfounded."); City of Pensacola v. S. Bell Tel. Co., 37 So. 820, 823 (Fla. 1905) ("[M]unicipalities which have the power and are charged with the duty of regulating the use of their streets, may impose a reasonable charge in the nature of a rental for the occupation of certain portions of their streets by telegraph and telephone companies, and may also impose a reasonable charge in the enforcement of local governmental supervision, the latter being a police regulation.").

159. *See supra* pts. III.A and III.B.

160. Henderson v. Lexington, 111 S.W. 318, 321–25 (Ky. 1908).

161. *Compare* Counties, Dedication and Vacation of County Roads and Streets, Op. Att'y Gen. Fla. 78-118, (1978) ("The county is not authorized, however, and cannot in any manner legally convey or transfer the ownership and control of the vacated roads or streets to a homeowners' association as such, but upon lawful vacation thereof the abutting fee owners

governments have been authorized to vacate and convey such county right of way to homeowner's associations; and since 2021, to vacate and convey such platted right of way to a community development district[162]—with these provisions not only conflicting with caselaw, but creating dueling and potentially conflicting processes between Chapters 336 and 177, Florida Statutes.[163] Further, quitclaim conveyances of such platted right of way easements are routine from local governments to the State of Florida's Department of Transportation ("FDOT").[164] And FDOT also has a process to quitclaim potential interest in property.[165] Thus, it can be inferred through these statutory provisions and practices amongst subdivisions of the state, that certain types of vacations and conveyances are occurring counter to established case law, and processes exist that convert an easement held in trust for the public to fee simple ownership passed to a private company (albeit a homeowners' association—which are typically not-for-profit corporations).[166]

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hold the title in fee simple to the vacated roadways or streets to the center thereof unburdened and unencumbered by the public's prior easement to use such roadways or streets for travel."), *with* FLA. STAT. § 336.125(1)(a) (2023) ("In addition to the authority provided in s. 336.12, the governing body of the county may abandon the roads and rights-of-way dedicated in a recorded residential subdivision plat and simultaneously convey the county's interest in such roads, rights-of-way, and appurtenant drainage facilities to a homeowners' association for the subdivision.").

162. FLA. STAT. § 177.107(1) (2023) ("The governing body of a municipality or county may abandon the roads and rights-of-way dedicated in a recorded residential subdivision plat and simultaneously convey the municipality's or county's interest in such roads, rights-of-way, and appurtenant drainage facilities to a community development district established under chapter 190 in which the subdivision is located.").

163. *See supra* pt. II.B.ii.

164. *See* FLA. STAT. § 335.0415 (2023) ("Public road jurisdiction and transfer process."); *see, e.g.*, OFF. REC. OF SEMINOLE CNTY., FLA., QUIT CLAIM DEED: L2 SPRINGSIDE ETC, Plat Bk. 6482, pp. 1–2 (Nov. 14, 2006) (illustrating a quit claim deed resulting from an access easement from County to FDOT); Casselberry City Comm'n Res. No. 08-1899, PUB. REC. OF CASSELBERRY, FLA. (July 14, 2008) (granting FDOT a quit claim deed).

165. FLA. DEP'T OF TRANSP., OFF. OF RIGHT OF WAY, RIGHT OF WAY PROCEDURES MANUAL, SECTION 10.5.11 DISPOSAL OF SURPLUS REAL PROPERTY DISCLAIMERS (July 27, 2021), https://fdotwww.blob.core.windows.net/sitefinity/docs/default-source/rightofway/documents/rowmanual/20220506_row_full.pdf?sfvrsn=3604477c_4.

166. *See* Proprietors of Mt. Hope Cemetery v. City of Boston, 33 N.E. 695, 699 (Mass. 1893) ("But liability to the exercise of the police power rests on different considerations, and that power does not extend so far as to include a right to require the transfer of property to another person without compensation. The distinction between public and private corporations is well marked and clear. Public corporations are governmental and political,

B. Conditions Precedent for Vacating Right of Way

While it is said local governments do not have the right to barter or sell streets, there is certainly differing and conflicting interpretations throughout American jurisprudence in what that means or entails. It is a reality that local governments, in vacating easements, require conditions precedent to those vacations to ensure sufficient public benefit—including obtaining additional and different easements,[167] site improvements,[168] or other commitments[169] from the applicant. In *City of Temple Terrace v. Tozier*, Florida's second district upheld such conditions precedent as they related to a vacation, tacitly approving the inducement of the vacation resolution with a development agreement.[170] In *Tozier*, a property owner sought vacation based on certain redevelopment expectations.[171] The vacation was conditioned on "specific terms and conditions contained in an enforceable development agreement and possible replatting of property approved by the City of Temple Terrace including, but not limited

like counties, cities, towns, school districts; mere departments of the government, established by the legislature, and modified and destroyed without their own consent. Private corporations are formed by the voluntary agreement of their members, and cannot be established without the consent of the corporators. Public corporations, as has been seen, may to some extent in relation to the ownership of property, partake of the character of private corporations; and, on the other hand, many private corporations are charged with some duties and obligations to the public, as in the case of railroad, telegraph, canal, bridge, gas, and water companies.").

167. *See, e.g.*, Resolution No. 5587, CITY OF LAKELAND, FLA. (Dec. 16, 2019) (vacating a public utility easement conditioned on a replacement easement being provided); *Request for Release of Easement*, CHARLOTTE CNTY., FLA., https://www.charlottecountyfl.gov/departments/budget-administrative-services/real-estate-services/request-for-release-of-easement.stml (last visited Apr. 6, 2024) ("The county may request replacement of the side easements.").

168. *See, e.g.*, Naples City Council Res. No. 14-13438, CITY OF NAPLES, FLA (Apr. 2, 2014) (vacating two drainage easements in exchange for a replacement drainage easement and relocation of a drainage pipe).

169. *See, e.g.*, LONGWOOD, FLA., ORDINANCE 16-2085 (2016) (vacating right of way easement but reserving unto itself perpetual drainage and utility easements and setting out conditions of subsequent easement use [a building] for those reservations).

170. City of Temple Terrace v. Tozier, 903 So. 2d 970, 974 (Fla. 2d Dist. Ct. App. 2005) ("[U]ndoubtably [the vacation] would not have been enacted by the City without the condition of a development agreement. Thus, if we were to conclude that the conditions were invalid, we would necessarily also have to conclude that the entire ordinance should fail because the legislative intent could not be accomplished without the condition of the development agreement.").

171. *Id.* at 970.

to, reverter and repeal provisions pertaining to th[e] ordinance."[172] However, the property owner's proposed site plan "bore little resemblance to the drawing that" was shown to the City to induce the vacation.[173] The City rejected the proposed site plan, deeming the vacation void.[174] The property owners filed suit, and the court granted partial summary judgment in favor of the property owners because "the conditions placed on the vacation were invalid because the City exceeded its municipal powers when it attempted to barter with the [property owners] over their property rights in exchange for the City's exercise of its legislative powers,"[175] in accord with previously discussed common law.[176] Specifically,

> [t]he court found no statutory or case law authority that would permit the City to place conditions subsequent on abutting private landowners in return for the vacation of a right-of-way, and the court expressly rejected the City's argument that the Municipal Home Rule Powers Act (the Act) grants authority for the City to take the action that it did.[177]

The court stated:

> While the Court recognizes and appreciates the City's desire to make the best and highest possible use of land within its boundaries, the attempt by the City to barter such property rights as a condition to or an exchange for the exercise of its legislative power to vacate streets no longer required for public use is not and does not constitute a municipal purpose.[178]

The trial court also relied on the 1971 second district decision *Naples v. Miller*, where a local government's vacation ordinance was partially invalidated because its conditions precedent were vague (a fact both parties stipulated to), but the remaining

172. *Id.* (citing TEMPLE TERRACE, FLA., ORDINANCE 1067 (2002)).
173. *Id.*
174. *Id.*
175. *Id.* at 972.
176. *See supra* pt. III.
177. *Tozier*, 903 So. 2d at 972.
178. *Id.*

(vacation portion) ordinance was held effective to avoid an absurd result.[179]

However, on appeal, the *Tozier* court rejected the trial court's reasoning and concluded that Florida law allows for legislation to have conditions precedent, and thereby upheld the vacation's conditions as part and parcel of the vacation (reasoning that without such conditions, the vacation would not have passed to begin with).[180] The court specifically distinguished its decision in (and essentially overturned) *Naples v. Miller*,[181] clarifying that the conditions precedent in *Naples* were invalid because they were vague, not because conditions precedent on a vacation are inherently problematic.[182]

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179. City of Naples v. Miller, 243 So. 2d 608, 610 (Fla. 2d Dist. Ct. App. 1971), *cert. denied*, 249 So. 2d 688 (Fla. 1971) ("All parties concede that the conditions contained in the ordinance are invalid because they are so vague that their precise meaning cannot be determined. A municipal ordinance should be clear, definite and certain in its terms and is invalid if it is so vague that its precise meaning cannot be ascertained. If the effectiveness of the ordinance is conditioned upon the necessity for the subsequent execution of a contract with private parties it cannot be held to provide the degree of clarity and certainty required of municipal legislation.") (citations omitted).

180. *Tozier*, 903 So. 2d at 973–74 ("Notably, in City of Naples, all parties conceded on appeal that the conditions contained in the ordinance at issue were so vague that their precise meaning could not be ascertained. Here, however, the City of Temple Terrace has made no concessions in regard to vagueness of the conditions set out in the ordinance, and we conclude that the conditions are not overly vague."); *see also* Lexis Case Note, FLA. CONST. art. VIII, § 2 ("Fla. Const. art. VIII, § 2(b) and Fla. Stat. ch. 166 of the Community Redevelopment Act provide authority for a city to impose conditions on the vacation of a right-of-way in relation to a development agreement between the property owner and the city.").

181. *Miller*, 243 So. 2d at 610 ("All parties concede that the conditions contained in the ordinance are invalid because they are so vague that their precise meaning cannot be determined. A municipal ordinance should be clear, definite and certain in its terms and is invalid if it is so vague that its precise meaning cannot be ascertained. If the effectiveness of the ordinance is conditioned upon the necessity for the subsequent execution of a contract with private parties it cannot be held to provide the degree of clarity and certainty required of municipal legislation.") (citations omitted).

182. *Tozier*, 903 So. 2d at 973–74 ("Notably, in City of Naples, all parties conceded on appeal that the conditions contained in the ordinance at issue were so vague that their precise meaning could not be ascertained. Here, however, the City of Temple Terrace has made no concessions in regard to vagueness of the conditions set out in the ordinance, and we conclude that the conditions are not overly vague."); *see* Timber Homeowners' Ass'n Inc. et al. v. City of Tallahassee and [Florida] Dept. of Env't Prot., Case. No. 07-2467, FLA. DIV. OF ADM. HEAR. (Sept. 2, 2008) (final order) ("the application [by the City] clearly meets the new policy criteria for abandonment of right-of-way and it is in the best interest of the general public"); *see also* FLA. CONST. art. VIII, § 2 (LEXIS through 2020 Legis. Sess.) (citations omitted) ("Fla. Const. art. VIII, § 2(b) and Fla. Stat. ch. 166 of the Community

C. A Hot Take on Eminent Domain

Although the caselaw on the issue raises questions as to the validity of conditioning a vacation on some form of compensation (via replacement easement, site development, etc.), a case could be argued, on behalf of the public, that rights of way are held for the public in trust, and the public is entitled to compensation under the Fifth (with the Fourteenth[183]) Amendment of the United States Constitution's requirement that just compensation be provided for a governmental taking—the act of vacating said right of way.[184] The act of vacating a right of way by the local government as body politic may be considered a governmental taking of that right of way from the public whose title is held in trust by that same local government.[185] Now, of course, the concept of "private property" would need to be radically redefined to extend to rights of way held in trust by local governments on behalf of the public, but other such cases involving rights of way, when taken for other competing public uses, were held to require compensation to the general

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Redevelopment Act provide authority for a city to impose conditions on the vacation of a right-of-way in relation to a development agreement between the property owner and the city.").

183. *See* Wilton et al. v. St. Johns County, 123 So. 527, 533 (Fla. 1928) (citations omitted) ("The Legislature cannot, under the guise of the exercise of the vast public and sovereign power of eminent domain which can only be exerted for a public purpose, take without his consent one citizen's property and give it to another for his mere private use, even though compensation be paid. To do so would also come in conflict with the Fourteenth Amendment to the Federal Constitution, as a deprivation of property without due process of law.").

184. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

185. *See* Loretto v. Teleprompter Manhattan Catv Corp., 458 U.S. 419, 428 (1982) (quoting St. Louis v. W. Union Telegraph Co., 148 U.S. 92, 98–99, 101–02 (1893) ("It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the state may if it chooses exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated.")); W. Union Tel. Co. v. Pa. R.R. Co., 195 U.S. 540, 570 (1904) ("A railroad's right of way has, therefore, the substantiality of the fee, and it is private property even to the public in all else but an interest and benefit in its uses. It cannot be invaded without guilt of trespass. It cannot be appropriated in whole or part except upon the payment of compensation."); United States v. Gettysburg Elec. Ry., 160 U.S. 668, 685 (1896) ("The power of [the government] to take land devoted to one public use for another and a different public use upon making just compensation cannot be disputed.").

public for the loss of their rights.[186] Therefore, this proposition transcends theoretical and hyperbolic navel gazing and must be considered a viable legal theory.[187]

And as it relates to vacations, with the landmark ruling *Kelo v. City of New London*, the U.S. Supreme Court ruled that economic development (among other things, historically) satisfies the public use requirement of the Fifth Amendment.[188] Some relevant highlights of the decision include: "[p]romoting economic development is a traditional and long-accepted function of government . . . Quite simply, the government's pursuit of a public purpose will often benefit individual private parties."[189] Moreover, it goes without saying that the Florida legislature responded to *Kelo* by curtailing local governments' ability to take private

186. *See Loretto*, 458 U.S. at 428–29 (1982) (quoting *St. Louis*, 148 U.S. at 98–99, 101–02); *Gettysburg Elec. Ry.*, 160 U.S. at 685; *see, e.g.*, Herr v. St. Petersburg, 114 So. 2d 171, 174 (Fla. 1959) ("[T]he transaction amounts to an equal exchange of properties between the City and the railroad, both having the power of eminent domain; and it is well settled in courts of other jurisdictions that where, in furtherance of a public purpose, a body politic is authorized to condemn land, it may condemn other property and exchange it for that needed to accomplish such purpose. This doctrine, known as 'compensation by substitution,' has been applied in highway re-routing."); *cf.* First Baptist Church v. City of Mauldin, 417 S.E.2d 592, 594 (S.C. 1992) ("A public street may not be vacated for the sole purpose of benefiting an abutting owner. However, the mere fact that the vacation was at the instigation of an individual who owns abutting property does not invalidate the vacation or constitute abuse of discretion, nor does the fact that some private interest may be served incidentally. On the other hand, it must appear clearly that no consideration other than that of public interest could have prompted the action.").

187. *See, e.g.*, Sarpy v. United States, 386 F.2d 453, 460 (1967) ("The test is what is reasonable under all the circumstances to restore the county to substantially as good a position as it was in prior to the taking, not what the county would prefer to have for long-range planning purposes, or what would be the most desirable improvement."); United States v. Alderson, 53 F. Supp. 528, 530–31 (S.D. W. Va. 1944) ("However, if the State of West Virginia has been damaged by reason of the closing of these roads, and thereby the State is legally compellable to spend money for improvements to make the roads reasonable outlets under all the circumstances, then the State is entitled to such damages as are necessarily incurred.").

188. Kelo v. City of New London, 545 U.S. 469, 484–85 (2005).

189. *Id.* at 484–85.

property for economic development,[190] and this hot take suspends Florida's constitutional and statutory responses to *Kelo*.[191]

Sufficient academic analysis and discussion of the *Kelo* ruling exists elsewhere;[192] and whereas prior vacations that benefitted private property owners were first questioned and impugned based on the argument that the private interests of entities ran afoul of public benefit,[193] the *Kelo* decision upsets this notion and brings economic development—a key reason for vacations to begin with—into the realm of public benefit, significantly reducing the common law threshold on the appropriateness of a right of way vacation.[194] *Kelo* essentially unties local governments' hands in their need for public benefit in vacating rights of way (and other easements) in favor of private entities who provide economic development, theoretically undercutting prior common law rules against vacations that inures private benefit.[195]

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190. Harry M. Hipler, *Conflicting Parameters of Code Enforcement Fines and Liens Pursuant to Chapter 162 of the Florida Statutes, Timbs, and the Eighth Amendment: How Much Is Too Much?*, 52 STETSON L. REV. 669, 715 n.264 (2023) ("As a result of Kelo and the fear that 'blighted area' was insufficiently defined in the statutes, the Florida Legislature passed statutory amendments contained in Florida Statutes sections 73.013-.014, that severely restricted a condemning authorities' power to take private property for economic development. This law amended Florida Statutes chapter 73 and created a prohibition against the transfer of property to a private entity or natural person that can be taken through eminent domain. Local governments are restricted to taking private property for uses that have historically had a public purpose, i.e., roads, utilities, public infrastructure, transportation related services, parks, civic buildings, and so forth.").

191. *See* Scott J. Kennelly, *Florida's Eminent Domain Overhaul: Creating More Problems Than it Solved*, 60 FLA. L. REV. 471, 474 (2008); *see also* FLA. CONST. art. X, § 6; FLA. STAT. § 73.013–.014 (2023); *cf.* R. Benjamin Lingle, *Post-Kelo Eminent Domain Reform: A Double-Edged Sword for Historic Preservation*, 63 FLA. L. REV. 985, 1008–10 (2011).

192. *See, e.g.*, Ilya Somin, THE GRASPING HAND, KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN (Univ. of Chi. Press 2015); Carla T. Main, BULLDOZED: KELO, EMINENT DOMAIN AND THE AMERICAN LUST FOR LAND (Encounter Books 2007); *see also, e.g.*, Samuel J. Ciulla, *Putting a Moratorium on Moratoria: Avoiding an Unlawful Regulatory Taking While Preserving Safe Rental Housing During a National Crisis*, 52 STETSON L. REV. 507, 519 (2023); Douglas J. Sale, *Free Enterprise vs. Economic Incentives: The Evolution of the "Public Purpose" Fulcrum*, 46 STETSON L. REV. 481 (2017); Gregory V. Jolivette, Jr., Kelo v. City of New London*: A Reduction of Property Rights but a Tool to Combat Urban Sprawl*, 55 CLEV. ST. L. REV. 103 (2007); Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rational Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 4 (2006).

193. *See supra* pt. III.

194. *See generally supra* pt. IV.C.

195. *Compare supra* pt. III, *with* pt. IV.C; *see also* W. Union Tel. Co. v. Pa. R.R. Co., 195 U.S. 540, 570 (1904) ("A railroad's right of way has, therefore, the substantiality of the fee,

The *Kelo* decision reshaped the concept of public benefit to encompass economic development. Additionally, it helps suggest that a vacation of property rights could be viewed as a form of taking, made legal by *Kelo's* broader interpretation of what constitutes a public benefit. Instead of simply questioning whether compensation is necessary, it can be argued that, as a matter of constitutional principle, local governments and private entities requesting the vacation of rights of way for economic development should be obliged to provide compensation to the public. These rights of way are held in trust by the local government on behalf of the public.[196] More than one hundred years later, there is wisdom in Lexington, Kentucky's vacation/eminent domain hybrid framework,[197] and after all, "a governmental entity which possesses fee simple title to property may convert the property to nonpublic uses even where the property had been originally acquired through eminent domain."[198]

For rights of way are not merely valuable for their present possessory use; the loss of such right of way or easement creates

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and it is private property even to the public in all else but an interest and benefit in its uses. It cannot be invaded without guilt of trespass. It cannot be appropriated in whole or part except upon the payment of compensation.").

196. *See generally* CNL Resort Hotel, L.P. v. City of Doral, 991 So. 2d 417, 420 (Fla. 3d Dist Ct. App. 2008) ("Our founders drafted the Fifth Amendment of the United States Constitution to provide that no person shall have property 'taken for public use, without just compensation."). *See* U.S. CONST. amend. V. The Fifth Amendment, Takings Clause, is made applicable to the states through the Fourteenth Amendment. *See* U.S. CONST. amend. XIV. Florida's state constitution also provides that "no private property shall be taken except for a public purpose and with full compensation." *See* FLA. CONST. Art. X, § 6,"); *cf.* Kelo v. City of New London, 545 U.S. 469, 484–85 (2005); Loeffler v. Roe, 69 So. 2d 331, 339 (Fla. 1953) ("We are fully aware that the public places of a municipality are held in trust by the authorities for the benefit of the people, but this principle does not prevent the vacation of the streets or portions thereof when done in the interest of the general welfare."); Longboat Key v. Lands End, 433 So. 2d 574, 576 (Fla. 2d Dist. Ct. App. 1983) (citing Hollywood, Inc. v. Broward County, 431 So. 2d 606, 611 (Fla. 4th Dist. Ct. App. 1983) ("[E]xactions for county level parks 'are permissible so long as . . . the exactions are shown to offset, but not exceed, reasonable needs sufficiently attributable to the new subdivision residents and . . . the funds collected are adequately earmarked for the acquisition of capital assets that will sufficiently benefit those new residents.'")).

197. Henderson v. Lexington, 132 Ky. 390, 393–94 (Ky. 1908).

198. Coral Gables v. Old Cutler Bay Homeowners Corp., 529 So. 2d 1188, 1190 (Fla. 3d Dist. Ct. App. 1988) (citing Mainer v. Canal Authority, 467 So. 2d 989, 992–93 (Fla. 1985) ("[O]nce fee simple title to property taken by governmental entity, whether through condemnation, purchase, or donation, public use of property may be abandoned and property converted to different use without impairment of title.")).

an immediate loss, but additionally, a loss in opportunity.[199] The opportunity cost of vacating a right of way or other easement is seldom fully realized until years later, after the vacation, traffic or drainage issues arise that would have been mitigated or alleviated through the exercise of the vacated easement.[200] Local governments have to navigate the complicated issues of competing public purposes; on one hand, redevelopment would create public benefit, but on the other, there may be a future use for said easement that is being foreclosed upon through the vacation.[201] It could be said that local governments therefore have a duty to barter rights of way, upon request and determination of a worthwhile public purpose, in exchange for a likewise public benefit so as to not run afoul of constitutional requirements and to protect the interests of the public on whose behalf the local government holds the rights of way in trust.[202]

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199. *See, e.g.*, Bedford v. United States, 23 F.2d 453, 456–57 (1st Cir. 1927) ("Careful consideration of these two opinions makes it clear that many of the difficulties, logical and under the authorities, that the court there met, grew out of the failure of the town of Nahant to claim full compensation -- not merely for its structures in the streets, but for its right in the land constituting the streets. The logic of these two decisions covers all rights and interests that towns have in highways, and, as already noted, the right to exoneration from the burden of constructing and maintaining a substitute way is a valuable property right belonging to the group of taxpayers called a town.").

200. Predicting the future use and need of a particularly dedicated public use easement, dedication, or property is difficult to ascertain until the moment the public utilizes the particular property—and even then, it is subject to change. *See* Hanna v. Sunrise Recreation, Inc., 94 So. 2d 597, 601 (Fla. 1957) (explaining that a park property's applicable uses change and evolve over time, perhaps beginning with a playground and recreational use, but evolving into other uses, such as parking, provided the use generally remains a park); *Coral Gables*, 529 So. at 1190.

201. *See also* Dickson v. St. Lucie County, 67 So. 2d 662, 665 (Fla. 1953) ("In acquiring rights of way public officials are no longer confined to acquiring only so much land as is necessary for pavement today but they may look to the future and acquire rights of way sufficient to take care of the needs of the foreseeable future. It is a matter of common knowledge that paved portions of highways are constantly being widened all over the state. When public convenience and necessity require the widening of an old road, if the public authorities did not secure a right of way of sufficient width at the time of the original construction, it is necessary that they acquire such additional right of way before the required improvement can be made.").

202. *Cf.* Loeffler v. Roe, 69 So. 2d 331, 339 (Fla. 1953) ("We are fully aware that the public places of a municipality are held in trust by the authorities for the benefit of the people, but this principle does not prevent the vacation of the streets or portions thereof when done in the interest of the general welfare."); Longboat Key v. Lands End, 433 So. 2d 574, 576 (Fla. 2d Dist. Ct. App. 1983) ("[E]xactions for county level parks 'are permissible so long as . . . the exactions are shown to offset, but not exceed, reasonable needs sufficiently attributable

1. Exactions Remain an Open Question

As an aside from the previous discussion, applicants in practice often insist that government asks are an unlawful exaction, and the issue of exactions when vacating easements (and local governments requesting replacement easements, compensation, or other public benefit) must be discussed. Private property is constitutionally protected from being taken for public use without just compensation.[203] However, government often exacts property rights from applicants in exchange for permitting approval.[204] The common law test to determine whether such exactions are lawful requires an "essential nexus" to and "rough proportionality" with the property sought by the government and the "societal costs of the applicant's proposal."[205] Provided that the government's request is reasonably related to the applicant's project and the breadth of the government's request is proportionate to the applicant's benefit and/or the society's detriment, the exaction is lawful.[206] However, exaction case law is based on permitting applications and the government gatekeeping development but-for the applicant ceding some property right without compensation.[207] Whether exaction common law applies to

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to the new subdivision residents and . . . the funds collected are adequately earmarked for the acquisition of capital assets that will sufficiently benefit those new residents.'" (citing Hollywood, Inc. v. Broward County, 431 So. 2d 606, 611 (Fla. 4th Dist. Ct. App. 1983)).

203. U.S. CONST. amends. V, XIV, § 1; Dolan v. City of Tigard, 512 U.S. 374, 383–84 (1994); Highlands-In-The-Woods, L.L.C. v. Polk Couty, 217 So. 3d 1175, 1178 (Fla. 2d Dist. Ct. App. 2017).

204. *See, e.g.*, Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 606 (2013) ("The principles that undergird our decisions in Nollan and Dolan do not change depending on whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant refuses to do so."); *Highlands-In-The-Woods, L.L.C.*, 217 So. 3d at 1178.

205. *Koontz*, 570 U.S. at 605–06 ("*Nollan* and *Dolan* accommodate both realities by allowing the government to condition approval of a permit on the dedication of property to the public so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal." (citing Dolan v. City of Tigard, 512 U.S. 383, 391 (1994)); *Highlands-In-The-Woods, L.L.C.*, 217 So. 3d at 1179 ("Under *Nollan* and *Dolan*[,] the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate state interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts." (quoting *Koontz*, 570 U.S at 606)).

206. *Koontz*, 570 U.S. at 605–06; *Highlands-In-The-Woods, L.L.C.*, 217 So. 3d at 1179.

207. *Koontz*, 570 U.S. at 605–06; *Highlands-In-The-Woods, L.L.C.*, 217 So. 3d at 1179.

legislative matters is yet to be decided.[208] Further, whether exaction case law applies to vacations, although adjudicative (or quasi-judicial) and dealing with land use in nature, appears arguable.[209] For now, the Supreme Court is poised to consider the lawfulness of impact fees in deciding "[w]hether a building-permit exaction is exempt from the unconstitutional-conditions doctrine as applied in [unlawful exactions caselaw] . . . simply because it is authorized by legislation."[210]

With that said, the courts "have repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights."[211] The government cannot deny a benefit to an applicant for reasons that infringe upon constitutionally protected interests.[212]

Even so, there is a pronounced difference between exactions garnered during the permitting process and the fruits of negotiated consideration during a quasi-judicial hearing.[213] Oftentimes,

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208. *Highlands-In-The-Woods*, 217 So. 3d at 1178 n.3 ("[I]t is unclear whether the Nollan and Dolan standard applies to generally applicable legislative determinations that affect property rights"); Edward D. Rogers, et al., *Legal Alert, Supreme Court Case Will Clarify Constitutionality of Permit Exaction Fees*, BALLARD SPAHR (Oct. 3, 2023), https://www.ballardspahr.com/Insights/Alerts-and-Articles/2023/10/Supreme-Court-Case-May-Clarify-Legality-of-Permit-Exaction-Fees ("On Friday, September 29, 2023, the Supreme Court of the United States granted certiorari in *George Sheetz v. County of El Dorado*, which should clarify the circumstances under which an exaction for a land-use permit created by legislation violates the Takings Clause of the United States Constitution. Specifically, the Court will consider whether an exaction is constitutional even absent an 'essential nexus' and 'rough proportionality' between the exaction and the impact of the property owner's development.").

209. *Cf. Highlands-In-The-Woods*, 217 So. 3d at 1178–79; Koontz, 570 U.S. at 600–18; Dolan v. City of Tigard, 512 U.S. 374, 386 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 850 (1987).

210. *Sheetz v. County of El Dorado, California*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/sheetz-v-county-of-el-dorado-california/ (last visited Feb. 18, 2024).

211. *Koontz*, 570 U.S. at 608; *e.g.*, United States v. Am. Libr. Ass'n, 539 U.S. 194, 210 (2003).

212. *See Am. Libr. Ass'n*, 539 U.S. at 210 (citing Bd. of Comm'rs, Wabaunsee Cty. v. Umbehr, 518 U.S. 668, 674 (1996)) ("[T]he government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected [rights]' even if he has no entitlement to that benefit.").

213. Sarasota County v. Taylor Woodrow Homes, 652 So. 2d 1247, 1251 (Fla. 2d Dist. Ct. App. 1995) (citing Treasure Island v. Strong, 215 So. 2d 473, 479 (Fla. 1968) (highlighting that while some patently illegal provisions may be deemed facially invalid and a developer

permitting is a largely administrative and/or ministerial process in which an applicant is asked to meet standardized objectives (local land development code regulations or Florida Building Code rules) in order to be allowed to utilize their land for a specific purpose,[214] whereas vacating an easement is a quasi-judicial decision that invokes the collective wisdom of the elected body of a local government supported by substantial competent evidence.[215]

Whereas an exaction may be described as a governmental ask in exchange for approval for something that an applicant is otherwise entitled to; such an exaction ought not be possible in the case of a vacation application where the government is under no duty to cede easement rights, and (contrary to the premise of an (unlawful or otherwise) exaction) may even be required to obtain (or be able to otherwise demonstrate) a public benefit for the

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may agree to an exaction at a hearing and subsequently file an action to determine the exactions lawfulness, when negotiating a major development, an applicant "rationally could have waived its personal constitutional right to compensation for . . . specific property."));
see also Treasure Island v. Strong, 215 So. 2d 473, 479 (Fla. 1968) ("In this case the City, under legislative authority, possessed the power to allocate on a fair and reasonable basis the benefits presumed to arise from the improvement and to prorate the same in terms of the construction cost, subject, however, to a timely showing by an affected property owner that such collective allocation was erroneous and unfair for the reason that the assessment against his property was not supported by commensurate special benefits derived from the improvement. This right is endowed by the constitutional imperative that an assessment in excess of special benefits accruing to the property is a confiscation or taking of property without due process. However, it is firmly established that such constitutional rights designed solely for the protection of the individual concerned may be lost through waiver, estoppel or laches, if not timely asserted."). *But see* Scott A. McLaren & Jeffrey W. Glasgow, *Success in Litigating Local Permit Denials: Alternative Theories of Obtaining Justice*, 86 FLA. BAR J. 10, 20 (Dec. 2012) ("A local government's decision on a rezoning application or request for a development permit is considered a quasi-judicial decision in most circumstances." (citing D.R. Horton, Inc., Jacksonville v. Peyton, 959 So. 2d 390, 398–99 (Fla. 1st Dist. Ct. App. 2007))).

214. Town of Manalapan v. Rechler, 674 So. 2d 789, 790 (Fla. 4th Dist. Ct. App. 1996) ("A duty or act is defined as ministerial when there is no room for the exercise of discretion, and the performance being required is directed by law." (citing Solomon v. Sanitarians' Registration Bd., 155 So. 2d 353 (Fla. 1963))).

215. *See* Bd. of Cnty. Comm'rs v. Snyder, 627 So. 2d 469, 474 (Fla. 1993) ("It is the character of the hearing that determines whether or not board action is legislative or quasi-judicial. Generally speaking, legislative action results in the formulation of a general rule of policy, whereas judicial action results in the application of a general rule of policy."); De Groot v. Sheffield, 95 So. 2d 912, 915 (Fla. 1957) ("[W]hen notice and a hearing are required and the judgment of the board is contingent on the showing made at the hearing, then its judgment becomes judicial or quasi-judicial."); *see also* Miami Beach v. State, 4 So. 2d 116, 117 (Fla. 1941) ("A ministerial act is distinguished from a judicial act in that in the former the duty is clearly prescribed by law, the discharge of which can be performed without the exercise of discretion.").

approval of a vacation request.[216] With that said, the question as to whether such negotiated consideration for a vacation may be considered an exaction at all, let alone unlawful (in excess of the *rough proportionality* test) remains open.[217]

D. Changes in Reliance on Local Governments by Society

Roads began as animal paths coopted by humans, formally evidenced as early as 6000 BCE (but surely in existence for much longer).[218] And although highways existed before the Industrial Revolution, it is certain society's reliance on roads thereafter increased exponentially. By the turn of the twentieth century, roads were used for travel, light, electricity, and communication.[219] Soon thereafter, other utilities were in rights of way, such as water and sewer.[220]

In tandem, the government expanded over this time and began providing services never contemplated by society—but soon universally accepted as critical and necessary.[221] Similarly, judicial decisions also tend to follow public opinion over time.[222] Therefore, when revisited through a modern lens, decisions from

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216. *See supra* pts. III & IV.

217. *See supra* pt. IV.C.1.

218. *See Road*, BRITTANICA, https://www.britannica.com/technology/road (last visited Feb. 18, 2024).

219. *See, e.g.*, Selden v. Jacksonville, 10 So. 457, 464 (Fla. 1891) ("[T]he use of a street for a surface horse railroad; the laying of sewers, gas and water-pipes beneath the soil; the erection of street-lamps and hitching posts, and of poles for electric lights used for street lighting. All of these relate to street uses, sanctioned as much by their obvious purpose and long-continued usage, and authorized by the appropriation of land for a public street." (quoting Lohr v. Metro. Elevated R.R. Co., 10 N.E. 528, 533 (N.Y. 1887))).

220. *See, e.g.*, Boothby v. Gulf Props. of Ala., Inc., 40 So. 2d 117, 118 (Fla. 1948) (stating that a plat dedication with "street car lines, electric light lines and poles, and other poles, gas pipe lines, telegraph and telephone line, water pipes, sewer pipes, and such other public utilities as it, the said dedicator, may elect to construct, maintain and operate in and upon said streets and alleys").

221. *See* Stephen Moore, *The Growth of Government in America,* FOUND. FOR ECON. EDUC. (April 1, 1993), https://fee.org/articles/the-growth-of-government-in-america/.

222. *See, e.g.*, *How the Supreme Court Shapes (and is Shaped by) Its Public Support*, NISKANEN CTR. (July 15, 2020), https://www.niskanencenter.org/how-the-supreme-court-shapes-and-is-shaped-by-its-public-support/ ("Most of the evidence suggests that the courts decisions particularly on important issues tend to be congruent with public opinion."); James F. Smith, *U.S. Supreme Court v. American Public Opinion: The Verdict Is in*, HARV. KENNEDY SCH. (July 13, 2020), https://www.hks.harvard.edu/faculty-research/policy-topics/democracy-governance/us-supreme-court-v-american-public-opinion ("[T]he court's position in every major case this term was exactly in line with public opinion.").

the nineteenth and twentieth centuries are softened, updated, nuanced, distinguished, or overturned.[223] Such has been the instance in regards to public benefit and right of way vacations in Florida between *Lutterloh* and *Kelo*.[224] As discussed, it appeared any private benefit deemed a vacation unlawful.[225] Then incidental private benefit was allowable.[226] Since *Kelo*, private benefit may be deemed a public benefit by virtue of economic development (and to be fair, this actually has circumstantially been the case even in

223. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 479 (2005) ("[W]hile many state courts in the mid-19th century endorsed 'use by the public' as the proper definition of public use, that narrow view steadily eroded over time."); Brown v. Bd. of Educ., 347 U.S. 483, 486 (1954) (overturning the 'separate but equal' doctrine for racial segregation in schools established by Plessy v. Ferguson, 163 U.S. 537, 540 (1896)); W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 389–90 (1937) ("We are of the opinion that this ruling of the state court demands on our part a reexamination of the *Adkins* [v. Children's Hosp., 261 U.S. 525, 540 (1923)] case. The importance of the question, in which many states having similar laws are concerned, the close division by which the decision in the *Adkins* case was reached, and the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the State must be considered, make it not only appropriate, but we think imperative, that in deciding the present case the subject should receive fresh consideration."). *But compare* Slaughter-House Cases, 83 U.S. 36 (1872), *with* Saenz v. Roe, 526 U.S. 489, 503 (1999) ("Despite fundamentally differing views concerning the coverage of the Privileges or Immunities Clause of the Fourteenth Amendment, most notably expressed in the majority and dissenting opinions in the Slaughter-House Cases, 83 U.S. 36 (1872), it has always been common ground that this Clause protects the third component of the right to travel."), *and* McDonald v. City of Chicago, 561 U.S. 742, 852 (2010) (Thomas, J., concurring) ("I reject that understanding [held in Slaughter-House Cases, 83 U.S. 36 (1872)]. There was no reason to interpret the Privileges or Immunities Clause as putting the Court to the extreme choice of interpreting the 'privileges and immunities' of federal citizenship to mean either all those rights listed in *Corfield*, or almost no rights at all."). *See also* Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631 n.178 (2001) ("This clause [Privileges and Immunities Clause of the Fourteenth Amendment] does not escape Justice Thomas, however, who goes out of his way to flag the issue. Of course, reviving the clause might require repudiating some of the language of The Slaughter-House Cases, which (on the most straightforward and conventional reading) virtually read the clause-the central clause of Section One!-out of the Amendment. Virtually no serious modern scholar-left, right, and center-thinks that this is a plausible reading of the Amendment (The holding on the facts of the case is far more defensible than some of the overly broad language). It is also worth noting that the Justices who decided the case in 1873 had not exactly been cheerleaders for the Amendment in 1867, and that the case was decided on a set a facts and at a time not especially conducive to a generous reading of the Amendment.") (citations omitted) (citing Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 655–78 (1994)).

224. *Compare* Lutterloh v. Cedar Keys, 15 Fla. 306, 308 (1875), *with Kelo*, 545 U.S. at 479.

225. *See generally supra* pt. III.

226. *Compare supra* pt. III, *with supra* part. IV.

Tozier).[227] The Court has expanded its definition of public benefit, and along with it, what is appropriate for the government to expend taxpayer dollars on.[228]

Likewise, where the courts would readily intervene in local affairs in *Lutterloh*, *Ocala Street*, and *Roney*, the courts eventually adopted case law that shifted with public policy to afford more power to local governments, stating the new rule that "[a] wide latitude of discretion is accorded to the government agency by the law applicable in such [vacations], and the exercise of that discretion will not be disturbed in the absence of a clear abuse thereof or unless there occurs an invasion of property rights."[229]

Modern local government schemes, like public-private partnerships, tax increment funding, and community redevelopment agencies, run afoul of the original intentions for government authority and early constitutional provisions. However, as Florida's constitution was rewritten (six times, now), along with its statutes (revised nearly every year since becoming a territory of the United States), local governments' powers and abilities to conduct affairs beneficial to private enterprises in the name of public benefit have grown exponentially.

It only follows that private land rights, coupled with statutory and common law restrictions on private inurement by the government and public sentiment, gave way for the emergent decisions regarding right of way vacations at the turn of the twentieth century. After all, Floridians were conscripted into road crews several days each year to ensure that the roads were passible. However, by the turn of the twenty-first century, the public's appetite for government services (and collective inability to pave roads themselves), shows in the caselaw, statutes, and

227. *See Kelo*, 545 U.S. at 479; City of Temple Terrace v. Tozier, 903 So. 2d 970, 974 (Fla. 2d Dist. Ct. App. 2005). *See generally supra* pt. IV.B.

228. *See, e.g.*, State v. Wash. Cty. Dev. Auth., 178 So. 2d 573, 578 (Fla. 1965) ("Section 10 of Article IX of the State Constitution does not prohibit the public loan contemplated in this case. This constitutional provision has been held in earlier cases to be inapplicable to situations similar to the kind involved in the instant project and the plan for its financing.").

229. Sun Oil Co. v. Gerstein, 206 So. 2d 439, 440 (Fla. 3d Dist. Ct. App. 1968) (citations omitted); *see also* Isleworth Grove Co. v. Orange County, 84 So. 83, 84 (Fla. 1920) ("When acting in good faith and within their statutory authority, county commissioners are by law accorded a wide administrative discretion, which will not be controlled by the courts unless illegality or abuse of discretion is shown.").

public policy in local government's powers to interfere, for the betterment of its jurisdiction, in the economies and lives of its citizenry. Essentially, what was likely unthinkable government power a hundred years ago is commonplace today. Regardless of one's political views or desires, this is a reality that must be accepted as true and contemplated when revisiting the caselaw of the late 1800s and early 1900s as it relates to vacations and private benefit.

E. The Thing About Fla. Op. Att'y Gen. 1978-125

On October 23, 1978, the Florida Attorney General's Office issued AGO 78-125 that squarely addressed whether a local government was authorized by law to "require abutting landowners who request vacation of a public street to . . . pay for the proportionate costs of an appraisal and for the proportionate appraised value of such property interest as conditions to the vacation."[230] Specifically, the AGO Opinion states:

> With regard to the instant inquiry, therefore, it is apparent that the Frostproof City Council does not "own" streets which have been dedicated to public use. *Cf.* AGO 078-118 in which this office concluded that a county was not authorized to convey or transfer ownership and control of dedicated streets to a "homeowners association" since the county possessed no legal title in the property which it could convey or transfer. Under such circumstances, there would appear to be no legal basis upon which the city could require abutting fee owners to pay to secure property interests which they already possess. *See* McQuillin *Municipal Corporations* s. 30.189, at 123 (3rd rev. ed. 1977), stating: "A municipality is not entitled to compensation for loss of a public easement in streets in which it does not own the fee." *Accord*: Lockwood & Strickland Co. v. City of Chicago, 117 N.E. 81, 82 (Ill. 1917), in which the court held, among other things:
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> "[I]t would be beyond the power of the city to grant or convey to a private person or corporation the ground embraced in a

230. Municipalities, Vacation of Streets and Roads, Rights of Property Owners, Fla. Op. Att'y Gen. 78-125 (1998).

> vacated street or alley. Whether a city owns the fee in an alley or merely an easement, when it is vacated because no longer needed for public use, the law disposes of the reversionary interest, and the reversionary rights cannot be granted or conveyed by the city. . . . Whether the alley was no longer needed for public use, and whether the public interest would be subserved by its vacation, could not be made to depend on how much the city could get for its action. The legislative powers of a city must be exercised for the public benefit, but that does not authorize a municipality to sell or bargain legislation as a means of obtaining revenue."[231]

And although opinions of Florida's Attorney General are not legally binding, they are given great weight by the courts and utilized by the local governments whose questions they answer.[232] And between 1937's *Roney Investment Co. and Twenty-Third Street Realty Corp. v. City of Miami Beach*[233] and AGO 1978-125, local governments are left with little authority to request payment in exchange for a vacation, no matter how valid the request.[234]

However, AGO 1978-125 is not infallible. First, it restates AGO 1978-118's position that local governments are "not authorized to convey or transfer ownership and control of dedicated streets to a 'homeowners association'"—a statement repudiated by Florida Statutes section 336.125, which prescribes the statutory scheme in which a local government may vacate a

231. *Id.*

232. Browning v. Fla. Prosecuting Att'ys Ass'n, 56 So. 3d 873, 876 n.2 (Fla. 1st Dist. Ct. App. 2011) ("Attorney General opinions are not binding on Florida courts and can be rejected. However, this court has previously held Attorney General opinions 'are entitled to great weight in construing the law of this State.'" (quoting Beverly v. Div. of Beverage of Dep't of Bus. Regul., 282 So. 2d 657, 660 (Fla. 1st Dist. Ct. App. 1973))). *But see* Bunkley v. State, 882 So. 2d 890, 897 (Fla. 2004) ("[O]pinions of the Attorney General are not statements of law.") (citations omitted).

233. Roney Inv. Co. v. Miami Beach, 174 So. 26, 29 (Fla. 1937) ("[Local government] has no power to sell or barter the streets and alleys which it holds in trust for the benefit of the public and cannot vacate a street for the benefit of a purely private interest.").

234. Memorandum from David C. Weigel on Potential Compensation for Vacation of Right-of-Way (Jan. 3, 2003), https://perma.cc/3289-KBZV; *cf.* City of Temple Terrace v. Tozier, 903 So. 2d 970, 973–74 (Fla. 2d Dist. Ct. App. 2005); Naples v. Miller, 243 So. 2d 608, 610 (Fla. 2d Dist. Ct. App. 1971), *cert. denied*, 249 So. 2d 688 (Fla. 1971).

roadway and simultaneously convey it to a homeowners' association.[235]

Second, AGO 1978-125 relies, in part, upon *Lockwood & Strickland Co. v. City of Chicago* for its moral reasoning against vacating an easement "as a means of obtaining revenue."[236] In the aftermath of *Lockwood*, the Illinois legislature amended its statutes to allow compensation as a condition precedent in vacating right of way, essentially nullifying or overturning *Lockwood*.[237] And although not wrong, AGO 1978-125 may have missed an opportunity to note that compensation would be permissible should statute change.[238]

Similar to the reading into the Corpus Juris reference utilized by *Roney*, a mistake is being made and echoed throughout caselaw as to the subtle distinctions between an allowable reason to accept payment for a vacation and an unlawful reason to accept payment for a vacation.[239] The argument against local governments selling off right of way for general funding and revenue purposes need not be had—but this instance must be distinguished from the valid and virtuous necessity of a local government to require certain improvements or payments in lieu thereof to offset the public's loss

235. Municipalities, Vacation of Streets and Roads, Rights of Property Owners, Fla. Op. Att'y Gen. 78-125 (1998). First codified as Florida Statutes section 316.00825 (2002) by Chapter 2002-235, Laws of Florida.

236. Municipalities, Vacation of Streets and Roads, Rights of Property Owners, Fla. Op. Att'y Gen. 78-125 (1998); Lockwood & Strickland Co., v. City of Chicago, 117 N.E. 81, 82 (Ill. 1917).

237. Puget Sound Alumni of Kappa Sigma v. Seattle, 422 P.2d 799, 808 n.1 (Wash. 1967) ("The Illinois legislature subsequently remedied this decision by authorizing cities to make a charge for street vacations. People *ex rel.* Franchere v. Chicago, 321 Ill. 466, 152 N.E. 141 (Ill. 1926), upheld this right and in effect overruled the decision of Lockwood & Strickland v. Chicago, 279 Ill. 445, 117 N.E. 81 (Ill 1917)."); People *ex rel.* Franchere v. Chicago, 152 N.E. 141, 144 (Ill. 1926) ("While under a former statute, which only gave to a municipality a limited power as to the vacation of streets, it was held in *Lockwood* v. *City of Chicago,* 279 Ill. 445, and other similar cases, that the municipality only held the title to its streets and alleys in trust, and that it was contrary to public policy to allow the municipality to demand and receive from private parties compensation as a condition precedent to the exercise of its power to vacate a street or alley no longer needed for public use, those authorities can have no application to the present case. . . . The action of the city council in the present case being expressly authorized by statute, it was not contrary to the public policy of the State.").

238. *See generally* Municipalities, Vacation of Streets and Roads, Rights of Property Owners, Fla. Op. Att'y Gen. 78-125 (1998).

239. *See supra* pt. IV.

of the actual or potential use and enjoyment of the easement.[240]

And this maligned chorus of mistaken caselaw has not gone without dissent. Washington State Supreme Court Justice Frank Hale dissented in *Puget Sound Alumni of Kappa Sigma v. Seattle*:

> I see little authority for and no merit whatever in the proposition that, once a city has decided it has little use for its property, it must give that property away. After all, a street to be vacated represents but one of many forms of surplus property from which the city should derive some consideration. The city's property belongs to all of its citizens; its officers and employees, whenever parting with anything the city owns, are bound in law to negotiate on behalf of their principal the best possible bargain, keeping ever in mind the municipality's best interests. The rule just announced in the majority opinion does violence to this idea; it compels the city to give away that which it acquired on behalf of the public for whom it holds all property in trust. Under the majority ruling, once the city has decided that the public service no longer needs the property, it not only must give it to a special class of persons strategically located to receive it, but, of more serious consequence, ask nothing for it on behalf of the beneficiaries for whom it was originally acquired.
>
> If, as the majority seems to have done, we declare a rule that the city of Seattle, in vacating a public street and thereby surrendering to adjoining owners its valuable rights in real property must do so without recompense to the public treasury, but, contrarily, must give such valuable property away to the abutting owners. . . .[241]

Further, Justice Hale's dissent outlines a pathway for the courts to revisit their understanding of rights of way from *easements held in trust*[242] to something more (and even superior to fee simple interest):

> [Rights of way] represent[] a tenure in land that resembles a fee simple absolute and in some ways rights in land of an even

240. *See supra* pt. IV.
241. *Seattle*, 422 P.2d at 807–08 (Hale, J., dissenting).
242. *See supra* pt. II.A.

> stronger and more abiding nature than those of a fee ownership. The city's rights and interests in the streets, for example, cannot be vitiated for nonpayment of taxes . . . Again, unlike private ownership in fee, the city's possessory rights in its streets may not be disturbed or infringed by adverse possession or prescription. The city cannot be forced to vacate. It enjoys an immunity from alienation and prescription unknown to fee simple tenure. The decision to vacate a public street under our statutes lies solely in the legislative authority of the city, a decision that body cannot be compelled to make even though the street is unimproved and unopened and the abutting owners show continuing occupancy and greater need of it than the public . . . Finally, as a crowning manifestation of the city's superior tenure when compared to that of a fee ownership, we have its freedom from creditor's rights. The city's possession, easement and rights in the streets may not be impaired or abrogated for debts and defaults nor through execution, attachment or sequestration. No creditor's rights may run against the city's possessory rights. Thus, its easement is free of the one most harrowing and frequently fatal burdens from which privately held lands suffer perpetual jeopardy -- compulsory sale under creditor's execution . . . This means that, when the city vacates a street, it actually parts with and turns over to the abutting owners not a mere easement, but extremely valuable rights in land. . . . Therefore, the city ought not be allowed, much less be compelled, to yield its property without securing for its people maximum benefits therefrom, for the legislative act of vacating a street is an act of public business, and the public business should be transacted in the public interest on the best terms attainable. The streets, being held in trust for the public by the city, ought not be vacated unless for a public purpose. . . . I would think the city council derelict in its duties had it not exacted for the public, on whose behalf it functions, a reasonable recompense for surrendering the public's property in lands having so substantial a worth, even though the surrender were in part for a public purpose. And I can think of no fairer way in determining whether the exaction be reasonable than to base it on the market value, as determined by a fair appraisal.[243]

243. *Seattle*, 422 P.2d at 808–10 (Hale, J., dissenting) (citations omitted).

V. CONCLUSION

At a minimum, this Article demonstrates there exists a myriad of conflicting statutes and caselaw that sow confusion throughout Florida in the application and practice of vacating rights of way and other public easements.[244] And ideally, this Article has demonstrated that albeit misguided, the law on the subjection of vacations has evolved over time as the use of such rights of way and public easements has changed in practice and with the public's expanded expectations for government services.[245] At the outset of right of way caselaw, roads were built for pedestrians, horses, and carriages.[246] Then came cars and railroads.[247] Along the way, telegraph wires gave way to electrical, telephone, and cable lines.[248] Water and sewer systems came along.[249] Times have changed, and the uses and expectations of rights of way and public easements along with them.[250] It follows that the law governing such rights of way and public easements will also need to change, adapt, and evolve as a matter of public policy.

Statutorily, commonsense changes can be made to both the platting and roadway chapters to harmonize the processes and powers granted to local governments, such as aligning advertising requirements, local governments' ability to vacate on its own motion, and other inconsistencies amongst the statutes discussed herein—including the need to quash absurdity and allow the

244. *See generally supra* pts. II.B–D. Additionally, the Author would like to footnote the absurdity between Florida Statutes section 177.42, which allows local governments to change the name of a subdivision, street, or other name constituting an ethnic or racial slur by ordinance (advertised and adopted as a law pursuant to Florida Statutes section 125.66), and Florida Statutes section 336.05, which grants counties plenary authority to rename roads. A strict reading of these competing statutes essentially allows counties to rename roads at their discretion (administratively, by resolution, or by ordinance) except for when such roads constitute an ethnic or racial slur—then the county must advertise an ordinance to change the street name.

245. *See generally supra* pts. II, III, and IV.

246. *See generally supra* pt. II. *See also Road*, *supra* note 218.

247. *See Road*, *supra* note 218.

248. *See id.*

249. *See id.*

250. *See id.*

holdover of vacated plats' legal descriptions and muniments of title.[251]

The legislature could create additional statutory authority and processes to empower local governments to address public policy issues (like affordable housing) by explicitly allowing local governments to simultaneously vacate right of way and convey the property to affordable housing providers or other economic catalysts like theaters or museums.[252] This is already done by contract in the private sector; a developer will buy two properties abutting a dead-end, vacate the piece of road, and replat or otherwise develop the former street into a home site.[253] Another such example is when the City of Naples closed a street to allow a theater to be built to spur revitalization in a decaying downtown.[254]

Additional statutory guidance can be provided for courts to define, limit, or otherwise direct the scope in which local governments can place conditions precedent on such vacations, such as specifically allowing compensation paid to local governments as an inducement to vacate right of way but limiting such compensation to harmonize with exaction law and requiring that the compensation provided have an essential nexus to a legitimate public purpose and be roughly proportionate to the impacts of the proposed vacation.[255] This limitation could prevent local government from taking money into its general fund, and instead utilize any proceeds in a manner that directly offsets reasonably perceived impacts in an amount that is reasonably

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251. *See generally supra* pts. II and III.

252. *See infra* notes 253–54.

253. In Collier County, the dead-end portion of 12th Street North was vacated by Resolution No. 2000-74. The adjacent parcels took fee to the centerline of the vacated right of way. More than twenty years later, a property owner consolidated the fee interest in the right of way and replated the vacated portion of the street to create a buildable lot. *See Top Gun Paradise*, OFF. REC. OF COLLIER CNTY., FLA, Plat Bk. 70, p. 11.

254. *See Naples City Council Regular Meeting Agenda*, No. 7.a–7.h, CITY OF NAPLES (Dec. 4, 2013), https://naples.granicus.com/MediaPlayer.php?view_id=14&clip_id=2187&meta_id=107216 ; *see also* The Naples Players, *History of the Naples Players' Facility*, YOUTUBE (Sept. 25, 2021), https://www.youtube.com/watch?v=wghQWd6vehc&t=124s&ab_channel=TheNaples Players; *Sugden Community Theatre*, EXPLORENAPLES.COM, https://www.explorenaples.com/sugden-community-theatre.php (last visited Mar. 24, 2024). Author's note: author has volunteered for and worked professionally for said theatre company in the past.

255. *See* FLA. STAT. § 70.45 (2023).

related to the land value (either by appraisal, purchase price, or taxable value).[256]

The courts, in authoring future decisions regarding the lawfulness of vacations with conditions precedent, should look not to the primordial vacation and rights of way case law, but should blend together modern twenty-first century approaches as taken by the *Tozier* and *Kelo* courts.[257] The courts and practitioners (and even the legislature) should find a path forward in allowing some level of bartering or sale or conversion of rights of way or public easements into fee simple interest to be disposed of in a manner beneficial to the public. This could be accomplished through the existing statutory allowance for the vacation and conveyance of roadway to a homeowners' association, other modern jurisdictions' interpretations on the matter, or through eminent domain and exaction statutes and caselaw.[258] And in the least, the courts must heed the nuanced distinction between selling a right of way as fee to an uninterested party versus exchanging consideration with abutting property owners as an inducement.[259]

Finally, based on the arguments and distinctions in this Article, the public, legal practitioners, and local governments should feel comfortable exchanging consideration as a public benefit to induce the vacation of precious rights of way and public easements. After all, these vacations must be for the benefit of the public—the true owner of these rights of way and easements.[260] A

256. *See, e.g.*, Longboat Key v. Lands End, 433 So. 2d 574, 576 (Fla. 2d Dist. Ct. App. 1983) ("[E]xactions for county level parks 'are permissible so long as . . . the exactions are shown to offset, but not exceed, reasonable needs sufficiently attributable to the new subdivision residents and . . . the funds collected are adequately earmarked for the acquisition of capital assets that will sufficiently benefit those new residents.'" (citing Hollywood, Inc. v. Broward County., 431 So. 2d 606, 611 (Fla. 4th Dist. Ct. App. 1983))).

257. *See generally supra* pt. IV.

258. *See generally supra* pt. I.

259. *See generally supra* pt. IV.

260. *See* Loeffler v. Roe, 69 So. 2d 331, 339 (Fla. 1953) ("We are fully aware that the public places of a municipality are held in trust by the authorities for the benefit of the people, but this principle does not prevent the vacation of the streets or portions thereof when done in the interest of the general welfare."); Fla. Cent. & Peninsular R.R. Co. v. Ocala St. & Suburban R.R., 22 So. 692, 696 (Fla. 1897) ("[A] municipality can alter a street by abandoning a portion of it when done in the reasonable exercise of the powers conferred for the public benefit."); Sun Oil Co. v. Gerstein, 206 So. 2d 439, 441 (Fla. 3d Dist. Ct. App. 1968) ("[I]t is well settled that this public trust concept does not prevent the abandonment, vacation or discontinuance of streets when done in the interest of the general welfare."); Woodlawn Park Cemetery Co. v. Miami, 104 So. 2d 851, 853 (Fla. 3d Dist. Ct. App. 1958).

strict and draconian application of the statutes and common law would essentially prevent most all vacations because it is preposterous to find, in fact, that a right of way or public easement is no longer needed, considering that it was dedicated to and accepted by the public for a specific purpose and there will likely always remain opportunity costs in relinquishing the public's right to those rights of way or easements.

The public is unlikely to ever benefit from a vacation of right of way or public easement unless there is a condition precedent establishing consideration and ensuring public benefit—in other words, right of way and other public easement vacations must be bartered and sold.