In Memory of Patsy Ford

The greatest use of a life is to spend it on something that will outlast it.

William James

Patsy Ford (1955 - 1999) was the only Office Manager the *Journal of Land Use and Environmental Law* had ever known until this point. Her dedication, sweat, and tears are the foundation of this *Journal* and her kindness and patience was a constant for every Editorial Board from 1988 onward. Aside from her commitment to this publication, she also was responsible for the day-to-day and year-to-year operations of the *Journal of Transnational Law and Policy* at the Florida State University College of Law. She passed away in November due to complications from cancer. This section is meant as a tribute to her from those whose lives she has touched through her work on this *Journal*. You are sorely missed and deeply loved. God bless you, Patsy.

Patsy Ford will always be remembered by me as a dedicated, patient and caring individual. Perhaps more than anyone, Patsy contributed to the success of the *Journal*. Through her dedication, the *Journal* became one of the premier environmental publications in the nation. Through her devotion, countless editors were trained over the years. She provided a level of continuity without which the *Journal* may not have survived. Her contributions are too numerous to list and too significant to quantify. Despite Patsy's tremendous contributions to the *Journal*, however, I most fondly remember her as a friend. As a friend to me, and a friend to the entire*Journal* family, she will be missed.

Ronald A. Christaldi

Editor-in-Chief, Volume 11

If I were bidding Patsy Ford farewell today and giving her my thanks for her service to the *Journal*, I would most remember her patience. Patsy's calm and amiable demeanor set a positive tone during stressful times when deadlines were nigh. Her ability to deal with the numerous personality types of *Journal* members and help us work together as a team was commendable. In her service to the *Journal*, Patsy has

been the *Journal's* collective memory from year to year-from its infancy to the present. The *Journal* will certainly miss her expertise and input, but as past *Journal* members, we will miss our relationships with her.

Elizabeth Williamson

Editor-in-Chief, Volume 12

Attempting to list Patsy Ford's contributions to the *Journal of Land Use and Environmental Law* would be impossible for there are far too many. In my opinion, the greatest contribution Patsy gave to the *Journal* was her tireless dedication to our success. Even more amazing is that she not only served this journal, she also provided the *Journal of Transnational Law and Policy* with the same level of dedication. As the last editor-in-chief to serve alongside Patsy, I watched in awe on a daily basis as Patsy continued to devote her time and efforts to both journals despite her failing health. With no outward indications as to the problems facing her, Patsy insured that not only was day-to-day business tended to but that the *Journal* was as prepared to continue its success in her absence. Patsy, your relentless pursuit of perfection in all that the journals have done in he past and all that they will undertake in the future is greatly appreciated. It is with a great sadness in our hearts that the *Journal* family bids you farewell.

Jeffrey A. Ferguson

Editor-in-Chief, Volume 14

COMMUNITY BY COVENANT, PROCESS, AND DESIGN: COHOUSING AND THE CONTEMPORARY COMMON INTEREST COMMUNITY

MARK FENSTER[*]

I. INTRODUCTION

It seems to me that cohousing is a means for people to make a major step toward community without giving up their privacy, or control over their personal lives.[1]

Though it requires more work, residents at Pioneer Valley [Cohousing] seem to enjoy controlling things where they live. "We run this whole place," Ms. Doyama said, hanging wet clothes next to her neighbors' on a community clothesline. "Nobody is telling us what to do. It's a sense of camaraderie, like we're all in this together."[2]

The common interest community (CIC)[3] is a type of private housing project organized within an association created by either statute or covenants running with the land, whose membership consists of holders of units in the development.[4] It is a central tool of private, commercial housing development, with approximately 205,000 CIC's comprising the residences of forty million Americans in 1998.[5] This prominence has led to the development of a large body of common and statutory law,[6] as well as extensive commentary by advocates and critics who provide vastly different accounts of the social, political, and legal effects of the form. Proponents celebrate the private community by covenant that the CIC form offers, while critics decry the purportedly anti-democratic and coercive effects that the CIC imposes on both its members and on society.[7]

This paper focuses on cohousing, an emerging, small-scale type of residential housing development that illuminates both the theoretical and doctrinal issues in the debates over the CIC. Increasingly popular,[8] cohousing developments are initiated, developed, and managed by residents (occasionally with the assistance of a commercial developer).[9] Cohousing adapts the legal forms of the CIC to a more intensive, deliberative democracy and explicitly strives for a sense of community by neighborhood. With privately owned, individual residences constructed around an extensive "common house" that includes shared cooking, dining, and childcare facilities, cohousing employs participatory management through collective, consensus decision-making.[10]

Cohousing's organizing principle, which operates in residents' active participation in the project's design, development process, and the group's governance, is to resolve competing desires for the inclusivity of community and the exclusivity of privacy. The community serves as the notion of a greater collective "we" that can be invoked while hanging wet clothes on a common line and represents an ongoing goal,

something towards which cohousing enables its participants to "make a major step." Privacy, in terms of control over an individual's or family's "private life," as well as a community's collective control over the use of its land, represents the core of selfhood that is continually under threat by the demands of agents external to both the self and to the group, with which the individual most closely identifies.[11] Neither an inclusive public community nor an exclusive privacy is essentially privileged in cohousing. The cohousing movement explicitly attempts to reject the classic isolationism and ideological homogeneity of the American commune,[12] the single family home's private enclave located within wasteful suburban sprawl,[13] and the middle class urban neighborhood that is only drawn together through shared fear of crime and random violence.[14] Cohousing posits a crisis narrative in contemporary housing based upon "[d]ramatic demographic and economic changes" that render "[t]raditional forms of housing" powerless to create and protect those parts of life "that people once took for granted—family, community, a sense of belonging."[15]

Property relations are one important way cohousing attempts to resolve the public-inclusivity/private-exclusivity conflict it identifies. This Article focuses on those moments in the process of cohousing development in which members seek to define their property rights through legal documents, including the founding documents of the group's initial incorporation, formal declarations of organizational form and property rights and restrictions, and bylaws that govern enforcement of these rights and restrictions. Working from the assumption that the creation of a set of covenants is a socially symbolic act that signals to others "a basis of association,"[16] the Article describes and analyzes cohousing groups' attempts in founding legal documents to resolve conflicts between the vision of the private common property of cohousing, and the accepted legal concepts of real property law, particularly those developed for CICs, within which the groups work.[17] In doing so, cohousing works from the assumption that the public/private dyad is equivalent to a commons/property dyad. By articulating a notion of recuperative synthesis in its legal agreements - community achieved through a private, enclosed public sphere and privacy achieved through a complex bundle of individual and common property rights - cohousing can both create a public community and protect private property. The fully realized property rights of cohousing should encompass what CIC proponents celebrate, the creation of community through contract and property ownership, while it overcomes what CIC critics condemn, alienation from public life and exclusion of outsiders through the creation of anti-democratic, gated communities.

This Article argues, however, that cohousing has not overcome the alienating, older models of property relations through the creation of new legal forms specific to cohousing. Instead, cohousing has proceeded by sometimes adopting, and often adapting, the already existing legal forms of the CIC. Due to the widespread

acceptance of these established forms by the disciplinary, regulatory regimes of lending institutions, the common law, and state statutes,[18] cohousing developments have tailored their visions of a new community to the conventions of the widely accepted, decidedly conventional community association, consequently reconfiguring and recreating the CIC as a more participatory neighborhood and democracy.[19]

Part I presents a general introduction to the design, composition, and development process of cohousing. Part II explains some of the legal issues that cohousing groups face, and the knowledge and perspectives of law that they circulate among themselves through periodicals, books, and the Internet. Part III presents case studies of the production of legal documents in three different cohousing groups. It focuses on three issues: first, how cohousing groups plan legal documents and non-binding agreements when the rights of individual property owners may conflict with the desire or needs of the community, or the desires of the community might conflict with the legal/financial regulatory system of private residential housing development; second, restrictions on the alienation or leasing of a unit, where sellers' interests in maximizing the price of their property may conflict with the group's concerns about the community's composition; and third, processes of community decision-making and dispute resolution, where concerns with communitarian values may conflict with decisional efficiency. Part IV relates cohousing and its legal forms and processes to the debate over CICs, and evaluates cohousing's attempt to develop intensive common property for its residents as a potential model for low-income housing. In addition, Part IV considers the implications of cohousing for understanding the relationship between community, selfhood, and property that are central to the debates surrounding CICs.

II. Community by Design

Originating in Denmark in the 1970s,[20] the cohousing concept was introduced in the United States in 1988 by architects Kathryn McCamant and Charles Durrett through their influential book and presentations on cohousing.[21] Cohousing's design exemplifies the "romantic resurgence" in contemporary architecture that combines nostalgia for an ideal notion of the simple, meaningful, and authentic historical town with modern concepts of progress and modernity, and an increased standard of living.[22] American cohousing has emerged as a viable alternative to the CIC form, which is a mixture of private and common property that is financed, organized, and designed by private developers, sold to individual homeowners with covenants that run with the land, and overseen by a private govern ment.[23] The CIC form itself is the result of a hybrid of utopian ideas about community, a desire for privacy through private property, and a concern with the maintenance of property values.[24] It is the culmination of the movement from early twentieth century "garden cities," through post-war suburbs created by "community builders," and, during the 1960s and 1970s, "new towns" like Columbia, Maryland and Reston, Virginia, to the concurrent boom

in condominium building and the rapid expansion of common interest developments in the last two decades.[25]

Proponents stress the design of cohousing's "physical environment" as integral to the support of community ties through the encouragement of social contact.[26] The placement of houses within a site varies widely among groups[27] with some communities, like Muir Commons in Davis, California, utilizing attached townhouse-type units,[28] while others, like Southside Park in Sacramento, California, include detached houses.[29] Regardless of whether individual units are attached, most cohousing sites cluster individual residences more closely than do most CICs. Clustering offers social advantages by increasing human interaction,[30] environmental advantages by minimizing human development on the land and protecting open space, and economic advantages by reducing the infrastructure costs of developing the property and through shared walls, further reducing building costs as well as costs of heating.[31] Nonetheless, cohousing properties are typically more expensive than similarly sized and equipped individual houses,[32] although savings from the energy efficiency of units and the sharing of amenities and equipment with the community may balance the added cost over time.[33]

As the nucleus of community activity, the common house is typically centrally positioned on the property, so residents walk past it frequently and can see it from their individual units.[34] Common houses generally include a large kitchen and dining hall for common meals, a children's playroom, bulletin boards for community announcements, laundry facilities, a meeting room, a lounge, and a craft workshop.[35] Therefore, they provide not only extra rooms that are either left out of or reduced in size in the individual dwellings, but also facilities that will attract activities shared by the entire community. Unlike the clubhouse or community room of the condominium or community association, the common house in cohousing is designed to be open and accessible to all members of the community at all times for a variety of participatory activities.[36]

III. Formation and Development Processes

While cohousing's design is central to its purpose of cultivating interactions within a development, the processes of group formation and project development are the initial stages of cohousing community building. Residents initiate a vast majority of cohousing projects and play integral roles in every stage of their development. They break down the conventional division in the development process of residential housing projects between developer-producer and homeowner-consumer and work collectively to create both common and individual property.

A. Initial Group Formation

The movement towards cohousing development begins with the organization of a group of interested individuals. Groups form in numerous ways, typically beginning with a core group of enthusias tic leaders who recruit new members through organizational meet ings that they advertise in local business and media outlets.[37] The leadership role assumed by one person or a few individuals is often crucial to the successful completion of a cohousing project.[38] As the group moves forward in the development and design processes described below, group membership may change as households drop out or enter.[39] Occasionally, continual frustration over the progress of development may lead an entire group to disband.[40]

From their beginnings as a collaborative enterprise, most co housing groups utilize a consensus decision-making process.[41] This requires that a meeting "facilitator" draw an open-ended discussion of an issue towards an end by stating a proposal that summarizes the group's preferences.[42] The group then discusses the concerns that individual members raise about the proposal and amends the proposal until the entire group reaches consensus.[43] Cohousing groups often use a somewhat complex system of hand or colored card signals to demonstrate degrees of agreement and disagreement with the discussion or to request the floor.[44] Members who dissent from the consensus that emerges may either step aside from the process (which then moves forward without them) or block the group.[45] Most cohousing groups include a modification from "pure" consensus within their decision-making process by allowing groups to "fall-back" to majority or super-majority voting if consensus cannot be reached on particular issues or over a specified period of time.[46] While the consensus process takes as much as a third longer to reach a decision than a majority voting process, proponents assert that it results in better solutions to problems, greater commitment to the implementation of the group's solutions, and more effective conflict resolution.[47]

In all, cohousing's processes of resident development and self-governance sacrifice the efficiency that comes from delegating responsibility of property management and maintenance for an ideal of procedural and substantive democracy that both encourages and demands the participation of members.[48]

B. Development Process (1): Project Development

Once a group forms and begins to meet regularly, it creates an initial, relatively open-ended but formal organizing agreement that establishes a purpose, delineates qualifications and financial obligations (if any) for membership, and lays out general meeting and decision-making procedures.[49] As the group grows, it becomes more financially committed to creating the development. The group attempts to find a site

and contributes to an initial pool of money to secure the land.[50]This step can often be time consuming, as it re quires group agreement to a general geographic location and a particular parcel of land to be purchased.[51] Most groups attempt to sell or rent all of the units before completion of the project to spread the financial costs and risks of development to as many parties as possible.[52]

Upon securing a site, a group must successfully move its project through the demands and processes of local land use bureaucracies.[53] Neighbors to a proposed site often raise objections and occasionally form coordinated resistance to the necessary approvals from local governments.[54] In Brunswick, Maine, for example, neighbors were concerned that the Cumberland County Cohousing Commu-nity would spoil the rural character of their neighborhood and were suspicious about the "type of people" who would move into the project.[55] After the cohousing group received the necessary approvals from the town planning board for its twenty-seven unit development, approximately one hundred neighbors signed a petition to block future large developments in the area by making zoning more restrictive.[56] Similarly, a condominium developer in Delray Beach, Florida organized local opposition to the Synergy Cohousing group, fearing an invasion of a "commune" into the community and because the project had a density of ten units per acre.[57] Successful cohousing groups have persuaded local governments and opposing neighbors by lobbying and providing testimony of cohousing experts at government and community meetings. Groups also attempt to assure local citizens that the development's residents will be "respectable citizens with worthy intentions."[58]

In all, the entire development process, from initial group formation through the end of construction, can last between two and eight years.[59] For example, members of the Blueberry Hill group in Vienna, Virginia, who planned to move into their community last year, first began making payments toward securing their site in 1994.[60] In the first stage of the group's planning process interested members paid a $100 fee to participate in regular meetings. Once plans became more definite, they paid $5,000 toward their individual residences and common land.[61] When enough members made the requisite financial contributions, the group began the process of choosing an architect. After zoning for the property was approved, members were required to pay $15,000 over a 21-month period to cover building construction, site work, consultant fees, architectural and engineering costs, legal and county fees, and taxes.[62]

Some cohousing groups hire private developers to alleviate the costs, risks, and work that are required during the early periods of a community's development.[63] Developers typically have valuable expertise that can prove helpful in site location, dealing with local government and land use laws,[64] and securing financing.[65] Yet in such cases, developers do not build the project on their own. Rather, residents shape the project and make the most important decisions in its

design and development.[66] Some proponents of using private developers in cohousing have argued that because the "community" life of cohousing is not defined by the process of creating physical structures, but by living within them, using professionals to assist in developing cohousing makes the process of building these communities more efficient and more likely to succeed.[67] In other words, the creation of the physical properties of cohousing is secondary to and detached from the practice of community.

C. Development Process (2): Legal Processes of Cohousing[68]

Cohousing projects typically face a number of legal issues that arise at specific stages in the group's development. A group's requirements for legal documents, predicated upon both its need to organize and its need to interact with external actors (such as realtors, builders, and lending institutions), change between the period in which the group attempts to create the physical form of the cohousing development and when, as one guide describes it, "the [group's] purpose will be to live in community."[69] In order to create the physical form, the group must work together both as a financially viable entity that can manage the complexities of real estate development and as a social organization that can collectively formulate plans and reach decisions. Similarly, in the midst of living "in community," the group must continue to adopt and adapt the arrangements and rules to which they previously agreed, and respond to internal conflicts and external pressures (such as the real estate market or local government) that might require new legal action or a redrafting of existing agreements. This is especially important because cohousing groups depend on the recruitment of strangers to reach the number of households necessary to finance the development and to form the community. Formal and widely accepted legal documentation provide group members mutual reassurance that their investments and rights as future homeowners are protected.[70]

Before the acquisition of property, simple documents that groups initially produce either by themselves or with the assistance of lawyers outline the group's general purpose. These documents also explain the decision-making process, qualifications for new members and provisions for member exit, as well as how the collection and maintenance of funds for the group's operation will be accomplished.[71] They enable groups to require commitment to the project through the signing of legally binding agreements and allow the group to sign contracts and borrow money by gaining the confidence of paid professionals, banks, and realtors through a demonstrable commitment of funds.[72] In addition, most cohousing groups include provisions in these early documents for consensus decision-making.[73]

When a major financial commitment like the purchase of prop erty is imminent, groups generally hire a lawyer to help them incorporate or sign a partnership

agreement that will require a substantial commitment of funds and will limit their liability.[74] As this stage will also require a group to finance its land purchase (if possible), obtain a construction loan, and begin arranging separate mortgages for the individual units (or, in the case of a cooperative, a blanket mortgage), the group must also choose the development's specific organizational form.[75] To this end, cohousing groups have adopted and adapted the well-established forms developed by CICs.[76]

As a legal form, the CIC is based upon three elements: associational ownership of common property,[77] deed restrictions that limit the individual owners' uses of their property,[78] and a mandatory homeowners association that administers the property and enforces restrictions on its use.[79] The legal relationships upon which the de velopment and its community association are based are created through servitudes that run with the land and are contained in the contractual agreement between the association's developer and the initial purchasers of units.[80] The vast majority of community associations are condominiums, in which common property is owned by all unit owners, or as homeowners associations, in which individual homeowners within a subdivision become members of the association that is typically a nonprofit, nonstock corporation that owns the common property.[81] A small minority of community associations are organized as cooperatives,[82] in which a cooperative housing corporation owns all of the real property and issues stock and proprietary leases to tenant-stockholders.[83]

To date, most American cohousing groups have chosen to or ganize as condominiums, with a minority organizing as cooperatives and subdivisions with community associations.[84] As one how-to guide for cohousing groups describes, "[c]ondominiums are a common legal structure for Cohousing because they are well defined, allowing groups to control common areas and giving individuals title to units. They have the added advantage of being well understood and accepted by the banking industry."[85]

The document that sets out a condominium's plan of develop ment and ownership, method of operation, and the rights and re sponsibilities of owners is variably called the declaration of the condominium, or the Master Deed, and in homeowner associations, the Declaration of Covenants, Conditions, and Restrictions (the CC&Rs).[86] It is recorded in local land records, is binding upon every person who owns land in the project,[87] is essential to lending institutions in their mortgage approval decisions,[88] and is the document most likely to be reviewed by courts to settle disputes.[89] Accordingly, cohousing experts advise that the declaration should closely follow the relevant jurisdiction's standard forms for the type of organization being created.[90] Most of the agreements and rules specific to a cohousing community should be placed in the by-laws and house rules.[91]

The bylaws are to the declaration what statutes are to a constitution.[92] Bylaws can be more specific to cohousing in general and to the wishes of the group in particular by providing procedures for decision-making and by stipulating binding rules and responsibilities. Except where required by statute, bylaws are private and need not be filed with any public agency.[93] While the bylaws need to be both accessible and stable as rules and provisions that are central to the operation of the group (generally requiring a supermajority or a consensus decision to be changed), they are also more easily amended than the declaration, which plays an important role in the resale of the property and in securing financing.[94]

In some ways, the cooperative form would seem more ideologi cally amenable to cohousing because it combines the common ownership of the land and improvements (including the common house and residential units) with a shareholder ownership interest and proprietary leases for residents. Cooperatives also allow greater control over the sale of the share interest that residents have in their units.[95] However, outside of financial institutions in the few northeastern states that finance cooperative housing, most banks are unfamiliar with cooperatives and are unwilling to finance such pur chases.[96] Furthermore, the Federal National Mortgage Association (FNMA or Fannie Mae), which purchases loans from banks, does not buy co-op loans.[97] Cooperative residents also face joint and several liability for all of the debts of members in the blanket mortgage that the cooperative association takes out.[98] Finally, in some areas co-ops may receive lower appraisals than condominiums because the appraised value may be aligned with rental property.[99]

These additional difficulties in organizing as cooperatives lead most developments to organize as condominiums.[100] Those that do organize cooperatively do so as market rate co-ops that allow members to negotiate the sale price of their shares and transfer the proprietary lease in their units without price controls.[101] No cohousing group to date has organized as a limited equity cooperative, which would provide an even stronger form of restraint on individual property rights by limiting the amount that sellers can demand for their units over their original purchase price.[102] Indeed, the leading cohousing guides advise against the limited equity model.[103]

When construction is complete, groups either supplement or replace some of their previous agreements with the more modifiable documents upon which the homeowners or residents association is based.[104] All CICs provide for the ongoing governance of the property by representative bodies and officials whose powers[105] arise primarily from the servitudes creating the association,[106] as well as from condominium and common interest ownership statutes.[107] If the CIC is incorporated, statutory authority grants power to those corporations.[108] The community's rules formalize and collect in one accessible document, group decisions about such ongoing concerns as limits on pets and work responsibilities for common

areas[109] that "tend to be much more fluid and changeable than the bylaws."[110] While the organizational structure and decision-making procedures established in the early legal documents continue to set the framework for the process of dealing with important issues (such as emergency assessments or important disputes between residents), smaller community issues are likely to be addressed in the continually evolving rules written by community members.[111]

D. The Limits to Innovation in the Cohousing Legal Development Process

Published guides on the cohousing legal process often stress that groups should obtain professional representation in drawing up documents and should refrain from creating wholly new or idiosyncratic legal forms. One guide suggests that a cohousing group's Articles of Incorporation be "an absolutely standard document" that "[m]ake[s] sure to observe traditions."[112] The same guide also recommends that for the sake of efficiency, a group should create a "simple, standard" set of bylaws, which is supplemented with a private, internal document establishing the development's more detailed procedures and policies.[113] When phrasing documents, the guide advises groups to "[k]eep things simple. Use English language (as opposed to legalese) agreements if at all possible. And don't re-invent the wheel. Seriously consider modeling your legal structure after someone else's."[114]

Rather than expressing an anti-lawyer populism that tries to avoid the technocratic rules and language of the modern legal document, cohousing's notion of legal simplicity is a pragmatic conservatism arising from "rational" concerns about property values, efficiency and the creation of an accessible, participatory community. Most printed guides warn cohousing groups not to waste their time, and that of their lawyer, creating their own legal documents.[115] One guide gives three reasons "to stay within the . . . 'mainstream' choices" of organizational form: the resale market for individual units, the ability to refinance a mortgage, and the availability of established statutes and common law to help resolve future questions and disputes.[116]

Thus cohousing's general approach to the laws of real property and planned communities is conflicted. In its originating narrative, cohousing perceives property as contributing to the dissolution of community, and cohousing represents a community-enabling solution to the problem of property. Yet the cohousing narrative also depends on, and indeed celebrates, property's ability to create a limited commons,[117] to protect the wealth and privacy of individu als, to establish a binding set of collaborative arrangements for members, and to enable the civilizing and socializing of individuals within the group.[118] Property thus enables the community of cohousing. This conflicted response to property law runs throughout individual cohousing groups' attempts to create legal documents that will "work"

(defined in terms of enabling the building of a development) and adequately reflect their desires for "community."

IV. Cohousing Case Studies

This section describes three cohousing communities, focusing on the ways in which each has attempted to draft agreements that follow established organizational forms while also including two types of provisions that would protect or enable community: limits on alienation and leasing; and specific stipulations as to decision making. The three accounts progress from the community that utilized the most standardized documents to that which for a variety of reasons created the most innovative and restrictive agreements with respect to the rights of individual shareholders.

A. Doyle Street Cohousing

The Doyle Street cohousing project, completed in April 1992[119] as the second newly built cohousing project in the United States, inhabits a converted warehouse in Emeryville, California,[120] a city across the bay from San Francisco and next to Oakland. It was developed by a resident group, none of whom previously knew each other,[121] that included a retired professor and his wife, an attorney raising her child alone, a woman raising her granddaughter alone, and a single professional woman.[122] The group developed Doyle Street with the assistance of two parties: the Cohousing Company, a Berkeley-based consulting group which helped to find the then-abandoned warehouse and aided the residents in their self-organization and decision-making processes, and a private local developer with whom the residents formed a limited partnership and who undertook financial responsibility for the project and oversaw the warehouse's renovation.[123]

Organized as a condominium, Doyle Street's two floors include twelve individual units on two levels that range in size from 780 to 1600 square feet.[124] Common facilities on the first floor (including a kitchen and dining room, children's playroom, laundry, and hot tub) total approximately 2000 square feet.[125] The units include high ceilings that enable sleeping lofts in many of the bedrooms, as well as individualized features like fireplaces and skylights.[126] All of the units' front doors open onto a common patio or terrace.[127] The apartments in Doyle Street, located within one of the most expensive real estate markets in the country, are not inexpensive. The most valuable unit in Doyle Street was recently estimated to be worth $275,000.[128]

Doyle Street faced fairly difficult obstacles in development because of its position as the first urban cohousing development in the United States and its location in both a tight real estate market and one of the most heavily planned and regulated land use

regimes in the country. It first had to win approval from the local planning commission. While the process of obtaining approvals from local government is a standard part of the development process for CICs,[129] Doyle Street faced especially strong opposition from neighbors concerned with increased neighborhood density, traffic, and with what was perceived to be the project's inadequate parking facilities.[130] Through a one-month active public campaign members of the group successfully appealed an initial rejection by the city planning commission to the Emeryville City Council.[131]

1. Legal form

An equally important obstacle to the Doyle Street cohousing project was the creation of contractual agreements that would enable the property relations, design, and decision-making elements of cohousing while still satisfying lending institutions at a time when there were no existing cohousing groups in the United States. In meetings with their attorney and developer, group members attempted to develop a set of management documents concerning community participation, the use of common facilities, and the orientation of new households in the community. As part of the mortgage application process, the residents individually submitted the CC&Rs they created to local banks, who in turn submitted them to the FNMA. As Doyle Street's consultants describe the process, Fannie Mae refused to approve the project because it was "too new and untried"[132] and potentially difficult for a bank to resell in the event of a foreclosure.[133] Fannie Mae's rejection effectively barred lenders from selling Doyle Street mortgages on the secondary mortgage market and led banks to withdraw tentative offers of mortgages to group members.[134] In response,

at an emergency group meeting, faced with the possi bility of being unable to finance the purchase of their homes, the residents decided to amend the CC&Rs to make no mention of the cohousing nature of the project. Even the legal name was changed to Doyle Street Condominiums [from the original Doyle Street Cohousing Community Association].[135] While they are free to amend their CC&Rs at any time, at this point, legally, residents have no way to ensure that the project will remain a cohousing community. Although the decision was difficult for the residents, once the changes were made, banks were willing to loan on the project.[136]

By virtue of the banks' unwillingness to lend to a cohousing group that attempted to build the provisions of cohousing into its formal documents, all references to the distinctive characteristics of cohousing had to be stripped from the Doyle Street CC&Rs.

Doyle Street's founding legal documents therefore closely resemble those of the standard condominium. Its articles of incorporation use the generic language of a non-

profit condominium management association.[137] The CC&Rs create owners' fee interest in their condominium along with an undivided equal interest in the development's common areas,[138] which includes both the physical rooms and the equipment within them.[139] As established in the Doyle Street declaration, voting rights also follow standard condominium form,[140] reserving for the declarant/developer three votes for each unsold condominium until the total votes of the owners of individual units equaled the total votes of developer, or until the second anniversary of the original issuance of the final public subdivision report for the development.[141] Since the cohousing process attempts to minimize the typical division of the condominium development process between the developer-seller and the resident-consumer, this formal reservation of voting power is typically less important in pre-sold, resident-developed cohousing projects than privately developed CICs. However, in the case of Doyle Street the developer retained voting control because four of the units remained unsold for a time after the initial residents moved in.[142]

2. Restraints on Alienation

The prevailing CC&Rs provide Doyle Street residents with little formal control over the composition of their community in two important ways. First, under the CC&Rs, residents have no power over the process by which owners may rent their unit. Owners need only provide the association with the names of the occupant-renters and with their own addresses and telephone numbers.[143] More importantly, the group retained no right of first refusal or any other restriction on the right of the owners of units to sell.[144]

Despite this, the group has attempted to protect entry into the community by renters and buyers through formal agreements that are separate from the official CC&Rs and bylaws. Through "participation agreements" for owners and renters, original and subsequent residents are urged to make a number of commitments. Buyers are informed that any tenants or buyers are subject to an orientation process and will be required to sign a participation agreement. These new owners will have to commit to playing "an active role" in the community association by participating in the preparation of common meals and contributing to the maintenance and improvement of the property.[145] The renter's agreement recognizes that an occupant must abide by the development's CC&Rs, bylaws, and house rules, as well as share the same active roles and responsibilities in the community owners.[146] The only right that renters do not share with owners is to participate in financial decisions such as the annual budget.[147] On matters "concerning plans or arrangements . . . set up for working, playing or just living together,"[148] renters participate equally in the consensus process, including the power to block consensus or to vote in case consensus breaks down.[149] Thus far, Doyle Street has not experienced any conflicts

arising from the active role that renters play in the decision-making process.[150] The agreements are voluntary, although the majority of residents have signed them and their provisions have been followed in every sale and rental so far.[151]

3. Decision-making

On the other hand, the Doyle Street CC&Rs explicitly define a consensus decision-making regime for its condominium association's governance. While the three members of the initial Board of Directors make decisions by a majority vote, once the declarant's voting rights end, the "Appointed Board of Directors" make decisions by consensus.[152] If consensus fails, one member present at the meeting can call for a vote on an issue under discussion. If six members in attendance agree, the group holds a formal vote whose outcome is determined by a majority of the quorum present (as long as no fewer than six eligible voters are in favor of the proposal).[153] Three or more voting members, however, may request that the issue be referred to non-binding mediation.[154] If mediation fails after thirty days, the issue returns to the Board for a majority vote.[155] The CC&Rs also stipulate a specific alternative dispute resolution procedure before parties can formally litigate disputes. Beginning with non-binding mediation,[156] disputants are required to move to non-binding arbi tration[157] as a final step before proceeding to formal litigation in court.[158]

B. New View Cohousing

New View Cohousing, a condominium located in the Boston suburb of West Acton, Massachusetts, began with the formation of a core group of interested households in October 1989.[159] First established by Yvonne Bauer after she read McCamant and Durrett's book on cohousing, the group grew from her circle of friends and acquaintances by recruiting new members through advertisements posted in food co-ops.[160] Membership during its early stages was fluid, with some people departing the group because of their desire to keep the planned cohousing development's prices more affordable, rather than like the traditional, market-rate suburban housing model within which New View eventually developed.[161]After spending more than two years searching and unsuccessfully bidding for land in the Acton area, the group finally found and assembled multiple parcels of land totaling 19.5 acres.[162] Once the group purchased the land, demand for membership grew beyond the number of available slots and the group created a waiting list. The residents that eventually purchased units and moved into New View include "traditional" two-parent families as well as single mothers, older singles, and a lesbian couple.[163]

Situated on a secluded wooded hillside, New View's mixture of attached and detached units is clustered in groups of four or five units with pedestrian paths winding between them and the central parking lot.[164] All of the units are designed with the kitchens

in front, overlooking the pathways and common land. The living rooms are set in the back of the house.[165] Residents began to move into the units in April 1996 and broke ground on their common house in 1998.[166] Before the common house's completion, common meals were held as revolving potluck dinners in individual residential units.[167]

The New View units are relatively large and expensive, with nine of the twenty-four units having between 2,200 and 3,000 square feet and costing more than $300,000.[168] The most expensive unit sold for $420,000.[169] While close to the market average for suburban West Acton, the figure is double the median home price for the Boston area.[170]

1. Legal Form

The group's earliest agreement created, documented, and con trolled the use of an "earnest money fund."[171] Initially made up of $1,000 contributions and monthly fees from each household, the fund was intended not only to cover the ongoing costs but also to solidify the group and communicate to banks and developers its commitment to developing a cohousing project.[172] While it shopped for land, the group hired a lawyer to work with its legal committee to create a non-profit corporation that would protect members from potential liability.[173]

Group members ultimately chose to organize as a condominium rather than as a cooperative after learning that in Massachusetts, the condominium form was more advantageous for homebuyers seeking a mortgage.[174] Indeed, because mortgage approval cast a wide shadow over the organization as it developed, the group required that membership be contingent upon "proving pre-qualification for a mortgage in the range . . . expect[ed] ."[175] The charter itself included two provisions distinctive to cohousing: a set of principles about community and property rights, and a consensus decision making process that would be included within the Declaration of Trust discussed *infra*. The Master Deed, on the other hand, is a straight-forward document describing the property, individual units, common areas and facilities, as well as unit owners' percentage interest in them. It also delineates the powers of the condominium's trustees and the rights of mortgage holders.[176]

2. Restraints on alienation

In its Master Deed, the New View group reserved the right of first refusal for any sale or transfer of a unit. This provision is explicitly allowed in deeds under the Massachusetts condominium statute.[177] The New View Master Deed asserts that the right of first refusal is "exercisable as a means of insuring owner-occupancy of a Unit and to insure the continuance of the mission of the Condominium Trust . . . but

only upon the terms and conditions set forth herein,"[178] and with the proviso that the right be used in a non-discriminatory manner.[179] However, in order to comply with requirements set by Fannie Mae and the Federal Home Loan Mortgage Corporation the right of first refusal does not extend to mortgagees in the case of any lease, sale, or transfer of a unit related to a mortgage foreclosure or in case of the transfer of a deed in lieu of foreclosure.[180] Thus far, the limited formal protections of these provisions have not been necessary, as evidenced by the first sale of a New View unit from an original resident to a family on the waiting list.[181]

New View did attempt to enhance its limited control over the composition of the community through restrictions on the renting of units. The original drafts of the Master Deed stipulated that any unit or part thereof could only be leased with the written permission of the Trustees and "in accordance with the By-Laws."[182]

3. Decision-making and Dispute Resolution

While residents may have felt constrained by organizing as a condominium in developing their legal agreements, New View's Declaration of Trust, which constituted the framework of members' collective relationships to each other and individual rights to their property, included an extensive description of the goals of the project and outlined their consensus decision-making process. These descriptions were not based upon the boilerplate of condominium law. Instead, they were the documentary passages in which the New View group attempted to delineate substantive and procedural aspirations for its future decision-making that would develop and protect the group's distinctiveness as a cohousing project.

The aspirations appear in the section of the Declaration of Trust devoted to enumerating the organization's purposes. The first part of this section describes the condominium's "general purposes," and defines the general statutory rights and powers of the trustees to "exercise, manage, administer and dispose"[183] of the trust under Massachusetts law.[184] However, the other. entitled "Furthering Goals of Condominium,"[185] is specific to New View as a cohousing project. It lists eight general goals that describe the condominium as one "whose architectural and social organization will enrich the daily lives of the Unit Owners,"[186] that will "encourage, through shared responsibilities and other means, a sense of community among Unit Owners,"[187] and that will be "a secure and enriched setting for children,"[188] "environmentally gentle,"[189] and "affordable."[190] Standing out in a document where the majority of legal language comes from the boilerplate of condominium law, this section, though vague and lacking enforcement provisions, is an attempt to define the group's goals in its future substantive decisions in a legally binding contract that runs with the land. Exceeding the common utilitarian contents of the model condominium declara tion,[191] this statement of purpose is at once a set of

structuring principles that will prove difficult to follow if they are not made enforceable in the bylaws and house rules, and a symbolic, communitarian intervention into the legalistic discourse of contract and property that seems weighed towards defining individual rights and obtaining approval from external actors — namely lenders seeking to protect their investment in loans to individuals from what mortgage holders might consider their mortgagees' excessive mutual obligations to fellow community members.

If these goals attempt to construct a substantive framework for New View's future, the New View declaration's "modified consensus" process, which must be used for all decisions made by the trust and its individual unit owners, provides a procedural framework for future decision-making.[192] This process requires that in order to adopt a proposal, all of those eligible to vote must either agree with it or stand aside.[193] Its "fall-back" provisions allow for a proposal that does not pass within a specified time to be tabled until a subsequent meeting[194] and, after three failed attempts to reach consensus, to come to a vote.[195] According to one original member, the group has relied on voting only twice in its ten years of existence.[196]

The New View declaration includes an alternative dispute resolution framework that seeks to avoid litigating conflicts. Under the declaration, disputes that cannot be resolved through good faith negotiation efforts by the parties must first go through a formal mediation process. They may then be subject to binding arbitration.[197]

4. Conclusion

Designed as a suburban project with homes that are typical in size and price for the suburb in which it is located, New View adapted the condominium cohousing form through provisions that attempt to retain cohousing community ideals in its legal documents. These provisions set unenforceable substantive goals and establish standard cohousing procedural frameworks for decision-making.

C. EcoVillage Cohousing

In its development process and organizational forms, the Eco Village Cohousing Cooperative (EVCC) strayed further from the typical condominium/homeowners association model. Completed in August 1997, it is located two miles west of downtown Ithaca, New York.[198] Its land was originally part of a 176-acre parcel of fields, woods, and wetlands owned by EcoVillage at Ithaca (EVI), a nonprofit educational institution with ties to Cornell University.[199] EVI sold a portion of its land to EVCC, holding the remainder in a land trust with plans to sell a limited number of discrete parcels for additional "eco-village" cohousing neighborhoods on its site.[200] EVI maintains the undeveloped land for preservation, agriculture, and

passive recreation.[201] EVCC's pre-existing relationship with EVI made land purchase relatively easy, allowing the group to bypass the lengthy and difficult process through which more typical cohousing groups like Doyle Street and New View must go.

The "eco-village" concept that EVCC attempts to embody en courages the mixed use of land for domestic, agricultural, and commercial use while limiting the use of power and water.[202] Although consistent with the general concept of cohousing,[203] only a few currently existing cohousing projects in the United States call themselves eco-villages. In the words of one cohousing community member, who suggests making only minor modifications to existing building methods, ecovillages are difficult to create because an "ecologically sound building site" is more expensive to build and more difficult to maintain than a conventional development.[204] In addition, such a project is more likely to meet with resistance from conventional local building codes and departments.[205]

EVCC includes thirty units, all of which are attached duplexes lining a pedestrian walkway the width of a small street. Homes range in size from 922 square feet one-bedrooms to 1642 square feet four-bedrooms, while the majority are 1300 square feet three-bedrooms.[206] The EVCC common house, located at one end of the central walkway, includes a dining area that overlooks the property's pond, restaurant-style kitchen, children's play room, sitting room, private offices, guest room, crafts room, teen room, root cellar, and laundry facilities.[207] The carport is detached from the neighborhood, and includes a wood shop and recycling/storage shed.[208] All of the structures at EVCC are designed to achieve high-energy efficiency through solar power, insulation, and shared hot water. In addition, individual units forego full-sized kitchen appliances and their own laundry facilities under the assumption that residents will take advantage of the facilities at the common house.[209] The basement of the common house includes office space that is part of the proprietary leases of the residents who use the small offices for their businesses.[210] The smallest unit, a one-bedroom, cost $90,000, while the largest and most expensive unit is a four-bedroom, which sold for $155,000.[211]

Residents typically share three meals per week in the common house and each resident helps to prepare a common meal approxi mately once per month.[212] The common house is also the site of evening events like parties, potlucks, and talks by invited speakers. Residents share the common work of cooking, cleaning, and outdoor maintenance through a rotating "work team" system.[213]

The EVCC resident group is organized as a housing cooperative in which members purchase shares associated with their unit through a proprietary lease.[214] The cooperative acted as its own developer, hiring a private firm as architect and

development consultant, and contracting directly with private builders.[215] One important reason for EVCC's greater self-sufficiency is that since its inception, the group has included Susan McGreivy, a gay rights activist and attorney, who previously worked for the ACLU in Los Angeles. While not a member of the New York Bar Association, McGreivy has overseen the production of most of EVCC's agreements and documents with the help of local counsel.[216] She remains an active member of the EVCC community, attending meetings and assuming a leadership role due to her familiarity with the charter, by-laws, and proprietary lease. She also continues to coordinate EVCC's dealings with local government concerning land use issues.[217]

1. Early Legal Documents

EVCC's earliest charter, written in August 1992, was intended by prospective members to raise capital and define the financial and time commitments that the "core group" and waiting list households would be required to make.[218] Non-financial commitments of households included regular attendance at resident meetings and participation in at least one committee or task group. Absence at more than three of the twelve monthly meetings in a calendar year was grounds for losing core group member status.[219] In addition, core group households were required to pay an initial $250 fee and commit to paying ongoing fees that the core group decided to levy (those on the waiting list paid $50, which could be credited to the initial core group membership fee should they move up in status).[220] Although parts of the charter emphasized the participatory nature of the cohousing project and required signors to read the leading book on cohousing,[221] it said little about what practices or relationships distinguished cohousing and Ecovillage from other housing models.

As EVCC began to organize formally, EVI hosted four land use planning forums from September 1992 to March 1993 on the use of its property.[222] At these meetings were the early members of what would become EVCC, as well as architects, landscape architects, students, professors, planners, ecologists, and energy experts.[223] The result was a document called the "Guidelines for Development," which was approved by the EVI Board of Directors in October 1993. The Guidelines provided fairly detailed directions for the general design of future cohousing developments, including the placement of buildings and roads, and the kinds of building materials to use.[224] They also supplied directions to protect and limit human impact on the site's environment, including guidelines for energy and water use and for solid waste and water disposal. In addition, the Guidelines contained suggestions that residents rely upon agriculture produced organically on-site and that residents limit their use of automobiles on the property.[225]

Prior to the completion of the Guidelines for Development, current members of the EVCC signed a joint venture agreement (JVA),[226] which was later revised and expanded in an amended joint venture agreement (AJVA) effective May 1993.[227] Each document provided more detailed definitions of the rights of signors than the original EVCC charter,[228] required an increasing financial commitment from the group's members,[229] and placed larger barriers to the withdrawal of signors.[230] The amended agreement also included express and detailed provisions for waiting list members.[231] Furthermore, the AJVA provided a fuller definition of the decision-making procedures of the group by referring directly to the consensus process outlined in the original charter.[232] More importantly, the AJVA precisely defined the polis of the emerging EVCC community by explicitly excluding from the "consensus pool" those who were not "responsible parties" to the agreement (i.e., fully committed members and those on the highest level of the waiting list).[233] The agreements thereby protected the emerging EVCC community through the strength of each individual's commitment, which was expressed by the ability and willingness to commit the funds required to become legally binding members.

2. Alienability of Shares

As the EVCC progressed, revised legal documents began de-fining the limits of the residents' property rights in their cooperative shares and specifically the alienability of their homes. The EVCC's Certificate of Incorporation, signed in May 1995, stipulated that the new corporation's bylaws and proprietary lease had to "restrict the facility with which shares in the Corporation may be transferred, assigned, or otherwise used."[234] Under the certificate, shareholders seeking to transfer shares were obligated to pay a transfer fee or "flip tax" on a percentage of the profit realized in the sale.[235] This obligation served three purposes: first, it limited speculation and profit-taking on shares and private property in the community; second, it recaptured some of the increasing value that the community was helping to create in the private property located within it; and third, according to the proprietary lease, established that half of the proceeds would be used to assist lower-income potential purchasers share in the EVCC.[236] The EVCC also required that shareholders receive written consent from at least two-thirds of the corporation's directors before transferring shares to others, except in the case of a transfer to a spouse or domestic partner.[237]

The EVCC proprietary lease established procedures for the re view of prospective buyers in a proposed share transfer.[238] These procedures also require that two-thirds of the corporation board approve any sale[239] and that the corporation maintain a waiting list of interested parties.[240] Within three days of the receipt of intent to transfer a lease, the board of directors is obliged to notify all members on the waiting list of the shares' availability and the seller's asking price.[241]The corporation also retains the right of first refusal to purchase shares on the market

before any transfer as long as the EVCC makes a matching offer within ten days.[242] The proprietary lease also institutionalized the flip tax, setting a "present" rate at 20% of the net gain, reduced by expenses of the sale and the cost of the seller's documented improvements to the unit, and reduced either by inflation or by the local county Board of Realtors' annual average appreciation factor for housing.[243]

The proprietary lease also stipulates review procedures for the rental of units. Residents may not sublet or take in an additional tenant without majority approval from the board of directors,[244] and residents must "present the proposed sublessee or additional tenant to meet the residents of the neighborhood over the course of several days."[245] Subleases, which must be submitted to the board,[246] are required to contain provisions concerning the community at large, such as parking and the use of common facilities, and should also address "participation in Corporation activities."[247] Furthermore, leases must include the House Rules as an appendix.[248]

These provisions allow the community to have some control over new entrants.[249] At the same time, the provisions enable residents to discriminate in the selection of new entrants, a power that is used in cooperative housing structures owned by upper-income groups,[250] which may adversely affect the building of a richer, more diverse community.[251] EVCC thus established, fairly early on in the project, restraints on alienation that were central to the legal incorporation of the group and its procedural construction and protection of community.

3. Decision-making Procedures

Beginning in its early charters, EVCC has relied upon consensus decision-making, which one version of the charter describes as a "group decision . . . arrived at without voting, through a process whereby all members feel that they have been adequately heard, . . . [and] so that all are satisfied with the process."[252] While the charter fails, except in general language, to specify the precise procedures for this process, it does describe the voting "fall back" procedures in detail, requiring that a voted decision be made at a meeting where two-thirds of the households are represented and an 80% majority is reached.[253] Prior to taking a vote, the group must discuss "whether a decision on this issue is so urgent that it justifies abandoning consensus,"[254] a proposition with which at least 80% must agree.[255] These procedures, used at every meeting before and in the time since construction was completed, remain in place despite the fact that they are not provided for in either the Proprietary Lease or the Bylaws. Instead, the Bylaws describe a standard voting procedure for meet ings of the shareholder-lessees that distribute one vote per household, require a quorum of 70% of the households,[256] but allow the cooperative's directors, as a first order of business after the first annual meeting, to establish a "rules of Order" for EVCC that

employs a consensus process.[257] In so doing, the EVCC documents first establish the development as a "normal" cooperative under New York law and then, once it has begun, enable EVCC to aspire to become a cohousing project through its procedural framework.

The Bylaws also attempt to avoid litigation through the use of alternative dispute resolution. Disputes must first be taken to an internal mediation procedure through a "process committee" appointed by the coop's directors.[258] If this does not bring about a successful resolution, aggrieved parties must agree to "set the matter aside for a period of twenty-four hours of reflection" before the directors submit the dispute to a local dispute resolution center.[259] If this step also fails, then parties may submit the dispute to binding arbitration for money damages only.[260] Unlike Doyle Street,[261] EVCC attempts to foreclose the availability of courts to resolve disputes within the group or between individual residents and the group itself.

4. Conclusion

In its agreements and documents, EVCC embodies more of a commitment to the ideals and practices associated with cohousing than Doyle Street and New View do in their documents. This con trast is the result of a combination of factors, including New York State's cooperative laws, EVCC's location in a liberal college town rather than in an urban or suburban area, and the stronger commitment of participants to agree to greater restraints on property rights in favor of community and commitment to cohousing principles. Further, EVCC has the participation of a resident who was trained in law and had the time and inclination to develop the group's legal documents.

V. COHOUSING AND/AS CICS: THE POSSIBILITIES AND PROBLEMS OF COMMON RESIDENTIAL PROPERTY BY COVENANT

This section considers cohousing in light of current critiques of CICs and theories of limited common property. It also notes the policy implications of the cohousing model and addresses the model's potential to address societal needs for affordable housing.

A. Cohousing and Common Interest Communities

The prominence of the CIC as both a private community created by contract and a dominant form in the private residential housing development industry has stirred forceful debate among legal and political science scholars. This debate raises a number of issues that are relevant to understanding cohousing.

For its proponents, the CIC is a utopian project that enables partnerships between public and private entities and allows for the development of diverse middle class values and alliances for "building and sustaining community."[262] More libertarian advocates praise CICs for creating a market of private communities that are legally protected through the "true social contract" of the covenants to which individual owners assent in the provisions of a CIC's original governing documents.[263] In the drafting and enforcement of covenants, CICs "provide some value that traditional governments cannot, whether it be a good or service, an opportunity for private rulemaking, or assurances of stability."[264]

Critics, however, characterize such utopianism as "inherently mistaken" in its assumption that the ownership of private property is the "ideal basis for a sense of community."[265] Instead, they argue, CICs' creation of "privatopias" based upon exclusion and isolation are threats to democracy and social interaction.[266] Other skeptical commentators decry abuses and structural inequities in the CIC market, including the control of the associational creation process by developers;[267]the coercion of consumers into buying houses in CICs because of the pervasiveness of the CIC form in the market for new homes;[268] the de facto exclusion of lower income individuals from the vast majority of CICs through lot size, house size, and the resulting price;[269] and CICs' anti-democratic governance processes.[270] Whether due to distributional inequities or market failures that lead to an exclusive, imperfect CIC form, or because of the procedural failures of CICs' governing structures and practices, these critics—many of them communitarians who might otherwise celebrate a utopian longing for the small-scale polity of the neighborhood association—find the CIC to be anti-democratic and coercive both internally for its residents and externally for its effects on the community.[271]

The difference between proponents and critics is basic. For contractarians, residents "consent" to the government to which they agree by contract, and that consent should be respected and protected by the state.[272] For communitarians, residents merely "assent" to the contractual arrangement of the CIC, and legislators and the judiciary should not assume their consent, nor should their assent be allowed to create negative externalities for society.[273] By using covenants to bind voluntarily original and future residents to its community and by insuring the presence of both assent and consent through a remarkably active, elaborate, and deliberative contractual negotiation and governing process, however, cohousing should attract both CIC proponents and critics.

Yet, the legal processes and documents of cohousing developments demonstrate the problems of both approaches. To the extent that most cohousing groups feel constrained by the regulatory system of property law and financing, their ability to contract freely with each other and to create innovative social contracts is impaired.

Similarly, legal constraints—intended to protect consumers from the allegedly coercive nature of the CIC form and developer practices, and to protect society from the exclusionary and rights infringing practices of gated communities—may create a regulatory regime that makes the creation of cohousing communities more difficult to achieve.

By appropriating the CIC form for the creation of a more intensive, deliberative, and democratic "community association," cohousing demonstrates both the potential of the CIC form to create innovative, community-oriented property relations, and its shortcomings in current practice.

B. Cohousing, CICs, and Limited Common Property

Similarly, by providing a more intensive use of and reliance upon common property, cohousing is an important model for the theory and practice of resource management in the residential housing context. Neither thoroughly privatized nor state-controlled,[274] cohousing developments, like CICs, create limited common property, "property held as a commons among the members of a group, but exclusively vis-a-vis the outside world."[275] Limited common prop erty excludes other potential users of the common pool of resources (in this case, land and commonly held facilities built upon it) and regulates the use and users of the resources to prohibit or ameliorate the resources' depletion.[276]

To form common property, members of a group must share the ability to communicate with each other and have the capacity to make credible commitments to each other. They must also be able to agree on behavioral norms and possess the ability and willingness to monitor each other and sanction noncompliance.[277] Furthermore, the group must create norms, rules, and property rights that are recognized by external authorities.[278] As indicated by the cohousing case studies, future cohousing residents are concerned with developing internal norms and commitments and in having those commitments recognized by external legal authorities. These processes differ from the majority of privately developed CICs, whose CC&Rs and physical design are created prior to consumers' involvement in the development and purchase of the individual unit. Although formally similar to those of CICs, the "institutional arrangements" of cohousing—the rules in use by a development to determine who may use commonly held property[279]—are predicated upon collaborative decision-making and contemporaneous use of property (as in the use of the common house for common meals). Cohousing's creation of limited common property enables the private, individual homeowner to create and opt into a public community with shared resources and activities.

Cohousing attempts explicitly to balance the private concerns of the homeowner with the public desires of the community member through the creation of a "commons." Like the private community associations whose corporate forms and legal structure provide part of its legal context, cohousing is legally private to those outside the boundaries of the community.[280] Even a cohousing's "commons" is private. Cohousing as a model of residential development, therefore, does not address the criticisms of CICs as exclusionary "privatopias" that isolate developments from their surrounding communities. Privatopias, critics allege, play on individuals' fears of the encroachment (racial or class) of the inner city in soliciting new residents[281] and develop a local micro-government that implicitly secedes from the municipality and county in which they are located.[282] Cohousing itself is relatively homogeneous in the racial, social, and economic backgrounds of its participants,[283] due at least in part to self-selection and the requirements of available capital, knowledge, and time to participate.[284]

Such exclusion from surroundings and diverse populations, though clearly troubling to many in cohousing,[285] is one of the key features of limited common property. Theories and histories of the commons posit that "open access" regimes, in which entry is unlimited and no coordinated management exists, are more susceptible to the purportedly "tragic" consequences of the commons.[286] Moreover, such exclusion should not be surprising given the mix of libertarian-contractarian and communitarian desires embedded in cohousing's attempt to create an intensive community. A normative goal of libertarian theories of property, contract, and community in a world where power and resources are unevenly distributed is to protect the rights of (some) individuals to opt into their own communities and exclude others.[287] A normative goal for communitarians is to protect the rights of one or a limited number of majoritarian groups to create and protect communities such that no others could invoke legal rights that would threaten the groups' commitment to community.[288] Furthermore, as Iris Marion Young has argued, homogeneity in a communitarian movement should not be surprising given communitarianism's "commitment to an ideal of community [that] tends to value and enforce homogeneity," that might lead to "interactions dissolving into unity or commonness,"[289] and that "in practice operates to exclude those with whom the group does not identify."[290]

The problems of exclusion notwithstanding, the internal community structures built into cohousing accentuate the social and relational aspects of property and encourage group identity through common property.[291] Cohousing residents collectively utilize and supervise the commonly held land and facilities of their developments — unlike more traditional CICs, which are typically built around professionally managed recreational facilities like a golf course or swimming pool that residents utilize

individually—and sacrifice the maximum private ownership of land by clustering smaller units together. Cohousing thereby attempts to reject the traditional, legal relationship among fee simple owners as well as the somewhat more complex legal relationship among condominium unit owners and housing association members in favor of evolving a group identity in common property.[292] Accordingly, cohousing represents a small step toward collaborative action in property relations and away from the utilitarian approach to property that allots privileges through commodification.[293] Cohousing provides a more intensively communitarian model of limited common residential property than traditional CICs. It also provides an innovative model for individuals, families, and groups dissatisfied with current private housing options.

C. Cohousing as a Model for Affordable Housing

Notwithstanding the relative homogeneity and implicit exclusion of current private cohousing developments, cohousing's model of a democratic development process, community self-governance, and limited commons may provide a model, or at least an inspiration, for affordable housing.[294] A recent HUD report describes six cohousing projects, including the Ecovillage Cohousing Cooperative in Ithaca, whose units' prices average below the reported median for their respective housing markets.[295] Praising cohousing as a model of "innovation for homeownership," the report notes that cohousing projects' shared construction and maintenance costs for individual units help keep the price and ongoing expenses of units relatively low.[296]

Resident-designed and resident-managed affordable housing has historical precedent. In the first half of the twentieth century, unions in New York used an advantageous state law to establish cooperative housing projects, including five buildings built by the Amalgamated Clothing Workers in the Bronx.[297] During the New Deal, unions and some housing advocates attempted to establish federal legislation enabling the construction of cooperative, low-income housing. Their efforts, tied to the Wagner Public Housing Act, failed due to the resistance of members of Congress who feared the cost of such projects and the social implications of such a model for housing and due also to lobbying by real estate, business, and banking interests.[298]

Currently, cohousing could be an important part of what affordable housing advocates call a "third sector" of affordable housing creation and maintenance.[299] Third sector housing is owned privately by individuals or non-profit organizations (rather than by the state or city), is "socially oriented" in that its purpose is to serve the social needs of its occupants, and is price-restricted to preserve affordability for future owners or renters.[300] Cohousing attracts "third sector" proponents by encouraging collaboration and by linking renters and/or owners "together in common cause."[301] The same self-creation of community that should attract libertarian and

communitarian commentators to cohousing has led one commentator to praise cohousing's "potential to empower women of color, particularly Latinas, [t]hrough the steps of identifying their own needs, planning a community to meet those needs, working with other residents, architects, city governments, contractors, nutritionists, health care professionals and education professionals, and seeing their plans materialize through construction of their own community¼."[302]

This combination of private individual autonomy, achieved through opting into a cohousing group and gaining a private resi dential unit, with public group formation, identification with a community, and mutual support is an important, innovative model for the future of affordable housing.

As part of the solution for affordable housing, some cohousing groups have included low-cost units within their developments. These include Common Ground in Aspen, Colorado, which is exclusively comprised of permanently affordable units, and Depot Commons in Morgan Hill, California, which includes twelve single-parent families attempting to move off of welfare.[303] Southside Park, in downtown Sacramento, California, included affordable housing as part of a deal with the city to gain approval for its high-density plan of development, and received assistance from the city's housing and redevelopment agency to enable residents to receive low-income housing subsidies.[304] Cohousing not only offers a model for affordable housing developments, it also serves as a model for small-scale, mixed-income urban projects that allow for a mix of diverse groups of individuals.

VI. Conclusion

Cohousing is a diverse movement based upon a concept sufficiently open to allow some groups to resemble middle class urban and suburban condominium developments and others to be intensive projects of cooperation and environmental conservation. The creation of legal documents, one part of the cohousing process, allows these small participatory groups to deliberate upon and construct a community by covenant by arranging property rights and setting forth procedural and substantive foundations for the future. Yet the available legal forms and the regulatory system of housing development structure the choices the groups can make in how they organize and bind themselves.

Cohousing's collective participation in the production of private and limited common spaces is an important model for fostering democratic accountability in the development and use of real property. Cohousing allows direct, collective control over spending for and management over the construction and maintenance of public and private spaces exercised through a governing structure that fosters deliberation and consensus.[305] To the extent that original residents initiate and participate in a

cohousing project's development, these residents' identification with the community is likely to be greater. To the extent that most cohousing groups impede an easy exit through restraints on the alienation of property, cohousing induces the internal participation of its residents.[306] Finally, to the extent that most cohousing groups facilitate deliberative decision-making by requiring a consensus process, cohousing may increase both the potential power of the individual resident's voice and the likelihood that it will be used.

If homeownership constitutes an ideal of Sperfected citizenship" by integrating the individual or family unit into wider systems of property rights, social value, and political rights,[307] then cohousing may constitute a form of direct, participatory democracy that would not only create a property right, but also connect the rights of ownership and citizenship to an engaged and engaging local community.[308] Cohousing's attempts to resolve the conflict between public/community and private/property in formal legal doctrines and documents may ultimately be part of the ongoing efforts to construct a sense of place with an appropriate set of property arrangements, arranged in law and in practice.

---

[*] Land Use & Environmental Law Fellow, Shute Mihaly & Weinberger, San Francisco, California; Ph.D., University of Illinois at Urbana-Champaign (Institute of Communications Research), 1992; J.D., Yale Law School, 1998. Many thanks to Carol Rose for extensive comments on earlier drafts. Thanks also to Robert C. Ellickson and Wayne Hyatt for helpful discussions while the project was still in its formative stages. Finally, I am exceptionally grateful to the following cohousers for their assistance: Joani Blank, Susan McGreivy, and Jim Snyder-Grant. Return to text.

[1] *See* CHRIS HANSON, THE COHOUSING HANDBOOK 3 (1996). Return to text.

[2] Lorraine Mirabella, *A Neighborly Lifestyle and Sense of Community*, BALTIMORE SUN, Nov. 27, 1995, at 1A. Return to text.

[3] While Hyatt claims that the term *community association* "is increasingly used as a generic term inclusive of all forms of housing that require a mandatory membership association," WAYNE HYATT, CONDOMINIUM AND HOMEOWNERASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW (2d ed. 1985) § 1.05(a)(1), at 17, Natelson rejects it as misleading and ambiguous. *See* ROBERT G. NATELSON, LAW OF PROPERTY OWNERS ASSOCIATIONS § 1.1.2 n.4, at 5 (1989). For the sake of simplicity — this is not intended as an extended treatment of the concept as it operates in the homebuilding industry and the law, but as a background in which cohousing groups and developments exist — I will use the following terms, and leave to others

the debate over terminological clarification: "A community association . . . refers to *the organization* in any form of real estate development with a mandatory membership" obligation created by either servitude or statute. The *common interest community* is the development itself. *See* Hyatt, *supra* § 1.05(a)(1) at 10; § 2.01 at 25. This is also the term used in the Uniform Common Interest Ownership Act, *see* UCIOA §1-103(7) cmt. 8, as well as in the forthcoming Restatement for servitudes, *see* RESTATEMENT OF PROPERTY (SERVITUDES), § 6.2, at 134 (Tentative Draft No. 7, 1998). Return to text.

[4] *See* SUSAN F. FRENCH & WAYNE S. HYATT, COMMUNITY ASSOCIATION LAW 4 (1998); NATELSON, *supra* note 3, §1.1.1, at 3-4. Return to text.

[5] *See* Felicia Paik, *Private Properties*, WALL ST. J., Mar. 27, 1998, at W8; *see also* James L. Winokur, *Critical Assessment: The Financial Role of Community Associations*, 38 SANTA CLARA L. REV. 1135, 1138-41 (1998) (describing the likely dominance in the near future of CICs in residential markets, and calling for state and local governments to consider the financial health of CICs for local governments and land use policy). Return to text.

[6] The clearest indices of this development are the treatises and recent casebooks devoted to the law of CICs. *See* sources cited, *supra* note 3; *see also* Todd Brower, *Communities Within the Community: Consent, Constitutionalism, and Other Failures of Legal Theory in Residential Associations*, 7 J. LAND USE & ENVTL. L. 203, 228-29 (1992) (describing state regulation of contracting process in CICs). Return to text.

[7] *See infra* notes 262-73 and accompanying text. Return to text.

[8] As of the spring of 1998, an estimated 3,000 people lived in fifty cohousing developments in the United States. *See* Darcie Lunsford, *Delray Beach housing concept goes back to basics*, S. FLA. BUS. J. , Feb, 27, 1998, at 1A (quoting president of the Cohousing Network, a national cohousing organization). This marks a steep increase from the fall of 1997, when there were an estimated twenty-eight established cohousing communities in the United States, with twenty-six more under construction, and as many as 150 groups formed to start new projects. *See* Mary McAleer Vizard, *Putting Up Housing With A Built-In Sense of Community*, N.Y. TIMES, Sep. 7, 1997, at Sec. 9, p. 1, col. 4. A 1998 report prepared for the U.S. Department of Housing & Urban Development included cohousing as one type of "the 'Next Generation' of American housing that will result in improved quality, durability, environmental efficiency, and affordability for tomorrow's homes." U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, BUILDING INNOVATION FOR HOMEOWNERSHIP 4, 100 (1998). Return to text.

[9] Even where a private developer oversees the project, future residents shape its final design, and cohousing consultants assist in the development. *See* John Rebchook, *Communal Living Gardens: Cohousing on Old Elitch Gardens Site*, ROCKY MOUNTAIN NEWS (Denver, Co.), Feb. 21, 1999, at 6G (discussing role of one developer in the development of numerous Colorado cohousing communities and the processes by which residents of one of his projects worked with the architect in designing the project's common space, layout, and aesthetics). Return to text.

[10] Basic introductions to cohousing include DORIT FROMM, COLLABORATIVE COMMUNITIES (1991); HANSON, *supra* note 1; KATHRYN MCCAMANT & CHARLES DURRETT, COHOUSING: A CONTEMPORARY APPROACH TO HOUSINGOURSELVES (1994). Return to text.

[11] To this end, one book on cohousing presents an apocryphal tale of the return of a hypothetical working mother named "Anne" to her ideal cohousing neighborhood. Anne's experience of cohousing is a re-entry into domestic sanctuary. Her trek moves from the driveway where she leaves her car (and therefore her ties to work and the pressures of the "outside world") and leads her through the playgrounds of her older daughter and her friends, a group of active, creative neighborhood children; the common house where she sees the evening's cooks, two of her neighbors, fixing the community dinner; past the common house patio where some of her neighbors are sharing a pot of tea in the afternoon sun; past neighboring residential units where people whom she knows go about their daily lives; and into her own home, where she drops her things before walking "through the birch trees behind the houses" to pick up her younger child from the community day care center. *See* MCCAMANT & DURRETT, *supra* note 10, at 13-14. Simultaneously at home in her community and her private residence, with her family integrated into a coherent neighborhood, Anne seems to have found a protective refuge from many of the crises of the private family and the public sphere in the domestic, semi-public, semi-private realm of cohousing. Of course, cohousing's emphasis on collective domestic recuperation can only solve part of Anne's crisis—by allowing her to "unwind at last" after a presumably hard day at work. *See id*. at 13. Return to text.

[12] Cohousing communities are not as close-knit, isolated, or insulated as communal utopias. They do not share most or all of their property or a specific set of ideological principles. *See* Donald E. Pitzer, AMERICA'S COMMUNAL UTOPIAS 3, 5 (Donald E. Pitzer ed., 1997); *see also* Rebchook, *supra* note 9 at 6G (quoting spokesperson's comparison between 1960s-era communes where "freeload[ing]" residents lived off the land, and contemporary cohousing developments where residents purchase their residential units and earn their living outside the community). Furthermore, cohousing projects are not nearly as intensive as what one author described as "political perfectionists"—examples of which include religious groups such as the Rajneesh in

Oregon and the Kiryas Joel community in New York—who develop and implement community laws and governance to socialize members' behavior thoroughly, and who sacrifice modern, liberal notions of the individual in favor of a total commitment to the group's interconnected welfare. *See* Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 VA. L. REV. 1053, 1064-67 (1998). Return to text.

[13] *See, e.g.*, MCCAMANT & DURRETT, *supra* note 10, at 201 (criticizing the wasteful land and resource consumption of suburban sprawl); Eleanor J. Bader, *Cohousing: Collective Living for the 90s*, DOLLARS & SENSE, Jan. 1, 1999, at 22 (contrasting suburbanites who "rarely know their neighbors" to the "connected, collective lifestyle" of cohousing dwellers); William A. Davis, *Instant Community*, BOSTON GLOBE, Mar. 26, 1998, at E1 (describing the unhappiness of one new cohousing resident with the "complete isolation" that she felt from her neighbors when she "lived a middle-class suburban version of the American dream"). Return to text.

[14] *See* MCCAMANT & DURRETT, *supra* note 10, at 201 (contrasting the "strong neighborhoods" of cohousing to the "strong security gates" and fearfulness of "Neighborhood Watch" programs that mark contemporary urban neighborhoods).Return to text.

[15] MCCAMANT & DURRETT, *supra* note 10, at 9. In this respect, cohousing assumes its creation of an "authentic" community—a rhetorically powerful construction that posits the neighborhood as a warm and welcoming shelter from the demands and difficulties of the outside world. *See* Dana Young, *The Laws of Community: The Normative Implications of Crime, Common Interest Developments, and "Celebration"*, 9 HASTINGS WOMEN'S L.J. 121, 127 (1998) (comparing cohousing to Native American communities and describing cohousing as "a voluntary, rather than ascriptive tribe . . . [that] strives for community in its truest sense"). Cohousing also asserts a particular understanding of contemporary life, as well as the proper goals of the individual and the group. Consequently, it establishes "as outside the group" those who by difference or disparity of income do not belong within the community. *See* CAROL J. GREENHOUSE ET AL., LAW & COMMUNITY IN THREE AMERICAN TOWNS 184-85 (1994). Yet cohousing also constitutes an attempt, like so many rural and urban places in the modern era, to re-imagine the common local community after the widespread enclosure of common lands in sixteenth century England. *See* RAYMOND WILLIAMS, THE COUNTRY AND THE CITY 105-07 (The Hogarth Press 1993) (discussing the social and cultural effects of the enclosure movement in England and the struggle for survival of a sense of local "community").

The "new urbanist" movement, which uses the traditionalist CIC form in designing and planning neighborhoods and towns, shares cohousing's utopian longing for small-town life and its crisis narrative of contemporary housing. *See generally*PETER CALTHORPE, THE NEXT AMERICAN METROPOLIS: ECOLOGY, COMMUNITY AND THE AMERICAN DREAM (1993); WILLIAM FULTON, THE NEW URBANISM: HOPE OR HYPE FOR AMERICAN COMMUNITIES? (1996); PETER KATZ, THE NEWURBANISM: TOWARD AN ARCHITECTURE OF COMMUNITY (1994); JAMES HOWARD KUNSTLER, HOME FROM NOWHERE: REMAKING OUR EVERYDAY WORLD FOR THE TWENTY-FIRST CENTURY (1996); PHILIP LANGDON, A BETTER PLACE TOLIVE: RESHAPING THE AMERICAN SUBURB (1994). However, new urbanism focuses its reform efforts almost exclusively on the design and planning elements of CICs, and, critics argue, fails to address larger land use issues, the notion of shared common property, and residents' participation in local governance (issues that cohousing attempts to explicitly address). *See* ANDREW ROSS, THE CELEBRATION CHRONICLES: LIFE, LIBERTY, AND THE PURSUIT OF PROPERTY VALUE IN DISNEY'SNEW TOWN 78-79 (1999); STUART C. AITKEN, FAMILY FANTASIES AND COMMUNITY SPACE 132 (1998). *See generally* PHILIP LANGDON, A BETTER PLACE TO LIVE: RESHAPING THE AMERICAN SUBURB 107-47 (1994) (describing new urbanist towns in terms of their innovative design and architecture). *But see id*. at 104-05 (describing innovations proposed by neo-traditionalist proponents in CIC covenants that would enable greater decision-making power by residents). Return to text.

[16] Clayton P. Gillette, *Mediating Institutions: Beyond the Public/Private Distinction: Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1396-97 (1994). Return to text.

[17] Cohousing developments face numerous important transactions in which they interact with legal institutions and create formal legal relationships. These include dealings with applicable regulatory, zoning, and environmental regimes; negotiations for the purchase of land, financing, and construction financing; and title examination and surveys. *See* Rob Sandelin & Dan Suchman, *Legal Issues, in Cohousing Resource Guide* (Rob Sandelin, ed.) (visited Nov. 6, 1999) . While some of these issues are mentioned in the paper, they are beyond its scope. Return to text.

[18] The terms "regulatory" and "disciplinary" in this context are intended to note the systemic roles of law and finance in private development through which the process of producing legal documents and developing a legally recognized organizational form are inextricably intertwined with obtaining the finances necessary to build a cohousing project. The notion of "regulation," from Alan Hunt's application of Michel Foucault's theory of power/knowledge to the sociology of law, refers to "the deployment of specific knowledges encapsulated in legal or quasi-legal forms of

interventions in specific social practices whose resultants have consequences for the distribution of benefits and detriments for the participants in the social practices subject to regulation." ALAN HUNT, EXPLORATIONS IN LAW AND SOCIETY 314 (1993). The legal/financial regulatory system of private residential housing development is productive in that it enables groups to gain legal recognition and secure capital. It is also disciplining in that it directs groups into certain kinds of organizations and relationships.

Working within this legal/financial regulatory system is also largely mandatory. Groups often cannot seek alternative legal regimes within states (although they can find somewhat different regimes across states) and they must receive assistance in financing. Such regulatory regimes in different states may affect a cohousing group's ability to organize and the organizational form it chooses. For example, the New York state banking law that allows cooperative shares to act as collateral for blanket mortgages has led to greater acceptance of the cooperative form by New York lending institutions for in-state projects. *See* N.Y. BANKING LAW §§ 103(5), 235.8-a, 380.2-a (McKinney 1999). The California Department of Real Estate, on the other hand, restricts the pre-selling of subdivisions (including planned developments, condominiums, and cooperatives) by requiring the filing of an extensive notice of intention with the Real Estate Commissioner before any parcels can be offered for sale or lease. *See* CAL. BUS. & PROF. CODE § 11010(b) (1987) (requiring reporting and detailing specific information to be included). California also mandates that the Commissioner issue a public report once the subdivision is approved that is to be given by the seller to each prospective buyer, *see id.* § 11018, and requires that prospective purchasers of common interest developments must be given a statement of general information about the development and access to the articles of incorporation, the bylaws of the owners' associations, as well as to the CC&Rs, *see id.* § 11018.1(c). In the interest of consumer protection, California's state laws and regulations make developing and financing cohousing projects in the state more difficult. *See* e-mail from Kathryn McCamant, Cohousing Company, to author (Nov. 5, 1997) (on file with author). Return to text.

[19] *But see* Young, *supra* note 15, at 128 (concluding that cohousing and CICs take "inherent[ly] . . . different approaches to private property"). Return to text.

[20] *See* MCCAMANT & DURRETT, *supra* note 10, at 12. On the origins of cohousing in Denmark and the role of Danish architect Jan Gudmand-Høyer in designing, developing, and promoting the concept, see *id.* at 135-41. Since 1972, approximately 200 cohousing projects have been completed in Denmark. *See* HANSON, *supra* note 1, at 2. Return to text.

[21] *See* MCCAMANT & DURRETT, *supra* note 10, at 203. Return to text.

[22] NAN ELLIN, POSTMODERN URBANISM 4 (1996). Return to text.

[23] *See* EVAN MCKENZIE, PRIVATOPIA 19 (1994). Return to text.

[24] *See id.* Return to text.

[25] *See* ROBERT JAY DILGER, NEIGHBORHOOD POLITICS: RESIDENTIAL COMMUNITY ASSOCIATIONS IN AMERICAN GOVERNANCE, 41-60 (1992); MCKENZIE, *supra* note 22, at 19; Stephan E. Barton & Carol J. Silverman, *History and Structure of the Common Interest Community*, *in* COMMON INTEREST COMMUNITIES 3, 3-12 (Stephan E. Barton & Carol J. Silverman, eds. 1994). Return to text.

[26] MCCAMANT & DURRETT, *supra* note 10, at 40, 173. Return to text.

[27] *See id.* at 44 (noting that most cohousing communities have attached dwellings, but that some consist of detached single-family houses). Return to text.

[28] *See id.* at 207-15. Return to text.

[29] *See id*. at 249-57. Return to text.

[30] Clustering in cohousing encourages interaction in a number of ways, including the creation of heavily utilized common areas that include facilities like children's play areas. *See* MCCAMANT & DURRETT, *supra* note 10, at 40. Relegating parking to the periphery of the site encourages pedestrian circulation. *See* HANSON, *supra* note 1, at 118-19; MCCAMANT & DURRETT, *supra* note 10, at 175-77. Designing individual units to open into the cluster with the most utilized rooms, such as the kitchen, in the front of the units with windows that look out onto pedestrian pathways also encourages interaction. *See* HANSON, *supra* note 1, at 119; MCCAMANT & DURRETT, *supra* note 10, at 179-80. Return to text.

[31] *See* HANSON, *supra* note 1, at 13. In addition, many cohousing groups standardize the designs of private units by either using a single plan for all units, or by employing a small number of plans that vary according to the unit size (i.e., one design for all one-bedroom units, and another for all two-bedroom units, etc.). *See* MCCAMANT & DURRETT, *supra* note 10, at 54-55. While this sacrifices the individuality of units, standardization not only saves money for those who might otherwise have made distinct design decisions, it simplifies and saves time in the construction process. *See* HANSON *supra* note 1, at 140-41. Return to text.

[32] *See* Vizard, *supra* note 8 (comparing the average new and existing house price of between $100,000 and $120,000 in Saugerties, New York to the $130,000 price of a house in Cantine's Island, a cohousing development in Saugerties); Richard Higgins, *Seeking Common Ground: Newton Group Looks to Join Cohousing Movement*, BOSTON GLOBE, Oct, 1, 1995, at West Weekly (estimating that while the expected price of a unit in a new cohousing development would be comparable to the "market rate" for houses in the area, the additional time and effort that the initial residents must invest in the development process makes it more expensive). *Cf.* MCCAMANT & DURRETT, *supra* note 10, at 284 (claiming that cohousing units are "usually comparably priced" with other residential units in an area, but noting that because cohousing also has costs associated with land acquisition, construction, consultants, and financing, cohousing developments "may incur extra expenses owing to a more lengthy design and approval process, a high level of customization, or any of numerous possible delays or setbacks"). *But see* Sarah Means, *Housing Trend Builds Community Bonds*, WASH. TIMES, July 25, 1997, at F1 (noting that homes in cohousing developments in the suburbs of Washington, D.C. sold for below or comparable prices to their county's average). Return to text.

[33] *See* Vizard, *supra* note 8. Return to text.

[34] *See* MCCAMANT & DURRETT, *supra* note 10, at 177. Return to text.

[35] *See* HANSON *supra* note 1, at 132-33; MCCAMANT & DURRETT, *supra* note 10, at 40-41; FROMM, *supra* note 10, at 233-38. Return to text.

[36] *See* MCCAMANT & DURRETT, *supra* note 10, at 41. More recent cohousing projects have increased the amount of common area in proportion to the size of residential units. Whereas the common property in European cohousing projects constituted 10-15% of the development, *see* FROMM, *supra* note 10, at 217, in America cohousing developments, the amount of indoor area held in common is typically over 40% in a 30 unit development. Currently, the size of the average common house has increased to 10,000 square feet (compared to the 1,500 square feet of cohousing's "first-generation" in Denmark), while the average size of individual private units has steadily declined to between 750 and 800 feet. *See*HANSON *supra* note 1, at 121-22. Return to text.

[37] *See, e.g.*, Vizard, *supra* note 8 (describing how one cohousing resident first heard of the group's initial organizing meetings through a radio interview); Mirabella, *supra* note 2 (noting that the Pioneer Valley Cohousing group in Amherst, Massachusetts, began when its initial organizer placed an advertisement in a local newspaper); Higgins, *supra* note 32 (describing initial organizing meetings for a

cohousing group in Newton, Massachusetts, attended by representatives from sixty-seven households). *See generally* HANSON, *supra* note 1, at 10 (describing the formation of a hypothetical cohousing group with a core group of friends soliciting additional members through fliers posted in grocery stores, laundromats, video stores, and public bulletin boards); FROMM, *supra* note 10, at 164-65 (describing how to "grow" a group through flyers and meetings with slide shows to explain the concept). Return to text.

[38] *See, e.g.*, Kimberly H. Byrd, *Past with a Future*, HERALD-SUN (Durham, N.C.), Sep. 8, 1996, at G4 (describing the role of Charles and Carol Eilber in organizing, designing, and selling units in the Solterra community in Durham, North Carolina). The name that some in the cohousing community have given to such leaders is "burning soul," which was first used by Danish cohousing advocates "to describe a group member who has kept the vision alive when the goal seem[s] far away." MCCAMANT & DURRETT, *supra* note 10, at 230. In the early days of the cohousing movement in the U.S., McCamant and Durrett themselves were leaders in a number of the projects they helped develop in northern California. *See id.*at 208 (describing McCamant and Durrett's role in Muir Commons in Davis, California, the first cohousing project in the U.S.).

One cohousing advocate notes, however, that such leadership should ideally not come at the expense of group cohesion and responsibility. *See* HANSON, *supra* note 1, at 37. Return to text.

[39] *See, e.g.*, Judith Evans, *Cohousing, a Neighborly Thing to Do*, WASH. POST, Jan. 27, 1996, at E1 (describing the changing membership of the Frederick [Maryland] Cohousing group over its six years of existence prior to the building of its development). Return to text.

[40] *See, e.g.*, Evans, *supra* note 38 (describing how the Montgomery Upcounty Cohousing group in Maryland disbanded after the group failed to secure land during its three-year attempt to develop a cohousing community). Return to text.

[41] *See* MCCAMANT & DURRETT, *supra* note 10, at 161. Return to text.

[42] *See* FROMM, *supra* note 10, at 169. Return to text.

[43] *See id*. Return to text.

[44] *See id.*; HANSON, *supra* note 1, at 27-28. Return to text.

[45] *See* FROMM, *supra* note 10, at 169. *But see* HANSON, *supra* note 1, at 32-33 (advocating a "true consensus" approach in which the group decides whether to honor an individual dissenter, who has "the right to be heard but not to veto and the responsibility to accept the will of the group when a dissent is not accepted"). Return to text.

[46] *See* MCCAMANT & DURRETT, *supra* note 10, at 169; FROMM, *supra* note 10, at 169 Return to text.

[47] *See* FROMM, *supra* note 10, at 168-69. Return to text.

[48] *See* MCCAMANT & DURRETT, *supra* note 10, at 42 Return to text.

[49] *See, e.g., id.* at 53 (reproducing the Initial Organizing Agreement of the Sun and Wind Cohousing Organizing Group). Return to text.

[50] *See, e.g.*, Vizard, *supra* note 8 (describing the process by which Greyrock Commons in Fort Collins, Colorado, began). Return to text.

[51] *See, e.g.*, Evans, *supra* note 39 (describing the fate of Montgomery County Cohousing group in Maryland, which folded after its fifth attempt to secure a site failed when outbid by a private developer). Return to text.

[52] *See* MCCAMANT & DURRETT, *supra* note 10, at 39. Return to text.

[53] *See id*. (describing costs of meeting requirements of local ordinances, such as fire sprinklers and minimum numbers of parking spaces); Evans, *supra* note 39. Return to text.

[54] *See, e.g.*, Higgins, *supra* note 32, at 3 (recounting successful efforts of "anxious" owners of neighboring property in Westborough, Massachusetts, to block a cohousing group's development). Return to text.

[55] *See* Peter Pochna, *Development Values Community*, PORTLAND PRESS HERALD, Jan. 25, 1996, at 1B. As one neighbor told a local newspaper, "It feels very much like it won't coincide with our community and our lifestyles. They are getting their own private little community, and we are losing ours." *Id*. Return to text.

[56] *See id*. Return to text.

[57] *See* Lunsford, *supra* note 8; Steve Liewer, *Neighbors Battle Co-Housing Plan*, SUN-SENTINEL (Fort Lauderdale) Oct. 11, 1996, at 1A. Return to text.

[58] MCCAMANT & DURRETT, *supra* note 10, at 39; s*ee also* Liewer, *supra* note 57 (describing Synergy Cohousing members' attempts to persuade neighbors and the local Land Use Advisory Board that "their community is not about flower children and free love"). Return to text.

[59] *See* Means, *supra* note 32. Return to text.

[60] *See id*. Return to text.

[61] *See id*. Many groups utilize different levels of membership before major expenditures begin to accrue. Puget Ridge Cohousing in Seattle, for example, had three levels before groundbreaking: full membership, which required investment of ten percent of the estimated cost of the individual unit; associate membership, which required payment of substantially less money and enabled the member to participate in decisions made at group meetings; and prospective membership, a level that required no investment (interested parties remained here until they attended five group meetings; participation in decisions or speaking was not allowed). *See* Marci Malinowycz, *RE: membership building*, Cohousing-l Electronic Mailing List [hereinafter Cohousing-l] (Dec. 1997) (visited Nov. 5, 1999) . Return to text.

[62] *See* Means, *supra* note 32. Return to text.

[63] *See, e.g.*, Jennifer Greaney, *Cohousing Plans Show a Future Look*, SUNDAY TELEGRAM, [Worcester, Ma.], Mar. 24, 1996, at B1 (discussing a cohousing group in Grafton, Massachusetts, that is working with a developer). Return to text.

[64] *See* HANSON *supra* note 1, at 46; Vizard, *supra* note 8. Return to text.

[65] *See* Vizard, *supra* note 8. Return to text.

[66] *See* MCCAMANT & DURRETT, *supra* note 10, at 39. Return to text.

[67] *See, e.g.*, Mike Malone, *Working woth* [sic] *a developer*, Cohousing-l, *supra* note 61 (May 1998); Rob Sandelin, *Re: Re: Robs Conference Report*, Cohousing-l, *supra* note 61 (archives Nov. 1994). Return to text.

[68] This section is based largely on the information made available to cohousing groups from cohousing-specific books and Internet sites detailing the legal experiences of established cohousing developments and providing suggestions for handling legal issues as they arise in the development process. *See, e.g.*, HANSON, *supra* note 1; MCCAMANT & DURRETT, *supra* note 10; Sandelin & Suchman, *supra* note 17. Hanson is a cohousing developer; McCamant and Durrett,

whose book is in its second edition, run a consulting group called the Cohousing Company; while Sandelin is an important presence in the national cohousing community and on the cohousing-l electronic mailing list.

These sources are well known among cohousing veterans, and newly interested parties are typically encouraged to read at least one of them. For examples of how people are referred to these guides, see the Charter of the Ecovillage Residents' Group, Ithaca, New York (Aug. 1992) [hereinafter Ecovillage Charter] (requiring that new members read the McCamant & Durrett book as part of the requirements for membership) and the *Cohousing Web Page* (visited Nov. 6, 1999)(characterizing Rob Sandelin's Cohousing Resource Guide, of which Sandelin & Suchman's legal guide are part, as an important resource).

Because of the complex set of legal and administrative contexts faced by groups in their state and municipal jurisdictions, these guides cannot and do not provide simple how-to instructions. Yet, in their descriptions of the general concerns that cohousing groups often address as they form and begin interacting as a unit, these guides introduce both the recurring issues that new groups can expect to face and successful approaches that groups have used in the past. The guides provide a practical, fairly conservative approach to the forms of legal agreements under which cohousing communities assign, share and respect property rights, make decisions, and resolve disputes. Return to text.

[69] HANSON, *supra* note 1, at 156. Return to text.

[70] *Cf.* Mary Frain, *Joys in the 'hood; Neighbors Try Cohousing*, SUNDAY TELEGRAM (Worcester, Massachusetts), Jan. 21, 1996, at B1 (describing failure of one cohousing group because of lack of sufficient trust among members to invest in the project). Return to text.

[71] *See* HANSON, *supra* note 1, at 163-64 (reproducing the initial organizing agreement of Winslow Cohousing Group of Bainbridge Island, Washington); MCCAMANT & DURRETT, *supra* note 10, at 164 (listing the necessary contents of the basic initial organizing agreement for cohousing groups). Return to text.

[72] *See* HANSON, *supra* note 1, at 156; MCCAMANT & DURRETT, *supra* note 10, at 164; Sandelin & Suchman, *supra* note 17. Return to text.

[73] *See, e.g.*, HANSON, *supra* note 1, at 163 (reproducing initial organizing agreement of Winslow Cohousing Group of Bainbridge Island, which includes a section committing the group to a "consensus-seeking" decision-making process); *id.* at 262-63 (reproducing a provision for cooperative decision-making in "prototypical"

cohousing bylaws); *id*. at 265-66 (reproducing a provision for consensus decision-making in Operating Guidelines of Victoria Cohousing Development Society in Victoria, British Columbia). Return to text.

[74] *See* MCCAMANT & DURRETT, *supra* note 10, at 164-65. Cohousing guides suggest different types of corporations for cohousing groups. Sandelin & Suchman assert that the nonprofit corporation is "the most common form of association used by cohousing groups." Sandelin & Suchman, *supra* note 17. Furthermore, the nonprofit corporation is "by far the most common" form of organization for community associations in general. *See* FRENCH & HYATT, *supra* note 3, at 34. Chris Hanson, however, asserts that the standard, for-profit corporation is the simplest and most flexible form of organization and is most likely to be recognized and approved by lending institutions. *See* HANSON, *supra* note 3, at 158-59. On the problems of partnership agreements for cohousing groups, see *id*. at 157 (noting that because of the diversity of individual members' financial capacities and knowledge, and their differing abilities to take risks, the shared responsibilities and liabilities of partnerships make the form less attractive and logical for cohousing groups). Return to text.

[75] *See* HANSON, *supra* note 1, at 177-79. Return to text.

[76] *See generally* HANSON, *supra* note 1. Return to text.

[77] *See* NATELSON, *supra* note 3, § 1.2, at 13. Return to text.

[78] *See* HYATT, *supra* note 3, §1.05(a)(2), at 12. Return to text.

[79] *See* Barton & Silverman, *supra* note 25, at 3. Return to text.

[80] *See* FRENCH & HYATT, *supra* note 4, at 41. Return to text.

[81] *See* DILGER, *supra* note 25, at 16-20; HYATT, *supra* note 3, § 1.05(c)(1), at 20. In 1990, 61% of community associations were organized as condominiums, and 35% were organized as homeowners associations. *See* DILGER, *supra* note 25, at 19. Return to text.

[82] In 1990, only 1% of community associations were organizations as cooperatives. *See* DILGER, *supra* note 25, at 19. This figure might be somewhat higher, as it was based upon membership in the Community Association Institute, an organization in which smaller common development communities and those located in New York, where groups are more likely to be organized as cooperatives, are underrepresented. *See id*. at 123-24. Return to text.

[83] *See* FRENCH & HYATT, *supra* note 4, at 23. On the general differences between condominium and cooperative, see RICHARD R. POWELL & PATRICK J. ROHAN, POWELL ON REAL PROPERTY § 54A.01(6) (1998). On the different tax, financing, and securities implications of the cooperative form see PAUL GOLDSTEIN & GERALD KORNGOLD, REAL ESTATE TRANSACTIONS 532-34 (1997). Return to text.

[84] *See* MCCAMANT & DURRETT, *supra* note 10, at 235-36. Cohousing is similar in this regard to the majority of private housing development in the U.S., where the cooperative form "has been outstripped in usage by the condominium in virtually every section of the country, with the possible exception of New York State." 4 THOMPSON ON REAL PROPERTY §36.05(b) (David A. Thomas ed., 1994). Return to text.

[85] Sandelin & Suchman, *supra* note 17. The same authors warn, however, that in markets where condominiums have been overbuilt, they can be undervalued. Moreover, in some states, restrictive condominium statutes set monthly maintenance fees and dictate voting percentages based upon the size of the unit. This might burden a consensus decision-making process which is based upon similarly weighted ability to assent to or block proposals. *See id*. Return to text.

[86] *See* HYATT, *supra* note 3, §7.02, at 356. Return to text.

[87] *See* FRENCH & HYATT, *supra* note 4, at 35. Return to text.

[88] *See* Rob Sandelin, *RE: Daily Management and CC&R's*, Cohousing-1, *supra* note 61 (Sept. 1996). Return to text.

[89] *See, e.g.*, Nahrstedt v. Lakeside Village Condominium Ass'n, Inc., 878 P.2d 1275, 1290 (Cal. 1994) (holding that a restriction placed in the CC&Rs will be "presumed to be reasonable and enforced uniformly against all residents of the [CIC] unless the restriction is arbitrary," imposes burdens that outweigh the benefit to the community, or violates public policy). Return to text.

[90] *See, e.g.*, Rob Sandelin, *RE: Daily Management and CC&R's*, Cohousing-1, *supra* note 61 (Sept. 1996). Return to text.

[91] *See id*. Return to text.

[92] *See* FRENCH & HYATT, *supra* note 4, at 36. Return to text.

[93] For a discussion of the role of bylaws in cohousing generally, see Sandelin & Suchman, *supra* note 17. *See also* HANSON, *supra* note 1, at 261-64 (providing bylaws for a "prototypical" cohousing group, which outlines qualifications of members, dues

and fees, rules for meetings, outlining decision-making process, establishing and describing a management board, giving duties of secretary and treasurer, and making provisions for adoption, amendment, and appeal of the bylaws). On the decision as to whether to record the bylaws with the declaration in the local land records, see FRENCH & HYATT, *supra* note 4, at 36 (noting the advantages under some state laws of recording bylaws). Return to text.

[94] *See* Sandelin & Suchman, *supra* note 17. Return to text.

[95] Restrictions on the transfer of units in a cooperative may include requiring the cooperative's approval of a prospective buyer, *see, e.g.*, 1050 Tenants Corp. v. Jakobson, 365 F. Supp. 1171, 1172 (S.D.N.Y. 1973), *aff'd*, 503 F.2d 1375 (2nd Cir. 1974); B.C. Ricketts, Annotation, *Transfer of, and Voting Rights in, Stock of Co-op. Apartment Association*, 99 A.L.R.2d 236, 238 (1965), or a preemptive right of the cooperative association to purchase the unit, *see* Gale v. York Center Community Coop., Inc., 171 N.E.2d 30, 32 (Ill. 1960); Sanders v. The Tropicana, 229 S.E.2d 304, 306 (N.C. Ct. App. 1976). Return to text.

[96] *See* Sandelin & Suchman, *supra* note 17. Return to text.

[97] *See id.* Return to text.

[98] *See generally* PATRICK J. ROHAN & MELVIN A. RESKIN, COOPERATIVE HOUSING LAW AND PRACTICE (1990). Return to text.

[99] *See* Sandelin & Suchman, *supra* note 17. Return to text.

[100] *See* MCCAMANT & DURRETT, *supra* note 10, at 235-36. Return to text.

[101] The Ecovillage Cohousing Cooperative in Ithaca, New York does attempt to recapture some of the increase in value in property through a "flip tax" on every sale, but does not limit a seller's asking price. *See infra* note 235 and accompanying text. Return to text.

[102] For an account of a group of limited equity cooperatives in California owned and occupied by low- and middle-income households arguing that the limited equity form, at least in this context, provides greater opportunities for direct democracy and a vibrant, if at times highly contentious, community, see Allan David Heskin & Dewey Bandy, *Community and Direct Democracy in a Limited-Equity Cooperative, in* COMMON INTEREST COMMUNITIES 192, 192-209 (Stephan E. Barton & Carol J. Silverman, eds. 1994). Return to text.

[103] *See* HANSON, *supra* note 1, at 159-160; MCCAMANT & DURRETT, *supra* note 10, at 235. Return to text.

[104] *See* MCCAMANT & DURRETT, *supra* note 10, at 165. Return to text.

[105] These powers rely largely upon the use of liens against property — a substantial power, given the financial and emotional investment that owners make in a primary residence, but not equivalent to, say, the powers of incarceration or eminent domain that sovereign governments enjoy. *See* NATELSON, *supra* note 3, § 3.4.2, at 96-97. *See, e.g.*, Telluride Lodge Ass'n v. Zoline, 707 P.2d 998, 1000 (Colo. Ct. App. 1985), *rev'd on other grounds*, 732 P.2d 635 (Colo. 1987) (upholding association's foreclosure on liens placed on homeowners who refused to pay assessment). Return to text.

[106] These covenants run with the land. *See, e.g.*, Lake Wauwonoka, Inc. v. Spain, 622 S.W.2d 309, 312-13 (Mo. Ct. App. 1981) (finding the basis of the contract for assessment of members of association to be an affirmative covenant that runs with the land); Neponsit Property Owners' Ass'n, Inc. v. Emigrant Industrial Savings Bank, 15 N.E.2d 793, 795 (N.Y. 1938) (confirming that assessment covenants run with the land). Return to text.

[107] *See* NATELSON, *supra* note 3, § 3.4.3, at 98-101; s*ee also* UNIF. COMMON INTEREST OWNERSHIP ACT § 3-116 (1994) (enabling lien on property for late assessment payment). *See, e.g.*, OKLA. STAT. ANN. tit. 60, § 524(a) (1994) (enabling condominium association to enforce unpaid assessments through a lien on property); FLA. STAT. § 718.116(5) (1999) (enabling condominium association to enforce assessment with lien, but requiring recorded notice of lien). Return to text.

[108] *See* NATELSON, *supra* note 3, § 3.4.3, at 97-98. Like cities, CICs elect representative governing bodies, raise funds for repair, maintenance, and improvements, and regulate and maintain bounded tracts of land. *See* Robert C. Ellickson,*Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1522-23 (1982); Wayne S. Hyatt & James B. Rhoads, *Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations*, 12 WAKEFOREST L. REV. 915, 918 (1976). Yet, unlike with the sovereign power of the surrounding city, the CIC cannot use force upon those under its jurisdiction beyond its boundaries, condemn property, redistribute wealth, and enjoy sovereign immunity (unless waived). *See* NATELSON, *supra* note 3, at § 11.1, at 490. Return to text.

[109] *See id*. Some groups do not collect the decisions they make about rules within a single document, relying instead upon meeting minutes for their institutional memory. *See id*. Return to text.

[110] Sandelin & Suchman, *supra* note 17. Return to text.

[111] *See id*. Return to text.

[112] HANSON, *supra* note 1, at 165. Return to text.

[113] *See id.* Return to text.

[114] *Id.* at 166. Return to text.

[115] *See, e.g.*, Sandelin & Suchman, *supra* note 17. Return to text.

[116] *Id.* Return to text.

[117] *See* Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 132 (1998). Return to text.

[118] *See* CAROL M. ROSE, PROPERTY & PERSUASION 149-50 (1994). Return to text.

[119] *See* MCCAMANT & DURRETT, *supra* note 10, at 224. Return to text.

[120] *See id.* at 217. Return to text.

[121] *See id*. Return to text.

[122] *See id.* Return to text.

[123] *See id.* at 218. Return to text.

[124] *See id*. Return to text.

[125] *See id.* Return to text.

[126] *See id.* at 219. Return to text.

[127] *See id.* Return to text.

[128] *See* Stefan Fatsis, *A Shared Experience: Cohousing Emerges As A '90s Alternative Suburban Lifestyle*, CHI. TRIB., Feb. 25, 1996, at 3I. Return to text.

[129] *See* HYATT, *supra* note 3, § 4.02(c), at 85-88. Return to text.

[130] *See* MCCAMANT & DURRETT, *supra* note 10, at 219-22. Return to text.

[131] *See id.* Return to text.

[132] *Id.* at 223. Return to text.

[133] Telephone interview with Joani Blank, resident of Doyle Street Cohousing (May 4, 1998). Return to text.

[134] *See* MCCAMANT & DURRETT, *supra* note 10, at 223. On the history and operation of FNMA and the secondary mortgage market generally, see Robin Paul Malloy, *The Secondary Mortgage Market—A Catalyst for Change in Real Estate Transactions*, 39 SW. L. J. 991, 992-95, 1001-10 (1986). On the growing importance of the secondary market and the resale of mortgages by local banks on the national and international markets, see Michael H. Schill, *Uniformity or Diversity: Residential Real Estate Finance Law in the 1990s and the Implications of Changing Financial Markets*, 64 S. CAL. L. REV. 1261, 1272 (1991). Return to text.

[135] *See* Certificate of Amendment of Articles of Incorporation, (Mar. 1992) (on file with author) (amending Articles of Incorporation of Doyle Street Cohousing Community Association, Feb. 10, 1992, to change the name of the corporation to Doyle Street Condominium Association). Return to text.

[136] MCCAMANT & DURRETT, *supra* note 10, at 223-24. Return to text.

[137] *See* Articles of Incorporation of Doyle Street Cohousing Community Association (Feb. 1992) (on file with author). Return to text.

[138] *See* Doyle Street Condominiums, Declaration of Restrictions and Declaration Establishing a Plan of Condominium Ownership § 1.5 (Mar. 1992) (on file with author) [hereinafter Doyle Street Declaration]. Return to text.

[139] *See id.* § 1.6. Return to text.

[140] Provisions allowing the developer to retain initial voting control over a condominium or homeowners' association are included in the applicable uniform act, *see* UNIF. COMMON INTEREST OWNERSHIP ACT §103(d)-(e) (allowing phase out of developer control according to the percentage of units sold and a set date), and have also been upheld by courts, *see, e.g.*, Investors Limited of Sun Valley v. Sun Mountain Condominiums, Phase I, Inc. Homeowners Ass'n, 683 P.2d 891, 894 (Idaho Ct. App. 1984) (holding developer voting control for a certain time period after completion to be legitimate); Barclay v. Deveau, 429 N.E.2d 323, 326-27 (Mass.

1981) (holding that absent overreaching or fraud, developer and unit owners may include provisions for initial developer control in CC&Rs). *See also* HYATT, *supra* note 3, § 7.06(a)(14), at 402 (providing and discussing sample provision). Return to text.

[141] *See* Doyle Street Declaration, *supra* note 138, § 5.4(ii)(a) & (b) Return to text.

[142] *See* Telephone interview with Joani Blank, *supra* note 133. Return to text.

[143] *See* Doyle Street Declaration, *supra* note 138, § 3.3(iii). Return to text.

[144] *See id.* § 10.11. Return to text.

[145] *See* Doyle Street CoHousing Community Unit Owner's Participation Agreement (on file with author). Return to text.

[146] *See id.* Return to text.

[147] *See* Joani Blank, *Responsibilities of Renters*, Cohousing-l, *supra* note 61 (Jan. 1998). Return to text.

[148] Joani Blank, *Re:Who gets to vote?*, Cohousing-l, *supra* note 61 (April 1998). Return to text.

[149] *See id.* Return to text.

[150] In the words of one original resident of Doyle Street who regularly rents out a room in her unit:

[a]s to someone's concerns that renters will not be as respectful of the property or as concerned about it, I think there is enough experience in cohousing to strongly suggest that when in Rome, most people do as the Romans, and when renters and owners all know one another quite well, as we typically do in cohousing, there is a sense of belonging and "ownership" of the community life, that is shared to some extent by everyone who lives there. Whether someone owns or rents his/her home seems unrelated to how engaged that person is in the life of the community.

Joani Blank, *Re: Renters*, Cohousing-l, *supra* note 61 (Feb. 1998). Return to text.

[151] *See* Telephone interview with Joani Blank, *supra* note 133. The precise content of the orientation, and the degree of participation expected of short-term renters, however, are continually being rewritten. *See id.* Return to text.

[152] *See* Doyle Street Bylaws, § 6.8 (Feb. 1992) (on file with author). Return to text.

[153] *See id.* § 7.7 Return to text.

[154] *See id.* Return to text.

[155] *See id.* § 7.8. Return to text.

[156] *See* Doyle Street Declaration, *supra* note 138, § 12.17(iii). If unable to agree on a mediator, the parties each nominate a representative who, working with each other, selects the mediator. *See id*. Evidence produced for the purposes of the mediation is to be excluded from any future court proceedings or arbitration hearings, pursuant to the Declaration. *See id.* § 12.17(iii)(i)*; see also* CAL. EVID. CODE § 1152.5(c) (West 1997) (excluding evidence made in the course of mediation from court proceedings, except for documents explicitly providing otherwise). Return to text.

[157] *See* Doyle Street Declaration, *supra* note 138, § 12.17(iii); CAL. CIV. P. CODE §§ 638-645.1 (West 1997). Return to text.

[158] *See* Doyle Street Declaration, *supra* note 138, § 12.17(iii). Return to text.

[159] *See* Tina Cassidy, *A New View of Neighborhood: Acton Cohousing Community Seeks to Recreate Life in Small-town America*, BOSTON GLOBE, Oct. 1, 1995, at Real Estate A1. Return to text.

[160] *See id*. Return to text.

[161] *See id*. Return to text.

[162] *See id.* Return to text.

[163] *See id*. Return to text.

[164] *See id.* Return to text.

[165] *See id.* Return to text.

[166] *See* Fatsis, *supra* note 128. Return to text.

[167] *See id.*

168 See id. Return to text.

[169] *See id.*; Joan O'Brien, *New View of Housing Neighborhood Near Boston Epitomizes Cohousing Ideals*, SALT LAKE TRIB., May 5, 1996, at J1. Return to text.

[170] *See* Fatsis, *supra* note 128. Return to text.

[171] *See* Jim Snyder-Grant, *Re: Membership sale agreement questions*, Cohousing-l, *supra* note 61 (archives April 19, 1994). Return to text.

[172] *See id.* Return to text.

[173] *See id.* Return to text.

[174] *See id.* Return to text.

[175] Jim Snyder-Grant, *Re: membership building*, Cohousing-l, *supra* note 61 (Oct. 1997). Return to text.

[176] *See* Master Deed, New View Condominium (1993) (on file with author). Return to text.

[177] *See* MASS. GEN. LAWS ANN. ch. 183A, § 12 (c) (West 1997). Return to text.

[178] Master Deed, New View Condominium, *supra* note 176, § 16. Return to text.

[179] *See id.* When owners wish to sell their units, they must provide written notice to the condominium trustees of the price, terms, and conditions they have accepted or would be willing to accept from a purchaser. The trustees then have thirty days to exercise an option to buy at the same price and under the same terms and conditions, and the condominium association has a duty to complete the purchase of the property "promptly and properly." *Id.* Before exercising the right of first refusal and purchasing a unit, all of the individual owners must give prior approval. *See* Declaration of Trust, New View Condominium, § 6.9 (1993) (on file with author). Return to text.

[180] *See* Master Deed, New View Condominium, *supra* note 176, § 17(a)(3). On the necessity of this provision for lender approval of residents' mortgage applications, see Jim Snyder-Grant, *Re: Resale of units (right of first refusal)*, Cohousing-l, *supra* note 61 (Dec. 1997). Return to text.

[181] *See* Jim Snyder-Grant, *Re: In a nutshell!*, Cohousing-l, *supra* note 61 (Feb. 1998). One longtime cohousing resident argues, however, that screening would-be entrants is unnecessary because only those already interested in and committed to cohousing will purchase a unit in a cohousing development. *See* Joani Blank, *Re:*

Members Leaving Cohousing Groups, Cohousing-l, *supra* note 61 (Feb. 1998). Some existing cohousing developments do not keep waiting lists, under the assumption that interested buyers are self-selected. *See* Marci Malinowycz, *RE: Selling Units after move-in*, Cohousing-l, *supra* note 61 (Dec. 1997) (written by Tom Whitmore) (noting, however, that would-be buyers of units at Puget Ridge in Seattle, Washington are expected to attend at least one meeting and meal, and that the group has used its right of refusal once to allow a member to move to a unit of a different size). Return to text.

[182] Master Deed, New View Condominium, *supra* note 176, § 10(a)(iv). Return to text.

[183] Declaration of Trust, New View Condominium, *supra* note 179, § 2.1. Return to text.

[184] *See* MASS. GEN. LAWS ANN. ch. 183A, § 10(b) (West 1997) (describing the rights and powers of the corporation, trust or association over the condominium). Return to text.

[185] Declaration of Trust, New View Condominium, *supra* note 179, § 2.2. Return to text.

[186] *Id*. § 2.2(i). Return to text.

[187] *Id.* §2.2(ii). Return to text.

[188] *Id.* § 2.2(iv). Return to text.

[189] *Id.* § 2.2(v). Return to text.

[190] *Id.* § 2.2(vi). Return to text.

[191] *See, e.g.*, HYATT, *supra* note 3, §7.06(a), at 380-413 (providing sample provisions for condominium declaration, which include definitions of common elements and the rights and responsibilities of declarant-developer and individual unit owners). Return to text.

[192] Declaration of Trust, New View Condominium, *supra* note 179, Art. III. Return to text.

[193] *See id*. Return to text.

[194] *See id.* Return to text.

[195] After three failed attempts to come to a consensus on a proposal (a process that must be given at least thirty minutes each time), any participant may move to vote. If two-thirds agree, then a vote is taken among eligible participants, with the requirements that the proposal passes with at least a two-thirds vote. If no vote is taken, the proposal continues to be discussed at meetings until consensus is reached or a vote is taken. If the proposal concerns an especially urgent matter, the group can call an emergency meeting, without the notice requirement of seven days before a meeting can be held. *See id*. Return to text.

[196] *See* Jim Snyder-Grant, *Re: consensus (when to skip it)*, Cohousing-l, *supra* note 61 (March 1999). Return to text.

[197] *See* Declaration of Trust, New View Condominiums, *supra* note 179, § 10.2 (1993). Return to text.

[198] *See EcoVillage Cohousing Cooperative* (visited Nov. 10, 1999) . Return to text.

[199] *See The EVA Times* (last modified Aug. 9, 1999) . EcoVillage at Ithaca, Inc. (EVI), which sold the land upon which EVCC sits and continues to own the surrounding land, is a not-for-profit foundation with ties to Cornell University's Center for Religion, Ethics, and Social Policy. *See id*. Fifty of the acres at EVI were given to the Finger Lakes Land Trust as a conservation easement, which limits building on the parcel to lean-tos, agriculture structures, and a research/education/visitor center. Currently, West Haven Farm, a Community Supported Agriculture project committed to sustainable, organic agriculture, is located on the easement property, and this and other agricultural uses are permitted by the easement. EcoVillage at Ithaca may add other portions of the land to the conservation easement in the future. *See* Betsy Darlington, *EcoVillage Donates Conservation Easement*, (visited Nov. 10, 1999) . Return to text.

[200] Another cohousing development, called the Second Neighborhood Group (SoNG), has been in the planning stages since August 1996, *see The EVA Times*, *supra* note 199, and holds regular meetings on-site, *see SoNG: Second Neighborhood Group of EcoVillage at Ithaca* (last modified Aug. 9, 1999) . A third group is just beginning to form through the efforts of a private developer. *See Ecovillage at Ithaca, Neighborhood IIII* [sic] (visited Nov. 10, 1999) . Return to text.

[201] *See The EVA Times*, *supra* note 199. Return to text.

[202] *See* Max Lindegger, *Crystal Waters Permaculture Village*, *in* ECO-VILLAGES AND SUSTAINABLE COMMUNITIES, MODELS FOR 21ST CENTURY LIVING 18-19 (Jillian Conrad ed. 1995). Return to text.

[203] *See* HANSON, *supra* note 1, at 4. Return to text.

[204] John Poteet (aka porcupin), *Re: Cohousing Groups Calling Themselves Ecovillages*, Cohousing-1, *supra* note 61 (Feb. 1999). Return to text.

[205] *See id.* Return to text.

[206] *See Ecovillage Cohousing Cooperative*, *supra* note 198. Return to text.

[207] *See id.* Return to text.

[208] *See id.* Return to text.

[209] *See id.* Return to text.

[210] *See* Vizard, *supra* note 8. Return to text.

[211] *See id*. Return to text.

[212] *See Ecovillage Cohousing Cooperative*, *supra* note 198. Return to text.

[213] *See id*. Return to text.

[214] *See* Bylaws of Ecovillage Cohousing Cooperative, Art. III, §1 (on file with author). Return to text.

[215] Interview with Susan McGrievy, resident of Ecovillage Cohousing Community, in Ithaca, N.Y. (Feb. 14, 1998). Return to text.

[216] *See id*. Return to text.

[217] *See id*. Return to text.

[218] *See* Ecovillage Charter, *supra* note 68. Return to text.

[219] *See id*. § 6. Return to text.

[220] *See id*. § 7.1. Return to text.

[221] *See id*. § 2. Return to text.

[222] *See* EcoVillage at Ithaca, Guidelines for Development (Oct. 1993) (on file with author). Return to text.

[223] *See id*. Return to text.

[224] *See id*. Return to text.

[225] *See id*. Return to text.

[226] First Resident Group of Ecovillage at Ithaca Joint Venture Agreement (on file with author) [hereinafter EVCC Joint Venture Agreement]. Return to text.

[227] First Residents' Group of Ecovillage at Ithaca Amended Joint Venture Agreement, (May 1993) (on file with author) [hereinafter EVCC Amended Joint Venture Agreement]. Return to text.

[228] Both documents defined the roles and rights of membership differently. They described the rights and responsibilities of members in terms of three separate conceptual terms. Both included the notion of "responsible parties" (those who have signed the joint venture agreement and met with all of its conditions), as "households" (the individual or group of individuals who will occupy one unit in the development). They differ, however, in their third term: where the original agreement used the concept of "membership" as a generic term referring to those who participated in the development, the amended agreement used the term "household member" to describe the individual of each unit designated as a voting member. In addition, the amended agreement defined responsible parties as the "consensus pool" and the right of the household as the "housing slot," the "reservation of the right to build a living unit" in the development. *See* EVCC Joint Venture Agreement, *supra* note 226, § 4; EVCC Amended Joint Venture Agreement, *supra* note 227, § 5. Return to text.

[229] The original JVA required a contribution of $2,000 from each household. *See* EVCC Joint Venture Agreement, *supra* note 226, § 7(b). By the time of the AJVA, the joint venture was estimating that by October 1994 the group would have to commit to $145,000 in investments, split between no more than twenty members. *See* EVCC Amended Joint Venture Agreement, *supra* note 227, §§ 9(m), (n). Return to text.

[230] Both agreements only allowed withdrawal when the number of households reached a certain level (fifteen in the original agreement; twenty in the amended agreement). *See* EVCC Joint Venture Agreement, *supra* note 226, § 19(a); EVCC

Amended Joint Venture Agreement, *supra* note 227, § 11(a). Both offered reimbursement of funds put into the venture only upon the investment of a new household, the closing of construction financing, or the sale of the joint venture asset by the withdrawing household. *See* EVCC Joint Venture Agreement, *supra* note 226, §§ 19(a)-(c); EVCC Amended Joint Venture Agreement, *supra* note 227, §§ 11(c)(i)-11(c)(I)-(iii). Both agreements expressly stated that no interest would be paid to a withdrawing household. *See* EVCC Joint Venture Agreement, *supra* note 226, § 19(d); EVCC Amended Joint Venture Agreement, *supra* note 227, § 11(d). Return to text.

[231] *See* EVCC Amended Joint Venture Agreement, *supra* note 227, § 13. The later agreement limited full membership in the group to twenty because of concerns that the development would not receive approval for more than twenty units. The "Escrow Account Waiting List" enabled the identification and participation of households beyond this limit and set two levels. "Peepers," were at the top of the waiting list and were required to deposit the amount assessed against all full members of the group and had full rights to participate in meetings and block consensus. "Tadpoles" paid $2,000 (the amount required by the original joint venture agreement), attended and spoke at meetings, but could not block consensus. Tadpoles were allowed to exit freely from the group and receive their original contribution, while the Peepers were forced to agree in writing not to withdraw funds from the escrow account unless they were informed that no housing slot would be available to them. *See id*. §§ 13A-B. Return to text.

[232] *See id*. § 7(a). Return to text.

[233] *See id*. § 7(c). Return to text.

[234] Certificate of Incorporation of Ecovillage Cohousing Cooperative, Inc., § 17 (May 1995) (on file with author). Return to text.

[235] *See id.* § 17(b). Return to text.

[236] *See* Proprietary Lease of Ecovillage Cohousing Cooperative, Inc., § 51(d) (on file with author). Return to text.

[237] *See* Certificate of Incorporation of Ecovillage Cohousing Cooperative, Inc., *supra* note 234, § 17(c). Return to text.

[238] The selling shareholder must present the proposed purchaser to the board, and must attempt to have the buyer meet other shareholders "over the course of several

days." Proprietary Lease of Ecovillage Cohousing Cooperative, Inc., *supra*note 236, § 48(b). Return to text.

[239] *See id*. § 48(c). The vote must take place within ten days of the Board's receipt of a written intent to transfer. *See id*. § 48(d). Return to text.

[240] *See id* § 49(a). Return to text.

[241] *See id*. Return to text.

[242] *See id.* §§ 50(a), (b). Return to text.

[243] *See id*. §§ 51(d), (e). As per the proprietary lease, the flip tax policy was to be reviewed by shareholders no earlier than one year after all thirty units had been occupied, and could be reviewed and amended by the directors at their discretion at any time thereafter. *See id*. § 51(f). Return to text.

[244] *See id*. § 38(a). Return to text.

[245] *Id*. § 38(b). Return to text.

[246] *See id*. § 40(b). Return to text.

[247] *Id*. § 40(c). Return to text.

[248] *See id.* § 40(d). Return to text.

[249] This power is limited by New York law that prohibits a cooperative from withholding consent to the sale of stock because of "the race, creed, national origin, or sex of the purchaser." N.Y. CIV. RIGHTS LAW § 19-a (McKinney 1999). In other contexts in which participants assume collective control, such as in producer cooperatives, the ability to choose new participants is essential to the control of the community and to the creation of a sense of a shared "common life." MICHAEL WALZER, SPHERES OF JUSTICE 162 (1983). Yet the control of entry into a cohousing community may, of course, be relatively unimportant. It is likely that prospective buyers would already know about the responsibilities of cohousing ownership (and, if not, would be so informed by the sellers). They may also be aware that the price of entry into a cohousing project with extensive common facilities would likely be higher than similar properties not affiliated with a cohousing development, whether due to comparative cost of an individual unit or the increased demands of community participation. *See id.* Accordingly, prospective entrants would already be self-selected. In addition, the norms of a cohousing community would

make it unlikely that a departing member would attempt to sell her property to an unwitting and seemingly "unsuitable" (in the sense of seeming unprepared or unwilling to participate in the community) buyer. Return to text.

[250] *See* Henry Hansmann, *Condominium and Cooperative Housing: Transactional Efficiency, Tax Subsidies, and Tenure Choice*, 20 J. LEGAL STUD. 25, 31-32 & n. 15 (1991). Return to text.

[251] *See* William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335, 1409-10 (1991) (arguing that institutions that choose their own members may base their decisions on "surface" similarities between applicant and group, thereby losing the opportunity for "deeper understandings and associations" that arise in such chance circumstances as the archetypal military combat unit). Return to text.

[252] Charter and Bylaws of the First Residents' Group, Ecovillage at Ithaca, N.Y. § 10.1, (Mar. 1994) (on file with author). Return to text.

[253] *See id.* § 10.5. Return to text.

[254] *Id.* § 10.5.5. Return to text.

[255] *Id.* § 10.5.6. Return to text.

[256] *See* Bylaws of Ecovillage Cohousing Cooperative, Inc., Art. VII, § 7 (on file with author). Return to text.

[257] *See id.* Art. VII, § 11. Return to text.

[258] *See id.* Art. XVI, § 2(a)(i). Return to text.

[259] *Id.* Art. XVI, § 2(a)(ii). Return to text.

[260] *See id.* Art. XVI, § 3. Return to text.

[261] *See supra* note 158 and text accompanying. Return to text.

[262] Wayne S. Hyatt, *Common Interest Communities: Evolution and Reinvention*, 31 J. MARSHALL L. REV. 303, 311 (1998) (quoting letter from Brent Herrington, Celebration Community Manager and President of CAI Research Foundation, to Charles Fraser and to author (July 26, 1997)). Return to text.

[263] Ellickson, *supra* note 108, at 1526-27; *see also* Richard Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1354 (1982)

(arguing that because of the volitional nature of the covenants creating community associations, courts should provide rigid and ready enforcement of servitudes as an essential protection of rights of contract and property). Return to text.

[264] Gillette, *supra* note 16, at 1381. Indeed, developers themselves see this "good" as a community, perceiving residential association as "the 'engine' and platform for social, recreational, and civic activities." Hyatt, *supra* note 262, at 311.Return to text.

[265] MCKENZIE, *supra* note 23, at 26. Return to text.

[266] *See id.* at 12, 18. Critics especially decry those CICs that separate themselves from their surroundings by gates. *See, e.g.*, EDWARD J. BLAKELY & MARY GAIL SNYDER, FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES(1997). So-called "gated communities" are especially popular in California, where an estimated nine out of every ten new middle- and upper-income housing developments are "forking up" as gated communities by erecting walls and secured fences. *See* PETER SCHRAG, PARADISE LOST: CALIFORNIA'S EXPERIENCE, AMERICA'S FUTURE 118 (1998). Return to text.

[267] *See, e.g.*, James L. Winokur, *Choice, Consent, and Citizenship in Common Interest Communities*, *in* COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE PUBLIC INTEREST 87, 98 (Stephen E. Barton & Carol J. Silverman, eds. 1994); Gregory S. Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 CORNELL L. REV. 883, 894 (1989). *See also* Uriel Reichman, *Residential Private Governments*: *An Introductory Survey*, 43 U. CHI. L. REV. 253, 285-88 (1976) (criticizing continued developer control throughout most of the sales period by virtue of various vote-weighting procedures contained in the declaration). Return to text.

[268] *See* Winokur, *supra* note 267, at 98-99; Winokur, *supra* note 5 and accompanying text. Return to text.

[269] *See* Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1843, 1860 (1994). Return to text.

[270] *See, e.g.*, DILGER, *supra* note 25, at 137-39. Furthermore, unit owners who become unhappy with servitudes face the difficult choice of an expensive and difficult exit through sale or grudging compliance with the rules of the community.*See* Alexander, *supra* note 267, at 888. Return to text.

[271] For an argument that CICs infringe the constitutional rights of their members and therefore should be deemed state actors, see Steven Siegel, *The Constitution and*

Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama, 6 WM. & MARY BILL RTS. J. 461, 555-58 (1998). For an argument that residential associations infringe upon the constitutional rights of *non-members* and should therefore be treated as state actors, see David J. Kennedy, Note, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L. J. 761, 790-91 (1995). In addition, one commentator has argued that judges should treat the typical CC&Rs of CICs as contracts of adhesion. *See* Evan McKenzie, *Reinventing Common Interest Developments: Reflections on a Policy Role for the Judiciary*, 31 J. MARSHALL L. REV. 397, 421-22, 426-27 (1998).Return to text.

[272] *See* McKenzie, *supra* note 271, at 420-21 (distinguishing consent to be governed and assent to contract). Return to text.

[273] *See id.* Return to text.

[274] Garrett Hardin's original solutions to the "tragedy of the commons" were either to assign property rights to commonly held land or to socialize it. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968). For an excellent critique that identifies the limited common property model as disproof of Hardin's overbroad thesis, see David Feeny et al., *The Tragedy of the Commons: Twenty-Two Years Later*, 18 HUMAN ECOLOGY 1 (1990). Return to text.

[275] Rose, *supra* note 117, at 132; *see also* Robert C. Ellickson, *Property in Land*, 102 YALE L. J. 1315, 1398 (1993) (describing homeowners' associations as limited-access commons). Return to text.

[276] *See* Feeny et al., *supra* note 274, at 5, 10, 11 (providing numerous examples of limited common property regimes throughout human history and around the world); Rose, *supra* note 117, at 177-79 (describing limited common property regimes in American history and law); GLENN G. STEVENSON, COMMON PROPERTY ECONOMICS 47-48 (1991) (describing successful limited common property regimes). Return to text.

[277] *See* Elinor Ostrom, *Covenants, Collective Action, and Common-Pool Resources*, *in* THE CONSTITUTION OF GOOD SOCIETIES 23, 25 (Karol Edward Soltan & Stephen L. Elkin eds., 1996). Return to text.

[278] *See id.* Return to text.

[279] *See* Elinor Ostrom, *Institutional Arrangements for Resolving the Commons Dilemma*, *in* THE QUESTION OF THE COMMONS 250, 250 (Bonnie J. McCay & James M. Acheson eds., 1987). Return to text.

[280] "Boundaries structure relationships. But they structure them badly, in part because boundary imagery masks the existence of relationships and their centrality to concepts like property and privacy." Jennifer Nedelsky, *Law, Boundaries, and the Bounded Self, in* LAW AND THE ORDER OF CULTURE 162, 177-78 (Robert Post ed., 1991). The boundaries protecting the internal cohousing community, constructed through contract and property ownership or rental, mask the relationship between the internal community and the individuals and groups that exist outside. The same could be said of cohousing's design, which is based upon the interaction of residents with each other within commonly held, but still private, spaces, notwithstanding possible "gestures" to the surrounding neighborhood such as architectural compatibility and shared pedestrian paths. *See* FROMM, *supra* note 10, at 218 (suggesting a "range of gestures" to create an inclusive "public edge" of the cohousing community). Return to text.

[281] *See generally* Nedelsky, *supra* note 280, at 178-182. Return to text.

[282] *See* MCKENZIE, *supra* note 23, at 18. Return to text.

[283] Relative homogeneity is in some respects likely to be an asset for the stability and long-term survival cohousing groups. Shared preferences and understandings about the community's goals and operations, as well as the development of norms of reciprocity and trust — which are more likely to arise within relatively homogeneous groups — will aid in the creation of group social capital, "the shared knowledge, understandings, and patterns of interaction that a group of individuals brings to any productive activity." Ostrom, *supra* note 277, at 31-33. Return to text.

[284] Cohousing residents are typically white, relatively wealthy, well educated professionals who have already owned a house and are free of debt. *See* HANSON, *supra* note 1, at 196-97. Approximately 13% of residents in existing cohousing communities in the U.S. are nonwhite, although cohousing groups do include a range of ages among their residents, attracting both couples with small children and "empty nesters," adults whose grown children have moved away from home.*See id*. at 196-97 (listing the general demographic profile of people interested in cohousing); MCCAMANT & DURRETT, *supra* note 10, at 144 (on demographic trends in European cohousing, which shows an increase in elderly populations).Return to text.

[285] Some existing cohousing groups have attempted to address cohousing's exclusivity, as it manifests in the movement's relative lack of diversity. Their attempts, which have ranged from self-imposed mechanisms to enhance ethnic and racial diversity, to employing government programs that either require or reward the inclusion of affordable homes, have been met with mixed results. Some groups have

attempted to attract diverse participants by creating membership quotas that would forbid them from adding white members until they successfully recruit non-white individuals or families. These attempts have been largely unsuccessful. *See* HANSON, *supra* note 1, at 196-97. Return to text.

[286] *See, e.g.*, STEVENSON, *supra* note 276, at 2, 3. Return to text.

[287] *See supra* notes 263-64 and accompanying text. Return to text.

[288] *See* GILLIAN ROSE, MOURNING BECOMES THE LAW 4-5 (1996). Moreover, cohousing groups develop and live in their communities within a broader social and economic system that limits their abilities to create new, utopian social relations able to overcome the public/private dyad that so limits libertarians and communitarians. For example, cohousing fails to adequately address the issue of the separation between private domestic space and public work space in contemporary land use. As feminist critics of current housing arrangements have argued, the domestic segregation of this sense of public/private, based upon a domesticity/work conflict, denigrates both the first term in each dyad and the gender associated with it. Effective solutions would seek to construct "transitional spaces and activities" that enable the binding together of the two and to create "a different kind of space, supportive and interpersonal, which cannot be seen in the concepts of the simple dichotomous divided city." GILLIAN ROSE, FEMINISM AND GEOGRAPHY 135 (1993). A minority of existing cohousing projects, such as Ecovillage at Ithaca, have included office space that is separate from the residential units in their design, *see supra* note 210 and accompanying text, and several communities being planned are following the trend, *see* Vizard, *supra* note 8. Yet, the integration of office space remains relatively exceptional in cohousing design, and the movement remains largely concerned with creating alternative residential communities that are located within commuting distance of residents' workplaces. Return to text.

[289] Iris Marion Young, *The Ideal of Community and the Politics of Difference*, *in* FEMINISM/POSTMODERNI SM 300 (L.J. Nicholson ed., 1990). Return to text.

[290] IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 270 (1990). Return to text.

[291] *See* Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 655 (1988) (calling for "social relations" approach to property that would emphasize ongoing, situated interpersonal relationships that develop over time, from which rights emerge and within which power relations exist). Return to text.

[292] *See* Simon, *supra* note 251, at 1388-92. Return to text.

[293] *See* GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970, at 379-81 (1997) (describing and critiquing dominance of neo-classical economic approach in contemporary legal theories of property); Thomas C. Grey, *The Disintegration of Property*, *in* NOMOS XXII: PROPERTY, 69, 69-71 (J. Ronald Pennock & John W. Chapman eds., 1980) (describing basic assumptions of utilitarian economic approach). Return to text.

[294] *See* Michael Pyatok, *Housing as a Social Enterprise: The Ambivalent Role of Design Competitions*, J. ARCHITECTURAL ED. 147, 159 (Feb. 1993); *see also* Anthony Ward, *The Suppression of the Social in Design: Architecture as War*, *in*RECONSTRUCTING ARCHITECTURE (Thomas A. Dutton & Lian Hurst Mann, eds. 1996) 27-70, 57-58 (citing examples of successful public housing built with residents participating in design and management); Michael Dear & Jurgen von Mahs,*Housing for the Homeless, by the Homeless, and of the Homeless*, *in* ARCHITECTURE OF FEAR (Nan Ellin, ed. 1997) 187-200 (describing efforts to build communities for homeless in Los Angeles based upon the participation of residents). *Cf.*Duncan Kennedy & Leopold Specht, *Limited Equity Housing Cooperatives as a Mode of Privatization*, *in* A FOURTH WAY? PRIVATIZATION, PROPERTY, AND THE EMERGENCE OF NEW MARKET ECONOMIES 267, 267-68 (Gregory S. Alexander & Grazyna Skapska eds., 1994) (proposing a privatization regime for public housing units formerly owned by the Hungarian state that would grant property rights to current occupants and establish them as self-managing, joint-tenancy shareholders with rights to retain part of any profit upon sale, while requiring that some of the surplus profits be used by a local development bank to promote fair housing goals in the locality). *But see* ELLIN, *supra* note 22, at 157-58 (describing the failures and summarizing the critiques of the architect-and planner-run community design movement of the 1960s and 1970s). Return to text.

[295] *See* BUILDING INNOVATION FOR HOMEOWNERSHIP, *supra* note 8, at 102-17. Return to text.

[296] *Id.* at 100. Return to text.

[297] *See* GWENDOLYN WRIGHT, BUILDING THE DREAM: A SOCIAL HISTORY OF HOUSING IN AMERICA 198-99 (1981); *see also* FROMM, *supra* note 10, at 128-31 (describing the Amalgamated apartment cooperatives, like cohousing developments, as "collaborative communities"). Return to text.

[298] *See* GAIL RADFORD, MODERN HOUSING IN AMERICA: POLICY STRUGGLES IN THE NEW DEAL ERA 188-95 (1996). Return to text.

[299] *See* DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR 44 (1992). Return to text.

[300] *See* John Emmeus Davis, *Introduction: Toward a Third Sector Housing Policy*, *in* THE AFFORDABLE CITY: TOWARD A THIRD SECTOR HOUSING POLICY 1, 5-6 (John Emmeus Davis ed., 1994). Return to text.

[301] *Id.* at 15. Another affordable housing advocate has also praised the collaborative nature of cohousing as a model for low- and lower middle-income housing development. *See* Peter W. Salsich, Jr., *Solutions to the Affordable Housing Crisis: Perspectives on Privatization*, 28 J. MARSHALL L. REV. 263, 291 (1995); Peter W. Salsich, Jr., *Urban Housing: A Strategic Role for the States*, 12 YALE L. & POL'Y REV. 93, 133 n.217 (1994). Return to text.

[302] Laura M. Padilla, *Single-Parent Latinas on the Margin: Seeking A Room With A View, Meals, and Built-In Community*, 13 WIS. WOMEN'S L. J. 179, 184 (1998). Return to text.

[303] *See* Eleanor J. Bader, *Low-Income Cohousing*, DOLLARS & SENSE, Jan./Feb. 1998, at 24. Return to text.

[304] *See* Robert Nusgart, *Where living space is shared: Advocate of cohousing says it may provide solution for Baltimore*, BALTIMORE SUN, June 22, 1997, at 1L; Dana Oland, *Common Ground*, SACRAMENTO BEE, July 6, 1996, at G1 (noting the role of a municipal); *see also* Tony Perez-Giese, *May We Share? A new CoHousing development in Boulder proves that communing is alive and well*, DENVER WESTWORD, Jan. 16, 1997 (describing how the Monad cohousing group in Boulder, Colorado, received quicker approval from the city's housing division because of its proportion of affordable homes). *But see* HANSON, *supra* note 1, at 51-52 (cautioning that only a handful of cohousing groups have sought such assistance due to the costs of the slow and complex movements of government bureaucracy). Ironically, a private developer has used one cohousing group to fulfill its legal obligation to build affordable homes within a larger private development. *See* Donna Spreitzer, Living in My Thesis: Cohousing in Davis, California (1992) (unpublished M.A. thesis, School for International Training (Brattleboro, VT)) (last visited Nov. 5, 1999) . Return to text.

[305] *See* PETER AMBROSE, URBAN PROCESS AND POWER 212-14 (1994). Return to text.

[306] *See* ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY 40-43 (1970). Return to text.

[307] *See* CONSTANCE PERIN, EVERYTHING IN ITS PLACE: SOCIAL ORDER AND LAND USE IN AMERICA 76-77 (1977). Return to text.

[308] As a model for participatory affordable housing communities, cohousing suggests communitarian notions of community-building and "insurgent" new social movements that bring about wider social change. On the tradition within twentieth century communitarian theory of privileging a participatory, small-scale government, *see* Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 48-49 (1989). On the concept of "insurgent citizenship," in which local, heterogenous movements subvert and transform the state by forcing the state's regulatory apparatus to respond, see James Holston, *Spaces of Insurgent Citizenship*, *in* MAKING THE INVISIBLEVISIBLE: A MULTICULTURAL PLANNING HISTORY 37-56, 46-48 (Leonie Sandercock, ed. 1998). Return to text.

JUDICIAL ACTIVISM IN ENFORCEMENT OF FLORIDA'S NET BAN

MARLENE K. STERN*

Table of Contents

I. INTRODUCTION

The Mullet is a Bird.

> *Roderick Donald McLeod . . . was Judge in Crawfordville from 1901 to 1928. His greatest acclaim was for his decision regarding mullet fishing.*
>
> *In the early 1900's a bill established January and February as the "open" season for mullet. In Wakulla County, November and December were the best time for mullet fishermen. Some men were arrested for fishing*

---

* Attorney, Florida Public Service Commission; J.D., Florida State University, 1999; M.S., Louisiana State University, 1986; B.A., Newcomb College of Tulane University, 1981. The author thanks Donna Christie and Charles Shelfer for their contributions to the development of this Article.

> *out of season and brought before Judge McLeod. With his reputation for being a fair man, the fishermen were sure they would get a proper judgement. He sent them on their way, however, with no real solution to their problem. He was very concerned about the livelihood of these fishermen, but had to obey the law . . . . It was pointed out to [the judge's wife] that mullet had gizzards, a unique feature, as other fish do not have gizzards. Upon hearing this, the judge was then assured of the course to take. When presented with the offending fishermen, he declared the mullet not a fish, since it had a gizzard, and released the fishermen! The entire state rejoiced over the victory brought about by Judge McLeod . . . [N]ewspapers throughout the state ran headlines proclaiming the mullet to be a bird!* [1]

On November 8, 1994, Floridians did something unusual; they voted in favor of a citizen initiative petition to amend the state constitution.[2] The constitutional amendment, commonly called the

---

1. This legend is inscribed on a placard in Azalea Park in Crawfordville, Florida, a small Panhandle fishing town in Wakulla County. The legend illustrates that sentiment against laws adversely affecting commercial fishing has an eighty year history in the Panhandle.

2. Article XI, section 3, of the Florida Constitution allows citizens to amend the constitution by initiative. *See* Art. XI, § 3, FLA. CONST. The process requires that a petition stating the text of the amendment be filed with the Secretary of State. *See id.* The petition must be signed by the number of people equal to eight percent of the votes cast in the presidential election, which immediately proceeded the filing of the petition. *See id*. The geographical distribution of the signatures from throughout the state must also meet certain requirements. *See id.* For example, the signatures must be distributed over at least one-half of congressional districts in the state. *See id*.

Constitutional amendment via citizen initiative has not met with great success in Florida. *See infra* notes 34-37 and accompanying text. In a 1997 presentation to the Constitution Revision Commission, former Florida Governor Reubin Askew stated, "[a] true citizen initiative is not an easy task." COASTAL CONSERVATION ASSOCIATION OF FLORIDA (CCA), OUTLINE FOR PRESENTATION TO FLORIDA CONSTITUTION REVISION COMMISSION, July 22, 1997 (on file with the CCA, Tallahassee, Florida.) [hereinafter CCA PRESENTATION]. A number of studies regarding commercial fishing and restrictions on net fishing are appended to the CCA PRESENTATION. *See id*

net ban, prohibits the use of entangling nets in all Florida waters and the use of non-entangling nets larger than 500 square feet in nearshore and inshore Florida waters.[3] The net ban is really nothing more than a gear restriction, the type of fishing regulation which is typically promulgated by rule in Florida.[4] The net ban's

---

3. Article X, section 16, of the Florida Constitution contains the net ban language, the relevant portions of which provide that:

(a) The marine resources of the State of Florida belong to all of the people of the state and should be conserved and managed for the benefit of the state, its people, and future generations. To this end the people hereby enact limitations on marine net fishing in Florida waters to protect saltwater finfish, shellfish, and other marine animals from unnecessary killing, overfishing, and waste.

(b) For the purpose of catching or taking any saltwater finfish, shellfish, or other marine animals in Florida waters:

(1) No gill nets or other entangling nets shall be used in any Florida waters; and

(2) In addition to the prohibition set forth in (1), no other type of net containing more than 500 square feet of mesh area shall be used in nearshore and inshore Florida waters. Additionally, no more than two such nets, which shall not be connected, shall be used from any vessel, and no person not on a vessel shall use more than one such net in nearshore and inshore Florida waters.

(c) For purposes of this section:

(1) "gill net" means one or more walls of netting which captures saltwater finfish by ensnaring or entangling them in the meshes of the net by the gills, and "entangling net" means a drift net, trammel net, stab net, or any other net which captures saltwater finfish, shellfish, or other marine animals by causing all or part of the heads, fins, legs, or other body parts to become entangled or ensnared in the meshes of the net, but a hand thrown cast net is not a gill net or an entangling net;

. . . .

(3) "coastline" means the territorial sea base line for the State of Florida established pursuant to the laws of the United States of America;

(4) "Florida waters" means the waters of the Atlantic Ocean, the Gulf of Mexico, the Straits of Florida, and any other bodies of water under the jurisdiction of the State of Florida, whether coastal, intracoastal or inland, and any part thereof; and

(5) "nearshore and inshore Florida waters" means all Florida waters inside a line three miles seaward of the coastline along the Gulf of Mexico and inside a line one mile seaward of the coastline along the Atlantic Ocean.

(d) This section shall not apply to the use of nets for scientific research or governmental purposes.

. . . .

Art. X, § 16, FLA. CONST.

4. From 1983 to 1997, the Florida Marine Fisheries Commission (MFC) was authorized to make rules pertaining to management of saltwater fisheries. *See* § 370.027(1), FLA. STAT. (1997). In 1998, the MFC was merged with the Florida Game and Fresh Water Fish Commission to create the Fish and Wildlife Conservation Commission. *See* Art. XII, § 12, FLA. CONST. The new agency now has the authority to manage saltwater fisheries. At the time of publication of this Article, the MFC technically does not exist and state statutes and rules are being amended to reflect the merging of the two agencies. Because this

anomalous place in the state constitution resulted from a political debate so divisive that it stalled efforts to manage inshore net fishery species for upwards of six years.[5] The key opponents in this debate were those with interests in the commercial fishing industry and those with interests in conservation and the sports fishing industry.[6]

The Florida Marine Fisheries Commission (MFC) was the state agency authorized to manage most marine species when the net ban was enacted[7] and it never proposed to limit the use of nets to such an extent. Most of the management strategies the MFC proposed over the years were much less restrictive than the ban.[8] Finally, however, frustrated by the lack of action to protect net fisheries,[9] the Florida Conservation Association proposed a constitutional amendment, which was supported by numerous

---

Article addresses actions that pre-date the merging of the agencies, continued reference is made to the MFC, statutes governing the MFC and rules promulgated by the MFC.

The MFC had the authority to implement specific management methods including prohibiting the use of certain types of gear. *See* § 370.027(2)(b), FLA. STAT. (1999). Examples of rules in which the MFC has exercised this specific authority include: 1) prohibiting the harvesting of Spanish mackerel by any net on the east coast, see FLA. ADMIN. CODE R. 46-23.003 (1997); 2) allowing king mackerel to be harvested only by hook and line gear, see FLA. ADMIN. CODE R. 46-12.0047(1) (1993); and, 3) allowing grouper and snapper to be harvested only by hook and line or a specific type of fish trap, see FLA. ADMIN. CODE R. 46-14.005(1) (1997).

5. *See* ROBERT Q. MARSTON & RUSSELL S. NELSON, NEW DIRECTIONS IN THE MANAGEMENT OF FLORIDA'S MARINE FISHERIES: A REPORT TO THE FLORIDA MARINE FISHERIES COMMISSION FOLLOWING PASSAGE OF ARTICLE X, SECTION 16, OF THE CONSTITUTION OF THE STATE OF FLORIDA 38-43, 46-49 (1995) [hereinafter MARSTON]. This report documents the efforts of the MFC to manage six species of fish prior to the passage of the net ban. *See id.*

6. *See id*.

7. *See* discussion *supra* note 4.

8. *See* MARSTON, *supra* note 5, at 38-43, 46-49.

9. *See, e.g.*, William E. Clague, *Florida's Net Ban: A Civic Republican Critique of Florida's Law of Fisheries*, 11 J. LAND USE & ENVTL. L. 537, 553 (1996) (citing unsuccessful efforts by the MFC to regulate marine fishery resources as a key factor contributing to the drive to pass the ban); Andrew Barnes, *No. 3: Vote to Limit Nets*, ST. PETE. TIMES, Oct. 31, 1994, at A8 (stating that the constitutional amendment was a last resort by anti-net groups who unsuccessfully tried "every other avenue for change," including the Governor, state Cabinet, and Legislature).

conservation and sports fishing organizations.[10] The signatures of 540,000 Floridians[11] assured the amendment's place on the ballot.

Although the net ban now has a secure place in the constitution, enforcement of its provisions has met with much resistance from the commercial fishing industry and elected judges who rely on industry votes.[12] Enforcement problems are especially pronounced in the Panhandle counties of Florida, where commercial fishing is one of the primary sources of revenue.[13] This Comment examines the litigation of net ban cases in Panhandle county courts and evaluates the legitimacy of the decisions by applying two models. The goal of this analysis is to decipher whether the decisions are influenced primarily by political, economic, and social factors, or whether they result primarily from rational application of the law.

Part II of this Comment describes the background events leading to the development of the net ban. Decisions issued by Panhandle county judges are presented and analyzed in Part III of this Comment to illustrate why the legitimacy of the judicial decisions is questionable. Some of the political, economic, and social factors that may be influencing the decisions of Panhandle county judges are discussed in Part IV. Part V applies to the Panhandle court opinions a framework for analyzing whether judicial decisions are activist and concludes that they are activist. The legitimacy of judicial activism by Panhandle judges is evaluated in Part VI by applying two models, one procedurally

---

10. *See* CCA PRESENTATION, *supra* note 2. In 1997, the Florida Conservation Association changed its name to the Coastal Conservation Association of Florida. *See id.* Organizations that supported the net ban included the Florida Audubon Society, the Wilderness Society, the Florida Wildlife Federation, the Florida League of Anglers, and the Florida Coalition of Fishing Clubs. *See id.*

11. *See id*.

12. *See* discussion *infra* Part III. A press release by the CCA provides data showing that net ban related arrests increased dramatically from July 1995, the month the ban became effective, through December 1996. *See* Press Release from CCA, *Illegal Netting Arrests Soar to Record Numbers as Outlaw Netting Increases* (Jan. 9, 1997) (stating that "the court system has been lax on punishing violators") (on file with the CCA, Tallahassee, Florida).

13. *See* Bill Moss, *Lifelong Fisherman Tears at Net Ban*, ST. PETE. TIMES, July 2, 1995, at B1.

oriented and the other more substantively oriented. Finally, Part VII concludes that because judicial decisions do not comport with models of legitimate activism, those decisions are better explained by the political, economic, and social pressures that affect Panhandle county court judges.

II. BACKGROUND EVENTS LEADING TO THE PASSAGE OF THE NET BAN

Much of the debate which prompted the net ban focused on the efforts of the MFC to manage the mullet fishery, which is the largest component of the inshore net fishery in the state.[14] Mullet are valued not only for their meat but also for their roe.[15] Sales of mullet roe can earn millions of dollars in a single season.[16] The value of the 1990 commercial inshore net harvest in Florida was approximately $42,800,000,[17] or 20% of the total commercial harvest in Florida.[18]

The MFC began conducting rulemaking workshops to manage the mullet fishery in 1989 when it first recognized the need to implement measures to conserve the species.[19] Caught in the struggle between commercial fishermen on one side, and conservationists and recreational fishermen on the other, however, the MFC could not pass a rule without it being petitioned.[20] Compromise became an impossibility as concessions made to one group were invariably challenged by the other.[21] The MFC also met with resistance from the Governor and Cabinet, most notably when that

---

14. *See* MARSTON, *supra* note 5, at 38.

15. Roe are fish eggs.

16. *See* MARSTON, *supra* note 5, at 46.

17. *See* CCA PRESENTATION, *supra* note 2, app. 11. The CCA estimate is based on data collected by the Florida Department of Environmental Protection. *See id.*

18. *See id*.; *see also* MARSTON, *supra* note 5, at 5 (stating 80% of the Florida commercial fishery will not be adversely affected by the net ban and that the industry is expected to benefit from the ban).

19. *See* MARSTON, *supra* note 5, at 38.

20. *See id*. at 38-43. The MFC must conduct rulemaking in accordance with the Florida Administrative Procedures Act, Chapter 120 of the Florida Statutes. *See* § 370.027(3)(a), FLA. STAT. (1999). Chapter 120 describes rulemaking procedures for all agencies and provides that all proposed rules must be noticed and can be challenged by filing a petition. *See* § 120.56, FLA. STAT. (1999).

21. *See* MARSTON, *supra* note 5, at 38-42.

body refused to approve a temporary emergency rule needed to protect the fishery during the pendency of a protracted rule challenge.[22] Despite the quantity and high quality of data available to support mullet management efforts, the "legal and political torsion brought to bear on the management process for mullet was extraordinary and sufficient to stall, if not preclude, implementation of a successful recovery plan."[23] The MFC's inability to obtain approval for a management plan and the corresponding unresolved political conflict between commercial and recreational fishermen served as the impetus for the net ban amendment.[24]

The issue of mullet conservation was particularly salient in the Panhandle counties of Florida, where commercial net fishing is a significant source of income.[25] Panhandle legislators followed the MFC's rulemaking process closely. In 1990, Panhandle legislators asked the MFC to exempt the Panhandle counties from the statewide restricted species designation for mullet, despite the fact that data showed more stringent conservation measures were needed.[26] When the MFC did not remove the restricted species designation in the Panhandle, the legislators accomplished their goal by revising the statutes during the 1991 legislative session to eliminate the restriction over mullet in Panhandle counties.[27] In 1992, the MFC proposed a net ban that would prohibit the use of gill net in rivers but allow the use of such nets in coastal waters.[28] This type of ban would have worked a compromise between commercial fishermen and their opponents by protecting juvenile fish while allowing harvests of adult fish.[29] The MFC withdrew

---

22. *See id*. at 42. All rules the MFC promulgates are subject to approval by the Governor and Cabinet. *See* § 370.027(1), FLA. STAT. (1999). The approval requirement frustrates and often impedes MFC rulemaking efforts. *See* Clague, *supra* note 9, at 562. "Review by the Governor and Cabinet functions largely as a method of political review of MFC action . . . . The cursory and adversarial nature of this review often discounts the economic and scientific considerations that drive MFC rulemaking." *Id.* at 570.

23. MARSTON, *supra* note 5, at 46.

24. *See* Clague, *supra* note 9, at 553.

25. *See* Moss, *supra* note 13.

26. *See* MARSTON, *supra* note 5, at 39-40.

27. *See id*. at 40.

28. *See* Clague, *supra* note 9, at 553-54.

29. *See id*. at 554, n.132.

the proposal, however, in response to threats by a Panhandle legislator to eliminate the MFC.[30] During an early stage in the state budget process for the 1995 legislative session, Panhandle legislators in the House Appropriations Committee cut funding for the MFC's research staff in response to proposed regulations implementing the net ban.[31] The research staff provides the MFC with data needed to justify proposed rules and to meet standards of judicial review.[32] Sufficient funding was ultimately restored in the state budget.[33]

In areas of the state other than the Panhandle, the net ban amendment was welcomed by a majority of the state's voters.[34] The initiative is one of the few successful citizen initiative petitions undertaken in the state. Since 1968, when the state constitution was amended to allow citizen initiatives, 132 petitions have been filed with the Secretary of State.[35] Of the 132 petitions, fifteen have made it to the ballot and only ten won voter approval.[36] In fact, the net ban initiative set a national record for the most signatures collected in a single day - 201,000.[37] The editorial boards of many major newspapers in the state recommended voting for the amendment.[38] At the polls, the initiative won by a 72% majority.[39]

---

30. *See id.* at 554. The legislator threatened to eliminate the MFC by invoking the sunset provision that requires re-authorization of the MFC every five years. *See id.* at 553-4.

31. *See id*.

32. *See id.*

33. *See id.* at 554, n.135.

34. *See infra* notes 39-41 and accompanying text.

35. *See* CCA PRESENTATION, *supra* note 2.

36. *See id.*

37. *See id*.

38. *See, e.g.,* David Lawrence Jr., *Amendment 3 - "Net Ban,"* MIAMI HERALD, Oct. 28, 1994, at A20; Tom Giuffrida, *No Red Herring: Net Ban Will Save Fishing For All,* PALM BCH. POST, Oct. 31, 1994, at A10; Barnes, *supra* note 9; L. John Haile Jr., *Net Ban Protects Fish Resource,* ORLANDO SENT., Oct. 19, 1994, at A16; Scott C. Smith, *Amendment 3: Floridians Should Vote "Yes" For Limits On Net Fishing*, FT. LAUD. SUN SENT., Oct. 26, 1994, at A14; Carrol Dadisman, *Voters Should Ban Gill Nets To Protect Our Marine Life*, TALL. DEM., Oct. 14, 1994, at A12; Michael J. Coleman, *Floridians Should Approve Proposal To Ban Gill Nets*, FLA. TODAY, Oct. 26, 1994, at A10; Don R. Whitworth, *Sealife Amendment: Yes*, THE LEDGER, Oct. 21, 1994, at A12.

39. *See* Clague, *supra* note 9, at 538.

The amendment passed in forty-five of Florida's sixty-seven counties.[40] The twenty-two counties where it was defeated are located in the Panhandle and North Florida.[41]

Concerns that county court judges, who are elected, would strike down the amendment began to surface shortly after it became effective.[42] The concern was particularly acute in the Panhandle counties.[43] Commercial fishermen in these counties and those in the seafood industry were expected to lose jobs.[44] The economic hardship was expected to threaten the social structure and unique culture of small fishing villages along the northern coast of the Gulf.[45] Given the potential economic and social consequences of the net ban in the Panhandle, it is not surprising that its deliberate violation has been supported by this region of Florida.[46]

III. SUSPECT DECISIONS BY PANHANDLE COUNTY COURTS

---

40. *See* State v. Kirvin, 718 So. 2d 893, 896, n.2 (Fla. 1st DCA 1998) (listing the counties in which the net ban was defeated).

41. *See id*. The net ban was defeated in the following counties: Bay, Calhoun, Dixie, Franklin, Gadsden, Gilchrist, Gulf, Hamilton, Holmes, Jackson, Jefferson, Lafayette, Levy, Liberty, Madison, Nassau, Suwannee, Taylor, Union, Wakulla, Walton, and Washington. *See id*.

42. *See* Steve Waters, *So Far, So Good For Net Ban Enforcement*, TALL. DEM., July 27, 1995, at C1.

43. *See id.*

44. Estimates of the number of jobs that would be lost are highly variable. The Organized Fishermen of Florida, a group representing commercial fishermen, estimated that up to 50,000 jobs would be lost as a result of the net ban. *See* Dadisman, *supra* note 38. Save Our Sea Life, a coalition of conservation and recreational fishing groups, estimated that 453 to 1,120 jobs would be lost. *See id.* Based on United States Department of Commerce methodology, a net ban is likely to affect 1,200 jobs. *See* Lawrence, *supra* note 38.

45. *See* Melissa Thorn, *Saving an Endangered Species: Florida Fishermen*, VI-30, VI-46-48, *in* LOOKING SEAWARD (Donna R. Christie ed., 1997). The author explains why Florida fishermen and their communities should be regarded as a unique cultural resource and how the net ban threatens the culture and communities of Florida fishermen. *See id.*

46. Illustrative of the support for net ban violators in this region is the reaction Jonas Porter, a lifelong commercial fisherman, received when he set out to challenge the law by violating it on the day the ban became effective. *See* Moss, *supra* note 13. Porter found "nothing but sympathy and cheerleading in the small Panhandle fishing towns." *Id.*

Decisions issued by judges in Panhandle courts have confounded efforts to enforce the net ban in that part of the state.[47] This Part introduces the enforcement problem by examining three ways in which county court judges, sitting as triers of fact, have impeded efforts to enforce the ban. County court judges have withheld adjudication of guilty defendants, ignored the intent and goals of the net ban amendment, and nullified the amendment. This Part provides evidence that such enforcement problems exist and delineates the nature and extent of the problems.

A. Withholding Adjudication

Florida judges have the discretion, when confronted with a guilty defendant, to withhold adjudication of guilt.[48] One way in which Panhandle county judges have frustrated efforts to enforce the net ban is by exercising this discretion, perhaps too freely. When adjudication is withheld, the defendant does not receive a judgment of conviction.[49] The defendant must be put on probation but does not have to serve a minimum sentence.[50] Withholding adjudication is only appropriate when "the defendant is not likely again to engage in a criminal course of conduct and . . . the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law."[51] The purpose of withholding adjudication is to avoid giving a criminal record to individuals who have good prospects for rehabilitation.[52] A decision to withhold adjudication is therefore based on the unique circumstances surrounding the crime and the defendant's character. Adjudication for violation of the net ban may only be withheld for first-time offenders.[53]

Section 370.092(8)(b), *Florida Statutes* (1995), provided penalties for persons *convicted* of violating the net ban. Within

---

47. *See* discussion *infra* Parts III.A.

48. *See* § 948.01(2), FLA. STAT. (1999).

49. *See id*.; *see also* State v. Gloster, 703 So. 2d 1174, 1176 (Fla. 1st DCA 1997).

50. *See* § 948.01(2), FLA. STAT. (1999).

51. *Id*.

52. *See* Holland v. Florida Real Estate Comm'n, 352 So. 2d 914, 916 (Fla. 2d DCA 1977).

53. *See* § 370.092(4)(a)(3), FLA. STAT. (1999).

months of the enactment of this statute, the Florida Marine Patrol (FMP) identified a loophole.[54] Certain judges were, "more often than not"[55] finding defendants guilty but not adjudicating them guilty.[56] In December 1995, the FMP reviewed seventeen net ban violations that had gone to court in Panhandle counties and reported that adjudication was withheld for all but one of the defendants despite findings of guilt.[57] In Franklin County, an offender cited twice in one day for violating the net ban had adjudication withheld on both charges.[58] These defendants were fined $25-$125 in court costs.[59] However, the sentence required for first-time violators is a civil penalty of $2,500 and a ninety-day suspension of their saltwater products license.[60]

In 1996, the legislature amended section 370.092(4), *Florida Statutes* (1997), to provide that any person "receiving any judicial disposition other than acquittal or dismissal" would be subject to the penalties in section 370.092. Thus, the benefit of withholding adjudication was eliminated.[61]

Since the withholding of adjudication appears to be relatively common in net ban cases tried in the Panhandle, one questions whether the decisions are based on assessment of unique circumstances and individual character traits. Furthermore, if economic hardship, and perhaps political protest, is driving fishermen to violate the ban, it is unlikely that their prospects for rehabilitation are good because the hardship will continue. Finally,

---

54. *See* Childers v. D.E.P., 696 So. 2d 962, 965-66 (Fla. 1st DCA 1997) (reviewing the legislative history of section 370.092(8)(b), *Florida Statutes* (1995), and its subsequent amendment in 1996).

55. *Id*. at 966.

56. *See id*.

57. *See* Florida Conservation Association, *FCA Special Report Illegal Gill Netting in Florida Waters* (on file with the CCA, Tallahassee, Florida) [hereinafter *FCA Special Report*].

58. *See* Charles L. Shelfer, Presentation at *The Second Annual Public Interest Environmental Conference* 6 (Mar. 1, 1996) (on file with the MFC, Tallahassee, Florida) [hereinafter Shelfer Presentation].

59. *See FCA Special Report*, *supra* note 57, at 4.

60. *See* § 370.092(4)(a)(1), FLA. STAT. (1999).

61. Act effective Oct. 1, 1996, ch. 96-300, § 2, at 1312, Laws of Fla. (codified at section 370.092(4)(a), *Florida Statutes* (1997)); *see also Childers*, 696 So. 2d at 966 (discussing the legislative history of the statutory amendment).

withholding adjudication of guilt so frequently promotes violation of the law, not justice or the welfare of society. The prevalence of withholding adjudication suggests Panhandle courts are attempting to mitigate the harsh effects of the net ban itself, rather than the harsh effects a criminal conviction would impose on a uniquely situated defendant. Like the admired Judge McLeod, perhaps present day judges are primarily concerned with protecting the livelihood of fisherman.

B. Ignoring Intent

A second way Panhandle courts have confounded enforcement of the net ban is by ignoring its intent. Insight into the intent of the amendment can be derived from its text, which states that "[n]o gill nets or other entangling nets shall be used in any Florida waters"[62] and "no other type of [non-entangling] net containing more than 500 square feet of mesh area shall be used in nearshore and inshore Florida waters."[63] These excerpts make clear that the voters intended to prohibit harvesting through nets that entangle fish and through other types of nets, such as seines, that confine and collect fish. Since passage of the net ban, fishermen have devised a number of alterations to standard types of nets.[64] The letter of the law does not address them explicitly because such alterations could not have been anticipated. However, the new gear actually entangles fish or is larger than 500 square feet.

When confronted with net alteration cases, Panhandle county courts have relied on the rationale that penal laws must be strictly construed and have thus allowed the use of the altered nets.[65] The courts have ignored textualist interpretations consistent with intent and have issued textualist decisions inconsistent with the intent of the law.[66] Consequently, the county court decisions

---

62. Art. X, § 16(b)(1), FLA. CONST.

63. Art. X, § 16(b)(2), FLA. CONST.

64. *See infra* notes 67-70, 82-86 and accompanying text.

65. *See infra* notes 103-21 and accompanying text.

66. *See infra* notes 67-82 and accompanying text.

seem strained, as if they are struggling to reach an outcome favorable to the fishermen.

In *State v. Taylor*, fishermen were cited for sewing entangling material into seines and deploying the seines in the manner used for gill nets.[67] The fishermen moved to dismiss the charges arguing that their nets did not meet the definition of "gill net" or "entangling net" as provided in the amendment and that those definitions were unconstitutionally vague.[68] The Franklin County Court granted the motion but offered little justification for its holding.[69] The county court did not explain why it considered the definitions vague, but the court stated that the manner in which a net is used should not be a factor in determining whether the net satisfies the definition for a gill net or an entangling net.[70]

Taylor was reversed on appeal by *State v. Kirvin*.[71] The First District Court of Appeal (First DCA) determined the state could properly characterize nets as entangling based on the manner of use.[72] The First DCA observed that the language of the amendment explicitly prohibited the *use* of entangling nets.[73] Furthermore, the First DCA addressed the issue of whether the prohibition on nets was vague with respect to the actual type of net used by the fishermen.[74] The court noted that the definition of "entangling net" in the amendment did not specifically exclude seines, although it did exclude other types of nets.[75] The court thus

---

67. No. 97-62-MMA (Fla. Franklin County. Ct. 1997). The Marine Patrol officers who issued the citations observed mullet entangled by the gills in four nets measuring larger than the 500 square feet limit. *See* State v. Kirvin, 718 So. 2d 893, 895 (Fla. 1st DCA 1998), *rev'g* State v. Taylor, No. 97-62-MMA (Fla. Franklin County. Ct. 1997). The officers also observed a two inch strip of mesh attached at the end of each net. *See id.*

68. *See Taylor*, No. 97-62-MMA at 1.

69. *See id.*

70. *See id.* at *2.*

71. 718 So. 2d 893, 894 (Fla. 1st DCA 1998).

72. *See id*. at 898.

73. *See id.*

74. *See id*. at 897.

75. *See id*. The Florida Constitution provides that "[n]o gill nets or other entangling nets shall be used in any Florida waters." Art. X, § 16(b)(1), FLA. CONST. The Constitution defines the terms "gill net" and "entangling net" and exempts from the definition hand-thrown cast nets, which can be deployed by an individual standing in a boat or on a dock. *See* Art. X, § 16(c)(1), FLA. CONST. Hand-thrown cast nets, typically used by recreational

determined that a seine could qualify as an entangling net if it was used as such.[76]

To illustrate, the First DCA analogized the use of nets "in these types of cases"[77] to burglary tools.[78] The burglary statute cannot criminalize the possession and use of all objects that may be employed in a burglary, such as screwdrivers and tire irons, but the statute can and does criminalize the use of objects to effectuate burglaries.[79] A screwdriver or tire iron is a burglary tool only if used to commit a burglary. The First DCA reasoned that because the newly-devised nets were used to effectuate entanglement of fish, they should be deemed entangling nets.[80] Accordingly, the First DCA held that the challenged provisions of the amendment were constitutional and that the nets violated the net ban.[81]

Both the First DCA and the Franklin County Court relied on the amendment's text to reach their decisions. However, the First DCA's decision comports with the intent of the amendment, while the county court's decision does not. The county court's decision was short on reasoning, providing no basis for decision. Given the lack of explanation, the county court is justifiably subject to the criticism that it unnecessarily ignored intent.

In *State v. Moore*, the defendant was charged with violating the net ban by using a non-entangling net larger than 500 square feet within nearshore waters.[82] The fisherman attached sheets of "shade material" to both sides of his otherwise legal size seine so that the entire piece of gear exceeded 500 square feet.[83] The shade material had a small mesh size that allowed water to pass through it and allowed for harvesting larger quantities of fish than could be

---

fishermen, are not prohibited because the nets are small and cannot harvest commercial quantities of fish efficiently.

76. *See Kirvin*, 718 So. 2d at 897.

77. *Id.*

78. *See id.*

79. *See id.*

80. *See id*. at 898.

81. *See Kirvin*, 718 So. 2d at 898.

82. No. 96-282-MM (Fla. Gulf County. Ct. 1996).

83. *See id.* at 1.

obtained if a standard 500 square foot seine were used.[84] The state argued that the entire piece of equipment was a net and that the measurement of its size should include the shade material.[85] The defendant filed a motion to dismiss, arguing that the shade material was not a net and that only the seine itself should be included in the measurement of size.[86]

The Gulf County Court granted the motion to dismiss on three grounds. First, the state had not prohibited tarps,[87] which are impervious to water, from being attached to seines.[88] The court indicated that allowing attachment of tarps, but not shade material, was inconsistent, and that the state's attempt to distinguish between the two materials on the basis of permeability was irrelevant.[89] The court reasoned that if a tarp was not a net, the shade material could not be a net.[90] Since the seine portion of the gear did not contain more than 500 square feet of mesh area, it did not violate the amendment.[91] Second, the court considered the state's interpretation of the term "net" overbroad.[92] The court maintained that the terms of the constitution must be strictly construed and given their usual, obvious meaning.[93] The court reasoned that neither the public, nor those in the industry, would consider the shade material a net.[94] Finally, the court found that only the equipment, rather than the conduct or activity of fishermen, was regulated.[95] Thus, the court found the fact that the gear was used like a net to be irrelevant. The case was not appealed.

---

84. *See id.* at 2-3.
85. *See id*. at 1.
86. *See id*.
87. *See* State v. Moore, No. 96-282-MM at 1 (Fla. Gulf County. Ct. 1996).
88. *See id.* at 1-2.
89. *See id*.
90. *See id.*
91. *See id*. at 3.
92. *See Moore*, at 2-3.
93. *See id.* at 2.
94. *See id.* at 3.
95. *See id*.

Although *Moore* was decided before *State v. Kirvin*,[96] the county court could have employed the reasoning of *Kirvin* that the amendment proscribes certain types of gear as well as the manner in which gear is used.[97] The net ban provides that "no other type of net containing more than 500 square feet of mesh area shall be *used* in nearshore and inshore Florida waters."[98] The net ban defines "mesh area" as "the total area of netting with the meshes open to comprise the maximum square footage."[99] Shade material functions exactly like a net. The defendant was using the gear to catch fish in the same manner one would use a seine net to catch fish. Furthermore, mesh size is not addressed in the amendment, only the total amount of mesh area is addressed. Because the shade material allowed water to pass through it, it could be considered mesh. Under the reasoning of *Kirvin*, the gear would have likely been considered a net measuring more than 500 square feet since it was made of material that functioned like a net and was used by the defendant as a net. Although the *Moore* court felt obliged to construe the text strictly, it could have done so in a way that acknowledged the intent of the amendment.

The tendency of Panhandle county courts to ignore intent is apparent in cases involving disputes over the geographic limits of the net ban. The amendment states that the net restrictions apply "three miles seaward of the coastline."[100] Whether the three mile distance should be measured in nautical or statutory miles has been controversial in the Panhandle region of the state,[101] whereas, the issue is subject to little debate outside the Panhandle.[102]

In *State v. Conner*,[103] the defendant was cited for fishing with a non-entangling net containing more than 500 square feet of mesh area within nearshore waters. [104] The defendant moved to

---

96. 718 So. 2d 893 (Fla. 1st DCA 1998).

97. *See id*. at 897.

98. Art. X, § 16(b)(2), FLA. CONST. (emphasis added).

99. Art. X, § 16(c)(2), FLA. CONST.

100. Art. X, § 16(c)(5), FLA. CONST.

101. *See infra* notes 104-11 and accompanying text.

102. *See infra* notes 123-24 and accompanying text.

103. No. 96-328-MMA (Fla. Wakulla Cty. Ct. 1996).

104. *See id.*

dismiss the charges on several grounds; one reason was that the MFC exceeded its rulemaking authority by promulgating a rule defining nearshore and inshore waters as "all Florida waters inside a line three *nautical* miles seaward of the coastline . . . ."[105] The amendment defines these waters as being "three miles seaward of the coastline."[106] The MFC added the term "nautical" to its rule. Because a nautical mile is 0.15 miles longer than a statutory mile, the defendant argued that the MFC expanded the area over which the amendment could be enforced and, therefore, exceeded its delegated legislative authority.[107]

In granting the motion to dismiss, the Wakulla County Court stated it was obligated to conduct a "strict construction analysis,"[108] and that the term should be given its plain and simple meaning because a penal statute carrying criminal penalties was at issue.[109] The court first examined the use of the terms "miles" and "nautical miles" throughout the Florida Constitution and Florida Statutes.[110] The court found that the term "miles" appears over 200 times in the statutes and "would appear to mean statute mile."[111] The court did not discuss whether the majority of the 200 citations referred to a distance over water or land. The court also noted that the term "nautical" could have been included in the amendment if so intended.[112] The court concluded that the plain and simple meaning of the term "miles" was not nautical miles but rather statute miles.[113] The court's second reason for granting the motion to dismiss was that doubts should be resolved in favor of the accused since a penal statute was at issue.[114] Finally, the court

---

105. *Id*. at 3 (quoting FLA. ADMIN. CODE R. 46-31.0035(3)(b) (1996)) (emphasis added by court).

106. Art. X, § 16(c)(5), FLA. CONST.

107. *See Conner*, No. 96-328-MMA at 3.

108. *Id*. at 4.

109. *See id.*

110. *See id*. at 3-4.

111. *Id*. at 4.

112. *See Conner*, No. 96-328-MMA at 4.

113. *See id*.

114. *See id*.

found that the rule was an invalid exercise of delegated legislative authority because it enlarged the jurisdiction of the amendment.[115]

The issue in *Conner* was ultimately certified to the First DCA as a question of great public importance.[116] The First DCA held that the MFC did not exceed its rulemaking authority.[117] Relying on existing case law, the court determined that the proper definition of the term "mile" should be based on common usage and understanding of the term as it appears in the amendment.[118] For example, the unit of measure under consideration by the court referred to a distance over water, not over land.[119] Applying this standard, the First DCA concluded the distance should be measured in nautical miles.[120] In response to the Wakulla County Court's argument that the term "nautical" could have been included in the amendment if intended, the First DCA noted the term "statutory" could have been included as well.[121] The Wakulla County Court's narrow analysis entirely ignored the amendment's context.

C. Judicial Nullification

In addition to withholding adjudication of guilty defendants and ignoring intent, county courts in the Panhandle have held the amendment and related statutes and rules unconstitutional.[122] Some of these decisions provide little or no justification for striking down the net ban.[123] Since constitutional amendments are to be

---

115. *See id*. at 5.

116. *See* State v. Conner, 717 So. 2d 179, 180 (Fla. 1st DCA 1998).

117. *See id.* at 181.

118. *See id*.

119. *See* Initial Brief for Appellant at 28, State v. Conner, No. 97-3283 (Fla. 1st DCA 1997).

120. *See id*.

121. *See id.* at 180.

122. *See, e.g.*, State v. Corbin, No. 96-414-MM (Fla. Dixie County. Ct. 1997); State v. Taylor, No. 97-62-MMA (Fla. Franklin County. Ct. 1997); State v. Conner, No. 96-328-MMA (Fla. Wakulla County. Ct. 1996).

123. *See, e.g.*, State v. Corbin, 715 So. 2d 1017 (Fla. 1st DCA 1998), *rev'g* State v. Corbin, No. 96-414-MM (Fla. Dixie County. Ct. 1997); State v. Kirvin, 718 So. 2d 893 (Fla. 1st DCA 1998), *rev'g* State v. Taylor, No. 97-62-MMA (Fla. Franklin County. Ct. 1997).

granted a greater degree of judicial deference than statutes,[124] a well reasoned justification should be provided for declaring the net ban amendment unconstitutional.

The three cases of nullification that were appealed were reversed.[125] In *State v. Taylor*, the defendants moved to dismiss charges against them on grounds that article X, sections 16(b)(1), 16(b)(2), 16(c)(1), 16(c)(3) and 16(c)(5) were unconstitutionally vague and violated their rights to due process.[126] The Franklin County Court granted the motion to dismiss without explaining why the challenged sections were vague.[127] Similarly, in *State v. Corbin*, the Dixie County Court held that six sections of the Florida Statutes, which provide penalties for net ban violations, were facially vague.[128] This opinion also gives no explanation for the holding.[129] In *State v. Conner*, the Wakulla County Court held that the definitions of "nearshore and inshore Florida waters" and "coastline" in the amendment were unconstitutionally vague.[130] The First DCA reversed all of these decisions.[131]

Significant aspects of the amendment's constitutionality were examined by the Florida Supreme Court in *Lane v. Chiles*.[132] The Florida Supreme Court upheld the net ban against vagueness,

---

124. *See* Lane v. Chiles, 698 So. 2d 260, 263 (Fla. 1997).

125. *See, e.g.*, State v. Corbin, 715 So. 2d 1017 (Fla. 1st DCA 1998), *rev'g* State v. Corbin, No. 96-414-MM (Fla. Dixie County. Ct. 1997); State v. Kirvin, 718 So. 2d 893 (Fla. 1st DCA 1998), *rev'g* State v. Taylor, No. 97-62-MMA (Fla. Franklin County. Ct. 1997); State v. Conner, 717 So. 2d 179 (Fla. 1st DCA 1998), *rev'g* State v. Conner, No. 96-328-MMA (Fla. Wakulla County. Ct. 1996).

126. *See* No. 97-62-MMA at 1 (Fla. Franklin County. Ct. 1997).

127. *See id*. The Florida Supreme Court has established a test for vagueness, which asks "whether the language conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice," State v. Hagan, 387 So. 2d 943, 945 (Fla. 1980), and whether the statute can be uniformly enforced, see Southeastern Fisheries Ass'n v. Dept. of Natural Resources, 453 So. 2d 1351, 1353 (Fla. 1984). However, no reference to this test appeared in the *Taylor* decision.

128. *See* No. 96-414-MM at 1 (Fla. Dixie County. Ct. 1997). The court found sections 370.092(1), (2), (3), (4), (5) and (6), *Florida Statutes* (1995), to be vague. *See id.*

129. *See id.*

130. No. 96-328-MMA at 5 (Fla. Wakulla County. Ct. 1996).

131. *See* State v. Conner, 717 So. 2d 179, 180 (Fla. 1st DCA 1998).

132. 698 So. 2d 260 (Fla. 1997) (involving a facial challenge to the validity of the net ban initially brought in circuit court).

takings, equal protection, impairment of contract, and due process challenges.[133] The Florida Supreme Court's decision in *Lane*, as well as the reversal rate of county court decisions, provides some indication that the net ban amendment is reasonable and that nullification by Panhandle judges should be viewed critically.

IV. FACTORS MOTIVATING PANHANDLE COURTS

Part IV examines the political, economic, and social pressures that may influence the decisions of county court judges in the Panhandle.

---

133. *See id*.

A. Political Pressures

County court judges in Florida are elected every four years.[134] For this reason, recent trends in judicial elections are worth examining. Judicial elections throughout the country have received increasing amounts of public attention and, consequently, judicial candidates have become increasingly subject to political pressures.[135] Possible causes for this trend include increasing media coverage of courts, increasing interest of lobbyist and special interest groups in court decisions, and increased partisan politics.[136] Judicial decisions are no longer scrutinized only by academics and practitioners but also by those who can reach a broader audience.[137] The experience of one Tennessee Supreme Court justice, Penny White, is an example. During her first year on the court she sided with the majority in reversing a death penalty decision.[138] Justice White was the only justice up for re-election in the year after that decision.[139] The Governor of Tennessee, seeing an opportunity to gain another Republican seat on the court, campaigned against her re-election by characterizing her as being soft on crime.[140] The Governor's efforts succeeded and she was defeated.[141]

In an effort to test the hypothesis that politics were influencing judicial decisions, one commentator surveyed death penalty decisions issued by six state supreme courts over a ten year period.[142] The affirmance rate of death penalty cases increased from sixty-three percent in 1985 to ninety percent in 1995 in those

---

134. *See* Art. V, § 10(b), FLA. CONST.

135. *See, e.g.,* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 694 (1995); Julian E. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733 (1994).

136. *See* Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1134 (1997).

137. *See id*. at 1134-35.

138. *See id*. at 1133.

139. *See id*.

140. *See id*.

141. *See* Uelmen, *supra* note 136, at 1133.

142. *See id.* at 1136.

states.[143] Since laws on the issue did not change significantly over the study period, other than by possibly becoming more settled,[144] one conclusion drawn from the results was that judges are susceptible to electoral pressures.[145] The conclusion of the study is bolstered by the results of a ten-state survey of judges subject to retention elections.[146] A high percentage of the nearly 1,000 judges surveyed acknowledged that elections exert a "major influence" on their behavior.[147] The survey results suggested that fear of losing an election was influential on decision making, even when losing was unlikely.[148] Thus, the fact that Panhandle county judges are subject to election may be a factor in the decision making process.

Judges stand the greatest risk of removal when they overturn constitutional amendments passed by voter initiatives.[149] Two factors make overruling initiatives risky. First, sponsors must reach a large portion of the electorate to pass an initiative, so voters are familiar with the issue by the time it is ruled on by a court.[150] Second, the sponsors are well situated to track judicial decisions on their initiatives and to initiate campaigns against judges because an organized structure is already in place.[151] Thus, judges place themselves at risk when they rule against constitutional amendments passed by citizen initiative.

Conversely, Panhandle county court judges subject themselves to voter reprisal by ruling in favor of the net ban amendment. Most constituents of Panhandle county court judges voted against the amendment and have much to lose by its enforcement. Florida's county court judges may be subject to an

---

143. *See id*.

144. *See id*.

145. *See id.*

146. *See* Eule, *supra* note 135, at 738.

147. *See id*. at 738-39.

148. *See id*.

149. *See* Uelmen, *supra* note 136, at 1147-49. One well-publicized example is the removal of Justice David Lanphier from the Nebraska Supreme Court for authoring a unanimous opinion that stuck down a term limits initiative. *See id.* at 1148. Sponsors of the initiative mounted a well-organized campaign against Lanphier, raising $200,000 for mass mailings, advertising, neighborhood canvassing, and telephone polling. *See id.*

150. *See id*.

151. *See id*.

even greater degree of pressure because they participate in contested elections,[152] which may be more competitive than retention elections. One cannot presume to read the minds of judges who make difficult decisions under difficult circumstances, yet one cannot ignore that these difficulties may influence their decisions. As one commentator notes, "[i]n spite of the empirical difficulties . . . it hardly seems far-fetched that even the most principled of jurists may hesitate to avoid an electoral mandate in the face of an impending election."[153]

B. Economic and Social Pressures

Electoral pressures are only one of several factors that may influence judicial decisions in the Panhandle. Economic and social factors which significantly affect judges' constituents may also affect judges' decisions.

The net ban has threatened the livelihood of fishermen throughout the state, but its impact on the economies, not just the fishermen, of Panhandle counties is probably more devastating than in other parts of the state. Commercial fishing and harvesting of timber are the primary sources of revenue in many Panhandle counties.[154] Furthermore, most Panhandle counties do not gain significant income from tourism or recreational fishing.[155] In Wakulla County, nearly one quarter of the 20,000 residents derived their income from net fishing prior to the amendment.[156] It has been estimated that the ban will result in the loss of 2,000 jobs in the coastal area south of Tallahassee.[157]

Economic considerations led Wakulla, Franklin, Gulf, Dixie, Taylor, and Jefferson counties to propose resolutions declaring fishing a governmental activity.[158] Article X, section 16(d) of the

---

152. *See* Art. V, § 10(b), FLA. CONST.

153. Eule, *supra* note 135, at 739.

154. *See* Moss, *supra* note 13.

155. *See id.*

156. *See* Bill Bergstrom, *Tempers Flare As Cabinet May Face Net Ban Opponents*, TALL. DEM., June 27, 1995, at C3.

157. *See* Bill Bergstrom, *Governor And Cabinet OK 2-Inch Limit On Net Mesh*, TALL. DEM., Mar. 25, 1998, at C6.

158. *See* Waters, *supra* note 42.

amendment provides that the ban does not apply to the use of nets for scientific or governmental purposes.[159] Wakulla County sought an injunction against enforcement of the net ban until it could adopt and implement a "governmental program for the management of marine resources"[160] whereby commercial fishermen who entered into fishing contracts with the county would be exempt from the ban.[161] Wakulla County maintained that commercial fishing served governmental purposes because counties would not be able to provide governmental services if the seafood industry could not contribute to the revenue base.[162] The circuit court did not grant the injunction, noting that commercial fishing, by definition, is not a governmental activity.[163]

The net ban has also been viewed as a cultural threat.[164] Small fishing communities began developing in the state around the turn of the century, yet few remain today.[165] Members of these tight-knit communities rely on each other for support during hard times.[166] In addition, many commercial fishermen believe their trade can only be mastered through long-term apprenticeship.[167] Thus, there is a history of one generation passing on its knowledge to the next through the shared experience of fishing.[168] Some maintain these small fishing villages are cultural resources that are worthy of protection and that the value of this resource was not adequately considered in the debate on the net ban.[169]

V. ARE PANHANDLE COUNTY COURTS ACTIVIST?

---

159. *See* Art. X, § 16(d), FLA. CONST.
160. Wakulla County v. State, 3 Fla. L. Weekly S263, 264 (Fla. 2d Cir. Ct. 1995).
161. *See id*.
162. *See id.*
163. *See id*. at 265.
164. *See* Thorn, *supra* note 45.
165. *See id.* at VI-32.
166. *See id.* at VI-35.
167. *See id*. at VI-34.
168. *See id.*
169. *See id*.

Judicial activism is difficult to define, or perhaps more accurately, the term has many definitions.[170] Examples of judicial activism include instances where a court makes "decisions [that] conflict with those of other political policy-makers";[171] nullifies legislation;[172] violates "its obligation of comity to the other branches of government";[173] abandons "neutral principals" in deciding cases;[174] or becomes unnecessarily involved in making policy or deciding matters which are essentially political.[175]

In an effort to bring cohesion and uniformity to scholarly debate on the subject, one commentator developed a framework for analyzing judicial activism in the United States Supreme Court's constitutional decisions.[176] Because the net ban is a provision of the state constitution, the framework is useful here. The framework includes six concepts of judicial activism that appear consistently in the literature, overlap only minimally, are not limited to a particular political ideology, and are not "restricted to particular jurisprudential eras."[177] The six concepts and brief explanations are:

> 1. Majoritarianism—the degree to which policies adopted through democratic processes are judicially negated.
>
> 2. Interpretive Stability—the degree to which earlier court decisions, doctrines, or interpretations are altered.

---

170. *See* Bradley C. Canon, *A Framework for Judicial Activism, in* SUPREME COURT ACTIVISM AND RESTRAINT 385 (Steven C. Halpern & Charles M. Lamb eds., Lexington Books, 1982) (enumerating the many ways judicial activism has been defined) [hereinafter Canon].

171. Canon, *supra* note 170, at 385 (quoting David Forte, *The Supreme Court: Judicial Activism Versus Judicial Restraint* 17 (D.C. Heath, 1972)).

172. *See id.*

173. *Id.*

174. *See id.*

175. *See id.*

176. *See* Canon, *supra* note 170, at 386.

177. *Id.*

> 3. Interpretive Fidelity—the degree to which constitutional provisions are interpreted contrary to the clear intentions of their drafters or the clear implications of language used.
>
> 4. Substance-Democratic Process Distinction—the degree to which judicial decisions make substantive policy rather than affect the preservation of the democratic process.
>
> 5. Specificity of Policy—the degree to which a judicial decision establishes policy itself as opposed to leaving discretion to other agencies or individuals.
>
> 6. Availability of an Alternative Policymaker—the degree to which a judicial decision supersedes serious consideration of the same problem by other governmental agencies.[178]

Before discussing each concept individually, an explanation of how the framework functions is needed. Each concept incorporates a range in degree of activism.[179] For example, nullification of a statute is generally considered more activist than nullification of an administrative rule.[180] However, for some of the concepts, assessment of the degree of activism reflected in a decision is highly individualized.[181] For example, opinions may differ with respect to the degree to which judicial decisions make substantive policy.[182] Furthermore, all six concepts may not be applicable to a single decision.[183] For example, the concept of Interpretive Stability will not be applicable when precedential cases do not exist.[184] To be considered activist, a decision need only satisfy one of the six

---

178. *Id*. at 386-87.
179. *See id*. at 387.
180. *See id*.
181. *See* Canon, *supra* note 170, at 388.
182. *See id.*
183. *See id*. at 387.
184. *See id*.

criteria, although some individuals may deem certain criteria more indicative of activism than other criteria.[185] Individuals may also rank the significance of each concept differently.[186] The order in which the concepts are listed above should not be construed as a ranking. The purpose of the framework is to facilitate more cohesive discussion on judicial activism not to quantify it.

The United States Supreme Court is activist in the Majoritarian sense when it declares acts of Congress, state legislatures, city councils, or agencies unconstitutional.[187] The degree of activism decreases as the number of citizens represented by each governmental body decreases.[188] Since Congress represents the entire nation, while a state legislature represents the population of a state, nullification of a federal law would be deemed more activist than nullification of a state law.[189] Nullification of administrative rules is also activism in the Majoritarian sense because agencies answer to elected officials and regulations are authorized by legislatures.[190]

The Majoritarian concept analysis is directly applicable to courts in Florida. For example, nullification of a state law would be deemed more activist than nullification of a local ordinance because the state law presumably reflects the desires of a greater number of the electors. Arguably, nullification of a constitutional amendment enacted through the initiative process would be more activist than nullifying a state statute because the electors vote on the constitutional amendment directly. In Florida, the supreme court has stated that constitutional amendments deserve greater judicial deference than state statutes.[191]

Under the Majoritarian principle, the actions of county courts in the Panhandle are highly activist. Panhandle county courts have nullified the amendment itself, statutes implementing

---

185. *See id*. at 388.

186. *See* Canon, *supra* note 170, at 388.

187. *See id.* at 391-92.

188. *See id*.

189. *See id*.

190. *See id.*

191. *See* Lane v. Chiles, 698 So. 2d 260, 263 (Fla. 1997).

the amendment, and a rule implementing the amendment.[192] While nullification of rules is the least activist of the nullification decisions, in the context of Florida's political structure it is more activist than nullification of a federal regulation by the United States Supreme Court for several reasons. MFC rules must be approved directly by the Governor and Cabinet,[193] while most federal regulations do not need approval of the President and Cabinet. Florida's Cabinet is comprised of elected officials.[194] Meetings of the Governor and Cabinet to decide on rules are open to the public, public input is allowed, and the body usually makes a decision at the meeting in public's presence.[195] When proposed rules are controversial, the body must make a decision in a politically charged atmosphere.[196] In the rulemaking context, linkage of the Governor and Cabinet to the electors in Florida is more direct than the linkage of the President and Cabinet to the national electorate, therefore nullification of an MFC rule is more activist than nullification of a federal rule.

Interpretive Stability is essentially the same concept as *stare decisis*.[197] The Interpretive Stability concept measures the degree to which a court follows or abandons judicial precedent.[198] Due to the principal that law should be predictable is fundamental, and because disturbing settled law can be highly disruptive to society, the explicit or implicit overruling of precedential decisions is activist.[199]

Florida Panhandle county courts have been activist with respect to Interpretive Stability. In *Corbin*[200] and *Taylor*,[201] the courts found the net ban amendment unconstitutionally vague

---

192. *See supra* Part III.

193. *See* § 370.027(1), FLA. STAT. (1999).

194. *See* Art. IV, § 5, FLA. CONST.

195. *See* ALLEN MORRIS, THE FLORIDA HANDBOOK 9 (25th ed. 1995-96).

196. *See* Bergstrom, *supra* note 156 ("Emotional debates over fish nets, offshore oil and an election-panel appointment by Gov. Lawton Chiles promise to pack today's cabinet meeting.").

197. *See* Canon, *supra* note 170, at 392-95.

198. *See id*. at 392.

199. *See id*.

200. State v. Corbin, No. 96-414-MM (Fla. Dixie County. Ct. 1997).

201. State v. Taylor, No. 97-62-MMA (Fla. Franklin County. Ct. 1998).

without applying the Florida Supreme Court's established test for vagueness.[202] Thus, county courts abandoned binding judicial precedent. In addition, county courts were activist to a lesser degree by frequently withholding adjudication of guilt, stretching the limits established by prior cases regarding the types of defendants deserving of leniency.[203]

Interpretive Fidelity gauges activism in a court's actual or inferential construction of constitutional provisions.[204] A court is deemed activist when its interpretation does not comport with the plain meaning of the text of the Constitution or with the intentions or goals of its drafters.[205] Those who believe a court's function is to make a document, centuries old, relevant to the current times, would not regard this form of activism as problematic, or may not regard it as activist.[206] In any case, the concept of Interpretive Fidelity appears frequently in literature and is deemed by many to comprise a type of judicial activism.[207]

With respect to plain meaning, decisions are considered activist under the Interpretive Fidelity principle when they contradict the textual meaning of one or more constitutional provisions.[208] An example is the Minnesota Mortgage Moratorium[209] case in which the court upheld a state law impairing contracts despite the express prohibition against such statutes in the Contracts Clause of the Constitution of the United States.[210] Also in this category are decisions that read additional rights into existing provisions, an example is the extension of the due process clause to include corporations although the text refers only to

---

202. For an explanation of the Florida Supreme Court's established test for vagueness, see discussion *supra* note 127.

203. *See* discussion *supra* Part III.A.

204. *See* Canon, *supra* note 170, at 395.

205. *See id*.

206. *See id*.

207. *See id*.

208. *See id*.

209. HomeBuilding & Loan Ass'n v. Blaisdell, 290 U.S. 398, 54 S. Ct. 231 (1934).

210. *See* Canon, *supra* note 170, at 396.

individuals.[211] Although this addition may have been welcome, it is no less activist.[212]

The concept of Interpretive Fidelity is applicable to interpretation of the net ban by Florida's courts. With respect to the text of the amendment, county courts in the Panhandle have interpreted text strictly and narrowly, an approach that would not be considered activist. For example, in the net alteration cases,[213] the text of the amendment does not explicitly make the altered nets illegal, nor do the rules implementing the amendment. Accordingly, the county court dismissed the charges against the defendant. Because the county courts interpreted the text narrowly, they were not activist in this respect.

However, the county courts were activist by ignoring the intent and goals of the amendment because they applied interpretations which unnecessarily ignored intent.[214] In *Kirvin*, the First DCA expanded the application of the amendment beyond that of the *Taylor* court. The First DCA determined that the amendment banned nets not only based on physical characteristics but also based on function. Thus, a net which incorporated entangling nets and which was deployed like a gill net was found to violate the amendment, even though such a net was probably not envisioned when the amendment was drafted.

Alternatively, the county courts since *Taylor* and *Moore* could have relied on their gap-filling authority to evaluate the net alteration cases. Gap-filling, which is typically not considered activist, can be defined as the making of law, by courts, where the legislature cannot act because it cannot predict all situations in which the law will apply, or because it can not formulate rules comprehensive and specific enough to cover all situations.[215] The

---

211. *See id*. (citing Santa Clara County v. Southern Pacific R. Co., 118 U.S. 394 (1886)). The author states that the extension of the due process clause from individuals to corporations is "well known but hardly well reasoned." *Id.*

212. *See id*.

213. *See, e.g.,* State v. Taylor, No. 97-62-MMA (Fla. Franklin County. Ct. 1997); State v. Moore, No. 96-282-MM (Fla. Gulf County. Ct. 1996).

214. *See* discussion *supra* Part III.B.

215. *See* Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 315-16 (1997). Peters proposes conditions under which judicial activism should be

exclusion of gap-filling from the six criteria in this framework for activism is also evidence that it is generally not considered activist. Since it would be impossible for statutes or rules to specifically prohibit the multitudes of conceivable net modifications, it would not be activist for a county court to rely on intent to fill in gaps pertaining to altered nets.

In *Conner*, the Wakulla County Court ignored intent when it ruled that the term "miles" meant statutory miles.[216] The court ignored the context of the amendment and case law on interpretation of constitutional provisions. When construing a constitutional provision, a court should give the words "reasonable meanings according to the subject matter, but in the framework of contemporary societal needs and structure. Such light may be gained from historical precedent, from present facts, or from common sense."[217] The *Conner* court overlooked simple and relevant facts. For example, the amendment refers to a distance over water; NOAA nautical charts, commonly used for navigation by fisherman, is calibrated in nautical miles. Given these facts and some common sense a court could have readily ascertained that the intended unti of measure was nautical miles. Because the court ignored these types of considerations, it ignored the intent of the amendment and its decisions are properly categorized as activist.

County courts were also activist with respect to Interpretive Fidelity by withholding adjudication of guilt. In taking this action, as set forth in section 948.01(2), *Florida Statutes*, judges must consider, case-by-case, a defendant's character and the circumstances surrounding the crime. Yet, in the Panhandle, the frequency with which adjudication has been withheld points to systematic rather than individualized application of the statute. A systematic application of the statute is inconsistent with its

---

considered legitimate. *See id.* at 315-17. His proposal is discussed in greater detail in Part VI.A of this Article.

216. *See* No. 96-328-MMA at 4 (Fla. Wakulla County. Ct. 1996).

217. *In re* Advisory Opinion to Governor, 276 So. 2d 25, 29 (Fla. 1973) (citing State *ex rel.* West v. Gray, 74 So. 2d 114, 116 (Fla. 1954)).

purpose, so it is not surprising that the statute was amended in a manner which deters its liberal application.[218]

The Substance-Democratic Process Distinction refers to courts scrutinizing laws that impinge upon political processes more closely than those which do not.[219] Under this principle, decisions that alter political processes are considered activist.[220] This type of activism is not applicable to the net ban litigation, however, because neither the net ban nor county court decisions interpreting the net ban alter the political process.

The Specificity of Policy principle is applicable when courts develop new policy.[221] Simple nullification of a law leaves policy makers free to pursue approaches to solving a problem other than that struck down.[222] When the Court limits these alternative approaches by setting a particular approach itself, its decisions are considered activist under the Specificity of Policy standard.[223]

The Specificity of Policy standard is not applicable to county courts. County courts constitute the first tier of courts in the state, so other courts are not bound by their decisions. Policy makers with jurisdiction over marine fisheries issues such as the legislature, the Governor and Cabinet, and the MFC are also not restricted by county court decisions. The state can continue to prosecute net ban violators in Panhandle county courts regardless of county court decisions. Aside from this, county court decisions have not actually created new policy as much as they have attempted to negate existing policy.[224] Typically, their decisions are short and devoid of legal or policy analysis.[225]

The Availability of Alternate Policymaker principle looks at the extent to which another agency could make policy similar to

---

218. Act effective Oct. 1, 1996, ch. 96-300, § 2, at 1308, 1311-13, Laws of Fla. (amending section 370.092, *Florida Statutes* (1995)).

219. *See* Canon, *supra* note 170, at 398-99.

220. *See id*.

221. *See id*. at 400.

222. *See id*.

223. *See id*.

224. *See* discussion *supra* Part III.B-C.

225. *See id.*

that found in a decision of the courts.[226] Since the Panhandle county courts have not been particularly active in affirmatively making policy, this standard is inapplicable.

Three of the six measures of activism discussed above are applicable to net ban issues: Majoritarianism, Interpretive Stability, and Interpretive Fidelity. Each of the suspect characteristics of the county court decisions—withholding adjudication, ignoring intent, and nullification,—fits into one or more categories of activism. Withholding adjudication of guilt is activist under the Interpretive Stability and Interpretive Fidelity principles. Ignoring intent of the amendment is activist under the Interpretive Fidelity principle. The nullification decisions are activist under the Majoritarian and Interpretive Stability principles. Thus, the decisions of the Panhandle county courts can properly be characterized as activist within the given framework.

VI. IS ACTIVISM BY PANHANDLE COUNTY COURTS LEGITIMATE?

Decisions by Panhandle county judges are surprising and unsettling. Panhandle judges have summarily nullified the net ban amendment and statutes imposing penalties for violations and failed to consider intent. Additionally, Panhandle county judges exploited a loophole in a statute that required convictions for imposing penalties by withholding adjudication of guilt. These actions are activist. The actions also leave the impression that the judges are more concerned with the political agenda of those who elect them than with rational application of the law.

This section evaluates whether the Panhandle county courts' activism is legitimate by considering two theories, one procedurally based and the other substantively based. The purpose is to discern whether judges are responding to the law or instead to political, economic, and social pressures. If the theories show the activism is legitimate, the judicial decisions have not exceeded legal bounds. If the theories show that the activism is not legitimate, the judicial decisions are based on something beyond the law. Looking

---

226. *See* Canon, *supra* note 170, at 402.

beyond the law, the political, economic, and social pressures brought to bear on county judges rationally explain their decisions.

A. Procedural Model

A commonly held belief is that activist courts are inherently undemocratic because they eschew application of the laws enacted through the democratic process;[227] those who view judicial activism as undemocratic generally consider it illegitimate.[228] In *Adjudication as Representation*,[229] Christopher Peters proposes that adjudication incorporates fundamentally democratic processes and that, to the extent these processes are followed, judicial activism is legitimate because it is not a threat to democracy. Peters argues that activism is not inherently undemocratic and, therefore, that it is not inherently illegitimate.[230] When the common law system functions as intended, it produces law through a process of representation akin to the legislative process and so imbues adjudicatory lawmaking with the same type of legitimacy as legislative lawmaking.[231]

Peters discusses two aspects of democracy, participatory decision-making and interest representation, and explains how the judicial process embodies these features.[232] Peters' premise is that adjudication is democratic to the extent that it incorporates these principles.[233]

The participatory decision-making principle posits that judicial lawmaking, like legislation, involves participation by those affected in the decision-making process.[234] Litigants participate by setting the course of the litigation through such means as selecting claims, pre-trial motions, proofs, and arguments.[235] Judicial decisions result from "a process of participation and debate among

---

227. *See id*. at 313.
228. *See id*. at 314.
229. *See* Peters, *supra* note 215.
230. *See id*.
231. *See id*. at 319.
232. *See id.* at 340.
233. *See id*.
234. *See id*. at 347.
235. *See id.*

the parties."[236] The autonomy of judges is limited because participation by the parties restricts the decisional options available to the court,[237] the court is expected to respond to the arguments of the litigants, and the court is expected to articulate reasons for its decision.[238]

Litigants participate actively in judicial decision-making, probably more so than the average citizen participates in legislating.[239] The decision is shaped largely by the participation of the parties just as a law may be shaped by public input.[240] Like democratic processes, "adjudication allocates much of the decisionmaking power to those who will be most affected by a decision: the litigants."[241]

Peters acknowledges that the validity of adjudication as a democratic process relies on judges respecting the scope of their authority.[242] There is always the risk of a judge ruling "by fiat"[243] and of a judge exercising disproportionate power over the litigants.[244] When a judge rules by fiat or exercises disproportionate power, the participation of the litigants is constrained.[245] Under such circumstances, the litigants cannot adequately represent their interests, and adjudication loses an important attribute of the democratic process.[246]

The second democratic principle Peters discusses, interest representation, is manifested in our judicial system via *stare decisis*.[247] A judicial decision, properly applied, should bind only those individuals similarly situated to the litigants.[248] So, parties to precedential cases function as representatives for subsequent

---

236. *Id*.
237. *See id.* at 347.
238. *See id.* at 352.
239. *See id*. at 356.
240. *See id*.
241. *Id*. at 358.
242. *See id.* at 358.
243. *Id.* at 359.
244. *See id*. at 360.
245. *See id*.
246. *See id*.
247 .*See id.* at 347.
248. *See id*.

litigants.[249] The binding force of a precedential case on a litigant diminishes as the degree of factual similarity between the precedent and the ongoing action diminishes.[250] In this way, the common law principle of *stare decisis* ensures that litigants only represent those with a common interest and that decisions are only applied to that subset of individuals.[251] Litigants may have more in common with those they "represent" than candidates for office have with their constituents and so may represent those interests more effectively.[252]

Peters recognizes that constraints on interest representation may exist in the adjudicatory context. Effective representation requires courts to adhere to *stare decisis*, which courts may not do.[253] In addition, an unfavorable precedent cannot be overruled as readily as a statute can be amended and cannot be replaced like a politician up for reelection.[254]

Under the Peters approach to activism, Panhandle county court judges did not act legitimately when they nullified the net ban amendment for vagueness in *Taylor* and in *Corbin*.[255] In these cases, the courts did not apply the test for determining vagueness established by the Florida Supreme Court.[256] The county court opinions never even acknowledged the test. Further, the courts erred because they did not acknowledge the limits that *stare decisis* places on their autonomy.

The Panhandle county court decisions were also procedurally deficient in that they often failed to articulate their reasoning in decisions.[257] Due to constitutional amendments receiving great deference, conclusory statements regarding

---

249. *See id*.

250. *See id*. at 365.

251. *See id*. at 367.

252. *See id.* at 369.

253. *See id.* at 366.

254. *See id*. at 371.

255. *See* State v. Taylor, No. 97-62-MMA (Fla. Franklin County. Ct. 1997); State v. Corbin, No. 96-414-MM (Fla. Dixie County. Ct. 1997).

256. For an explanation of the Florida Supreme Court's established test for vagueness, see discussion *supra* note 127.

257. *See supra* notes 67-70 and accompanying text.

nullification are suspect within the context of Peters' model. In one case, the court failed to articulate the arguments put forth by both parties, so the extent to which the court responded to those arguments, if at all, cannot be ascertained.[258] The extent to which the court allowed the litigants to participate in the decision, or whether the courts simply ruled by "judicial fiat," is also indeterminable.

The county courts paid little attention to *stare decisis* when they withheld adjudication so frequently. In their leniency, the courts expanded the subset of litigants to whom the law applied. Since they violated the principle of interest representation, their decisions are not legitimate under the procedural model.

In summary, nullification and withholding of adjudication by county courts may be deemed illegitimate using Peters' approach to activism. The courts violated the principle of participatory decision making in their decisions to nullify the amendment. They violated the principle of interest representation by liberally withholding adjudication of guilt.

B. Substantive Model

Proponents of judicial activism, especially in the form of nullification, usually consider activism justified to the extent that constitutional rights of minorities or the democratic structure of government are protected.[259] The legislative and executive branches of government represent majority interests. When these branches exercise their powers in ways that infringe upon constitutional rights of minorities or democratic processes, minorities have little power to stop them. However, minorities do have recourse in the courts. Courts are expected to protect individual rights and maintain checks and balances among the

---

258. *See Corbin*, No. 96-414-MM at 1 (articulating only the defendant's vagueness argument).

259. *See, e.g.*, Croley, *supra* note 138, at 704; Roger A. Fairfax, Jr., *Wielding the Double-Edged Sword: Charles Hamilton Houston and Judicial Activism in the Age of Legal Realism*, 14 HARV. BLACKLETTER J. 17, 17-18, 27-30 (1998); Lois D. Brandeis, *Public Choice Theory: A Unifying Framework for Judicial Activism*, 110 HARV. L. REV. 1161, 1162-63 (1997) (reviewing CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES (1996)).

branches of government. The following analysis is based on this substantive model justification for activism.

The critical question is whether the constitutional rights of net fishermen are violated by the amendment. The amendment is a gear restriction and does not affect democratic processes. Since the amendment was subject to a statewide election, and net fishermen are a minority group in the state, it is appropriate to consider them a minority.

In assessing whether the net ban infringes on the constitutional rights of commercial fishermen under commonly accepted principles of constitutional law, fishermen have a heavy burden of proof that makes it difficult for them to legitimately claim that their rights have been violated. If one accepts that well established law is an appropriate benchmark from which to measure existing constitutional rights, the net ban does not violate the constitutional provisions commonly challenged by commercial fishermen. If the rights of fishermen have not been violated, then nullification of the amendment is not legitimate.

The First DCA and Florida Supreme Court have upheld the net ban amendment against a variety of constitutional challenges, including vagueness, takings, equal protection, and due process.[260] This Comment does not address all constitutional challenges fishermen have brought or could bring in the future.[261] However, this Comment does address the heart of the tension: the economic impact the amendment has on commercial fishermen and the disparate impact it has on commercial fishermen with respect to recreational fishermen. The effect of the net ban on the ability of commercial fishermen to earn a living would be challenged as a deprivation of a right to due process in a liberty or property

---

260. *See, e.g.*, State v. Kirvin, 718 So. 2d 893 (Fla. 1st DCA 1998) (upholding the net ban against a vagueness challenge); Lane v. Chiles, 698 So. 2d 260 (Fla. 1997) (upholding the net ban against equal protection, due process, and takings challenges).

261. For a thorough analysis of constitutional claims which could be brought against the net ban, see Alexandra M. Renard, *Will Florida's Net Ban Sink or Swim?: Exploring the Constitutional Challenges to State Marine Fishery Restrictions*, 10 J. LAND USE & ENVTL. L. 273 (1995).

interest.[262] The disparate effect would be challenged as a violation of the equal protection clause.[263]

States have a legitimate interest in conserving their natural resources.[264] Use of gear restrictions as a method of conservation has withstood constitutional challenge since at least the 1940's when, in *Skiriotes v. Florida*, the United States Supreme Court upheld a Florida statute prohibiting the use of diving gear by sponge harvesters.[265] Today, in Florida, the Fish and Wildlife Conservation Commission is specifically granted the authority to implement gear restrictions in order to conserve fisheries.[266] Consequently, most of the Florida's gear restrictions have been promulgated as rules and appear in the *Florida Administrative Code*, not in the state constitution.[267]

Courts have reviewed the due process and equal protection claims under the rational basis test, the most lenient standard of review.[268] Strict scrutiny is not applied because commercial fishermen are not a suspect class.[269] Commercial fishermen have not experienced deliberate, unequal treatment historically and have not been rendered powerless in majoritarian processes.[270]

---

262. *See Lane*, 698 So. 2d at 264.

263. *See id*.

264. *See, e.g.*, Hughes v. Oklahoma, 441 U.S. 322, 337 (1979) (stating that a state's interest in conserving fish and maintaining balanced fish populations in its waters is legitimate and similar to its interest in protecting the health and safety of its citizens); Maine v. Taylor, 477 U.S. 131, 142 (1986) (stating that a state's interest in protecting its fish from imperfectly understood risks is legitimate).

265. 313 U.S. 69 (1941).

266. *See* § 370.027(2)(b), FLA. STAT. (1997).

267. *See supra* note 4.

268. *See, e.g.*, Renard, *supra* note 260, at 279; Marine Fisheries Comm'n v. Organized Fishermen of Fla., 503 So. 2d 935, 938-39 (Fla. 1st DCA 1987) (holding that MFC rules will be sustained against an equal protection challenge if the requirements of the rules are rationally related to the ends they are trying to achieve); Lane v. Chiles, 698 So. 2d 260, 262 (Fla. 1997) (holding that the rational basis test should be used to test the validity of the net ban because it should be granted at least as much deference as a statute).

269. *See* Renard, *supra* note 260, at 281.

270. *See id*. Although they are a minority in the state, Panhandle legislators have actively represented commercial fishermen's interests, and commercial fishermen have exerted a good deal of influence on the rulemaking process. See the discussion *infra* Part II for examples of how fishermen exerted influence in the legislative and rulemaking processes.

Furthermore, it is well established that the right to earn a living by working in a specific job is not fundamental.[271] An intermediate level of scrutiny is not applied because gear restrictions do not draw lines based on gender or legitimacy.[272]

Under the rational basis test, a statute must be upheld if it is reasonably related to the purpose it serves and if the purpose is a legitimate one for the state to pursue.[273] As stated previously, the interest of a state in conserving natural resources and the use of gear restrictions as a rational means of achieving conservation are well accepted.[274] One could argue, however, that this particular restriction is not reasonable. Since the rational basis test is very deferential to the lawmaker, in this case the citizens of Florida, it is a difficult argument to win. Under the rational basis test, a court starts with the assumption that the enactment is legitimate.[275] The burden of the plaintiff in proving that the statute is not legitimate is, therefore, very heavy. Proving that restricting the use of entangling nets and large seine-type nets is not rationally related to conserving fisheries would be difficult.

Laws that disparately affect commercial fishermen and sports fishermen are not deemed discriminatory.[276] With respect to gear restrictions, such laws "do not amount to unfair classifications or discriminate between persons, but only discriminate as to the appliances a fisherman may lawfully employ."[277] The laws treat

---

271. *See, e.g.*, LaBauve v. Louisiana Wildlife & Fisheries Comm'n, 444 F. Supp. 1370, 1382 (E.D. La. 1978) (holding that the pursuit of a livelihood is not a fundamental liberty or property interest); Fraternal Order of Police v. State, 392 So. 2d 1296, 1301 (Fla. 1980) (holding that state regulations violate a property interest only when they entirely preclude one from engaging in an occupation); Renard, *supra* note 260, at 281 ("the asserted right to earn a livelihood is merely an economic privilege that falls outside the company of fundamental rights which exact judicial scrutiny").

272. *See* Renard, *supra* note 260, at 281.

273. *See* Lite v. State, 617 So. 2d 1058, 1059-60 (Fla. 1993).

274. *See* cases cited *supra* note 263.

275. *See* State v. Kinner, 398 So. 2d 1360, 1363 (Fla. 1981).

276. *See* Skiriotes v. Florida, 313 U.S. 69, 75 (1941) (holding that a prohibition on the use of diving gear was not discriminatory because it applied to all citizens of the state equally); Renard, *supra* note 260, at 280 ("Gear restrictions apply uniformly to all fishermen, irrespective of the industry to which the user belongs").

277. Renard, *supra* note 260, at 280 (citing Washington Kelpers Ass'n v. State, 502 P.2d 1107 (Wash. 1972)).

all fishermen alike with respect to both the gear they can use and the sanctions they impose.[278] Disparate effects are therefore deemed incidental.[279] Courts have repeatedly upheld gear restrictions against equal protection challenges.[280]

Property and liberty interests in earning a living are not fundamental.[281] Equally important, the net ban does not prevent commercial fishermen from continuing to earn a living in their chosen field.[282] Commercial fishermen can continue to fish with a variety of gear in Florida's nearshore and inshore waters. In addition, the ban does not render their entangling nets or seines greater than 500 square feet in size devoid of economic value. Commercial fishermen may continue to use these nets three nautical miles from the coastline.[283]

The net ban does not contravene well established principles of equal protection and due process jurisprudence. Thus, the net ban does not infringe on those rights of commercial fishermen as discussed above. Under the theory that nullification of statutes is legitimate when constitutional rights of minorities are violated, nullification of the net ban by Panhandle county courts is not legitimate.

VII. CONCLUSION

Based on the preceding analysis, suspect decisions by Panhandle county courts can properly be characterized as activist and, as demonstrated, this activism is not legitimate. Panhandle county

---

278. *See id*.

279. *See id.*

280. *See id*. (citing Louisiana *ex rel.* Guste v. Verrity, 853 F.2d 322 (5th Cir. 1988); LaBauve v. Louisiana Wildlife & Fisheries Comm'n, 444 F. Supp. 1370 (E.D. La. 1978); State v. Raffield, 515 So.2d 283 (Fla. 1st DCA 1987); State v. Perkins, 436 So. 2d 150 (Fla. 2nd DCA 1983); Morgan v. State, 470 S.W.2d 877 (Tex. Crim. App. 1971); Washington Kelpers Ass'n v. State, 502 P.2d 1170 Wash. 1972)).

281. *See* Renard, *supra* note 260, at 281; *see also* LaBauve v. Louisiana Wildlife & Fisheries Comm'n, 444 F. Supp. 1370, 1376 (E.D. La. 1978) (holding pursuit of a livelihood is not a fundamental right); Sisk v. Texas Parks & Wildlife Dep't, 644 F.2d 1056, 1058 (5th Cir. 1981) (stating the ability to fish for a living is not a fundamental right).

282. *See* Lane v. Chiles, 698 So. 2d 260, 264 (Fla. 1997) (citing Fraternal Order of Police v. State, 392 So. 2d 1296 (Fla. 1980)).

283. *See id*.

courts have not provided rational, substantive justifications for their decisions to nullify the net ban. When appealed, the higher state courts consistently reversed the county court decisions. Furthermore, higher courts consistently upheld the amendment against constitutional challenges that were not initiated at the county court level. By failing to adequately justify their decisions, Panhandle county courts have left themselves vulnerable to the criticism that their decisions resulted from extra-legal considerations.

Like Judge McLeod in the legend, Panhandle county courts seem concerned about the livelihood of the fishermen and, in this way, the county court decisions withholding adjudication, ignoring intent, and nullifying the net ban are not unlike Judge McLeod's pronouncement that the mullet is a bird. That is, the Panhandle county court decisions appear to be trying to reach an outcome favorable to the fishermen. The net ban directly threatens the income of commercial fishermen and indirectly threatens the seafood industry and the economies of Panhandle counties, where commercial fishing and the seafood industry contribute substantially to the revenue base. Economic demise due to the net ban could destabilize the culture of fishing communities. Thus, strong judicial intolerance of the net ban in the Panhandle is understandable and can be better explained by the political, economic, and social factors, rather than current law.

THE TELECOMMUNICATIONS ACT OF 1996 AND VIEWSHED PROTECTION FOR THE NATIONAL SCENIC TRAILS

JAMES J. VINCH[*]

I. INTRODUCTION

On October 25, 1783, Thomas Jefferson stood on the heights overlooking the convergence of the Shenandoah and Potomac Rivers outside of modern day Harper's Ferry, West Virginia, on what is now the Appalachian Trail, and surveyed the view below. His description of the view appears in "Notes on the State of Virginia", first published in 1787:

> The passage of the Patowmac through the Blue ridge is perhaps one of the most stupendous scenes in nature . . . . The first glance of this scene hurries our senses into the opinion, that this earth has been created in time, that the mountains were formed first, that the rivers began to flow afterwards, that in this place particularly they have been dammed up by the Blue ridge of mountains, and have formed an ocean which filled the whole valley . . . . For the mountain being cloven asunder, she presents to your eye, through the cleft, a small catch of smooth blue horizon, at an infinite distance in the plain country, inviting you, as it were, from the riot and tumult roaring around, to pass through the breach and participate of the calm below . . . . This scene is worth a voyage across the Atlantic.[1]

Jefferson's comments marked the beginning of a growing recognition that the beauty of the American wilderness was "unmatched" in any other nation.[2] National pride grew as some Americans came to believe this beauty in nature gave them a "distinct moral advantage"[3] and helped separate the old world from the new.[4] Concerns about the preservation of natural areas with their "display of wonderful forms of nature, the ever-varying beauty of the rugged landscape, and the sublimity of the scenery"[5] would eventually inspire the nation's leaders to enact protective legislation in both the National Park Service Organic Act of 1916[6] and later the Wilderness Act of 1964.[7] Nearly eighty years after Yellowstone was set aside as the first national park, a similar but much less popular impetus also led to the formal recognition and protection of hiking trails, recreational footpaths, and their associated scenic corridors with the enactment of the National Trails System Act of 1968 (Trails Act).[8]

Today, the national trails system protects eight national scenic trails, nine national historic trails, and many national recreation trails throughout the United States. The legislation has proved to be only the first step in preserving the full range of recreational and environmental values the Trails Act was originally designed to

protect. Like the protected lands of the national park system, the components of the national trails system are increasingly being subjected to monumental pressures and threats from outside their borders. The press of civilization, with its crowding, increased air and water pollution, and insatiable appetite for commercial development, threatens the integrity of the national parks and, to a greater extent, the national trails.

National parks are typically large contiguous land masses, with a protected core or central zone buffered from external pressures by the surrounding park lands.[9] A single large park has relatively few neighbors. Thus, the parks have been relatively successful in working with local governments and neighboring landowners to develop zoning and other land use controls for their mutual benefit.[10] In contrast, the units of the national trails system are thin ribbons of protected land surrounded by thousands of private property owners and local governments. By their very nature, there is little buffer land standing between the protected trail corridor and the encroachments just beyond its border. Federal land managers find engaging in consistent land management policies difficult because the trails have numerous and diverse neighboring landowners and because of the diverse geographical areas through which the trails pass. As such, the trails are extremely sensitive to incursions from the outside, and the solutions to these problems have become costly and politically difficult to resolve.

Where the components of the national trails system are concerned, these external threats to federal lands come into a sharper focus. As the lands surrounding the trail corridors become more valuable for uses other than farming, logging, and recreational pursuits, the pressures on the trail lands will become more intense. Most recently, these threats have been magnified with the enactment of the Telecommunications Act of 1996 (Telecommunications Act). [11] To meet the increased demand for wireless communications services throughout the nation, and to promote less expensive, more powerful and efficient technology, Congress enacted the Telecommunications Act to encourage the development of advanced telecommunications technologies and pave the way for a massive build-out of telecommunications infrastructure to support the new technology. Due to of the particular characteristics of the new wireless technology, the telecommunications industry has targeted the peaks and high mountain ridge lines through which national scenic trails naturally pass for the construction of telecommunications towers. The Telecommunications Act gives preference to the telecommunications industry in making decisions about where to site telecommunications facilities, while restricting the authority of local governments and federal land managers to regulate the placement of these facilities.

This Article will discuss the growing conflict between the telecommunications industry and the Federal Communications Commission (FCC), on the one hand, and the public land managers responsible for maintaining the national scenic trails, on the

other. Part II of this Article will discuss the history, development, enactment, and implementation of the Trails Act. By focusing on the history of the trails system and the legislative history of the Trails Act, the Article will attempt to identify the values Congress intended to protect with its landmark legislation. In particular, this Article proposes to undertake a case study of the Appalachian Trail, the oldest continuous marked footpath in the United States and one of the first to receive federal protection. Part III will discuss the Telecommunications Act, the policies of the FCC in implementing the act, and the response of the telecommunications industry. Part III will also explore the conflict between the Telecommunications Act and the mission of the National Park Service (NPS or Park Service) concerning its land management decisions affecting the Appalachian Trail. Finally, Part IV will discuss the legal theories the NPS may be able to invoke to protect this resource and will suggest that the NPS may have an affirmative legal duty to take such actions as are necessary to protect the Appalachian Trail.

II. The Development Of The National Trails System

The establishment, protection, and management of the national trails from their inception to the present has undergone an evolution almost as dramatic as that which has affected the trails and their surrounding natural environments. As will be discussed in the following, the establishment of the national trails system, and the philosophies which govern the present-day management of the trails, are a product of natural history, practical experience, and extraordinary vision.

A. Early Establishment and Protection

The network of scenic and recreational footpaths the Trails Act eventually protected did not spring into existence by virtue of Congressional action. Rather, much of the present system predates the arrival of European settlers.[12] Originally used by Native Americans for hunting and trade, these rough foot trails extending up and down the east coast were transformed by the European settlers into more permanent transportation routes.[13] At their inception, trails served a very utilitarian purpose. Beginning in the late eighteenth century, however, Americans began looking at wilderness in a new perspective, recognizing that the "wild country" was no longer an obstacle to overcome,[14] and by the mid-nineteenth century they viewed the wilderness as a distinctive and valuable commodity in its own right.[15] In 1876, the Appalachian Mountain Club was formed in part to use the existing natural footpaths and to construct other paths to "explore the mountains of the Northeast and the adjacent regions, for both scientific and artistic purposes, and in general, to cultivate an interest in geographic studies."[16] Hiking and outdoor recreation became more popular with the growth of the conservation ethic in the early 1900s.[17]

One man had a broader vision for trails and their potential impact on society. Benton MacKaye, a regional planner and Harvard-educated forester who served in Gifford Pinchot's innovative United States Forest Service, visualized a single continuous wilderness trail stretching nearly 2,000 miles along the Appalachian mountain range.[18] In October 1921, MacKaye articulated his idea for the "Appalachian Trail" in an article published in the *Journal of the American Institute of Architects* entitled "An Appalachian Trail, A Project in Regional Planning."[19] The trail, MacKaye described, would be a "wilderness way through civilization . . . not a civilized way through the wilderness;"[20] a place where people could take refuge from the dehumanizing life in the city.[21] The trail would be a linear community where a wilderness traveler would be able "to see what you see."[22] Thus, from its inception, the Appalachian Trail was envisioned as encompassing values beyond those necessary to allow a traveler to walk from Georgia to Maine.[23]

Not long after MacKaye planted the seed, the trail began to grow. Much of the trail already existed as primitive footpaths. Building on what was already there, volunteers gathered to mark and cut the remaining sections necessary to connect Mount Washington in New Hampshire to Mount Mitchell in western North Carolina.[24] Over seven years, 500 miles of trail was formally established, and the entire trail was completed by 1937.[25] For many miles, the early trail traversed private land holdings, making management difficult.[26] Even where the trail was located on public lands, private development encroached upon its route.[27] The integrity of the trail depended on informal agreements with neighboring landowners.[28] This early tactic of using voluntary agreements with neighboring landowners would serve as a pattern for future land management policy but would ultimately prove inadequate to achieve permanent protection from the mounting pressures of civilization.

The Appalachian Trail Conference (ATC), a private not-for-profit governing body, was formed in 1925 to coordinate the maintenance and management of the trail.[29] At an annual ATC meeting in 1937, the NPS, which at that time had no formal affiliation with the trail, proposed protective right-of-way agreements between the ATC and federal and state land management agencies for those portions of the trail passing through public lands.[30] These agreements originally allowed for a one mile right-of-way on each side of the trail through federal lands and for one-half mile on each side of the trail through state lands.[31] Logging was permitted within two hundred feet of the trail, thus subordinating the trail's recreational and environmental significance to traditional uses.[32] Although the trail agreements did not shield the trail from the negative effects of local land use practices, they established two principles that would serve as the basis for future protection. First, the agreements clarified the federal and state governments' acknowledgement of public interest in the

protection and perpetuation of the trail.[33] Secondly, the agreements confirmed the existence of a *de facto* partnership between the trail community and the public land agencies overseeing the trail lands.[34]

B. Legislative Protection

In the ensuing years, some members of Congress expressed interest in formally recognizing and protecting the Appalachian Trail through legislation.[35] However, none of the early proposals were seriously considered, and no further effort was made to formally protect wilderness trails until the 1960s. By then, the Appalachian Trail first began to feel the press of population growth and commercial development. Expansion forced relocation at several points along the trail route, and its path was diverted to accommodate development.[36] Much of the early private sector enthusiasm to protect the trail began to fade, largely due to the enormity of the restructuring task and the lack of necessary funding to keep up with the backlog of maintenance and administrative expenses.[37]

In 1964, Wisconsin Senator Gaylord Nelson unsuccessfully introduced a bill intended to gain congressional recognition of the Appalachian Trail by promoting federal cooperation with state, local, and nongovernmental interests in protecting the trail and authorizing limited federal participation in the location and perpetuation of the trail.[38] The following year, Senator Nelson proposed S. 2590, a more ambitious trail protection bill, seeking to establish a national system of trails. The bill directed the Secretaries of the Interior and Agriculture to establish hiking trails on federal lands under their administration and made available federal grants to support the planning and construction of the trail routes.[39] Nelson's second trails bill was passed, perhaps due to the public's growing awareness of the value of wilderness and natural resource protection.[40]

The National Trails System Act of 1968 was signed by President Johnson on October 2, 1968.[41] The Trails Act was based on a study conducted by the Department of Interior's Bureau of Outdoor Recreation, entitled "Trails for America," which concluded that the nation faced a "crisis in outdoor recreation"[42] and acknowledged that opportunities for Americans to enjoy outdoor recreational activities were limited.[43] The expressed purpose of the Trails Act was to establish and protect a system of hiking trails to "provide for the ever-increasing outdoor recreation needs of an expanding population" and "to promote the preservation of, public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas . . . of the Nation."[44] The Trails Act designated the Appalachian Trail and the Pacific Crest Trail as the initial components of the system.[45] The Trails Act anticipated that the trails system would grow and that other trails would be granted protection as they were developed and proposed for inclusion in the system.[46]

The Trails Act designated three different types of trails for protection. The first type, "national recreation trails," were defined as hiking trails of shorter length and located near urban areas that would "provide a variety of outdoor recreation uses."[47] Recreation trails would provide urban populations a respite from life in the cities and would be nominated and selected for protection based on accessability rather than traditional wilderness values as the primary criteria. Secondly, "national historic trails" were those trails following routes of national historical significance.[48] These trails were designated primarily for the protection of historic values and not necessarily for their natural scenic splendor.[49] The last category of trails were the "national scenic trails." National scenic trails such as the Appalachian Trail were "extended trails so located as to provide for maximum outdoor recreation potential and for the conservation and enjoyment of nationally significant scenic, historic, natural, or cultural qualities of the areas through which such trails may pass."[50] Congressional emphasis on "nationally significant" scenic and natural values distinguishes the national scenic trails from the other types of trails created by the Trails Act. Thus, from the outset, the national scenic trails were set apart to provide something more than just a footpath, with Congress recognizing the importance of protecting their unique values.[51] Had Congress only intended to protect and preserve the purely recreational qualities trails might provide (e.g., accessibility, opportunity, and diversity of use), it would not have been necessary to create a separate class of trails designed to promote and protect significant scenic and natural qualities.[52]

During the first years of its existence, the Trails Act fell short of accomplishing all that its proponents had hoped. This shortfall was due in large measure to Congress' delegating to the states responsibility for acquiring and protecting trails lands.[53] Although federal land managing agencies were authorized to acquire necessary land through condemnation and purchase, as a practical matter limited funding constrained federal authority for land acquisition.[54] Furthermore, even when the federal agencies did have the funding to purchase valuable lands, the Trails Act limited condemnation authority to twenty-five acres for each mile of trail.[55] This authority allowed for the acquisition of a 200-foot wide trail corridor that would ultimately prove insufficient to protect the unique values of the trail and to rebuff encroaching urban expansion and commercial development.

Testimony regarding the progress of the Trails Act in the U.S. House of Representatives in 1977 revealed that the legislation had not averted the threats the Trails Act was designed to address.[56] During the oversight hearings, it became evident that the Trails Act had overestimated the states' abilities to develop and protect trail lands without the federal government's assistance.[57] Testimony presented to Congress indicated that the land along the Appalachian Trail route was

being developed at an alarming rate and that in a great many areas adverse development was threatening the existence of the trail.[58] Concerned with the limited progress thus far, Congress enacted amendments to the Trails Act to magnify the federal government's role in protecting trail resources.[59]

Most importantly, the 1978 Amendments increased the authority of the Secretary of the Interior to condemn up to 125 acres of land per mile and allocated an additional $90 million for land acquisitions.[60] This expanded authority would allow the federal government to acquire a trail corridor of 1,000 feet in width, substantially larger than the 200-foot corridor allowed by the original Trails Act. Furthermore, the amendments established advisory councils charged with trails administration and required the Secretary of the Interior to develop comprehensive land management plans for the trails.[61]

The 1978 Amendments reaffirmed and emphasized the congressional objective of the Trails Act, namely providing protection for more than a series of simple trails that could be negotiated by foot.[62] The amendments, although focused primarily on the protection of the Appalachian Trail, signified congressional concern over protection of trail and wilderness values beyond the trail itself.[63] In the case of the Appalachian Trail, the Park Service, through the Secretary of the Interior, was given the financial and legal mandate to complete the acquisition of land necessary to protect trail values.[64] The Trails Act Amendments have effected a doubling of trail miles under federal protection, with only approximately 26 miles of trail remaining to be officially protected.[65]

C. Land and Resource Management

The management of the Appalachian Trail is governed by a patchwork of statutory law, private agreements, and voluntary cooperation. The Trails Act assigns primary management responsibility for the Appalachian Trail to the Department of the Interior, which administers the trail as a unit of the NPS.[66] As with other units under NPS jurisdiction, the standards governing the management of the Appalachian Trail are set forth in the National Park Service Organic Act of 1916.[67]The management similarities end there, however, as the NPS manages the Appalachian Trail unlike any other unit in the system. The trail's unique management structure is due in large part to the historical successes achieved by private organizations and volunteers while establishing and maintaining the early trail.

While the Trails Act delegated formal administration authority to the Department of the Interior, Congress also sought to perpetuate the tradition of volunteer assistance.[68] Section 11 of the Trails Act provides that "the Secretary of the Interior . . . and the head of any Federal agency administering Federal lands, are authorized to

encourage volunteers and volunteer organizations to plan, develop, maintain, and manage, where appropriate, trails throughout the Nation."[69] The Trails Act contemplates that volunteer responsibilities may include planning, developing, maintaining or managing the trails, operating and supervising trail programs, building efforts, research projects, and educational opportunities.[70]

This Congressional preference to shift trail management responsibility to volunteer organizations has led to the delegation of general oversight responsibilities and day-to-day maintenance authority from the NPS to the ATC, which has local clubs and affiliates in each of the fourteen states bordering the trail.[71] The legal relationship between the NPS and the ATC is defined in a written agreement [72] entered into under the authority of the Trails Act.[73] The agreement delegates most of the on-the-ground decision-making responsibility to the ATC, but the NPS retains ultimate oversight and control, including all policy making and final decision-making authority with respect to macro-level issues affecting the trail.[74]As a practical matter, the agreement gives the ATC responsibility for maintaining and managing the trail outside of the proclaimed boundaries of national forests and existing units of the National Park system. Where the trail passes through federal lands, its management is coordinated by either the Forest Service or Park Service.[75]

The land and resource planning process, required by all units under NPS jurisdiction, makes clear the authority and control exercised by the federal government.[76] The NPS Organic Act directs the NPS to prepare "general management plans" for each of its park units.[77] General management plans are the basic planning documents that attempt to translate into words the mission of the NPS with respect to a particular unit, considering its unique resources, visitor requirements, and expansion or growth plans.[78] Although Congress neglected to make general management plans specifically binding on the Park Service, these plans provide a reviewing court with standards against which subsequent management actions may be judged and, therefore, do have an actual impact on management decisions.[79]

In addition to the general planning requirements embodied in the NPS Organic Act, the Trails Act separately provides for an additional level of planning to account for the unique differences between national trails and other units of the park system.[80] First, Congress recognized that Appalachian Trail management would involve a unique partnership between the federal government and those state and local governmental agencies and private groups sharing a common border with the trail along its entire length.[81] Second, unlike other units in the national park system, the length of the trail would bring it into contact with an almost unmanageable number of state, local and private landowners and would traverse a wide range of geographic, ecological and socioeconomic regions, presenting management challenges unlike those encountered in the more homogeneous parks.[82] Therefore, in order to

accommodate the local and regional diversity of the trail territories, trail management would have to forego traditional planning processes in favor of a more cooperative management system.

Section 7(h) of the Trails Act addresses these concerns, providing that the responsible Secretary, in consultation with state and local governments and private organizations, shall prepare "a comprehensive plan for the acquisition, management, development and use of the trail."[83] The plan must contain "specific objectives and practices to be observed in the management of the trail, including the identification of all significant natural, historical, and cultural resources to be preserved."[84] In addition, the plan must address "details of anticipated cooperative agreements to be consummated with other entities" and plans for the protection of all trail lands or interests in lands.[85] Finally, the comprehensive plan must include "site-specific development plans including anticipated costs."[86]

Pursuant to this directive, in September 1981, the NPS adopted a Comprehensive Management Plan (Plan) for the Appalachian Trail.[87] While recognizing the value of a cooperative system of management, the Plan expresses a dominant management philosophy that would govern the entire trail, despite the decentralization of management authority to local organizations.[88] The Plan sets forth nine principles and policies that define the Trail's mission and constrain the actions of local management organizations.[89] Most importantly, the Plan provides that the "Appalachian Trail will be managed to favor those values which have been traditional as goals within the [Appalachian Trail] community."[90] The Plan further defines this policy statement as, for example, prohibiting commercial enterprises along the Trail and exercising care that the "primitive quality" of the Trail not be lost.[91] A second major policy directive calls for land management that will protect the Appalachian Trail's diverse character.[92] This directive does not mean that the Trail is open to commercial or other forms of development as a qualified "diverse use."[93] Instead, the directive emphasizes that diversity in land management policies is acceptable so long as it does not interfere with the Trail's primary mission.[94]

The Plan specifically identifies the importance of protecting and preserving the viewshed[95] along the Trail, stating that "open areas and vistas are a particularly pleasing element of the [Appalachian Trail]" and should be preserved.[96] To protect viewsheds and other unique aspects of the Trail environment, the Plan cites supportive zoning, conservation easements, and voluntary restraint on adjacent private lands as appropriate management tools.[97] Furthermore, to the extent that Trail values cannot be protected by cooperative or voluntary measures, the Plan states that incompatible activities shall be controlled by "enforcement of laws and Trail regulations."[98]

The management philosophy and guiding principles articulated in the Plan are important for several reasons. First, the Plan embodies an expression of the Park Service's and the public's collective expertise on how best to manage the Appalachian Trail to conform with its obligations under the Organic Act and the Trails Act. Second, the Plan is not merely advisory, but is legally binding on the NPS with respect to all trail management decisions. These trail management decisions are subject to judicial review as provided by the Administrative Procedures Act (APA).[99]

The Plan recognizes that growth and development continue to threaten the isolated and scenic character of the Appalachian Trail. The Plan states that "the presently wild or pastoral areas through which the Trail passes will be continuously under pressure [from] many kinds of development: recreational homes, ski areas, mining and industrial operations, communications facilities, highways, and energy projects."[100] In the past, the threats had been abated by federal acquisitions. However, the NPS could not foresee the enormity of the threats that would arise with the enactment of the Telecommunications Act of 1996, nor could it envision the complex solutions likely to be needed. These solutions may require the NPS to look beyond its traditional philosophy of seeking compromise and cooperation in resolving Trail issues.

III. Telecommunications Act Of 1996

The Telecommunications Act of 1996 was enacted by Congress to address the burgeoning demand for new telecommunications services.[101] In 1993, there were typically only two telecommunications carriers in any one service area, but by 1998, some urban areas were being served by as many as eight carriers.[102] The new telecommunications technology requires a greater concentration of cellular facilities to transmit signals than was required by the older technology.[103]Telecommunications facilities typically consist of a tower, which may reach heights of up to 1,000 feet, and an attached antenna to transmit the signal.[104] In addition, there may be an out-building to house equipment and an access road leading to the tower site.[105] The telecommunications industry anticipates constructing a grid of telecommunications towers one to two miles apart throughout the nation in order to effectively transmit signals to the growing number of consumers demanding universal access to instant communications.[106]

Industry analysts predict that at least 100,000 new towers will be needed in the next ten years to handle the growing demand for communications services.[107] In addition to the towers necessary to support new personal communications services, the introduction of high definition television (HDTV) will necessitate the construction of thousands of additional towers reaching heights of 2,000 feet and

higher.[108] There telecommunications towers are constructed by private industry, with the approval of the federal government and, to a more limited extent, local governments.

Telecommunications carriers paid $20 billion to the FCC for the right to use the high frequency spectrum to transmit the new telecommunications signals.[109] Under this system, licansees are issued a blanket license for an entire market area, and the licensee then has the right to construct its telecommunications infrastructure anywhere within that area.[110] Depending on the height of a proposed tower structure, the licensee must also register with the FCC each individual tower constructed within its market area.[111]

The telecommunications industry believed the substantial prices paid for these rights warranted the federal government's assistance in getting the system up and running.[112] Consequently, the FCC ordered a rapid build-out of telecommunications facilities so that carriers would be able to recover their costs as soon as possible.[113] Section 704 of the Telecommunications Act facilitates the expeditious introduction of telecommunications services by curtailing local government authority to regulate or prohibit placement of telecommunications infrastructure within their jurisdictions.[114] Section 704 prohibits a local zoning authority from unreasonably discriminating among providers of functionally equivalent services.[115] Under this section, at least one court has held that a zoning authority unreasonably discriminates if it denies a tower siting request in a district where other towers have been approved under the same regulatory standards, without any reason given for the discriminatory treatment.[116] In addition, the Telecommunications Act prohibits local governments from adopting regulations that "prohibit or have the effect of prohibiting the provision of personal wireless services."[117] This standard forbids local jurisdictions from enacting permanent bans or moratoria on the provision of wireless services in a community.[118] Finally, section 704 requires that any rejection of a tower application be based upon substantial evidence.[119]

The courts have been inconsistent when defining the threshold level of substantial evidence required to support the denial of a tower application, especially where the tower siting is rejected for aesthetic reasons.[120] The FCC, in a recent rule making, has proposed that wireless carriers be relieved from complying with local standards in obtaining suitable tower sites.[121] Furthermore, the Telecommunications Act recognizes that industry may have to site telecommunications facilities on federal lands in order to accomplish the goal of providing universal access to telecommunications services to all Americans.[122] Consistent with the Telecommunications Act's policy of swift implementation of telecommunications facilities nationwide, section 704(c) provides that:

> [T]he President or his designee shall prescribe procedures by which Federal departments and agencies may make available on a fair, reasonable, and nondiscriminatory basis, property, rights-of-way, and easements under their control for the placement of new telecommunications services that are dependent, in whole or in part, upon the utilization of federal spectrum rights for the transmission or reception of such services. These procedures may establish a presumption that requests for the use of property, rights-of-way, and easements by duly authorized providers should be granted absent unavoidable direct conflict with the department or agency's mission or the current or planned use of the property.[123]

In enacting section 704(c), Congress sought "to make available to the maximum extent possible the use of federal government property" for siting telecommunications facilities.[124] The House Committee on Commerce conceded that certain uses of federal property would not be suitable for telecommunications facilities, stating that the use of "the Washington Monument, Yellowstone National Park or a pristine wildlife sanctuary, while perhaps prime sites for an antenna and other facilities, are not appropriate and the use of them would be contrary to environmental, conservation, and public safety laws . . . ."[125] Thus, the legislative history indicates that the build-out of telecommunications facilities would be permissible on federal lands, so long as the placement of the antennas on federal property does not contravene any other "environmental, conservation or public safety laws."[126]

An Executive Memorandum issued by the White House directed the General Services Administration (GSA) to promulgate rules for siting telecommunications facilities on federal property.[127] The memorandum supported the use of federal lands for the "rapid construction" and "efficient and timely implementation of such new technologies and the concomitant infrastructure build-out" of the nation's wireless communications network.[128] The guidelines developed by GSA were to be consistent with, among other factors, environmental and aesthetic concerns, the protection of natural resources, national park and wilderness values, protection of National Wildlife Refuge systems, and subject to "any Federal requirements promulgated by the agency managing the facility."[129] The memorandum did not purport to "give the siting of [telecommunications] antennas priority over other authorized uses of Federal buildings or land."[130] Despite encouraging the rapid deployment of a telecommunications network, the Executive Memorandum, consistent with congressional concerns, acknowledged that in certain circumstances, environmental and aesthetic values may take precedence over the unrestrained growth of telecommunications infrastructure.[131]

The GSA regulations implementing the Executive Memorandum provide that each agency must determine the extent and programmatic impact of placing commercial

telecommuni-cations antennas on their properties.[132] Furthermore, these regulations require federal agencies to review their policies and procedures for allowing commercial use of their property and to modify them as necessary to assure that they fully support the siting of antenna facilities.[133] When evaluating a siting request from industry, each agency must consider environmental and historic preservation issues, including, among other factors, public health and safety concerns, aesthetics, protection of natural and cultural resources, and compliance with the National Environmental Policy Act and any internal agency policies.[134] Each agency has the discretion to reject inappropriate siting requests to assure adequate federal property protection. In cases where antenna siting requests are denied, the service providers are granted the right to appeal the decision to a higher level of agency authority.[135]

It was not long before the telecommunications industry's continued expansion would come into conflict with the preservationist mandate of the NPS. In one instance, the telecommunications industry sought to situate several telecommunications towers adjacent to, and within the viewshed of, the Blue Ridge Parkway.[136] The park's superintendent urged twenty-nine communities bordering the parkway to reject tower siting requests that would negatively affect the park's viewshed.[137] The NPS's stance was motivated by its policy that "cellular towers are a visually intrusive and nonconforming use to national parks."[138]

As a result of the NPS's "stonewalling," industry representatives criticized the Park Service in a letter to the President, alleging that "federal agencies [were] either ignoring the [presidential] order or actively engaging in dilatory tactics."[139] In response, the President ordered the Park Service to accommodate the telecommunications industry.[140] The NPS issued guidance to assist park managers in processing applications to site telecommunications facilities on park property.[141]The NPS interpreted the executive memorandum as leaving very little room for the denial of a request to site a telecommunications facility on or near national scenic trails.[142] The NPS's interpretation was based on the memorandum's requirement that the Park Service prove that a particular telecommunications tower would "cause an unavoidable conflict with the agency's mission or current or planned use of the property" before it could deny a siting request.[143] Thus, although the NPS's mission is clearly stated in the Organic Act, the Trails Act, and the general management plan for a particular park, and the Telecommunications Act itself contemplates the incompatibility of communications facilities with certain natural resource values, the pressures exerted by the telecommunications industry thus far have caused the NPS to question the value of its goals.

To date, the NPS and the Appalachian Trail community have effectively resisted industry's efforts to construct telecommuni-cations towers within the confines of the park's boundaries. However, they will not likely enjoy as much success in protecting

the trail from more pervasive effects of the Telecommunications Act. Since along much of its route the trail corridor ranges from 250 to 1000 feet, there is relatively little federal land upon which telecommunications facilities can be situated. Furthermore, because industry recognizes that a proposal to site a telecommunications facility directly on Park Service property would likely raise a public outcry, industry has instead looked to the vast local and private land holdings that surround the trail.[144] However, the telecommunications facilities sited immediately outside the park's boundaries present an even greater threat to the integrity of the trail, due to the immense number of telecommunications towers that may be sited within the trail's viewshed and because the NPS's authority and political will to regulate threats of such widespread proportions is questionable.

IV.
Potential Legal Theories to Restrict Siting of Telecommunications Structures Within the Viewshed of the Appalachian Trail

The Appalachian Trail has yet to feel the full impact of the Telecommunications Act. Although there have been minor skirmishes between industry and federal land managers, the Telecommunications Act is still relatively new and the build-out of telecommunications facilities on a wide scale is only now just beginning.[145] Yet it is not difficult to foresee the inevitable conflict just over the horizon. As natural areas increasingly become the unwilling neighbors of encroaching development, it may no longer be practical to define the land managers' authority as strictly limited to the physical boundaries of the public land they administer. Instead, as development grows closer, impacts and intrusions once viewed as inconsequential have become magnified.

In the meantime, the NPS, through the Appalachian Trail Conference and other national trails organizations, has worked toward successfully resolving some tower siting issues in an amicable fashion.[146] An agreement has been proposed that would encourage telecommunications companies to notify the governing trail organization of a tower siting planned within the trail's viewshed.[147] Early notification would allow trail organizations and the NPS to offer comments during the planning process to more effectively influence the siting decision.

Proposals like this one are clearly the first steps in easing the growing tension between the telecommunications industry and the trail community. However, agreements like the one mentioned would not impose any legally enforceable commitments on industry. Instead, the duty to notify trails organizations prior to siting a tower within the trail's viewshed would ostensibly be a voluntary one, not subject to FCC oversight and enforcement.[148] For example, in a particularly difficult case, where it may be in industry's best interest to construct a tower within the trail's viewshed, it is likely that

industry would ignore the voluntary notice procedures and construct the telecommunications tower irrespective of the wishes of the trail community.[149] Beyond mutual cooperation, the continued protection of the trails will depend on other legally enforceable alternatives to restrict the siting of telecommunications towers within the viewshed of the scenic trails.

A. National Park Service Organic Act

The NPS Organic Act was enacted in 1916 to "promote and regulate the use of the Federal areas known as national parks, monuments, and reservations."[150] In carrying out this goal, the NPS was instructed "[t]o promote and regulate the *use*of the Federal areas known as national parks . . . by such means and measures as conform to the fundamental purpose of the said parks . . . which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."[151] The Organic Act singles out the national parks' scenic resources as among those resources with such fundamental importance to the mission of the park system that they are worthy of protection by "such means and measures so as to keep them unimpaired for the enjoyment of future generations."[152] Those scenic resources, such as mountain vistas, uninterrupted stretches of wilderness, and cascading waterfalls, that are wholly contained within a park's boundary are inarguably subject to the Park Service's preservationist mandate.

More troubling, however, are those scenic resources whose focal point may be located just beyond the park's formal boundary line. Since these scenic resources emanate from a source outside of the park's environs, one may argue that under the Organic Act these resources are not subject to the Park Service's protective authority.[153] Other commentators, however, have suggested that aesthetic and visual resources located outside a park's boundaries are subject to Park Service regulation.[154] This perspective relies on the common understanding of the term "use" in section 1 of the Organic Act, allowing the NPS to regulate the use of the parks to promote the twin aims of preservation and enjoyment of the resources.[155] If the "use" is located within the confines of the park, then it may be regulated.[156] For uses such as hiking, nature study, and conservation of plants and wildlife, there is little doubt that these uses are subject to regulation because they all occur inside the park itself. Similarly, where a scenic view encompasses a far off vista which may not lie within the park's formal boundaries, one may argue that the use is located within the park if the user is physically located in the park. The visual resource that the park visitor enjoys is a use occurring within the park's confines.[157] Therefore, under this interpretation of the Organic Act, the NPS would

have the authority to regulate transboundary obstructions that have the potential of degrading a park visitor's visual experience.

According to this interpretation, the NPS would have the legal authority to regulate the siting of wireless towers outside the trail's property lines but within the viewshed of the Appalachian Trail. These towers create a visual intrusion on a fundamental resource value which the NPS is obligated to protect under the Organic Act.[158] Even where the telecommunications towers are located outside the boundaries of the protected trail corridor, their very size and composition tend to dominate the landscape and seize the attention of the trail user, and so the effect of placing a telecommunications structure next to the trail can completely destroy a central reason for the trail's existence.

The national scenic trails are not merely footpaths designed to transport foot travelers from one location to another. The drafters of the Trails Act recognized that the width of a footpath may not be sufficient to protect all trail values and therefore additional acquisitions would be required to meet the purposes for which the trail was established.[159] Indeed, Congress recognized the unique character of the trail by granting it protection under the Trails Act, and placing its unique values under the care of the Park Service.[160]

To be sure, the Trails Act did not purport to give to the NPS the unbridled authority to restrict development anywhere within the viewshed of the trail. The original Senate bill referred to maintaining the primeval character of the trail, as originally envisioned by its founders.[161] In a subsequent draft, the word "primeval" was replaced with the term "natural" to describe the desired park environment.[162] In the debate that took place on the Senate floor, Senator Aiken inquired as to the meaning of this revision.[163] Senator Jackson responded that "'natural' is, I would think, pretty much synonymous with 'primeval.' 'Primeval,' one might say, means even older and a better description of the oldest possible state."[164]Senator Aiken pushed for further clarification: "Primeval means just as God left it?"[165] Senator Jackson agreed. And "natural," Senator Aiken continued, "means about as the last man that operated there left it?"[166] Senator Jackson responded that "perhaps" that was the proper understanding of the amendment.[167] Thus, the Trails Act was not meant to be a wilderness protection act.

More instructively, however, Senator Jackson stated that a "natural" condition would not prevent development such as "ski trails or ski runs" but was intended to mean that the trail not move into "commercial and industrial type developments."[168] In contrast, the Trails Act would not necessarily prohibit logging operations, resort hotels and ski resorts which were more in harmony with the fundamental purposes of the scenic trails. Senator Aiken then asked whether the Trails Act would create a

"scenic easement" that would prohibit logging or other operations on a distant slope within the view of the trail.[169] Senator Jackson answered no, not if they were on a "distant" slope.[170] Senator Aiken then got to the heart of the matter: "If a new ski slope or area were contemplated *near* a trail, would the promoters of the ski area be in violation of the law?"[171] Senator Jackson responded that it would not be a *per se* violation of the Trails Act for "a trail [to go] by or near a ski resort."[172] Thus, it would be within the land manager's discretionary authority to determine whether an economic activity proposed near the trail was incompatible with the trail and thus in violation of the Trails Act. [173]

The colloquy on the Senate floor can be interpreted in various ways. First, at face value, it appears that the Senate intended not to grant the federal government a "scenic easement" to protect the viewshed along the trail. Such a reading, however, assumes too much. The senators distinguished uses that would be compatible with the trail experience, such as ski runs, logging, and resort lodging. When correctly implemented, these uses are not necessarily incompatible with the trail's purpose. Other uses, such as "commercial and industrial type developments," would be completely out of character with the trail and were not viewed as compatible with the trail environment. Secondly, Senator Jackson's remarks reflected a hesitancy to draw clear lines separating compatible and incompatible land uses near the trail. Jackson's solution left these discretionary decisions to the land management agency charged with protecting the trail. In any event, Jackson acknowledged that, in some cases, federal regulatory authority may reach beyond the confines of the trail boundary to prevent incompatible uses that take place near the trail.[174]

In order to protect trail values, the Park Service has determined that telecommunications towers constructed within one mile of the trail's centerline have the potential to negatively affect trail values.[175] This position appears to be a legitimate interpretation of the Trails Act and its legislative history. While the Trails Act did not intend to confer a scenic easement to protect the trail's scenic views, it did intend to vest some discretionary authority in the land managers to protect this unique resource.[176] Moreover, unlike ski runs and logging operations, it is much more difficult to reconcile the presence of a two hundred-foot tall telecommunications tower with the surrounding natural environment. In general, these towers are designed to be conspicuous, rising above the surrounding land forms and dominating the landscape. These types of physical intrusions go beyond the compatible uses cited in the legislative history and were not likely encompassed within Congress' understanding of those uses that could be harmonized with the national scenic trails.[177]

Even if the Organic Act and the Trails Act, when interpreted together, are not viewed as conferring upon the Park Service sufficient authority to regulate transboundary

threats to the Appalachian Trail such as those posed by telecommunications towers, the Redwoods Amendments,[178] enacted by Congress in 1978, offer an additional source of regulatory authority. The enactment of the Redwoods Amendments was a well-aimed response from Congress to target the problems the NPS faced with threats that arose outside the borders of Redwoods National Park in California.[179] Congress created Redwoods National Park in 1968, dedicating nearly 58,000 acres for the protection of the resident coastal redwoods, *Sequoia Sempervirens*.[180] Most of the land upon which the redwoods grew was privately owned and was being used for timber production.[181] In establishing the park, the federal government had to acquire park land from private owners, some of whom were more willing to sell than others.[182] The resulting park boundary was gerrymandered so as to include several of the tallest groves of redwoods.[183] This resulted in a jagged boundary line, exposing many areas of the park to external pressures from three sides instead of one or two.[184] The threats came primarily from privately owned timber companies that continued to harvest timber on the adjacent private lands.[185] These timber cuts destabilized the ecosystem, generating silt that polluted the park's waterways.[186] The timbering also led to erosion of stream banks and the earth supporting the root systems of the massive redwoods, raising concerns about the trees' continued survival.[187]

The threats to the redwoods resulted in a series of lawsuits initiated by the Sierra Club, alleging that the Secretary of the Interior, through the Park Service, had an affirmative duty to protect the park's resources from those threats arising outside the park's boundaries.[188] In these cases, known collectively as the *Sierra Club* cases,[189] the court held that the Secretary had the substantive authority and a duty under the Organic Act to take affirmative actions as were reasonably necessary to protect the park from external threats by, for example, acquiring surrounding lands to serve as a buffer.[190] The court found such authority in the "trust" relationship existing between the Secretary of the Interior and the public lands that he was charged with preserving, obligating him to protect and conserve "the scenery and the natural and historic objects and the wild life" in the parks.[191] More importantly, the court determined that the duty to preserve the parks from external threats arose from the Organic Act itself.[192] Ultimately, the court recognized that the Secretary's authority was inadequate to fully address the external threats affecting the park.[193] The court held that:

> [i]n order adequately to exercise its powers and perform its duties in a manner adequately to protect the Park, Interior now stands in need of new Congressional legislation . . . . [The] primary responsi-bility for the protection of the Park rests, no longer upon Interior, but squarely upon Congress to decide whether . . . to provide additional regulatory powers . . . .[194]

In response, Congress enacted the amendments to the Organic Act, informally referred to as the Redwoods Amendments,[195] to clarify the scope of the Park Service's land management authority under the Organic Act. The pertinent portion of the Redwoods Amendments reads as follows:

> The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress. [196]

This ambiguous sounding amendment was intended to clarify that the Park Service has the management authority, and in fact a management duty, to take those actions necessary to protect the integrity of park values, including threats arising beyond a park's boundaries.[197] This meaning is supported by the legislative history, which states that "[T]his restatement of these highest principles of management is also intended to serve as the basis for any judicial resolution of competing private and public values and interests in the areas surrounding Redwoods National Park and other areas of the National Park System."[198]

Thus, the Secretary of the Interior is required to conduct management activities in a manner that does not permit destruction of park values, irrespective of whether the threats are internal or external to the park boundaries.[199] The Secretary's protective duty appears to be mandatory, absolutely prohibiting the Park Service from performing its administrative functions in derogation of the values of the Organic Act. The Redwoods Amendments also require the Park Service to act affirmatively, by adopting necessary regulations or taking appropriate management actions to preserve park values threatened by incompatible activities.[200]

The Redwoods Amendments would also require the Park Service to preserve those values specifically protected by Congress in the legislation creating a particular park.[201] In the case of the Appalachian Trail, the Trails Act sought to protect a wide range of values associated with the hiking experience, including scenic views.[202] While the legislative history suggests that Congress did not intend an unlimited preservationist mandate, the history does evidence Congress's concern for protecting the trail from scattered visual intrusions from outside the park.[203]

Moreover, in its Management Plan for the Appalachian Trail, the Park Service has interpreted the Organic Act and the Trails Act as requiring the protection of, among other values, the scenic views from the trail.[204] The Management Plan recognizes that visual resources are an integral part of the scenic trails system and are required by

statute to be preserved and protected.[205] One may argue that the Redwoods Amendments require that the Park Service take all necessary actions to regulate intrusions on park visitors' visual experience. These actions would include the promulgation of regulations that would, for example, require Park Service involvement in all antenna siting decisions contemplated within one mile from the trail's centerline. Certainly, under traditional principles of judicial review governing agency decisionmaking,[206] such an interpretation would not only be a permissible one, but would arguably be required to discharge the Park Service's duties under the Organic Act.[207]

An example of such a regulatory provision might simply be to require the FCC to give the Park Service written notice upon receiving an application from a telecommunications carrier to construct a tower within one mile of the trail corridor. Under such a regulation, no action could be taken with respect to the tower construction for ninety days, during which time the Park Service would have the opportunity to prepare a visual impact assessment of the proposed tower and suggest alternatives to mitigate impacts on the viewshed. Finally, an appropriate regulation might also require the FCC, along with an industry representative, to meet with the NPS to consider the effects of the siting decision on nearby scenic trails and to identify any proposed alternatives. If the location of the proposed tower is inconsistent with the primary values the Park Service is mandated to protect, then tower construction would not be able to proceed absent mitigation. As discussed later in this Article, mitigatory measures are nearly always available to reduce the overall visual or environmental impacts of siting a telecommuni-cations tower.[208] This process could be coordinated with the environ-mental analysis required under the National Environmental Policy Act and therefore would not necessarily add additional layers of bureaucracy, inefficiency, or expense.[209]

B. Property Clause

Clearly, the NPS has the authority to actively regulate placement of a telecommunications tower within the boundaries of the trail corridor itself. However, the NPS's authority to reach beyond its borders and prohibit conduct on adjacent private or public lands is more problematic.[210] Historically, the courts have recognized that the Property Clause of the United States Constitution gives Congress nearly absolute authority to manage the lands owned by the United States.[211] The Property Clause declares that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[212] In the early case of *Camfield v. United States*, the Supreme Court held that Congress could prohibit the erection of a fence on private property if the effect would be to block access to adjacent federal lands.[213] The Court reasoned that the federal government's power to manage its lands is "analogous

to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case."[214]

Thus, though the object of the regulation occurred on private property, it was a valid subject of federal control because the measure was designed to protect rights associated with federal property. Later, in *United States v. Alford*, the Supreme Court again upheld congressional regulation of private property to protect the public lands.[215] The act in question prohibited leaving a fire unextinguished "in or near" any national forest.[216] The law was challenged on the grounds that Congress lacked the authority to regulate land use decisions on non-federal lands.[217] In upholding congressional authority, the Court held that "[t]he danger depends upon the nearness of the fire, not upon the ownership of the land where it is built . . . . The statute is constitutional. Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests."[218] Absent from both the *Alford* and *Camfield* cases, however, was any explicit reference to the Property Clause as the source of congressional authority to regulate non-federal land.

Subsequently, in *Kleppe v. New Mexico*,[219] the Supreme Court clarified the basis for its jurisprudence authorizing Congress to regulate non-federal lands.[220] At issue in *Kleppe* was the Wild Free-Roaming Horses and Burros Act of 1971, enacted to protect "all unbranded and unclaimed horses and burros on public lands of the United States" from "capture, branding, harassment, or death."[221] Under the Act, if horses or burros "stray from Public lands onto privately owned land, the owners of such land may inform the nearest Federal marshal or agent of the Secretary [of the Interior], who shall arrange to have the animals removed."[222] A state livestock board proceeded to round up and attempt to sell nineteen unbranded burros that strayed off federal lands.[223] The Bureau of Land Management asserted jurisdiction over the burros and demanded that the animals be returned to public lands.[224] The State of New Mexico sued, alleging that the Wild Free-Roaming Horses and Burros Act was unconstitutional.[225]

Not surprisingly, the Supreme Court upheld the constitutionality of the Act.[226] Relying on *Camfield* and *Alford*, the Court reasoned that the Property Clause gives Congress the complete power to make all needful rules respecting public lands, even though the particular congressional action is not intended to protect the public lands from damage.[227]In *Camfield* and *Alford*, the actions which took place on private land directly threatened the value of the adjacent federal lands. In contrast, the Wild Free-Roaming Horses and Burros Act did not attempt to protect the well-being of federal lands themselves, but was aimed at protecting wild animals that could not be considered federal property. The Court's message was clear; the Property Clause was broad enough to reach beyond the territorial limits of federal property and regulate wildlife integral to the federal lands. The Court in *Kleppe* concluded that the

power conferred on Congress under the Property Clause was without limitations.[228] *The Kleppe* holding has been applied repeatedly by the lower courts to affirm congressional control over activities occurring on non-federal property that would affect federal land.[229]

More important to Appalachian Trail management, however, is whether the NPS and other federal land management agencies can exercise regulatory control over conduct occurring on non-federal lands without specific authorization from Congress. The care and management of the Appalachian Trail has been entrusted by Congress to the NPS, and it follows that Congress also intended to bestow upon the NPS the full constitutional authority to manage and protect the trail lands. The courts have, in other circumstances, upheld the authority of federal agencies to regulate private activity on non-federal land to protect federal interests. For instance, in *United States v. Lindsey*, the Ninth Circuit upheld a Forest Service regulation that prohibited the building of a fire on state land within the boundaries of Hells Canyon National Recreation Area.[230] The court held that it was "well established" that the Property Clause "grants to the United States power to regulate conduct on non-federal land when reasonably necessary to protect adjacent federal property or navigable waters."[231] In *United States v. Arbo*, the court upheld a Forest Service inspection of a private mining claim on state land adjacent to a National Forest.[232] The court in *Arbo* held that the actions of the Forest Service were reasonably necessary to protect adjacent federal property, and thus were valid under the Property Clause.[233] Likewise, in *United States v. Stephenson*, the Fourth Circuit upheld the actions of the NPS in prohibiting bear hunting on non-NPS lands adjacent to the Great Smoky Mountains National Park.[234] The court in *Stephenson* held that "Congress created national parks in order to conserve the scenery and the natural and historic objects and the wildlife therein . . . ."[235] The court reasoned that "[w]ere [they] to hold that NPS cannot enforce Park [regulations] on the [lands adjacent to the Park], hunters could easily circumvent the protections for Park wildlife . . . . This would frustrate the purpose for which the national park system was established."[236] These cases are significant because they acknowledge that federal agencies may exercise land management authority under the Property Clause that has been lawfully delegated to the agencies by Congress.

The NPS has not been eager to wield its protective authority by regulating the potential visual impacts resulting from the construction of telecommunications towers close to the trail corridor.[237] Nevertheless, authority does exist for the NPS to take affirmative steps to discourage the construction of telecommunications facilities within the trail's viewshed. The protection of visual and aesthetic values are central to the mission of the Appalachian Trail. Like the NPS's protection of wildlife values found to be integral to the NPS's mission in *Stephenson*, the NPS has the authority

under the Property Clause to regulate external threats to the physical, as well as the aesthetic, integrity of the trail.

The legislative history of the Trails Act illustrates that the primary aim of the statute was not simply to protect a narrow pathway that could be traversed by foot, but instead was designed to protect a full panoply of trail values, including wilderness, aesthetics, recreation, and scenic views.[238] In comments made on the Senate floor during the proposed 1978 Amendments to the Trails Act, Senator Durkin stressed that the trail was to be something more than "a path from a group of second homes to a roadside fast food stand."[239] The 1978 Amendments were urgently needed for "this historic trail . . . to remain what it has been, and what its founders meant it to be—a wilderness trail from Maine to Georgia."[240] Thus, the elements of the trail worthy of protection were no different from those values the NPS is charged with upholding under its Organic Act. Arguably then, encroachments to scenic and aesthetic values that interfere with the trail experience may be regulated by the NPS under the Property Clause, even in the absence of an explicit congressional directive to do so. Indeed, the NPS may have the affirmative duty to take those actions necessary to protect the values Congress thought it had preserved in 1978.

C. National Environmental Policy Act

The National Environmental Policy Act[241] (NEPA) has become an integral part of the federal land use management and planning process. Section 101 of NEPA declares a national policy of assuring "[a]esthetically and culturally pleasing surroundings" and of preserving "important historic, cultural and natural aspects of our national heritage."[242] In light of the "profound influences of population growth [and] high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances," Congress sought to "create and maintain conditions under which man and nature can exist in productive harmony."[243] To implement this policy, NEPA requires that an "agency, in reaching its decision, will have available, and will carefully consider detailed information concerning significant environmental impacts."[244] Although "NEPA establishes environmental quality as a substantive goal," it does not mandate any particular result, but simply prescribes the necessary process.[245] Nevertheless, by undertaking a detailed and thorough analysis of the environmental consequences of a particular decision, NEPA is "almost certain to affect the agency's substantive decision."[246] This result can be attributed, in part, to NEPA's other primary function - information to the public.[247] With the knowledge that its decisionmaking process will be subject to public scrutiny, NEPA may encourage an agency to make decisions based on environmental factors which they would not otherwisebe inclined to consider.

NEPA applies only to those proposals for major federal action that significantly affect the human environment.[248] The courts have held that proposed actions that would have an effect on the aesthetic qualities of the natural environment may constitute a significant effect on the human environment so as to require NEPA compliance.[249] Often, however, aesthetic values are imprecise and difficult to quantify because they are evaluated without a supporting scientific foundation or are not measured with explicit criteria.[250] Nevertheless, the Council of Environmental Quality regulations require consideration of aesthetic values in the environmental review process.[251] When measuring a proposal's effects, federal agencies must consider "direct" and "indirect" impacts on the aesthetic environment.[252] Also, in determining the significance of an aesthetic impact, an agency must consider the overall context of the proposal including, for example, the "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources, [or] park lands."[253] Thus, even though aesthetics are difficult to quantify, that difficulty does not allow an agency to evade NEPA's requirements when evaluating aesthetic values.

Federal projects that would obstruct natural scenic views have been held to require NEPA compliance.[254] This requirement may apply with greater force if scenic views were considered to be a "resource" protected by the NPS under the Organic Act. Certainly the protection of aesthetic values is at the core of the national park movement and the protection of scenic views would be integral to protecting the full range of aesthetic values.[255] Thus, under existing jurisprudence, an agency could reasonably interpret NEPA as requiring an environmental analysis before siting an FCC-licensed telecommunications tower within a national scenic trail's viewshed.[256]

The FCC, on the other hand, has been reluctant to concede that the placement of a telecommunications facility within the one-mile corridor of a national scenic trail would impact the environment so as to trigger its NEPA obligations.[257] The FCC first promulgated its NEPA regulations in 1974. In the original rule making, the FCC identified certain classes of FCC-permitted activities that would require the preparation of an Environmental Assessment (EA) under NEPA.[258] These activities included the construction of certain antenna towers, satellite earth stations, or communications facilities located in or affecting wilderness areas, wildlife preserves, places listed on the National Register of Historic Places, and areas recognized either nationally or locally for their special scenic or recreational value.[259] The FCC's initial rules specifically recognized the negative effects an improperly sited telecommunications tower could have on scenic views and sought to address these issues in the NEPA process.[260]

The FCC has since revised its NEPA implementation rules and removed the special protections provided for scenic and recreational areas.[261] Under its revised rules,

the FCC has determined that aesthetic concerns will not generally require the agency to comply with NEPA.[262] Instead, in Rule 1.1307, the FCC has identified only eight circumstances that would trigger NEPA compliance.[263] These circumstances include the siting of tele-communications towers (1) within the boundaries of designated wilderness areas; (2) within designated wildlife preserves; (3) in areas with endangered species or critical habitats; (4) that may affect historical sites as listed in the National Register of Historic Places; (5) in Indian religious sites; (6) on 100 year flood plains; (7) that involve significant changes in surface features; or (8) that use high intensity white lights in residential neighborhoods.[264] To the extent that a specific activity is not listed in Rule 1.1307, it is the FCC's position that all such other actions are "categorically excluded" from NEPA compliance.[265] For other types of projects that may have a potential impact on the environment, the FCC contends that its NEPA obligations are satisfied by providing a "safety valve" provision whereby interested persons can petition the FCC on a case-by-case basis.[266] If the FCC determines that the environmental impacts are significant, it may require the preparation of an EA. The FCC has cautioned, however, that this residual category is to be invoked only in "extraordinary circumstances."[267]

In its current NEPA rules, the FCC decided to drop the automatic protection for scenic, natural, and wilderness areas that would be negatively affected by telecommunications towers because commentators protested that the definition of aesthetic and scenic values was "unduly vague." [268] In addition, the FCC found that "aesthetic concerns may more appropriately be resolved by state, regional or local land use authorities."[269] While this may be true in many other situations, as has been discussed earlier,[270] the Telecommunications Act of 1996 does not accord local land use authorities a traditional degree of latitude in regulating land uses, such as the siting of telecommunications towers, within their jurisdictions.[271] Furthermore, the negative effects of siting a tower adjacent to a trail corridor may fall disproportionately upon the trail lands rather than on the local community. In such circumstances, the local land use agency is not likely to adequately represent the interests of the agency managing the trail.[272] For instance, with respect to a tower proposed to be sited adjacent to the Appalachian Trail, the Park Service would consider the cumulative impacts of antenna intrusions along the entire trail and the effects that the Telecommunications Act would have on the national interests embodied in the Trails Act. Local land use planning bodies would likely have more parochial concerns. Consequently, the FCC's NEPA implementation rules and the local land use decision-making process are likely to prove inadequate in addressing the potential pressures placed on the trail throughout its length.

The question, then, is whether the FCC's categorical exclusion regulations are lawful. In general, the decision whether to adopt a categorical exclusion requires that the

agency determine in advance the environmental significance of its actions. This analysis is similar to the significance determination agencies make when they decide whether to prepare an Environmental Impact Statement (EIS).[273] If the agency finds that the proposed action would not present a significant effect on the human environment, such that an EA would not be required, it may be categorically excluded.[274] Categorical exclusions are inappropriate where an action has cumulative impacts, where it presents unique or unknown risks, or where the action is controversial.[275]

Several potential problems exist with respect to the FCC's NEPA regulations as applied to the infrastructure build-out contemplated in the Telecommunications Act. First, the FCC has not simply excluded from NEPA certain actions "which do not individually or cumulatively have a significant effect on the human environment."[276] The FCC's categorical exclusion regulations exclude all agency actions except for those that fall into the enumerated list of actions that do trigger NEPA.[277] Thus, under its own regulations, the FCC must take a hard look at environmental impacts only in those limited circumstances identified in the rule. The environmental impacts of any other type of agency action, including those having a significant impact on the environment but which are not identified in the FCC's NEPA regulations, need FCC consideration only if brought to the agency's attention by individual petition under the "safety valve" provision.[278] This provision, in effect, shifts the burden of NEPA compliance from the agency to the public. The use of categorical exclusions by agencies is not intended to provide an exemption from NEPA compliance but is merely an administrative tool to avoid paperwork for those actions without significant environmental impacts.[279] Clearly, the aesthetic and visual impacts caused by the construction of a network of telecommunications towers within the trail's viewshed will significantly detract from the trail experience, and thus should require uniform NEPA compliance.[280]

Secondly, a single telecommunications tower erected in the vicinity of the trail may arguably have a *de minimis* impact on a particular section of the trail. However, a single telecommunications tower is functionless without a network of similar towers situated nearby to transmit the radio signal over long distances. As previ-ously discussed,[281] the infrastructure requirements necessary to support the new telecommunications system will require the con-struction of a nationwide grid of towers separated by distances of no more than one to two miles. The cumulative impacts of this infra-structure build-out along the entire trail will have a pervasive impact on trail values. Segmenting a large or cumulative project into smaller individual components so as to obviate the significance of NEPA impacts is unlawful.[282] Similarly, it is of equally questionable validity for the agency to attempt to shield itself from its NEPA obligations by claiming the benefit of a

categorical exclusion based on an artificial analysis of each separate component of a project rather than consider the environmental effects of the project as a whole.[283]

Lastly, aesthetics, including viewsheds, are a resource that the Park Service is charged with protecting under the Organic Act.[284] Like wildlife, land, habitat, and recreational uses, the visual resource is of critical importance to the integrity of the national park system. While the FCC may view the aesthetic impacts of telecommunications towers as "unduly vague,"[285] from the Park Service's perspective telecommunications towers have the potential to destroy visual resources which the Park Service is commissioned with protecting and preserving. In fact, federal land managers have developed a method to objectively quantify impacts to visual resources.[286] For instance, the Forest Service's Visual Management System classifies landscapes by character, type, variety, class, and sensitivity level.[287] The Appalachian Trail, because of its designation as a National Scenic Trail, is accorded a "sensitivity level 1," the highest sensitivity rating, susceptible to the lowest amount of intrusion.[288] In addition, visual impacts are analyzed from various distance zones, including a "visual foreground" ranging from one-fourth to one-half mile from the trail, followed by a middle-ground zone extending out to five miles, and a background zone beyond five miles from the trail's centerline.[289] The analysis under the Visual Management System yields a "Visual Quality Objective" that determines the acceptable degree of alteration to the natural landscape.[290] This system provides a scientific method for inventory-ing scenic viewsheds, thereby enabling federal land managers to quantify the amount of harm to these unique resources.

Even though the categorical exclusion may relieve the FCC from NEPA compliance for projects having only incidental aesthetic effects, the FCC has entertained individual petitions to comply with NEPA on a case-by-case basis.[291] In these cases, the FCC has ordinarily deferred the determination of whether NEPA compliance is required to the agency that has particular expertise in evaluating the potential environmental impacts.[292] For actions relating to the Appalachian Trail, the NPS would be the expert agency. Nevertheless, the FCC has been unwilling to accord the NPS significant deference in determining whether and to what extent NEPA compliance would be necessary in siting telecommunications towers adjacent to the Appalachian Trail.[293] In fact, the FCC has wholly co-opted the decision about whether to engage in NEPA analysis, without regard to the expectations of the NPS.[294]

If the NPS were accorded deference, it would likely conclude that NEPA compliance would be necessary for the entire telecommunications network as it affects the Appalachian Trail. NEPA would therefore arguably require the FCC to prepare a comprehensive EIS addressing the cumulative visual and aesthetic impacts of the telecommunications infrastructure on the trail and its users.[295] A comprehensive

EIS would prove valuable and necessary; through an EIS, the agency could analyze the visual, aesthetic, and environmental impacts of the telecommunications network throughout its length and could then propose reasonable alternatives to mitigate the cumulative impacts on the trail corridor.[296] In addition, NEPA would also require the FCC to engage in site-specific EISs regarding the localized environmental effects of each individual tower within the trail's viewshed.[297] The site-specific EISs would enable the FCC, the NPS, and local governmental agencies to engage in a micro-level analysis of siting determinations and explore ways to minimize local impacts of telecommunications towers. To avoid repetitious analysis and to maximize efficiency, the FCC could "tier" its NEPA analysis so that the broader programmatic analysis could be incorporated by reference into later, more site-specific EISs.[298]

It is uniformly accepted that NEPA imposes only procedural requirements upon federal agencies.[299] While NEPA does not require that agencies reach any particular substantive result in their decision-making process, it is designed to ensure that an agency's decisions have been made with recognition of proper environmental concerns.[300] Equally important, NEPA informs the public about the decision-making process, equipping it with information needed to ensure that agencies take a hard look at relevant environmental factors.[301] However, NEPA may also result in some measurable substantive benefits to the trail environment were it properly applied and its policies analyzed. First, the specter of having to comply with NEPA would cause the telecommunications industry to carefully consider whether the benefits of siting a tower near the trail would offset the costs of conducting NEPA analysis. If the costs would be too great, industry may find that it makes more economic sense to site the tower elsewhere. Furthermore, NEPA may have some substantive effect where the FCC proposes to take mitigatory measures in advance to avoid the threshold "significance" of the environmental impacts.[302] For instance, a tower proposed within the viewshed of the trail could be disguised as a tree, located at a greater distance from the trail's centerline, or the transmitter could be co-located on an existing tower structure, thereby avoiding many of the negative effects on the trail's viewshed. Here, the FCC would pre-pare a mitigative finding of no significant impact (FONSI), thereby avoiding comprehensive NEPA analysis, while providing substantive protection to the trail's aesthetic environment.

D. Endangered Species Act

The Appalachian Trail corridor passes through some of the most species diverse habitat in the world. More species of trees grow in the Great Smoky Mountains than in all of northern Europe.[303] The array of flowering plants, trees, insects, and other wildlife is greater than in almost any other place on earth, aside from the tropical rainforests of South America.[304] In recognition of this rich diversity, the NPS, along with the U.S. Forest Service, and other state, local, and private organizations are

conducting a natural heritage inven-tory of the Appalachian Trail corridor.[305] The purpose of the inventory, in its beginning stages now, is to "track the status of rare plants, animals and natural communities located along the Appalachian Trail, which will in turn help preserve the ecological diversity of the Trail corridor and the lands through which the Trail passes."[306] Due to its unique location "atop the Appalachian Mountain chain and because much of the corridor is relatively untouched, [the] Appalachian Trail lands contain many comparatively small, isolated populations of threatened, endangered or rare plants and animals."[307] Many of these rare species of flora and fauna are protected by the Endangered Species Act (ESA)[308] and therefore are entitled to special protection from activities that would diminish their numbers.[309]

As preliminarily revealed by the natural heritage inventories, the Appalachian Trail corridor contains 384 sites where endangered or threatened plant or animal species may be found.[310] Within those sites, the Park Service has identified 1,503 separate occurrences of endangered or threatened species.[311] Among others, the Ap-palachian region is home to the following threatened or endangered species: the Carolina flying squirrel, the Virginia northern flying squirrel, the St. Francis butterfly, the Virginia big-eared bat, the Roan Mountain bluet, and hundreds of other birds, amphibians, reptiles, clams, insects, and flowering and nonflowering plants.[312] Many of these species may be imperiled by the widespread build-out of telecommunications facilities along the trail. The goal of the natural resources inventory is to inform land management agencies along the trail of the existence of endangered species and their habitats and to recommend management initiatives to ensure the continued sur-vival of these species.[313]

In particular, telecommunications towers pose a significant threat to several endangered avian species, such as the Kirtland's warbler and the Berwick's wren.[314] The Kirtland's warbler, *dendroica kirtlandii*,[315] does not make the Appalachians its permanent home but relies on the Appalachians when making its annual migration from its summer range in the jack pine forests of northern Michigan to the Bahama Islands.[316] During its annual migration, the species traverses the Appalachian mountains in the northern Georgia-southern North Carolina region.[317] This region has the highest density of tele-communications towers over 200 feet than any other area of the United States.[318] Although no scientific studies have proven the correlation, the survival of the Kirtland's warbler species is believed by some to be imperiled by the density of telecommunications towers in this region.[319] This theory is supported by numerous studies conducted at other tower sites demonstrating the sus-ceptibility of the warbler as a species to fatal collisions with tele-communications towers.[320] Unless telecommunications towers are sited with environmental factors in mind, ornithologists believe that the unrestrained

expansion of telecommunications services could jeopardize the continued existence of species such as the Kirtland's warbler.[321]

Similarly, several endangered species of salamanders, including the Cheat Mountain salamander[322] and the Shenandoah salamander,[323] occupy small ranges in the Appalachians, frequently confined to isolated mountain tops.[324] For instance, the Shenandoah salamander inhabits the relatively dry, rocky talus slopes above 800 meters on three mountain tops in the Shenandoah National Park.[325] Since telecommunications towers are frequently located on mountain peaks, these structures would appear to pose a similar threat to the survival of these rare salamander species. The individual home range of several of these salamander species is as small as three square feet, thus making them extremely dependant on specific habitat conditions.[326] Habitat destruction resulting from the con-struction of electrical transmission towers and power line corridors has been implicated in the dramatic decline of these salamander species.[327] Furthermore, the use of herbicides along power lines' rights-of-way may have a toxic effect on salamander populations, further compromising their chance for survival.[328]

The ESA was designed in part to prevent the continued loss of endangered species which would result if man's technological advances, such as those presented by the expansion of tele-communications services, were permitted to grow unchecked by other values.[329] Congress recognized that "[man] and his technology [have] continued at an ever-increasing rate to disrupt the natural ecosystem . . . . [resulting] in a dramatic rise in the number and severity of the threats faced by the world's wildlife."[330] The check on federal agency authority proposed by Congress is embodied in section 7 of the ESA, requiring the "Secretaries and the heads of all other Federal departments and agencies to use their authorities in order to carry out programs for the protection of species, and . . . requires that those agencies take the necessary action that will not jeopardize the continuing existence of endangered species."[331] In-deed, ESA prohibitions were not limited to those agencies whose primary mission was the protection of the environment or natural resources, but were intended to apply equally to all federal agencies, irrespective of whether conservation was consistent with an agency's primary purposes.[332] Thus, even though many agencies such as the FCC have no institutional experience with environmental protection or species conservation, they must adhere to the ESA mandates. In fact, species conservation may be contradictory to an agency's mission, but Congress has clearly articulated a policy that species preservation must take priority over the "primary missions" of all federal agencies.[333]

To date, the FCC has evidenced little concern for the impacts of telecommunications structures on endangered species.[334] While Congress has indicated that the efficient and timely implementation of new telecommunications technologies and

infrastructure build-out is a national priority,[335] to the extent that these priorities conflict with the ESA, it is clear that the FCC is required to conform its mandate under the Telecommunications Act with the ESA.

1. Applicability of Section 7(a)(2) of the ESA

Telecommunications services, and the equipment and infrastructure necessary to support those services, are constructed by private industry. Decisions about where to site telecommunications towers are made by private industry according to customer needs. Therefore, section 7 of the ESA, which constrains federal agency action, may initially appear to be of questionable value in protecting endangered species from the harmful effects of privately constructed telecommunications towers. However, as discussed earlier in this Article,[336] the federal government is significantly involved in the process of telecommunications tower design and placement.

Section 7(a)(2) of the ESA requires all federal agencies to "insure that any action authorized, funded, or carried out by the agencies is not likely to jeopardize the continued existence of any endangered species or . . . result in the destruction or adverse modification of [the] habitat of such species."[337] The U.S. Fish and Wildlife Service (USFWS), the agency responsible for implementing the ESA, has defined agency "action" as "all activities or programs of any kind authorized, funded or carried out, in whole or in part, by Federal agencies . . . . Examples include, but are not limited to . . . the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid."[338] Thus, Congress chose to apply section 7(a)(2) to private parties engaged in certain relationships with the federal government. In those cases, the acts of the private party are inseparable from those of the federal agency and become "agency action" for purposes of the ESA.[339]

The relationship between the FCC and the telecommuni-cations industry is intertwined at several levels. First, on the most general level, the FCC auctioned license rights to telecommuni-cations companies to make use of a high frequency spectrum over which telecommunications signals could be transmitted.[340] The license granted by the FCC to industry authorizes telecommuni-cations carriers to offer exclusive communications services to customers within that particular geographical area.[341] If the issuance of a particular license would jeopardize the continued existence of an endangered species or modify its habitat, the FCC's initial licensing decision would likely be subject to section 7 of the ESA.[342]Secondly, on a more specific level, once a license is issued and a telecommuni-cations company desires to recapture the licensing fees by selling services to the public, industry must first construct the necessary infrastructure. As previously discussed,[343] each telecommunications tower must be registered with the FCC prior to construction.[344] Thus, the FCC's registration of a particular telecommunications

tower may also trigger section 7 of the ESA if that particular tower has may jeopardize the continued existence of an endangered species or modify its critical habitat. Each of the foregoing activities will require the FCC to consult with the U.S. Fish and Wildlife Service (USFWS). However, because in each case the scope of the FCC's licensing and permitting functions is different, the scope of the corresponding duty to consult will differ depending on the potential impact of the agency action.[345]

Actions taken by federal agencies are governed by the substantive and procedural provisions of section 7 of the ESA. Section 7 prohibits federal agencies from taking any action that would likely jeopardize the continued existence of a threatened or endangered species or that would adversely modify its critical habitat.[346] Section 7 of the ESA will play a preeminent role because the focus of this Article is on the consultation process as a means of causing the FCC and telecommunications industry to consider the environmental implications of tower siting decisions,. However, section 9 of the ESA, which applies to private parties such as the telecommunications industry, should not be overlooked as a means of protecting endangered species, and its implications will also be addressed.[347]

Section 7 imposes a multi-step process on federal agencies such as the FCC to ensure that the protections of the ESA are carefully considered by the agency and incorporated into its decision-making process.[348] First, the FCC must inquire of USFWS whether any threatened or endangered species "may be present" in the area of the proposed action.[349] If USFWS indicates threatened or endangered species are present in the area of the proposed action, the FCC must prepare a "biological assessment" to determine whether any such species are "likely to be affected" by the action.[350] If the action agency determines in the biological assessment that a threatened or endangered species "is likely to be affected," the agency must formally consult with USFWS.[351] As a result of the formal consultation, the USFWS is required to issue a biological opinion based on the "best scientific and commercial data available."[352]

If the biological opinion concludes that the FCC's proposed action would jeopardize[353] the species or destroy or adversely modify critical habitats, then the USFWS must suggest reasonable and prudent alternatives that would avoid jeopardy to a species or prevent the adverse modification of its habitat.[354] If the USFWS concludes that the agency action will not violate section 7, then it may still require that certain reasonable and prudent measures be adopted to minimize the impact of the agency's action.[355] The consultation process acts as a brake on agency action. During the period of consultation, and prior to the USFWS's determination that the agency's proposed action will not violate section 7 or that reasonable and prudent alternatives are available to the proposed action, the action agency is precluded from

making "any irreversible or irretrievable commitment of resources" to the project.[356]

a. Consultation Under Section 7

The cornerstone of section 7 is the consultation process. "The purpose of the consultation requirements . . . is to allow [the action] agency to avail itself of 'the expertise of [the USFWS] in assessing the impact of the proposed project' . . . ."[357]Furthermore, the process allows agencies to identify potential conflicts between the project proposed by the action agency, especially in those circumstances where the agency does not have the expertise to foresee potential conflicts on its own.[358] Although the consultation process is not an end in itself, in most cases it requires the agency to consciously reflect on the environmental consequences of its proposed actions and to consider the potentially harmful effects its proposed actions would have on endangered species.[359] By forcing the agency to consider factors that lie outside of its organic statutory mandate, the consultation process is designed to prevent hastily conceived projects that may have unintended, yet severe, consequences on endangered species.

The ESA consultation process is aimed at precisely the types of uninformed and single-minded projects such as those being proposed and implemented by the FCC and the telecommunications industry. While the FCC does have a mandate to assist industry in getting the new technology on line as soon as possible, the ESA prevents the FCC from making these decisions without considering the consequences to endangered species. Admittedly, it is difficult to correlate the data about the harmful consequences of telecommuni-cations facilities on avian species generally to particular types of endangered species, such as the Kirtland's warbler. However, the ESA does not permit the FCC to use this information gap as a justification for ignoring the probable consequences to particular endangered species. Although the information and research on the effects of telecommunications towers on endangered populations are in their infancy, it is clear that telecommunications towers may pose a threat to some migratory bird populations. Therefore, when it can be determined that endangered species inhabit or migrate through an area where a telecommunications tower has been proposed, then at the very least the ESA process has been triggered, and the FCC is obligated to initiate the section 7 process. In the alternative, in those cases where the USFWS is aware that endangered species may be affected by the FCC's actions, it has a corresponding duty to protect that species and initiate the section 7 procedures by providing written notice to the FCC.[360]

b. Scope of Consultation Under Section 7

As a matter of daily practice, the FCC's focus is on facilitating the development and implementation of technology to enhance and improve the nation's telecommunications capabilities. The FCC is not in the environmental protection business. While some have challenged telecommunications tower siting decisions based on the ESA, these matters have typically been disposed of through the FCC's administrative process, ordinarily in favor of the applicant with little consideration given to the substance and procedural requirements of the ESA.[361] However, under section 7 of the ESA, the FCC must consult with USFWS in those circumstances where threatened or endangered species may be jeopardized or critical habitats destroyed by construction of a telecommunications tower or system of towers. The scope of the FCC's obligation to consult arguably extends beyond the piecemeal evaluation of individual tower siting determinations,and may include the duty to consult on a more programmatic basis.

Because the FCC issues licenses to telecommunications carriers to provide services on a geographical basis, the initial licensing decision may trigger a duty to consult the USFWS regarding the cumulative effects of the permitted telecommuni-cations network on endangered species within that geographical area. Programmatic consultation recognizes that agency action should be evaluated early in the planning stage, where the cumu-lative impacts of the entire project may be examined.[362] If this consultation reveals potential negative impacts on a listed species, mitigatory action may be taken early in the process to reduce probable harmful effects.[363] Courts have acknowledged the duty of federal agencies to engage in programmatic consultation at the planning stage where, for example, specific land management plans[364] or mineral leases[365] have been approved in advance of more localized development activities, such as timbering or exploration, which would inevitably occur in the future. The same standard would appear to govern the FCC's telecommunications licensing decisions within specific geographical areas.

The proper time to evaluate the impacts of a telecommuni-cations build-out within a particular geographic area is at the earliest stage of the process where the FCC's decisions may "have an on-going and long-lasting effect even after adoption."[366] Logically, this evaluation should occur at the time the FCC issues a license to a tele-communications carrier. Early evaluation would enable the FCC to review the carrier's tower siting schematic and determine how the towers will cumulatively impact endangered species. Although the actual tower siting plan may ultimately deviate from the proposal, early evaluation would allow the FCC to make rational judgments about how the proposed tower siting pattern may affect endangered species.[367] With early evaluation, the FCC could determine where the towers would be fundamentally incompatible with endangered species habitat or migratory routes. Furthermore, the ESA's requirement that consultation be based on

the best available data would impose a duty on the FCC to be fully informed at the early stages of the decision-making process.[368] The lack of concrete information or exact science would not obviate the FCC's need to look at the potential impacts on endangered species in the area; instead, it would be sufficient for the FCC to rely on potential impacts and projected effects.[369]

In the past, the FCC has resisted programmatic review of the environmental consequences of communications towers.[370] How-ever, at the initial licensing stage the FCC could more effectively determine the effect that telecommunications towers may have on the overall populations of endangered species such as the Kirtland's warbler or the Shenandoah salamander. While species such as the Kirtland's warbler generally follow migratory corridors, their flight path cannot be precisely predicted. Examining tower siting decisions on a broad basis, the FCC would have a better grasp of the threats posed to species that traditionally migrate through or inhabit portions of entire geographic regions.

Furthermore, conducting a programmatic review may be less costly for industry. Evaluating impacts on endangered species in advance, rather than on a piecemeal basis, would better allow the telecommunications industry to predict its costs and avoid the possibility of needing to relocate towers when a project-by-project analysis reveals an ESA conflict. Evaluation early in the process would also allow the FCC to identify important habitat, biological resources, and geographical features that may be critical to the continued health of an endangered species. For example, it is well documented that warblers as a *genus* migrate at very low altitudes.[371] Therefore, in the warbler's migratory route, antennas should not be located on mountain tops or higher elevations.[372] During this early period of evaluation, the FCC and its licensees would be prohibited from initiating construction of any telecommunications infra-structure until impacts may be defined.[373]

A programmatic impact analysis is a necessary component of the consultation process between the FCC and USFWS; however, by itself a programmatic analysis would not be sufficient to ensure com-pliance with the ESA. In *Cabinet Mountains Wilderness v. Peterson*,[374] the Court of Appeals for the District of Columbia upheld a Forest Service and USFWS consultation regarding a four-year exploratory drilling proposal for copper and silver exploration in a Nevada wilderness area inhabited by certain endangered species.[375] The court limited its review to the four-year exploration plan but stated that "[a]ny future proposals . . . to conduct drilling activities in the Cabinet Mountains area will require further scrutiny under NEPA and the ESA."[376] Thus, while the FCC's programmatic consultation would enable it to predict cumulative impacts, programmatic consultations are often based on incomplete information as to location, scope, and timing of future activities.[377] When more specific information becomes available, the FCC has an

obligation to make a more accurate impact assessment for various post licensing activities.[378]

The rational point in time for the FCC to re-evaluate the impacts of individual towers on endangered species is at the site-specific permitting stage. Before any tower may be constructed, a telecommunications company must acquire an FCC permit.[379] At the site-specific permitting stage, the telecommunications industry has more concrete data about a tower's location and physical characteristics, such as its height, whether guy wires are necessary, or whether it will be a solid structure or steel latticework frame. In addition, at this stage of permitting the agencies have more specific data on the particular endangered species affected by the tower and how the species' habitat needs may impact the siting decision.

The project-level analysis need not duplicate the factors con-sidered at the programmatic level.[380] Instead, the site-specific con-sultation may simply incorporate the findings of the programmatic evaluation and supplement those findings to reflect the new data and more precise information obtained since the programmatic consultation.[381] The proposed action may go forward if the indi-vidual tower consultation reveals that its construction will not jeopardize the continued existence of an endangered species.[382] If the site-specific consultation and resultant biological opinion indicate probable jeopardy to a listed endangered species, then construction of the specific tower is prohibited, absent the existence of reasonable and prudent construction alternatives.[383] In most cases, alternatives will exist that will mitigate the harmful effects caused to endangered species, and the tower construction may proceed with only minor alterations.

c. Mitigation and Reasonable and Prudent Alternatives

Science overwhelmingly shares the conservation communi-ty's concerns about the threats that telecommunications towers pose to migratory bird species.[384] While there is little scientific evidence of effects of telecommunications towers on endangered species, it is rational to conclude from the existing evidence that certain endangered species are at risk.[385] Nevertheless, the scientific com-munity is hopeful that steps can be taken to avoid or minimize impacts on endangered species while allowing companies to meet the demand for telecommunications services without significant interruption.[386]

However, the FCC has not cooperated with the conservation community in seeking to obtain a workable solution to the environmental problems communications towers pose. The FCC and telecommunications industry have raised the stakes by charac-terizing the debate in terms of environmental protection versus access to telecommunications services.[387] In fact, a sensible reso-lution of these issues will

not necessarily require a choice between the convenience of wireless technologies and the health of en-dangered species. Instead, the conservation community, through protections provided by the ESA, is simply seeking to accommodate the FCC's goals with other important values. In fact, if the choice were between endangered species protection and communications towers, the result is clear: the Endangered Species Act admits of no exceptions nor bends to considerations of cost-benefit analysis.[388] Fortunately, like many attempts to discredit initiatives to protect the environment, the FCC has presented a false choice.

A number of alternatives and mitigation measures could avert possible conflict between endangered species and tele-communications towers. The first is to ensure that siting decisions are made not only with signal coverage and other technological con-siderations in mind, but also with full knowledge of the effects on endangered species and their habitats. With this information, the telecommunications industry will be able to site towers outside of primary flyways and species habitats.[389] One available alternative is the use of co-location in positioning transmission equipment. Co-location reduces the total number of towers by requiring communi-cations companies to situate more than one antenna or transmission device on a single tower.[390] Often, a carrier will lease space on a tower owned by another carrier and use the existing structure in lieu of erecting a new one. Reducing the number of towers obstructing migratory corridors will significantly diminish habitat loss and migratory interference.[391]

Clustering antennas in high concentration areas, referred to as "antenna farms," may be a less satisfactory option for reducing impacts on endangered species.[392] Adding another tower will con-tribute a relatively insignificant additional threat to endangered species occupying surrounding land because the area is already degraded with towers. Clustering would be an adequate solution if existing antenna farms were exempt from review under the ESA. However, the ESA does not exempt existing structures from its prohibitions on harming endangered species.[393] Therefore, assuming the ESA could be used to dismantle existing antenna farms, this option may not be a viable long-term solution.

Another mitigatory measure that will reduce the impacts on endangered bird species is to reduce the use of guy wires to support tower structures. Birds frequently become tangled in the web of steel cables reinforcing antenna towers. Current research indicates that potential impacts may be reduced by placing the supporting cables parallel to migratory flow where possible.[394] Also, researchers are currently studying the effectiveness of attaching neon yellow and orange balls to the guy wires as deterrents, using triangular shaped markers on the guy wires, or using isotope markers to deter bird strikes.[395] Another possibility may be to design towers in a way that obviates the need for supporting guy wires.[396]

The most likely cause of bird collisions with antenna towers is warning lights placed on the towers. FAA regulations require that all tower structures over 200 feet in height have adequate warning lights.[397] The type of lighting used is an important factor in attracting birds to telecommunications towers. Red or white lighting is often used, either in a constant beam or a flashing strobe.[398] Birds are attracted in greater numbers by constant beams of white light.[399] The use of red strobe lighting and lower intensity light sources tends to draw fewer birds into the antenna's orbit.[400] The use of auditory signals in conjunction with flashing lights may also be effective deterrents.[401] However, because birds' behavioral strategy is to "sidestep" predators at the last moment, lights may not work as a warning device because the birds' avoidance response may send them crashing into the outlying guy wires.[402]

The measures necessary to mitigate the effects of tele-communications towers on endangered salamander populations are somewhat different. Since these salamanders' habitats are so isolated and frequently occur on mountain tops, for the salamanders' survival it is critical that siting decisions be sensitive to their habitat requirements. Frequently, a tower may be sited on an adjacent peak that does not serve as critical habitat for a salamander population. Co-location may also be used to minimize impacts and concentrate development at pre-existing towers. Finally, the use of herbicides to control unwanted vegetation at tower sites could be eliminated and other forms of vegetation management employed that would have more benign effects on surrounding habitats.

Other mitigation techniques include incorporating antennas into existing structures such as church steeples and water towers, creating natural buffer zones around telecommunications structures, and disguising smaller antennas as trees, so that they blend into the surrounding forest canopy. A great deal of further research and study must be conducted on the siting of telecommunications towers and their effects on endangered species. However, the current lack of scientific precision does not relieve federal agencies of their obligation to comply with the ESA consultation provisions.[403]

2. Applicability of Section 7(a)(1) of the ESA

Less understood, but also potentially useful in prompting the FCC to engage in consultation, is section 7(a)(1) of the ESA. This section provides the following "All other federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species."[404] On its face, section 7(a)(1) imposes an affirmative duty on all federal agencies to engage in species conservation programs. Interestingly, this provision stands in stark contrast to the remainder of section 7, which is prohibitory in nature,

requiring only that agencies refrain from jeopardizing the continued existence of endangered species or destroying their critical habitat. All of the procedural mechanisms of section 7 are designed to enforce section 7(a)(2)'s prohibitions against federal agencies. There is no corresponding enforcement scheme to implement the directives of section 7(a)(1). The lack of statutory precision in defining the duties of section 7(a)(1) leaves it overlooked as an independent source of species protection.[405]

However, in cases such as *Sierra Club v. Glickman*,[406] the courts have shown some willingness to apply section 7(a)(1) according to its plain meaning, thereby giving teeth to the otherwise vague obligations of this section of the ESA. In*Glickman*, the Fifth Circuit held that the United States Department of Agriculture (USDA), which had regulatory authority over certain issues of water quality and water usage in the Edwards aquifer, had an affirmative obligation to adopt programs to conserve endangered species inhabiting the aquifer.[407] The court also held that the USDA had an obligation to consult with USFWS regarding its development of such conservation programs.[408] The court reasoned that Congress clearly evidenced its intent that agencies use "all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided pursuant to this chapter are no longer necessary."[409] The duty to conserve was not an accident of legislative drafting; rather, it was a theme running throughout the ESA.[410]

The duty to consult under section 7(a)(1) is species-specific and is required on a case-by-case basis.[411] The court in *Glickman* rejected the notion that section 7(a)(1) imposed only a generalized duty on all federal agencies to consult with USFWS on how agency activities would affect all endangered species as a whole.[412]

The species-specific duty to consult under section 7(a)(1) could be applied to the FCC's tower siting decisions. Arguably, section 7(a)(1) requires the FCC to consult with the USFWS in developing programs to conserve species such as the Kirtland's warbler and Shenandoah salamander. Under section 7(a)(1), the FCC is required to exercise greater foresight in analyzing the effects of telecommunications towers on species' health and in developing affirmative conservation programs to ensure that the ESA's purposes are fulfilled despite the FCC's own contradictory mission.[413] Section 7(a)(1) presents some promising opportunities to regulate tower siting decisions. Most importantly, the FCC is freed of difficult in-terpretations concerning the extent of its involvement in private activities, the scope of its consultation obligation, and determining whether there is jeopardy to a listed species. Section 7(a)(1) imposes a duty to consult and develop conservation plans irrespective of the traditional limitations of section 7(a)(2).[414] This consultation require-ment could have significant benefits for endangered species whose health would be an

ongoing consideration during every stage of the agency's decision-making process.[415]

3. The Implications of Section 9 of the ESA

Section 9 of the ESA, which applies to private parties, prohibits any person subject to the jurisdiction of the United States from "taking" any threatened or endangered species.[416] The term "take" under section 9 has been interpreted broadly to include any action that will "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect" any such species.[417] The term "harm" within the definition of "take" has been further expanded by regulatory interpretation to include "[s]ignificant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."[418] The definition of harm has not been precisely defined by the courts.[419] Beyond prohibiting the taking of endangered species, section 9 may be a useful tool in persuading the FCC to comply with its obligations to consult under section 7.

The process of authorizing and constructing telecommuni-cations towers and associated facilities is a combination of federal agency action and private initiative. When a federal agency, such as the FCC, complies with its obligations under section 7 and receives authorization from USFWS to proceed with the project, then section 7(o) of the ESA provides that any taking under section 9 shall not be prohibited.[420] Thus, once the requirements of section 7 are met, section 9 no longer operates as an independent constraint on the project.[421] This provision reflects the ESA policy that someone must consider the adverse effects of a project, and if the federal government fails to fulfill its obligations under section 7, then the burden will fall on the telecommunications industry pursuant to section 9.

Since the process of complying with section 9 and receiving a permit under section 10 may be an expensive proposition for industry and result in substantial liability, it is in the best interests of the telecommunication industry to encourage the FCC to engage in its consultation obligations under section 7. Consultation by the FCC and issuance by the USFWS of a no jeopardy opinion and/or an incidental take permit allowing an agency to proceed with a project relieves industry of its obligation to independently comply with section 9 of the ESA.

Section 7's consultation provisions have no application to the section 9 process. Therefore, if the FCC chooses not to comply with its duties under section 7, the opportunity for programmatic consultation is lost, and ESA compliance may be satisfied on an individual, tower-by-tower basis. Significant environmental protection is surrendered in the process. Section 7 consultation forces the FCC to deliberate

about the environmental consequences of its actions, and the resulting delay provides the FCC with the opportunity to contemplate its corresponding duties under NEPA.[422] The result is an increased awareness of, and sensitivity to, environmental impacts as well as solutions that avoid, minimize, and mitigate those impacts on a regional basis. Furthermore, through the NEPA process, the FCC is afforded the opportunity to consider the effects of its siting determinations on other resource management statutes as well. Both the Migratory Bird Treaty Act[423] and the Bald and Golden Eagle Protection Act[424] may supplement the protections afforded to certain bird species, and through the NEPA process the FCC will have time to consider these acts prior to any final siting determination. A much less satisfactory alternative may be after-the-fact enforcement of these statutes by means of private lawsuits filed after the towers have been erected and some damage already inflicted.

E. Migratory Bird Treaty Act

One of the primary goals of the Trails Act was to provide an extended wilderness pathway to allow individuals to escape from the pressures of civilization.[425] Long, uninterrupted stretches of trail are valuable for other reasons as well, one of the most important of which is ecosystem preservation. Proponents of the Trails Act felt that the trails would "provide numerous environmental benefits, including protection of wildlife habitats, timber resources and watersheds."[426] For example, the Appalachian mountain chain serves as a primary flyway for migratory birds traveling from the northern reaches of the United States and Canada to winter habitats in Central and South America.[427] The Appalachians are favored as a migratory route because the mountains are oriented north to south, bridging more than 2,000 miles from Newfoundland to Alabama.[428] Moreover, the mountains present an almost continuous chain of unbroken habitat, so that migrants do not have to contend with wide areas of open valley.[429] Finally, the Appalachian's central ridge and valley province provide a continuous series of parallel, evenly spaced hills and ridge tops that facilitate favorable wind patterns and guide the birds during flight.[430] Among the travelers frequenting the Appalachian flyway are sharp-shined hawks, golden eagles, saw-whet owls, loons, tundra swans, pine grosbeaks and red-breasted nuthatches, various species of warblers, and a number of other common migratory birds.[431]

In recent years, human development, including cellular and communications towers, has invaded the migratory pathway. Many peaks along the Appalachian Trail have lost their natural character, instead more closely resembling large pin cushions.[432] The proliferation of telecommunications facilities has caused more than aesthetic and scenic degradation. Studies have indicated that cellular towers and antennas built on ridges and mountaintops have become obstacles for migrating birds.[433] One recent study indicated that between 1957 and 1994 a single 1,000 foot

television tower caused the death of 121,560 migrating birds, representing 123 species.[434] With the increased number of cellular towers anticipated as a result of the Telecommunications Act, it has been estimated that annual tower kills in North America will soon exceed five million birds per year.[435]

Thus, while aesthetic impacts on trails values may be too "vague" to warrant the FCC's taking a hard look at the environmental consequences of its actions, more tangible evidence exists of environmental damage caused by cellular towers. These more tangible environmental impacts may make cellular tower siting decisions more susceptible to regulation. For instance, the Migratory Bird Treaty Act (MBTA)[436] may provide a source of regulatory authority for controlling the tower siting along the trail while incidentally benefiting viewshed protection as well.

The MBTA was originally enacted to implement the provisions of a 1916 convention between the United States and Great Britain, the purpose of which was to save birds "from indiscriminate slaughter and [to insure] the preservation of such migratory birds."[437] In addition, the MBTA has served to implement other similar treaties with Mexico, Japan and the Soviet Union to protect migratory birds that "[c]onstitute a natural resource of great value for recreational, aesthetic, scientific and economic purposes . . . ."[438] While the primary focus of the MBTA was to prevent the destruction of migratory birds by illegal hunting, the Act has been applied in other contexts as well.

The MBTA provides that "it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, at-tempt to take, capture or kill, possess, . . . any migratory bird . . . "[439] The MBTA applies to nearly all birds indigenous to North America, including such common varieties as the wren, robin, crow, oriole, sparrow, warbler, blackbird and grackle.[440]

The courts have been willing to use the MBTA to limit some land use practices that cause harm to migratory birds. In *United States v. Corbin Farm Service*, the court held that a supplier's spraying of a toxic pesticide that resulted in the death of 1,000 birds violated the MBTA.[441] In reaching its decision, the *Corbin* court held that the MBTA prohibited activities other than hunting that would result in the death of migratory birds and that the defendant need not have a specific intent to kill a bird before being subject to the Act.[442] Simil-arly, in *United States v. FMC Corp*., the Second Circuit affirmed the criminal conviction of a corporation for violating the MBTA after the company released toxic chemicals from its pesticide manufacturing plant into a wastewater pond, killing migratory waterfowl.[443] The court held that the defendant was liable even though the toxic release was accidental and unintentional.[444]

Most recently, in *United States v. Moon Lake Elec. Ass'n, Inc.*, a Colorado district court held that a rural electric cooperative was liable under the MBTA where its electrical transmission towers caused the deaths of migratory bird species.[445]The court disagreed with the electric company's contention that the MBTA applies only to physical conduct associated with hunting and poaching migratory birds.[446] Instead, the court held that the electric cooperative may be prosecuted under the MBTA because it was a foreseeable consequence that birds would be killed where the transmission facilities were erected without using available mitigatory measures that could have prevented the injuries.[447] The *Moon Lake* case is particularly apt to migratory bird deaths caused by telecommunications towers, which structurally resemble the electrical transmission towers found to violate the MBTA in *Moon Lake*.

The MBTA is a strict liability statute. As evidenced in the *Corbin Farm Service*, *FMC Corp*. and *Moon Lake* cases, the Department of the Interior, which is responsible for enforcing the MBTA, "considers strict liability under the statute to support an 'important public policy behind protecting migratory birds.'"[448] However, the case law has been less clear in applying the MBTA to constrain the actions of the federal government itself.

In *Sierra Club v. United States Department of Agriculture*, the court held that the MBTA prohibited the U.S. Forest Service from logging during the nesting season of resident migratory birds where birds would be killed by the logging.[449]Subsequently, in *Sierra Club v. Martin*, the court, relying on the rationale of *Sierra Club v. United States Department of Agriculture*, preliminarily enjoined logging operations in the Chattahoochee and Oconee National Forests in Georgia because the logging would interfere with the nesting season of certain migrating birds.[450] The court found "that a taking or killing does not occur simply because of habitat destruction or modification."[451] The court distinguished this case, however, and held that a killing of migratory birds was caused by defendants' logging activities during the critical nesting season.[452] Thus, activities that directly result in the deaths of migrating birds are prohibited by the MBTA, regardless of whether the activity was intended to harm the birds. However, the *Martin* case was reversed on appeal.[453] The Eleventh Circuit reasoned that the MBTA lacked any expression of Congressional intent that the word "person" in the MBTA included the federal government.[454] Thus, while the unpublished Seventh Circuit decision in *Sierra Club v. United States Department of Agriculture* remains a valid statement of the law, there is no remaining vitality in the assertion that the MBTA imposes liability on the actions of the federal government itself.

Nevertheless, the MBTA is still a formidable barrier to the unrestrained build-out of telecommunications towers along the Appalachian Trail. The construction of telecommunications towers by private industry along migratory corridors would

undoubtedly result in the deaths of migratory bird populations. If the telecommunications industry continues to pursue its goals and at the same time disregard the significant environmental consequences of its actions, it may be exposed to liability under the MBTA pursuant to the logic of *FMC Corp.*, *Corbin Farm Service*, and *Moon Lake*. Furthermore, while the application of the MBTA to federal agencies has been discredited by recent case law, at the very least the potential harm to migratory birds should spur the FCC and the telecommuni-cations industry to undertake meaningful environmental analysis of tower siting decisions under NEPA. The tangible harm to wildlife more clearly implicates the FCC's obligations under NEPA and, therefore, arguably requires the FCC to conduct a comprehensive environmental evaluation of projects in each region where tower construction would interfere with bird migration patterns.

V. Conclusion

The Appalachian Trail was conceived as a refuge from the modern world. At the time of its initial construction and designation, the spreading growth of urbanization could be viewed from many points along the trail's route. Certainly trail architects did not unrealistically assume that society would stop advancing, and, to the contrary, the early trail proponents intended that the trail exist in harmony with its surrounding environment. However, neither the founders of the Appalachian Trail nor the sponsors of the Trails Act could foresee the extent of the impacts the trail would experience as a result of rapid technological advancement. To the extent that the public policies embodied in the Telecommunications Act are accorded greater significance than those protected by the Trails Act and other environmental statutes, then not only is the national trails system in danger of failing in its mission, but the entire national park system is likewise in jeopardy of falling prey to similar economic cost-benefit analysis. However, the objectives of the Trails Act and the National Park Service Organic Act all demand much more of the government in deciding how the nation's resources should be used.

---

[*] Attorney, Ohio Environmental Protection Agency; LL.M., The George Washington University Law School, 1999; J.D., The Ohio State University College of Law, 1991; B.A., Miami University, 1984. The author would like to thank Andrew Hyman, counsel to the Appalachian Trail Conference, for sharing his knowledge and ideas about this topic and for his valuable comments and suggestions on earlier drafts of this Article. The author would also like to thank his wife, Judi, for her never-ending encouragement and support.

Return to text.

[1] Thomas Jefferson, Notes on the State of Virginia 19 (William Peden ed., Univ. of N.C. Press 1954) (1787). Return to text.

[2] *See* Roderick Nash, Wilderness and the American Mind, 68-69 (3d ed. 1982). *See generally,* Richard West Sellars, Preserving Nature in the National Parks: A History (1997). Return to text.

[3] *See* Nash, *supra* note 2, at 69. Return to text.

[4] *See id.* Return to text.

[5] Dyan Zaslowsky & T.H. Watkins, These American Lands: Parks, Wilderness and the Public Lands 19 (Wilderness Soc'y 1994) (1986). Return to text.

[6] National Park Service Organic Act, Ch. 408, 39 Stat. 535 (1916) (codified as amended at 16 U.S.C. §§ 1, 2-4 (1994)). Return to text.

[7] Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890 (1964) (codified as amended at 16 U.S.C. §§ 1131-36 (1994)). Return to text.

[8] National Trails System Act, Pub. L. No. 90-543, 82 Stat. 919 (1968) (codified as amended at 16 U.S.C. §§ 1241-51 (1994)). Return to text.

[9] *See* Peter Dykstra, *Defining the Mother Lode*: Yellowstone National Park v. The New World Mine, 24 Ecology L.Q. 299, 306 (1997). Return to text.

[10] *See id.* Return to text.

[11] Telecommunications Act, Pub. L. No. 104-104, § 1a, 110 Stat. 56, (1996) (codified as amended in scattered sections of 47 U.S.C. (Supp. III 1997)). Return to text.

[12] *See* Zaslowsky & Watkins, *supra* note 5, at 253. Return to text.

[13] *See id*. Return to text.

[14] *See* Nash, *supra* note 2, at 67. Return to text.

[15] *See id.* Return to text.

[16] Zaslowsky & Watkins, *supra* note 5, at 255. Return to text.

[17] *See id*. The ethos of conservation derived from the ideas and writings of Henry David Thoreau, John Muir, Robert Marshall and Aldo Leopold, among others. *See* Ian Marshall, Story Line: Exploring the Literature of the Appalachian Trail 7 (1998). Return to text.

[18] *See* Donald Dale Jackson, *The Long Way 'Round: The National Scenic Trails System and How it Grew*, Wilderness 17 (Summer 1988). Return to text.

[19] Benton MacKaye, *An Appalachian Trail: A Project in Regional Planning*, 9 J. Am. Inst. Arch. 325 (1921). Return to text.

[20] Zaslowsky & Watkins, *supra* note 5, at 257 (MacKaye saw the trail as a footpath and "not a road."). Return to text.

[21] *See* Jackson, *supra* note 18, at 17. *See generally* Bureau of Outdoor Recreation, U.S. DEP'T of the Interior, Trails for America: Report on the Nationwide Trail Study 32 (Sept. 1966) [hereinafter Trails for America].

[22] Marshall, *supra* note 17, at 228. This phrase has been interpreted by scholars to mean "seeing not just the tangible objects you can actually see but seeing as comprehending, seeing how everything fits together *here*, belongs *here*, in this particular place, with this particular climate and geology and supporting these particular kinds of plant and animal life." *Id*. Return to text.

[23] *See* Zaslowsky & Watkins, *supra* note 5, at 257. Return to text.

[24] *See id*. Return to text.

[25] *See id*. Return to text.

[26] *See id*. Return to text.

[27] *See id*. Return to text.

[28] *See* Zaslowsky & Watkins, *supra* note 5, at 257. Return to text.

[29] *See id*.; *see also* Trails for America, *supra* note 21, at 33. Return to text.

[30] *See* Zaslowsky & Watkins, *supra* note 5, at 258. Return to text.

[31] *See* Jackson, *supra* note 18, at 19. Return to text.

[32] *See id*. Return to text.

[33] *See id.* Return to text.

[34] *See id*. Return to text.

[35] *See id.* In 1945, Pennsylvania Congressman Daniel Hoch introduced legislation for a "national system of foot trails." *See id.* This bill, H.R. 2142, would have amended the Federal Highway Act of 1944 by providing for construction and maintenance of a system of trails extending over 10,000 miles, which were to be managed by the Forest Service and funded by annual appropriations of $50,000. *See id.* The bill specifically referred to the Appalachian Trail as its inspiration and sought to protect the "wilderness values" of the trail routes, a very ambitious proposition for its time. *See id.* The bill was opposed by the Roosevelt administration and died in committee. *See id*. at 19-20. In 1963, Senator Jennings Randolph introduced S. 1147 for the development of roads and trails in National Forests, but no action was ever taken on the bill. *See* Trails for America, *supra* note 21, at 19. Return to text.

[36] Development forced the relocation of the trail's southern terminus from Mount Oglethorpe, Georgia twenty miles north to Springer Mountain, Georgia. *See* Jackson, *supra* note 18, at 20. Just north of the Shenandoah National Park in Virginia, the trail was diverted onto public highways for twenty-five miles. *See* Trails for America, *supra* note 21, at 19. Return to text.

[37] *See* Jackson, *supra* note 18. *See generally* Earl Shaffer, Walking with Spring: The First Solo Through Hike of the Legendary Appalachian Trail (1995). Return to text.

[38] *See* Trails for America , *supra* note 21, at 20, *citing*, S. 622, 88th Cong. (1964). Return to text.

[39] *See id.* Return to text.

[40] The contours of the environmental landscape had been altered by the Wilderness Act of 1964, 16 U.S.C. §§ 1131-36, the Land and Water Conservation Fund Act of 1965, 16 U.S.C. §§ 4601-11 and the National Wildlife Refuge System Administration Act of 1964, 16 U.S.C. § 688dd, which collectively recognized the value of the nation's resources for recreation and preservation. Return to text.

[41] Pub. L. No. 90-543, 82 Stat. 919 (1968) (codified as amended at 16 U.S.C. §§ 1241-51 (1994)). Return to text.

[42] Trails for America, *supra* note 21, at 19. Return to text.

[43] *See* H.R. REP. NO. 1631, at 2 (1968), *reprinted in* 1968 U.S.C.C.A.N. 3856. Return to text.

[44] 16 U.S.C. § 1241(a) (1994). Return to text.

[45] *See id.* § 1241(b). Return to text.

[46] *See id.* Return to text.

[47] *Id.* § 1242(a)(1). Return to text.

[48] *Id.* § 1242(a)(3). Return to text.

[49] *See* 16 U.S.C. § 1242(a)(3). Return to text.

[50] *Id.* § 1242(a)(2). Return to text.

[51] *See* Comments of Gaylord Nelson, Trails Across America, *reprinted in* 115 CONG. REC. 16404-405 (daily ed. June 18, 1969) (Scenic trails meant to protect "old trails, rich in natural splendor or deeply woven into the nation's history . . . before all of them are obliterated by the impact of our industrial society."). Return to text.

[52] *See* H.R. REP. NO. 1631, at 2 (1968), *reprinted in* 1968 U.S.C.C.A.N. 3856, 3857 (basic aim of recreational trails is to provide the greatest outdoor recreation potential, while a goal of the scenic trails is to provide protection of outdoor values). Return to text.

[53] *See* ZASLOWSKY & WATKINS, *supra* note 5, at 262. Return to text.

[54] *See* 16 U.S.C. § 1246(g) (1994) (authorizing the Secretary to "utilize condemnation proceedings without the consent of the owner to acquire private lands or interests therein . . . in cases where, in his judgment, all reasonable efforts to acquire such lands or interests therein by negotiation have failed, and in such cases he shall acquire only such title as, in his judgment, is reasonably necessary to provide passage across such lands . . . ."). Return to text.

[55] *See* Pub. L. No. 90-543, § 7(g), 82 Stat. 919, 924 (1968), *as amended by,* Pub. L. No. 95-248, § 1(14), 92 Stat. 159, 160 (1978) (codified as amended at 16 U.S.C § 1246(g) (1999)).

[56] *See* Oversight of the National Trails System Act of 1968: Hearings before the Subcommittee on National Parks and Recreation of the House Committee on Interior and Insular Affairs, 94th Cong., 2d Sess. 18 (1977). Return to text.

[57] *See id.* Return to text.

[58] *See id.*; *see also* Appalachian Trail Amendments: Hearing on S. 2066 and H.R. 8803 before the Subcommittee on Parks and Recreation of the Committee on Energy and Natural Resources, 95th Cong., 1st Sess. 1 (1978). Return to text.

[59] *See id.* Return to text.

[60] *See* Pub. L. No. 95-248, 92 Stat. 159 (1978) (codified as amended in scattered sections of 16 U.S.C. (1994)). Return to text.

[61] *See* Pub. L. No. 95-625, § 551, 92 Stat. 3467, 3511-17 (1978) (codified as amended at 16 U.S.C. §§ 1244(d) and (e) (Supp. III 1997)). Return to text.

[62] *See* S. Rep. No. 95-636, at 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 457 (amendments necessary to preserve the "hiking experience" even though the footpath itself had already been established.). Return to text.

[63] *See, e.g.*, 123 Cong. Rec. 27945 (daily ed. Sept. 7, 1977) (Senator Mathias, commenting that the Appalachian Trail was to be a haven from urban sprawl from the east coast, and the Trails Act was intended to create a solid greenbelt corridor protected from fragmentation and incompatible uses); 115 Cong. Rec. 16404, 16404 (daily ed. June 18, 1969) (Senator Mondale, remarking that green open spaces were rapidly gobbled up by highways, buildings and parking lots, and that action needed to be taken to protect the Appalachian Trail and other national trails.). Return to text.

[64] *See* Pub. L. No. 95-248, 92 Stat. 159 (1978) (codified as amended in scattered sections of 16 U.S.C. (1994)). Return to text.

[65] *See* Appalachian Trail Conference, *Countdown*, 60 Appalachian Trailway News 6 (May/June 1999). In 1998, Congress appropriated an additional $15.1 million to complete the protection of the remaining 26.6 miles (9,708 acres) of unprotected trail. *See id.; see also* Memorandum of the United States Department of the Interior Regarding the Progress Report on the Acquisition of Lands for the Appalachian Trail (Aug. 20, 1998) (on file with author). Return to text.

[66] *See* 16 U.S.C. § 1244(a)(1) (1994). Return to text.

[67] *See* 16 U.S.C.A. §§ 1-4 (West 1985 & Supp. 1999). Return to text.

[68] *See* 16 U.S.C. §§ 1244(a)(1), 1250 (a)(1) (1994). Return to text.

[69] *Id.* § 1250(a)(1). Return to text.

[70] *See id.* § 1250(b). Return to text.

[71] *See* Brian B. King and Judy Jenner, *Radford '99: Embracing the Challenge*, 60 Appalachian Trailway News 12-15 (Sept./Oct. 1999). Return to text.

[72] *See* Memorandum of Understanding Appalachian National Scenic Trail, *opened for signature* Oct. 23, 1987 [hereinafter Memorandum of Understanding]. Return to text.

[73] *See* 16 U.S.C. § 1250(a) (1994). Return to text.

[74] *See* Memorandum of Understanding, *supra* note 72, at 4. Return to text.

[75] The trail passes through six national park units, eight national forests, and several wilderness areas along its 2,000 mile route, each prescribing different land management standards. *See* King & Jenner, *supra* note 71 at 15; *see also* John S. Davis, *The National Trails System Act and the Use of Protective Federal Zoning*, 10 Harv. Envtl. L. Rev. 189, 201 (1986). Return to text.

[76] *See* Memorandum of Understanding, *supra* note 72, at 4. Return to text.

[77] *See* 16 U.S.C. §§ 1a-7(b). Return to text.

[78] *See id.* Return to text.

[79] *See, e.g.*, George Cameron Coggins, *The Developing Law of Land Use Planning on the Federal Lands*, 61 U. Colo. L. Rev. 307, 309 (1990); Lindsey Kate Shaw, *Land Use Planning at the National Parks: Canyonlands National Park and Off-Road Vehicles*, 68 U. Colo. L. Rev. 795, 806 (1997). *But see* Town of Beverly Shores v. Lujan, 736 F. Supp. 934, 940 n.6 (N.D. Ind. 1989) (management plan provides no law for an appellate court to apply and so cannot be enforced). Return to text.

[80] See 16 U.S.C. § 1250(a) (1994). Return to text.

[81] *See id.* § 1250(a)(1) (providing authority to the head of any federal agency managing federal lands to enter into partnerships with "volunteer organizations to plan, develop, maintain, and manage . . . trails throughout the Nation."). Return to text.

[82] *See id.* Return to text.

[83] *Id.* § 1244(e). Return to text.

[84] *Id.* § 1244(e)(1). Return to text.

[85] 16 U.S.C. §§ 1244(e)(1), (2). Return to text.

[86] *Id.* § 1244(e)(3). Return to text.

[87] *See* National Park Service, Appalachian Trail Project Office, Comprehensive Plan for the Protection, Development and Use of the Appalachian National Scenic Trail (1981) [hereinafter Comprehensive Plan]. Return to text.

[88] *See id.* at 5. Return to text.

[89] *See id.* at 5-8. Return to text.

[90] *Id.* at 5. Return to text.

[91] *See id.* at 6. Return to text.

[92] *See* Comprehensive Plan, *supra* note 87, at 6. Return to text.

[93] *See id.* Return to text.

[94] *See id.* at 6. For instance, if the Trail passes through designated Wilderness Areas, it must be managed in accordance with the Wilderness Act, and when it passes through Forest Service property, it will be managed for multiple use, as long as multiple use management does not conflict with the values of the trail. *See* 16 U.S.C. § 1600. Return to text.

[95] *See* Petition by Appalachian Trail Conference to Federal Communications Commission, *The National Environmental Policy Act and the Placement of Telecommunications Facilities Near National Scenic Trails*, at 2 n. 11 (Apr. 21, 1998) (on file with author). The term "viewshed . . . refers to all points which could be connected by a straight line to [a] person['s eye], without intersecting the Earth's surface." *Id.; see also* 16 U.S.C. § 460vv-b(c) (1994) (protecting viewshed of Winding Stair Mountain Recreation and Wilderness Area); 16 U.S.C. § 90c-1(a) (1994) (protecting viewshed of North Cascades National Park); Cal. Pub. Res. Code § 5907(e)(5) (West Supp. 1999) ($25 million authorized for protection of critical viewshed along Big Sur coast); 20 Ill. Comp. Stat. 3905/1005 (West. Supp. 1999) (Alton Lake Parkway Corridor); Nev. Rev. Stat. Ann. § 376A.010 (Michie 1993)

(concerning taxes applicable to development of open spaces and protected viewsheds); N.Y. Envtl. Conserv. Law § 44-0113 (15) (McKinney 1997) (protection of viewsheds along Hudson Valley Greenway). Return to text.

[96] Comprehensive Plan, *supra* note 87, at 6. Return to text.

[97] *See id.* "The Trail values to be perpetuated include more than a narrow footpath, and the scheme for protecting these values must thus be broader than simple ownership of land." *Id.* at 27. Return to text.

[98] *Id*. at 7. In addition to the Plan, each local managing organization is required to prepare local management plans to describe the tasks, assess each organization's contributions to management, assign responsibilities and provide standard procedures to identify site-specific actions needed on a localized level. Return to text.

[99] *See, e.g.*, Conservation Law Found., Inc. v. Secretary of the Interior, 864 F.2d 954, 957 (1st Cir. 1989) (APA establishes the standard of judicial review for agency actions); Sierra Club v. Lujan, 716 F. Supp. 1289, 1293 (D. Ariz. 1989) (NPS must adhere to its management plan unless its policies are waived by the Department of the Interior). *See also* George Cameron Coggins et al., Federal Public Land and Resources Law 912-13 (3d ed. 1993). Return to text.

[100] Comprehensive Plan, *supra* note 87, at 25. Return to text.

[101] *See* Telecommunications Act, Pub. L. No. 104-104, § 1a , 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C. (Supp. III 1997)). Return to text.

[102] *See* Robert B. Foster et al., *An Analysis of Facility Siting Issues Under Section 704 of the Telecommunications Act of 1996*, 30 Urb. Law. 729 (1998). Return to text.

[103] *See* Mary Margaret Sloan, *New in Your Neighborhood: 2,000 foot TV Towers,* Am. Hiker (Feb. 1998). Return to text.

[104] *See id.* Currently, there are approximately 75,000 telecommunications towers in the United States that are more than two hundred feet in height. *See* Scott Weidensaul, *Tower Lights Can Fatally Attract Migratory Songbirds*, ThePhiladelphia Inquirer, July 27, 1998 (visited Mar. 21, 1999) . Return to text.

[105] *See* Sloan, *supra* note 103. Return to text.

[106] *See id.* Return to text.

[107] *See id.* Return to text.

[108] *See id.* As a point of reference, the Empire State Building in New York City is only 1,414 feet tall, including its 164-foot antenna tower. *See* The World Almanac and Book of Facts 699 (1997). Return to text.

[109] *See id.* Return to text.

[110] *See Fact Sheet on New National Wireless Tower Siting Policies*, Wireless Telecommunications Bureau, 1996 FCC Lexis 2142 (Apr. 23, 1996). The FCC used Rand McNally definitions to determine market areas for licensing purposes.Return to text.

[111] *See, e.g.*, 47 C.F.R. § 17.4 (1998) (governing registration of antenna structures), 47 C.F.R. § 24.55 (1999) (governing the registration of personal communication services structures). *See also* Federal Communications Commission,*Antenna Structure Registration* (visited May 25, 1999) . Return to text.

[112] *See* Foster et al., *supra* note 102, at 730. Return to text.

[113] *See id.* The Conference Report explained that the act was to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans . . . ." H.R. Conf. Rep. No. 104-458, at 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124. Return to text.

[114] *See* 47 U.S.C. § 332(c)(7)(b) (Supp. III 1997). However, some courts have interpreted Section 332 (c)(7)(b) more expansively. Recently, in *360 Communications Co. v. Board of Supervisors*, 50 F. Supp. 2d 551, 563 (W.D. Va. 1999), the court held that where a local government's denial of an application to site a telecommunications tower leaves the applicant "no reasonable alternatives to the application site" then the denial would amount to an unlawful prohibition of wireless services. In *360 Communications*, the telecommunications company proposed to construct a transmission tower on Dudley Mountain. *See id.* at 553. The tower would protrude above the surrounding forest canopy, interrupting the unbroken mountain skyline, and would aesthetically degrade the existing environment. *See id.* at 555. Nevertheless, the court held that "there are a limited number of geographic areas where the only reasonable and effective site for a cellular tower is a mountain top." *Id.* at 562. In such a case, the Telecommunications Act requires that the permit application be approved even though it may be located on a site "highly prized by the public for [its] natural beauty." *Id.* The court's expansive interpretation of the federal government's authority under the Telecommunications Act, giving permission to supersede local land use

decision-making, is akin to federal preemption of local land use regulations. *See, e.g.*, Lucas v. Planning Bd., 7 F. Supp. 2d 310 (S.D.N.Y. 1998) (finding that "[a]lthough the Telecommunications Act does not completely preempt the authority of state and local governments to make decisions regarding the placement of wireless communications facilities within their borders," *citing* BellSouth Mobility, Inc. v. Gwinnett Co., 944 F. Supp. 923, 927 (N.D. Ga. 1996), it quite clearly preempts any state regulations "which conflict with its provisions," *citing* Sprint Spectrum L.P. v. Town of Easton, 982 F. Supp. 47, 50 (D. Mass. 1997)). Return to text.

[115] *See* 47 U.S.C. § 332(C)(7)(B)(i)(I) (Supp. III 1997). Return to text.

[116] *See* Illinois RSA No. 3, Inc. v. County of Peoria, 963 F. Supp. 732, 744 (C.D. Ill. 1997). Return to text.

[117] 47 U.S.C. § 332(c)(7)(B)(i)(II). Return to text.

[118] *See* Sprint Spectrum L.P. v. Town of Farmington, No. 3:97 CV 863, 1997 U.S. Dist. LEXIS 15832 at *18 (D. Conn. Oct. 6, 1997). In *360 Communications Co. v. Board of Supervisors*, 50 F. Supp. 2d 551, 563 (W.D. Va. 1999), the court held that Albemarle County improperly prohibited wireless service by requiring that antenna towers be located downslope from the highest elevations in the county where they would not break the skyline. The court's decision was based on its finding that wireless services would effectively be prohibited if the county's rejection of a wireless application would deprive the wireless company of "reasonable alternatives" that would enable it to provide a "high level" of service. *Id.* at 563.Return to text.

[119] *See* 47 U.S.C. § 332(c)(7)(B)(iii). Return to text.

[120] *See* Cellular Tel. Co. v. Town of Oyster Bay, 166 F.3d 490, 495 (2d Cir. 1999) (noting that "[c]ourts have split as to the weight to be afforded to constituent testimony on aesthetics."). C*ompare* OmniPoint Corp. v. Zoning Hearing Bd., 20 F. Supp. 2d 875, 880 (E.D. Pa. 1998) (stating that unsubstantiated personal opinions and "generalized concerns . . . about aesthetic and visual impacts on the neighborhood do not amount to substantial evidence"), *aff'd*, 181 F.3d 403 (3d Cir. 1999), *with* AT & T Wireless PCS, Inc. v. Virginia Beach, 155 F.3d 423, 430 (4th Cir. 1998) (observing that aesthetic concerns of community members could constitute "compelling" evidence for legislative bodies). As a consequence of these different interpretations, local jurisdictions are left in a quandary about their authority to restrict or regulate the siting of telecommunications towers. The willingness of the courts to restrict the ability of local governments to regulate telecommunications towers for aesthetic reasons is curious, because the legislative history of the Telecommunications Act explicitly states that localities were to be provided "flexibility to treat facilities that

create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent services. For example, the conferees do not intend that if a State or local government grants a permit in a commercial district, it must also grant a permit for a competitor's 50-foot tower in a residential district." H.R. CONF. REP. NO. 104-458, at 208 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 222. Return to text.

[121] On September 7, 1997, the FCC issued a Notice of Proposed Rule Making (the "NPRM") which sought to streamline the build-out of telecommunications facilities by giving broadcast companies the power to preempt state and local zoning ordinances. *Proposed Rule: Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Transmission Facilities*, 62 Fed. Reg. 46,241 (Sept. 2, 1997). Several environmental organizations, including the National Audubon Society, have challenged the NPRM arguing that the FCC's proposed regulations require it to consider the environmental implications of the rule making under NEPA. *Supplemental Proposed Rule: Preemption of State and Local Zoning and Land Use Retrictions on the Siting, Placement and Construction of Broadcast Transmission Facilities*, 63 Fed. Reg. 13,610 (Mar. 20, 1998). Return to text.

[122] *See* Telecommunications Act, Pub. L. No. 104-104, § 1a , 110 Stat. 56 (1996) (codified as amended at 47 U.S.C. § 332 (Supp. III 1997)). Return to text.

[123] *Id.* Return to text.

[124] H.R. REP. NO. 104-204, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 62. Return to text.

[125] *Id.*; *see also* S. REP. NO. 104-230, at 223 (1996) ("With respect to the availability of Federal property for the use of wireless telecommunications infrastructure sites under section 704(c), the conferees generally adopt the House provisions."). The House version provided that the FCC was to be charged with developing procedures to make federal lands available to the telecommunications industry. *See id.* This statement was subsequently revised by the Conference Committee to grant to the "President or his designee" the right to develop procedures for the siting of telecommunications facilities on federal lands. *See id.* Return to text.

[126] H.R. REP. NO. 104-204, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 62. Return to text.

[127] Memorandum on Mobile Services Antennas, WEEKLY COMP. PRES. DOC. 1424 (Aug. 10, 1995). Return to text.

[128] *Id.* Return to text.

[129] *Id.* at 1425. Return to text.

[130] *Id*. Return to text.

[131] *See id.* Return to text.

[132] *See* Notice of Bulletin, General Services Administration, Placement of Commercial Antennas on Federal Property, 62 Fed. Reg. 32,611-615 (1997). Return to text.

[133] *See id.* Return to text.

[134] *See id.* Return to text.

[135] *See id.* Return to text.

[136] *See* Edward Warner, *Park Service Promising Cooperation With Carriers*, Wireless Week (Dec. 9, 1996). Return to text.

[137] *See id.* Return to text.

[138] *Id.* Return to text.

[139] *Id*. Return to text.

[140] Interview with Rita Hennessy, Assistant Director, National Park Service, Appalachian Trail Project Office (Sept. 25, 1998). Return to text.

[141] *See id.* Return to text.

[142] *See id*.; *see also* Director, National Park Service, Order No. 53A: Wireless Communications (Dec. 1, 1997) (on file with author); National Park Service Guidelines, 63 Fed. Reg. 10,243 (Mar. 2, 1999) and 63 Fed. Reg. 44,274 (Apr. 18, 1999). Return to text.

[143] National Park Service Guidelines, 63 Fed. Reg. 10,243 (Mar. 2, 1999) and 63 Fed. Reg. 44,274 (Apr. 18, 1999). Return to text.

[144] *See* Interview with Rita Hennessy, *supra* note 140. Return to text.

[145] *See, e.g.*, Eugene L. Meyer, *More Than a Walk in the Park*, WASH. POST, Oct. 16, 1998, at N39; *Park Service Won't Oppose Antennas*, WASH. POST, Mar. 4, 1999, at B03; Doug Abrahms, *Antennas Barred in Rock Creek Park*, WASH. TIMES, Apr. 11, 1998, at C10; *Not in Rock Creek Park*, WASH. POST, Mar. 1, 1998, at C08. Return to text.

[146] *See* Resolution, *Siting of Wireless Telecommunications Facilities Near National Scenic Trails*, by, between and among the Cellular Telecommunications Industry Association, the Personal Communications Industry Association, the Appalachian Trail Conference, the Continental Divide Trail Alliance, the Florida Trail Association, the Ice Age Park and Trail Foundation, the North Country Trail Association, and the Pacific Crest Trail Association (on file with author).Return to text.

[147] *See id.* Return to text.

[148] *See id.* Section II.A. of the agreement provides that if industry "proposes to site a wireless telecommunications facility within one mile of a National Scenic Trail, then the applicant will voluntarily notify the [trail organization] . . . no later than five business days after filing its application with" the local governmental authorities. *Id*. It is the position of the ATC that this duty is not purely voluntary but would be enforceable in court. *Cf.* United States v. Orozco, 160 F.3d 1309 (11th Cir. 1998) (obligation that defendant "will voluntarily appear" to give testimony pursuant to a plea agreement is enforceable); United States v. Britt, 917 F.2d 353 (8th Cir. 1990), *cert. denied*, 498 U.S. 1090 (1991) (defendant's obligation in plea agreement to voluntarily submit to a lie detector test is enforceable); Mayhue's Super Liquor Stores v. Hodgson, 464 F.2d 1196 (5th Cir. 1972), *cert. denied*, 409 U.S. 1108 (1973). Return to text.

[149] *See* Interview with Rita Hennessy, *supra* note 140. Return to text.

[150] 16 U.S.C. § 1 (1994). Return to text.

[151] *Id*. (emphasis added). Return to text.

[152] *Id.* Return to text.

[153] The academic community has not agreed on the extent or existence of the Park Service's authority to protect the parks from transboundary threats. Professor Keiter has stated that while the Secretary may have a "duty" to protect the parks from external threats, it is unclear whether he has the necessary "authority" to fulfill his duty. *See* Robert B. Keiter, *On Protecting the National Parks From the External Threats Dilemma*, 20 LAND & WATER L. REV. 355, 370 (1985). Professor Coggins, on the other hand, questions whether the Secretary even has the authority to remedy

transboundary threats. *See* George Cameron Coggins, *Protecting The Wildlife Resources of National Parks From External Threats*, 22 LAND & WATERL. REV. 1, 16-17 (1987). Finally, Professor Lockhart, with whom this author substantially agrees, argues that the Secretary may, in fact, have the duty and authority to address external threats. *See* William J. Lockhart, *External Threats to our National Parks: An Argument for Substantive Protection*, 16 STAN. ENVTL. L. J. 3, 61-73 (1997). Return to text.

[154] *See, e.g.*, Lockhart, *supra* note 153 at 64-65. Return to text.

[155] *See id.* at 65. Return to text.

[156] *See id.* Return to text.

[157] *See id.* According to Professor Lockhart, the Organic Act's nonimpairment standard applies to the two fundamental purposes protected by the Act: the duty to "conserve" resources and the duty to provide for the "enjoyment" of those resources. Thus, the statute is "explicit that the 'enjoyment' protected is of those 'unimpaired' resources." *Id*. at 64-65, n.205. Return to text.

[158] *See id.* Return to text.

[159] *See* H.R. REP. NO. 1631, at 2 (1968), *reprinted in* 1968 U.S.C.C.A.N. 3856. Return to text.

[160] One of the principle purposes for conferring special protection to the trail was to prevent "scattered intrusions" to the "integrity and values" of the trail. *See* H.R. REP. NO. 1631, at 5 (1968), *reprinted in*, 1968 U.S.C.C.A.N. 3857. Return to text.

[161] *See* 114 CONG. REC. 19,454, 19,455 (July 1, 1968). Return to text.

[162] *See id.* Return to text.

[163] *See id.* Return to text.

[164] *Id.* Return to text.

[165] *Id.* Return to text.

[166] 114 CONG. REC. 19,454, 19,455 (July 1, 1968). Return to text.

[167] *See id.* Return to text.

[168] *Id.* Return to text.

[169] *See id.* Return to text.

[170] *See id.* Return to text.

[171] 114 CONG. REC. 19,454, 19,454 (July 1, 1968) (emphasis added). Return to text.

[172] *Id.* Return to text.

[173] *See id.* Return to text.

[174] The Senate did not clearly articulate the scope of the term "near the trail" when considering the extent of the Park Service's regulatory authority over development activities occurring outside of the protected trail corridor. It is clear, however, that there would be some limit to the Park Service's authority. Senator Aiken asked: "when the national forests lease the right to operate a ski run or something in a forest area, I have had people living several miles away object to the Secretary granting such right, because they would not like to look over across the valley—at least one who wrote me was [seven] miles away—and see activity on that slope. In other words, they do not like to see people working for a living; that disgusts some of them in some way." *Id.* at 19,455. Senator Jackson assured the Senator from Vermont that the Park Service's authority could not be used to regulate activities occurring seven miles from the park's border. *See id*. Return to text.

[175] *See* Petition by Appalachian Trail Conference to FCC, *The National Environmental Policy Act and the Placement of Telecommunications Facilities Near National Scenic Trails* (Apr. 21, 1998) (on file with author). The one mile figure was derived from similar regulations governing viewshed protection and standards adopted by the telecommunications industry itself. *See, e.g.*, Fauquier County, Va., Ordinance § 11-102(3)(b)(14) (1999) (applications for towers situated within one mile of a designated historic district or property listed on the National Register of Historic Places must undergo specific review procedures.); Haywood County, N.C., Ord. Art. 3, § 6 (1998) (applications for telecommunications towers situated within one mile of the Great Smoky Mountains National Park, the Appalachian Trail, or the Blue Ridge Parkway must be filed with the appropriate federal land manager for review); Lehigh Valley Planning Commission, Sample Regulation for the Processing of Applications for Commercial Communications Towers and Antennas (visited May 25, 1999) (an applicant desiring to site a tower within one mile of the Appalachian Trail must notify the Appalachian Trail Conference and relevant federal land manager). *See also* Chamblee, Ga., Ord. § 18-156 (1998); Crestview, Fla., Ord. § 102-133; Holyoke, Mass., Ord. § 6-6 (1998); Morrow, Ga., Ord. § 9-6-7 (1999); *Model Wireless*

Communications Ordinance Framework (Apr. 15, 1997) (visited May 25, 1999) (Telecommunications industry agreed that antenna towers should be discouraged if they are "within one mile of an existing support tower" in order to preserve "community character.") Many local ordinances may be found at (visited Oct. 29, 1999). Return to text.

[176] *See* Report of Committee on Interior and Insular Affairs (Oct. 21, 1978) accompanying H.R. 8803, amending the National Trails Act to protect substantial scenic value of trail. Return to text.

[177] *See id.; see also* 16 U.S.C. § 1246(c) (stating that "[n]ational scenic . . . trails may contain campsites, shelters, and related-public-use facilities. Other uses along the trail, which will not substantially interfere with the nature and purposes of the trail, may be permitted by the Secretary charged with the administration of the trail. Reasonable efforts . . . shall be made to avoid activities incompatible with the purposes for which such trails were established."). Return to text.

[178] Pub. L. No. 95-250, Title I, § 101(b), 92 Stat. 166 (1978) (codified as amended at 16 U.S.C. § 1a-1 (1994)). Return to text.

[179] *See id.* Return to text.

[180] *See* 16 U.S.C. § 79 (1994). Return to text.

[181] *See* Coggins et al., *supra* note 99, at 979. Return to text.

[182] *See id.* Return to text.

[183] *See id.* Return to text.

[184] *See id.* Return to text.

[185] *See id.* Return to text.

[186] *See* Coggins et al., *supra* note 99, at 979. Return to text.

[187] *See id.* Return to text.

[188] The *Sierra Club* cases were three separate decisions issued at different times during the course of a single lawsuit. Sierra Club v. Department of the Interior, 424 F. Supp. 172 (N.D. Cal. 1976); Sierra Club v. Department of the Interior, 398 F. Supp. 284 (N.D. Cal. 1975); Sierra Club v. Department of the Interior, 376 F. Supp. 90 (N.D. Cal. 1974). [hereinafter *Sierra Club* cases]. Return to text.

[189] *See Sierra Club* cases, *supra* note 188. Return to text.

[190] *See Sierra Club* cases, *supra* note 188. Return to text.

[191] Sierra Club v. Department of the Interior, 376 F. Supp. 90, 93 (N.D. Cal. 1974). Return to text.

[192] *See id.* Return to text.

[193] *See* Sierra Club v. Department of the Interior, 424 F. Supp. 172, 175 (N.D. Cal. 1976). Return to text.

[194] *Id.* Return to text.

[195] The Redwoods Amendments, Pub. L. No. 95-250, Title I, § 101(b), 92 Stat. 166 (1978) (codified as amended at 16 U.S.C. § 1a-1 (1994)). The familiar name for these amendments is not intended to suggest that they apply exclusively to Redwoods National Park. Instead, these amendments apply to all units of the national park system equally. The legislative history states that, pursuant to the Redwoods Amendments, the Secretary "is to afford the highest standard of protection and care to the natural resources within Redwoods National Park and the National Park System." S. Rep. No. 95-528, at 114 (1977). Return to text.

[196] 16 U.S.C. § 1a-1 (1994). Return to text.

[197] *See* S. Rep. No. 95-528, at 7-8 (1977). Return to text.

[198] *Id.* Return to text.

[199] *See* Lockhart, *supra* note 153, at 67-68; *see also* Dunn McCampbell Royalty Interest, Inc. v. National Park Serv., 964 F. Supp. 1125 (S.D. Tex. 1995) (§1a-1 requires the Park Service to promulgate regulations to achieve purposes of Organic Act). Return to text.

[200] 16 U.S.C. §1a-1. Return to text.

[201] *See, e.g.*, Bear Lodge Multiple Use Ass'n v. Babbitt, 176 F.3d 814 (9th Cir. 1999) (Under 16 U.S.C. § 1a-1 the Park Service must protect those values for which Devil's Tower National Monument was established by Presidential Proclamation, No. 458, 34 Stat. 3236, 3237 (Sept. 24, 1906)). Return to text.

[202] *See* 114 Cong. Rec. 19,454 (July 1, 1968). Return to text.

[203] *See id.* Return to text.

[204] *See* Comprehensive Plan, *supra* note 87, at 25. Return to text.

[205] *See id.* Return to text.

[206] *See* Chevron USA, Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984). *Chevron* sets forth a two-part test for a reviewing court to apply to determine whether an agency's regulation is faithful to its organic statute. *Id.*First, if Congress has directly addressed the precise issue the agency has construed in its regulation, then the agency is bound by Congress' expressed intent. *Id.* Secondly, if Congress has not spoken to the precise question at issue, then the agency's interpretation of the statute, as expressed in its regulations, will be upheld as long as the interpretation is a permissible one. *Id.* The Chevron doctrine is based on the principle that the courts should defer to an agency's expertise when construing its organic statute. *Id.* Return to text.

[207] *See id.* Return to text.

[208] *See infra,* notes 381-400 and accompanying text. Return to text.

[209] *See infra,* notes 240-301 and accompanying text. Return to text.

[210] *See generally* Joseph Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 Mich. L. Rev. 239 (1976); Lockhart, *supra* note 153 and accompanying text. Return to text.

[211] *See* Hunt v. United States, 278 U.S. 96 (1928); Utah Power & Light Co. v. United States, 243 U.S. 389 (1917); Light v. United States, 220 U.S. 523 (1911). Return to text.

[212] U.S. Const. art. IV, § 3, cl.2. Return to text.

[213] *See* Camfield v. United States, 167 U.S. 518, 525 (1897). Return to text.

[214] *Id*. Return to text.

[215] *See* United States v. Alford, 274 U.S. 264 (1927). Return to text.

[216] *See id.* at 266. Return to text.

[217] *See id.* Return to text.

[218] *Id.* at 267. Return to text.

[219] 426 U.S. 529 (1976). Return to text.

[220] *See id*. Return to text.

[221] Wild Free-Roaming Horses and Burros Act, Pub. L. No. 92-195, 85 Stat. 649 (1971) (codified as amended at 16 U.S.C. §§ 1331-40 (1994)). Return to text.

[222] *Id*. § 1334. Return to text.

[223] *See Kleppe*, 426 U.S. at 533-34. Return to text.

[224] *See id.* at 534. Return to text.

[225] *See id.* Return to text.

[226] *See id.* at 535. Return to text.

[227] *See id.* Return to text.

[228] *See Kleppe*, 426 U.S. at 536, *citing* United States v. San Francisco, 310 U.S. 16, 29 (1940); *see also* California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 581 (1987) (stating that Congress has plenary power under the Property Clause). Return to text.

[229] *See* Minnesota v. Block, 660 F.2d 1240 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982); United States v. Lindsey, 595 F.2d 5 (9th Cir. 1979); United States v. Brown, 552 F.2d 817 (8th Cir. 1977), *cert. denied*, 431 U.S. 949 (1977); Stupak-Thrall v. United States, 70 F.3d 881 (6th Cir. 1995), *reh'g, en banc, granted, vacated* (6th Cir. 1996). *But see* Marla E. Mansfield, *A Primer of Public Land Law*, 68 WASH. L. REV. 801 (1993) (asserting that *Kleppe* concerned federal regulatory authority over nonfederal public lands, not private lands). Return to text.

[230] *See* United States v. Lindsey, 595 F.2d 5 (9th Cir. 1979). Return to text.

[231] *Id.* at 6. Return to text.

[232] *See* United States v. Arbo, 691 F.2d 862 (9th Cir. 1982). Return to text.

[233] *See id.* at 866. Return to text.

[234] *See* United States v. Stephenson, 29 F.3d 162 (4th Cir. 1994). Return to text.

[235] *Id.* at 165. Return to text.

[236] *Id.*; *see also* Free Enterprise Canoe Renters Ass'n v. Watt, 549 F. Supp. 252 (E.D. Mo. 1982) (NPS could prohibit the use of state roads for canoe pickups by renters who lacked a NPS permit), *aff'd*, 711 F.2d 852 (8th Cir. 1983). Return to text.

[237] *See* Interview with Pamela Underhill, Director, Appalachian Trail Project Office, National Park Service (Sept. 25, 1998). Return to text.

[238] *See* 124 CONG. REC. 4217 (daily ed. Feb. 22, 1978) (statement of Sen. Durkin). Return to text.

[239] *Id.* Return to text.

[240] *Id.*; *see also* H.R. REP. NO. 95-734, 95th Cong, 1st Sess. (1977) (The Trails Act was intended to "insure that long-distance, high-quality trails with substantial recreation and scenic potential were afforded Federal recognition and protection." The Trails Act was designed to protect the "hiking experience" and to insure the existence of a trail corridor "wide enough to protect trail values.") Return to text.

[241] Pub. L. No. 91-190, Title 1, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4331-35 (1994)). Return to text.

[242] 42 U.S.C. § 4331(b) (1994); *see also* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 348 (1989). Return to text.

[243] 42 U.S.C. § 4331. Return to text.

[244] Pub. L. No. 91-190, 83 Stat. 855 (1970) (codified as amended at 42 U.S.C. §§ 4321-35 (1994)). Return to text.

[245] Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 443 (4th Cir. 1996). Return to text.

[246] Robertson, 490 U.S. at 350. Return to text.

[247] *See id.* Return to text.

[248] *See* 42 U.S.C. § 4332(C), which states that all agencies of the Federal Government shall "include in every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement" regarding the environmental impacts and alternatives. To clarify the issue of timing for complying with NEPA, CEQ has defined the term "proposal."

40 C.F.R. § 1508.23 (1998). A "'proposal' exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated." *Id.* Return to text.

[249] *See, e.g.*, LaFlamme v. Federal Energy Regulatory Comm'n, 842 F.2d 1063 (9th Cir. 1988), *on reh'g amended*, 852 F.2d 389 (9th Cir. 1988); Maryland-Nat'l Capital Park & Planning Comm'n v. United States Postal Serv., 487 F.2d 1029 (D.C. Cir.1973). Return to text.

[250] *See* Robert B. Keiter, *NEPA and the Emerging Concept of Ecosystem Management on the Public Lands*, 25 Land & Water L. Rev. 43, 58 (1990). Return to text.

[251] *See* 40 C.F.R. § 1508.8(b) (1998). Return to text.

[252] *See id.* Return to text.

[253] 40 C.F.R. § 1508.27(b)(3) (1998); *see also* Keiter, *supra* note 250, at 58. Return to text.

[254] *See* Goose Hollow Foothills League v. Romney, 334 F. Supp. 877 (D. Or. 1971). Return to text.

[255] *See, e.g.*, A. Runte, National Parks: The American Experience 2 (2d ed. 1987); La Flamme v. Federal Energy Reg. Comm'n, 852 F.2d 389 (9th Cir. 1988) (regarding power projects' effect on visual resources in natural areas); Maryland Conserv. Council v. Gilchrist, 808 F.2d 1039 (4th Cir. 1986) (regarding construction of highway through state park); Scenic Hudson Preserv. Conf. v. Federal Power Comm'n, 453 F.2d 463 (2d Cir. 1971) (Oakes, J., dissenting) (regarding highway affecting scenic views in Palasades Interstate Park). *But see* Mt. Lookout-Mt. Nebo Property Protection Ass'n v. Federal Energy Reg. Comm'n, 143 F.3d 165 (4th Cir. 1998) (holding no NEPA compliance where FERC determined that transmission lines would have only minor adverse impact on scenic views of Gauley River National Recreation Area). Return to text.

[256] *See, e.g.*, Western Radio Serv. Co., Inc. v. Glickman, 123 F.3d 1189 (9th Cir. 1997) (NEPA may be implicated where telecommunications tower has negative affects on aesthetic values of surrounding national forest). Return to text.

[257] In fact, the FCC has assigned to its licensees the initial responsibility for determining whether NEPA compliance is necessary. *See* 47 C.F.R. §§ 1.1307-8,

1.1311-12 (1999). The FCC is required to independently review its licensees' decisions, including EA's, and if appropriate, solicit the views of other experts and affected federal agencies and interested parties to determine whether proposed facilities will have significant environmental effects. *See* 47 C.F.R. §§ 1.1307(c) and 1.1308 (1999). If the FCC determines that a proposed facility will have significant environmental effects, then it is required to inform the applicant or licensee and the applicant or licensee is afforded an opportunity to "reduce, minimize or eliminate" the environmental problems. 47 C.F.R. § 1.1309 (1999). If the environmental problems remain, then the FCC is required to conduct further environmental review by preparing an environmental impact statement (EIS). *See* 47 C.F.R. § 1.1314-19 (1999). Thus, the FCC's NEPA process relies substantially on the judgement of its licensees in determining whether a project presents a significant environmental effect. Licensees often are motivated by interests other than environmental protection, and therefore, predictably, frequently conclude that proposed projects do not warrant full NEPA review. Were the FCC diligently supervising its licensees' NEPA determinations, there would be a check against self-interested decision-making. Unfortunately, federal land management agencies are growing frustrated with the FCC's lack of involvement in coordinating the entire NEPA process. *See* Correspondence from John M. Hefner, Field Supervisor, United States Department of the Interior, Fish and Wildlife Service to 360 Communications (Apr. 23, 1998) (on file with author); Internal Memorandum from Ron Singer, United States Department of the Interior, Fish and Wildlife Service (Mar. 9, 1998) (on file with author). The result is that environmental compliance under NEPA is being subordinated to business and other interests. Return to text.

[258] *See In the Matter of Implementation of the National Environmental Policy Act of 1969*, Report and Order, F.C.C. 97-1042, 49 F.C.C.2d 1313 (1974). Return to text.

[259] *See id.* Return to text.

[260] *See id*. ¶¶ 28, 32, and 37. Return to text.

[261] *See Amendment of Environmental Rules in Response to New Regulations Issued by the Council on Environmental Quality*, Report and Order, F.C.C. 85-626, ¶¶ 11-13 (1986). Return to text.

[262] *See id.* Return to text.

[263] *See id.* Return to text.

[264] *See id.* Return to text.

[265] *Id*. at ¶ 6. For instance, the Commission stated in its rule making that "if a proposed facility is within close proximity to a sensitive area, such as a wilderness preserve, but is not located within that area so as to come within § 1.1307, the action is categorically excluded." *Id.* Return to text.

[266] *See Amendment of Environmental Rules in Response to New Regulations Issued by the Council on Environmental Quality*, Summary of Final Rule, 51 Fed. Reg. 14999 (Apr. 22, 1986). Return to text.

[267] 40 C.F.R. § 1508.4 (1998). Return to text.

[268] Federal Communications Commission, *Amendment of Environmental Rules in Response to New Regulations Issued by the Council on Environmental Quality*, Report and Order, F.C.C. 85-626, ¶ 11. Return to text.

[269] *Id*. at ¶ 12; *In the Matter of Implementation of the National Environmental Policy Act of 1969*, Report and Order, F.C.C. 97-1042, 49 F.C.C.2d 1313 (1974), which explained the following:

Where local land use authorities have authorized the use of a site for communications facilities, we think that the Commission's role under NEPA should be narrowly construed. In such circumstances, we will proceed with caution and with due respect for the role and qualifications of local authorities. Deference will be accorded to their rulings and their views, particularly in matters of aesthetics and when the record demonstrates that environmental issues have been given full and fair consideration.

Id. at 1329. Return to text.

[270] *See supra* notes 95-98 and accompanying text. Return to text.

[271] *See id.*; *see also* Implementation of the National Environmental Policy Act of 1969, 49 F.C.C.2d 1313, 1329 (stating that because state or local authorities are not required to comply with NEPA's mandates, "their approval of a project cannot be accepted as conclusive and does not absolve the Commission of its statutory responsibilities."). Return to text.

[272] *See Objections by Carroll County Trails Association*, Opinion, F.C.C. 72-1121, 38 F.C.C.2d 1013, 1014 (1972), which states the following:

There appear to be no public parks or significant historical sites in the area [of a proposed telecommunications tower]. In considering the esthetic aspects of environmental matters, we believe the Commission must, to a significant extent,

evaluate the impact of the proposed construction in relation to the national or widespread public interests, and not as a body for the appeal of local zoning decisions concerning only a very localized interest.

Id. Return to text.

[273] *See* DANIEL R. MANDELKER, NEPA LAW AND LITIGATION, § 7.04(2) (1998). Return to text.

[274] *See* 40 C.F.R. § 1508.4 (1998). Return to text.

[275] *See* Jones v. Gordon, 792 F.2d 821 (9th Cir. 1986) (holding exception to categorical exclusion because environmentally controversial and environmental effects uncertain); *see also* Restore: North Woods v. United States Dep't of Agric., 968 F. Supp. 168 (D. Vt. 1997) (finding land exchange with substantial change in use); Fund for Animals v. Espy, 814 F. Supp. 142 (D.D.C. 1993) (finding agency merely cited categorical exclusion regulation after complaint filed); Mississippi*ex rel.* Moore v. Marsh, 710 F. Supp. 1488 (D. Miss. 1989); Greenpeace U.S.A. v. Evans, 688 F. Supp. 579 (D. Wash. 1987) (holding action controversial). Return to text.

[276] 40 C.F.R. § 1508.4 (1998). Return to text.

[277] *See Amendment of Environmental Rules in Response to New Regulations Issued by the Council on Environmental Quality,* Report and Order, F.C.C. 85-626, ¶¶ 11-13 (1986). Return to text.

[278] *See id.* Return to text.

[279] *See, e.g.*, Dinah Bear, *NEPA at 19: A Primer on an "Old" Law with Solutions to New Problems*, 19 ENVTL. L. REP. 10060, 10063 (1989); Washington Trails Ass'n v. United States Forest Serv., 935 F. Supp. 1117 (W.D. Wash. 1996) (holding categorical exclusions should be interpreted narrowly because of Congress' expressed intent that agencies comply with NEPA to the "fullest extent possible."). *See also* 42 U.S.C. § 4332 (1999) (stating "[t]he Congress authorizes and directs that, to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter."). Return to text.

[280] It is important to consider the context of the particular siting decision. The significance of the impact on the environment must be determined by comparing the impact of the action to the environmental baseline. The baseline is the condition of the environment prior to the time that the action is commenced. *See* MANDELKER, *supra* note

273, at § 8.06[4][a]. If the baseline is unspoiled, the impact of a new project on the existing environment would have dramatic effects. *See id.* Return to text.

[281] *See supra* notes 274-80 and accompanying text. Return to text.

[282] *See, e.g.*, New Jersey v. Long Island Power Auth., 30 F.3d 403 (9th Cir. 1994); Coalition on Sensible Transp., Inc. v. Dole, 826 F.2d 60 (D.C. Cir. 1987). The term "significantly affecting . . . the human environment" as used in 42 U.S.C. § 4332 (2)(C) requires a consideration of both context and intensity. "Context" means that "the significance of an action must be analyzed in several different contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality," including the particular setting of the proposed action. 40 C.F.R. § 1508.27(a) (1998). "Intensity" refers to the severity of the impact, which will vary depending on the "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas." *Id*. § 1508.27(b)(3). Return to text.

[283] *See, e.g.*, Conservation Law Found. of New England v. United States Dep't of the Air Force, No. 87-1871-K, 1987 U.S. Dist. LEXIS 15149 (D. Mass. Nov. 23, 1987) (cumulative impacts of radio towers); Kleppe v. Sierra Club, 427 U.S. 390 (1976) (when several proposals will have a cumulative or synergistic environmental impact, their environmental consequences must be considered together). *See also* Heartwood, Inc. v. United States, No. 98-CV-4289-JPG, slip op. (S.D. Ill. Sept. 29, 1999), where the court held that if a particular type of project might pose cumulative impacts, those impacts must be considered before the agency's adoption of a categorical exclusion for that particular class of projects. The Agency cannot rely upon the "extraordinary circumstances" exception to the categorical exclusion, 40 C.F.R. § 1508.4, to analyze the cumulative impacts on a case-by-case basis after the categorical exclusion is promulgated. *Id.* Rather, categorical exclusions are inappropriate for projects where cumulative impacts are likely. *Id.* Return to text.

[284] *See* Lockhart, *supra* note 153, at 64-65. Return to text.

[285] *See* National Park Service, *Environmental Assessment for the Protection of the Appalachian National Scenic Trail Across Saddleback Mountain, Franklin County, Maine*, 3-5 (June 1999). Return to text.

[286] *See id.* Return to text.

[287] *See id.* The Visual Management System is published in USDA Forest Service Handbook No. 701, *Landscape Aesthetics: A Handbook for Scenery Management*. This Visual Management System has been used by the Forest Service "for more than

[thirty] years and is widely accepted by other governmental agencies." *Id*. Return to text.

[288] *See id*. at 3-6. Return to text.

[289] *See id.* Return to text.

[290] National Park Service, *Environmental Assessment*, *supra* note 285. The Visual Quality Objectives may range as follows: (1) "Preservation," which is ordinarily applied only to designated wilderness and allows only for ecological changes, (2) "Retention" which allows management activities that are not visually evident and which "only repeat form, line, color, and texture that are frequently found in the landscape"; (3) "Partial Retention" allows for "management activities that remain visually subordinate to the characteristic landscape. Activities should repeat form, line, color and texture common to the characteristic landscape but changes in their qualities should remain visually subordinate to the characteristic landscape"; (4) "Modification" allows for activities that "dominate the landscape. However, changes to vegetation and landform should borrow from the established natural form, line, color and texture so completely that the visual characteristics are similar to the surrounding area"; and (5) "Maximum Modification" where management activities are permitted to dominate the landscape irrespective of aesthetics. *Id*. at 3-6-3-7. Return to text.

[291] *See, e.g.*, Leelanau, Mich., Applications for Licenses in the Private Land Mobile and Operational Fixed Microwave Radio Serv., 9 F.C.C. Rcd. 6901 (Nov. 4, 1994) (FCC deferred to interpretation of National NPS with respect to tower affecting Sleeping Bear Dunes National Lakeshore); Application of Weigel Broadcasting Company to Modify the Authorized Facilities of WDJT-TV, Milwaukee, Wisc., 11 F.C.C. Rcd. 17202 (May 17, 1996) (FCC deferred to opinion of Army Corps of Engineers and U.S. Fish and Wildlife Service regarding the construction of tower near a floodplain). Return to text.

[292] *See supra* note 291. Return to text.

[293] *See* Interview with Rita Hennessy, *supra* note 140. Return to text.

[294] *See id.*; *see also* Internal Memorandum from Ron Singer, Department of the Interior, Fish and Wildlife Service, Division of Refuges (Mar. 9, 1998) (on file with author) (FCC has attempted to bypass NEPA responsibilities with respect to the siting of telecommunications towers that may affect National Wildlife Refuges). Return to text.

[295] *See, e.g.*, Foundation on Economic Trends v. Lyng, 817 F.2d 882 (D.C. Cir. 1987); National Wildlife Fed'n v. Benn, 491 F. Supp. 1234, 1251 (S.D. N.Y. 1980); National Resources Defense Council v. Hodel, 435 F. Supp. 590, 598-602 (D. Or. 1977), *aff'd sub nom.*, National Resources Defense Council v. Munro, 626 F.2d 134 (9th Cir. 1980). Return to text.

[296] *See* Jon C. Cooper, *Broad Programmatic, Policy and Planning Assessments Under the National Environmental Policy Act and Similar Devices: A Quiet Revolution in an Approach to Environmental Considerations*, 11 PACE ENVTL. L. REV. 89 (1993). Return to text.

[297] *See* Kleppe v. Sierra Club, 427 U.S. 390 (1976). The obligation to conduct NEPA analysis on each individual tower would be triggered by the FCC's requirement that each tower must be registered with the FCC prior to construction. *Seesupra* note 111. *See also* 40 C.F.R. § 1508.18 (1998); Ramsey v. Kantor, 96 F.3d 434, 444 (9th Cir. 1996) (" [I]f a federal permit is a prerequisite for a project with adverse impact on the environment, issuance of that permit does constitute a major federal action . . . ."); Jones v. Gordon, 792 F.2d 821, 827-29 (9th Cir. 1986); Astoria v. Hodel, 595 F.2d 467, 478 (9th Cir. 1979). Return to text.

[298] *See* 40 C.F.R. § 1508.28 (1998), which states that "'[t]iering' refers to the coverage of general matters in broader environmental impact statements . . . with subsequent narrower statements or environmental analyses . . . incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared." *See* No GWEN Alliance, Inc. v. Aldridge, 855 F.2d 1380 (9th Cir. 1988) (The Air Force issued generic environmental assessment for an entire network of radio towers and a site specific environmental assessment for each particular tower location). Return to text.

[299] *See* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-28 (1980); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 558 (1978). Return to text.

[300] *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989). Return to text.

[301] *See id*. Return to text.

[302] *See, e.g.*, Neighbors v. United States Forest Serv., 137 F.3d 1372, 1380 (9th Cir. 1998) (holding that Forest Services' description of mitigating measures it would impose to offset damage that proposed timber sale would cause to red band trout habitat was insufficient under NEPA.); Friends of the Payette v. Horseshoe Bend

Hydroelectric Co., 988 F.2d 989, 993 (9th Cir. 1993) (holding that no EIS was necessary); Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 987 (9th Cir. 1985) (holding that no EIS was necessary); Preservation Coalition, Inc. v. Pierce, 667 F.2d 851, 860 (9th Cir. 1982) (holding that no EIS was necessary). Return to text.

[303] *See* LEONARD M. ADKINS, THE APPALACHIAN TRAIL: A VISITOR'S COMPANION 59 (1998). Return to text.

[304] *See id.* Return to text.

[305] *See* Kent Schwarzkopf, *Appalachian Trail Natural Heritage Inventory and Monitoring Program* (Apr. 1999) (on file with author). Return to text.

[306] *Id.* The Natural Heritage Inventory is limited to the identification of threatened and endangered species occurring on federal lands within the Appalachian Trail corridor. *Id.* Similar studies of private lands adjacent to the trail corridor have not been conducted; this is important, because in most cases, telecommunications towers are sited adjacent to the trail corridor. *Id.* For the purposes of this Article, it is assumed that the species which inhabit the trail corridor also inhabit adjacent private, non-federal lands. *Id*. Return to text.

[307] *Id*. Return to text.

[308] Pub. L. No. 93-205, 81 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-43 (1994)). Return to text.

[309] *See id.* Return to text.

[310] *See* Schwarzkopf, *supra* note 305. Return to text.

[311] *See id.* To date, the natural heritage inventories have been completed for the trail corridor in the states of Pennsylvania, New Hampshire, Vermont, Connecticut, North Carolina, Virginia, Tennessee, West Virginia, Maine, and Massachusetts. *See id.* It is anticipated that the inventory in the state of Georgia will be completed by November, 1999, and the inventories for the states of New York, New Jersey, and Maryland are expected to be completed by 2000. *Id*. Return to text.

[312] *See, e.g.*, U.S. Fish and Wildlife Service, *Listed Threatened and Endangered Species by Lead Region*, (updated June 4, 1999), ; Letter from Kent Schwarzkopf, Natural Resource Specialist, National Park Service to James J. Vinch (June 10, 1999) (on file with author) (citing the following endangered, threatened, or rare species along the Appalachian Trail as identified by the Natural Heritage Inventory: Fraser's

fir (*Abies fraseri*), piratebush (*Buckleya distichophylla*), variable sedge (*Carex polymorpha*), long stalked holly (*Ilex collina*), Kankakee globe mallow (*Iliamina remota*), Peregrine falcon (*Falco peregrinus*), Mountain avens (*Geum peckii*), Alpine bittercress (*Cardamine bellidifolla*), and Boot's rattlesnake root (*Prenanthes booti*)). Return to text.

[313] *See* Schwarzkopf, *supra* note 305. Return to text.

[314] *See* Interview with Bill Evans, Ph.D., Cornell University Department of Ornithology (Feb. 12, 1998). Return to text.

[315] The Kirtland's warbler is listed at 50 C.F.R. § 17.11 (1998). Return to text.

[316] *See* United States Forest Service, *Working Together to Save a Special Bird*, (visited Mar. 21, 1999) . Return to text.

[317] *See id.* Return to text.

[318] *See* Interview with Bill Evans, Ph.D., *supra* note 314; *see also* Weidensaul, *supra* note 104 (The Kirtland's Warbler must migrate through North Carolina, which has more than 1,500 towers, including 66 that are more than 800 feet high.).Return to text.

[319] *See* Weidensaul, *supra* note 104. Return to text.

[320] *See, e.g.*, Lesley J. Evans Ogden, Collision Course: The Hazards of Lighted Structures and Windows to Migratory Birds, Report of the World Wildlife Fund App. 1 at 38-46 (Sept. 1996); John L. Trapp, U.S. Fish and Wildlife Service Office of Migratory Bird Management, *Bird Kills at Towers and Other Man-Made Structures: An Annotated Partial Bibliography* (1960-1998). Return to text.

[321] *See* Interview with Bill Evans, Ph.D., *supra* note 314. Scientists are not exactly certain how and why birds are drawn to communications towers, but it is believed that they are attracted by the flashing lights on the structures, become disoriented, and collide with the steel structure or the web of supporting guy wires. *See id.* Telecommunications towers pose a particular threat to migratory song birds, such as the Kirtland's warbler, which tend to fly at low altitudes across mountain passes and fly principally at night using the stars for navigation. *See id.* Coincidentally, telecommunications towers tend to be clustered along mountain ridge tops, where the higher altitude expands signal coverage. *See id.* Migratory birds use mountains, such as the Appalachians, as flyways to guide them in their long journeys to and from their

tropical wintering grounds. *See id.* Structures located at key points along these migratory routes represent a greater hazard than those towers located elsewhere. *See id.* Studies have indicated that, in the eastern United States alone, between 2 and 5 million birds are killed each year in collisions with telecommunications structures. *See* Ogden, *supra* note 318 at 4-8, 19-24.Return to text.

[322] The Cheat Mountain salamander is listed at 50 C.F.R. § 17.11 (1998). Return to text.

[323] The Shenandoah salamander is listed at 50 C.F.R. § 17.11 (1998). Return to text.

[324] *See* George Constantz, Hollows, Peepers and Highlanders: An Appalachian Mountain Ecology (1994). Return to text.

[325] *See, e.g.*, Judy Jacobs, *Shenandoah Salamander Recovery Plan*, United States Fish and Wildlife Service (1994); Scott Weidensaul, Mountains Of The Heart: A Natural History of the Appalachians 41 (1994); Thomas K. Pauley, *Cheat Mountain Salamander Recovery Plan: Technical/Agency Draft*, United States Fish and Wildlife Service (1991). Similarly, the Cheat Mountain salamander lives at elevations of 3,000 feet and is usually confined to a limited band of less than two hundred feet in vertical rise. *Id.* Return to text.

[326] *See* Weidensaul, *supra* note 325, at 42. Return to text.

[327] *See id*. at 41-42. Return to text.

[328] *See* Jacobs, *supra* note 325, at 10. Return to text.

[329] *See Tennessee Valley Auth*. v. Hill, 437 U.S. 153, 176-77 (1977). Return to text.

[330] *Hearings on Endangered Species Before a Subcommittee of the House Committee on Merchant Marine and Fisheries*, 93d Cong., 1st Sess., 202 (1973) (statement of Assistant Secretary of the Interior), *cited in* Tennessee Valley Auth., 437 U.S. at 176. Return to text.

[331] *Id*. Return to text.

[332] *See Tennessee Valley Auth*., 437 U.S. at 181-85. Return to text.

[333] *See id*. at 185. Return to text.

[334] *See* Internal Memorandum from Ron Singer, Department of the Interior, Fish and Wildlife Service, Division of Refuges (Mar. 9, 1998) (on file with author). Return to text.

[335] *See* H.R. CONF. REP. NO. 104-458, 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124 ("[T]he managers of the House and Senate [intend] to provide for a pro-competitive, de-regulatory, national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans."). Return to text.

[336] *See supra* notes 109-13 and accompanying text. Return to text.

[337] Endangered Species Act of 1973 § 7, 16 U.S.C. § 1536(a)(2) (1994). Return to text.

[338] 50 C.F.R. § 402.02 (1998). Return to text.

[339] *See, e.g.*, Sierra Club v. Babbitt, 65 F.3d 1502, 1508 (9th Cir. 1995) (finding right-of-way agreement negotiated between private party and Bureau of Land Management (BLM) after enactment of ESA would constitute agency action); O'Neill v. United States, 50 F.3d 677, 680-81 (9th Cir. 1995) (finding ESA applies to a water service contract between private party and federal government), *cert. denied*, 516 U.S. 1028 (1995); Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1053-56 (9th Cir. 1994) (finding ESA applies to forest management plans), *cert. denied*, 514 U.S. 1082 (1995); Natural Resources Defense Council v. Houston, 146 F.3d 1118, 1125 (9th Cir. 1998) (finding water service contracts between BLM and private party implicated ESA), *cert. denied*, 119 S.Ct. 1754 (1999); Conner v. Burford, 848 F.2d 1441, 1452 (9th Cir. 1988) (finding proposed sale of oil and gas leases by Forest Service pursuant to Mineral Leasing Act of 1920, 30 U.S.C. § 181 *et seq*., triggered ESA), *cert. denied*, 489 U.S. 1012 (1989). *See also* 50 C.F.R. § 402.03 (1998), which restricts the types of agency actions that will trigger the ESA to those "actions in which there is discretionary Federal involvement or control." Thus, where the federal government has no discretion to approve or deny a permit or license, such as is the case when the federal government issues a patent under the Mining Act of 1872, then section 7 would not be implicated. *See*COGGINS ET AL., *supra* note 99, at 813-14. Return to text.

[340] *See* Foster et al., *supra* note 102, at 729. Return to text.

[341] *See id.* Return to text.

[342] *See id.* Return to text.

[343] *See* discussion *supra* Part III. Return to text.

[344] *See* 47 C.F.R. § 17.4 (1998). Return to text.

[345] The scope of the FCC's duty to consult under section 7 will be explored in more detail later. *See infra* Part IV(D)(1)(b). Return to text.

[346] *See* 16 U.S.C. § 1536(a)(2) (1998). Return to text.

[347] *See infra* Part IV(D)(3). Return to text.

[348] *See* § 1536(c)(1). Return to text.

[349] *Id.*; *see also* Thomas v. Peterson, 753 F.2d 754, 763 (9th Cir. 1985) (describing substantive and procedural obligations of federal agencies under section 7). Return to text.

[350] § 1536(c)(1); *see also Thomas*, 753 F.2d at 763. The biological assessment may be part of an environmental assessment or environmental impact statement prepared by the FCC to comply with NEPA. *Id.* Return to text.

[351] *See* § 1536(a)(2), (c)(1). "Any possible effect, whether beneficial, benign, adverse or of undetermined character . . . " will trigger consultation. 50 C.F.R. § 402.14(a) (1998) Return to text.

[352] 16 U.S.C. § 1536(a)(2). Return to text.

[353] Jeopardy is defined as engaging "in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02 (1999). It is important to note that "jeopardy" is a completely separate standard from the prohibition of "take" in section 9. A single section 9 taking should not necessarily result in section 7 liability; however, multiple "takings" may rise to the level of harm necessary to "jeopardize" the health of the entire species. *See* Sierra Club v. Yeutter, 926 F.2d 429, 439 n.16 (5th Cir. 1991). Return to text.

[354] *See* 16 U.S.C § 1536(b)(3)(A) (1994). Return to text.

[355] *See id.* § 1536(b)(4). Return to text.

[356] *Id.* § 1536(d). Return to text.

[357] Kentucky Heartwood, Inc. v. Worthington, 20 F. Supp. 2d 1076, 1084 n.8 (E.D. Ky. 1998) (citation omitted). Return to text.

[358] *See* Federico Cheever, *The Road to Recovery: A New Way of Thinking About the Endangered Species Act*, 23 Ecology L.Q. 1, 17 (1996). Return to text.

[359] *See* Lone Rock Timber Co. v. United States Dep't of Interior, 842 F. Supp. 433, 440 (D. Or. 1994). Return to text.

[360] *See* 50 C.F.R. § 402.14(a) (1999). When the USFWS requests the action agency to enter into consultation, it is required to "forward to [that] agency a written explanation of the basis for the request." *Id*. The USFWS has recognized that telecommunications towers present a threat to threatened and endangered migratory bird species. *See id*. However, because the telecommunications boom is a relatively recent phenomenon, the USFWS is just beginning to study the effects and potential solutions. *See* Summary of Meeting of USFWS, Migratory Bird Conservation and Communications Towers: Avoiding and Minimizing Conflicts (Nov. 17, 1998) [hereinafter USFWS Meeting] (on file with author). Return to text.

[361] *See, e.g.*, Twenver, Inc., 65 Rad. Reg. 2d (P & F) 607 (1988) (no ESA section 7 arguments submitted in opposition to tower relocation plan); Caloosa Television Corp., 2 F.C.C. Rcd. 3656 (1988); WMNN (AM), File No. BMP-940802DA (FCC refused to consult with USFWS regarding effects of tower on Bald Eagle populations). *But see* County of Leelanau, 9 F.C.C. Rcd. 6901, 6902 (1994) (FCC complied with ESA concerning effects of tower on Piping Plover, Bald Eagle, and Peregrine Falcon). Return to text.

[362] *See, e.g.*, Arthur D. Smith, *Programmatic Consultation Under the Endangered Species Act: An Anatomy of the Salmon Habitat Litigation*, 11 J. Envtl. L. & Litig. 247 (1996); Peter Van Tuyn & Christine Everett, *The Endangered Species Act and Federal Programmatic Land and Resource Management: Consultation Fact or Fiction*, 13 Pub. Land L. Rev. 99 (1992). Return to text.

[363] *See* Smith, *supra* note 362, at 263. Return to text.

[364] *See* Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1056 (9th Cir. 1994) (requiring consultation by National Forest Service on Land and Resource Management Plan in advance of individual logging determinations in order to protect Chinook salmon); Lane County Audubon Soc'y v. Jamison, 958 F.2d 290, 295 (9th Cir. 1992) (finding programmatic consultation on BLM timber plan necessary to protect Spotted Owl). Return to text.

[365] *See, e.g.*, Connor v. Burford, 848 F.2d 1441 (9th Cir. 1988) (finding ESA consultation on oil and gas leases covering one million acres of national forest land must take place at the planning stage to consider impacts of full field development on endangered bald eagle, gray wolf, peregrine falcon, and grizzly bear), *cert. denied*, 489 U.S. 1012 (1988); North Slope Borough v. Andrus, 642 F.2d 589 (D.C. Cir. 1980) (holding all possible ramifications of agency decision must be considered to issue oil and gas lease). Return to text.

[366] *Pacific Rivers Council*, 30 F.3d at 1053. Return to text.

[367] *See Conner*, 848 F.2d at 1450. Return to text.

[368] *See id.* Return to text.

[369] *See id.; see also* Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041, 1052 (1st Cir. 1982) (EPA required to prepare "real time simulation" studies of effects of oil spills on endangered species, even though it would only be an informed estimate). Return to text.

[370] *See* USFWS Meeting, *supra* note 360. Return to text.

[371] *See* Weidensaul, *supra* note 104. Return to text.

[372] *See* USFWS Meeting, *supra* note 360. Return to text.

[373] *See* 16 U.S.C. § 1536(d) (1994). Return to text.

[374] 685 F.2d 678, 687 (D.C. Cir. 1982). Return to text.

[375] *See id*. Return to text.

[376] *Id*. Return to text.

[377] *See* North Slope Borough v. Andrus, 642 F.2d at 589, 610-11 (D.C. Cir. 1980). Return to text.

[378] *See* Conner v. Burford, 848 F.2d 1441, 1462 (9th Cir. 1988). Return to text.

[379] *See* Sierra Club v. Babbitt, 65 F.3d 1502, 1508 (9th Cir. 1995) (finding further consultation is appropriate at each stage where agency has discretion to influence private action). Return to text.

[380] *See* Smith, *supra* note 362, at 267. Return to text.

[381] *See* 50 C.F.R. § 402.14(k) (1999) (authorizing consultation on the basis of incremental steps). Return to text.

[382] *See id*. § 402.14(k)(1). Return to text.

[383] *See id.* Return to text.

[384] *See* OGDEN, *supra* note 320, app. 1; *see also* MICHAEL L. AVERY ET AL., U.S. DEP'T OF THE INTERIOR, AVIAN MORTALITY AT MAN MADE STRUCTURES: AN ANNOTATED BIBLIOGRAPHY (1980); R.C. Banks, *Human Related Mortality of Birds in the United States*, U.S. Fish and Wildlife Service, Special Scientific Report on Wildlife No. 215 (1979); R.D. WEIR, ANNOTATED BIBLIOGRAPHY OF BIRD KILLS AT MAN- MADE OBSTACLES: A REVIEW OF THE STATE OF THE ART AND SOLUTIONS, CANADIAN DEP'T OF FISHERIESAND THE ENVIRONMENT (1976); Towerkill Website, (visited Mar. 21, 1999) (website provides a summary of research on avian mortality at towers). Return to text.

[385] *See* Interview with Bill Evans, Ph.D., *supra* note 314. Studies indicate that all types of warbler species, including the endangered Kirtland's warbler, may be at a higher level of risk because they migrate at altitudes of less than 500 feet, which makes them susceptible to tower collisions. *See* USFWS Meeting, *supra* note 358. Return to text.

[386] *See* Interview with Bill Evans, Ph.D., *supra* note 314. Return to text.

[387] *See The Siting of Telecommunications Antennas in National Parks: Hearings Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Comm. on Commerce*, 145 Cong. Rec. D96-01 (Feb. 3, 1999) (statement of Maureen Finnerty). Return to text.

[388] *See* Tennessee Valley Auth.v. Hill, 437 U.S 153, 188 (1978) (stating agencies must afford first priority to conserving endangered species and there are no "hardship" exemptions to this mandate). Return to text.

[389] *See* USFWS Meeting, *supra* note 360, at 8-9 (proposing the use of radar technology to identify migratory patterns which "may aid us in the advisement of communications towers placement to reduce impacts to birds."). Return to text.

[390] *See id*. at 6; *see also* Kreines & Kreines, Inc., *Siting Criteria for Personal Wireless Service Facilities* (on file with author). Return to text.

[391] *See* USFWS Meeting, *supra* note 360, at 8-9. Return to text.

[392] *See id*. at 6. Return to text.

[393] *See* Sierra Club v. Babbitt, 65 F.3d 1502, 1512 (9th Cir. 1995). Because the FCC arguably has no discretion to regulate existing towers once the initial permitting decision is made, section 7 of the ESA may not be applicable to existing towers. However, section 9 of the ESA allows the government to halt private activity that is reasonably certain to result in a "taking." *See* Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781, 787-88 (9th Cir. 1995). Return to text.

[394] *See* USFWS Meeting, *supra* note 360, at 10-11. Return to text.

[395] *See id*. Return to text.

[396] *See id*. Return to text.

[397] *See* 47 C.F.R. § 17.7 (1998). Return to text.

[398] *See* OGDEN, *supra* note 320, at 27-31 Return to text.

[399] *See id.* Return to text.

[400] *See id.* Pilots have difficulty seeing red lights and instead prefer white lights, which are more visible. *See* USFWS Meeting, *supra* note 360, at 10. Return to text.

[401] *See* OGDEN, *supra* note 320, at 29. Return to text.

[402] *See* USFWS Meeting, *supra* note 360, at 11. Return to text.

[403] *See* Conner v. Burford, 848 F.2d 1441, 1454 (9th Cir. 1988). Return to text.

[404] 16 U.S.C. § 1536(a)(1) (1994). Return to text.

[405] *See* J.B. Ruhl, *Section 7(a)(1) of the "New" Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies' Duty to Conserve Species*, 25 ENVTL. L. 1107, 1110 (1995). Return to text.

[406] 156 F.3d 606 (5th Cir. 1998). Return to text.

[407] *See id*. at 617. Return to text.

[408] *See id*. at 616. Return to text.

[409] *Id*. at 615, *citing* 16 U.S.C. § 1532(2). Return to text.

[410] *See* Sierra Club v. Glickman, 156 F.3d 606; *see also* 16 U.S.C. § 1531(b) (Purposes of the ESA are to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . ." and to "[p]rovide a program for the conservation of . . . species."). Return to text.

[411] *See* Sierra Club v. Glickman, 156 F.3d at 615. Return to text.

[412] *See id.* Return to text.

[413] *See* Ruhl, *supra* note 405, at 1122-23. Return to text.

[414] *See id.* Return to text.

[415] *See id.* Return to text.

[416] *See* 16 U.S.C.A. § 1538(a)(1)(B) (1999). Return to text.

[417] *Id*. § 1532(19). Return to text.

[418] 50 C.F.R. § 17.3 (1998); *see also* Babbitt v. Sweet Home Chapter, 115 S.Ct. 2407, 2410 (1995). Return to text.

[419] *See* Hawksbill Sea Turtle v. Federal Emergency Management Agency, 11 F. Supp. 2d 529, 537-38 (D.V. 1998) (finding evidence of causal relationship between the habitat modification and actual harm to species required to support an infraction); Coastside Habitat Coalition v. Prime Properties, Inc., No. C97-4025, 1998 WL 231024 (N.D. Cal. 1998). Return to text.

[420] *See* 16 U.S.C.A. § 1536(o)(2) (1999). Return to text.

[421] *See* Ramsey v. Kantor, 96 F.3d 434, 441-42 (9th Cir. 1996). Return to text.

[422] *See* National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 855 (1970) (codified as amended at 42 U.S.C. §§ 4321-35 (1994)). Return to text.

[423] *See* 16 U.S.C.A. §§ 703-12 (1999). Return to text.

[424] *See* 16 U.S.C.A. §§ 668-68d (1999). Return to text.

[425] *See* 123 CONG. REC. 27944 (Sept. 7, 1977) (stating "[t]he trail was intended as a 'back to nature' respite for the many urban dwellers who wanted to find mental peace and time to think, away from the hurried pace and noise of city life."); *see also* Jackson, *supra* note 18, at 18. Return to text.

[426] John S. Davis, *The National Trails System Act and the Use of Protective Federal Zoning*, 10 HARV. ENVTL. L. REV. 189, 193, *citing*, *Nationwide System of Trails: Hearings on S.827 Before the Senate Comm. on Interior and Insular Affairs*, 90th Cong., 1st Sess. 55 (1967). Return to text.

[427] *See* WEIDENSAUL, *supra* note 325, at 27-29. Return to text.

[428] *See id.* Return to text.

[429] *See id.* Return to text.

[430] *See id.* Return to text.

[431] *See id.* Return to text.

[432] *See, e.g.*, Katy Hillenmeyer, *County Aims to Tighten Cell Tower Law*, ASHEVILLE CITIZEN-TIMES, Mar. 24, 1999, at A1; Kathy Brister, *Share and Share Alike: The Solution to Tower Proliferation*, KNOXVILLE NEWS SENT., Oct. 22, 1998, at C1; Marlon Manuel, *Cobb Tower Approval Could Be First of Many*, THE ATLANTA J. & ATLANTA CONST., July 9, 1997, at 04B. Return to text.

[433] *See* OGDEN, *supra* note 320; *see also* Bill Evans & Cynthia Melcher, *Bird Mortality at Communications Towers*, 33 J. OF THE COLO. FIELD ORNITH. 48 (1999). Return to text.

[434] *See* Audubon Reports, *Why Birds Hate Seinfeld*, (visited Oct. 15, 1998) . Return to text.

[435] *See id.*; *see also* Crawford, R.L., *Bird Casualties at Leon County, Florida TV Tower: A Twenty-Five Year Migration Study*, Bull. Tall Timbers Res. Sta. 22 (1981); John L. Trapp, U.S. Fish and Wildlife Service Office of Migratory Bird Management, *Bird Kills at Towers and Other Man-Made Structures: An Annotated Partial Bibliography* (1960-1998). Return to text.

[436] Ch. 128, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703-11 (1994). Return to text.

[437] The Convention Between the United States and Great Britain for the Protection of Migratory Birds, Aug. 16, 1916, U.S.-Can., 39 Stat. 1702, T.S. No. 628 (protecting three classes of birds: "migratory game birds," "migratory insectivorous birds," and "other migratory nongame birds."). Return to text.

[438] The Convention Between the United States and Mexico for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, U.S.-Mex., 50 Stat. 1311, T.S. No. 912; *see also* The Convention Between the Government of the United States of America and the Government of Japan for the Protection of Migratory Birds in Danger of Extinction and their Environment, Mar. 4, 1972, U.S.-Jap., 25 U.S.T. 3329, 3331, T.I.A.S. No. 7990; The Convention Between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and their Environment, Oct. 13, 1978, U.S.-U.S.S.R., 29 U.S.T. 4647. Return to text.

[439] 16 U.S.C. § 703. A "taking" has been defined by the Department of the Interior to include "pursue, hunt, shoot, wound, kill, trap, capture or collect." 50 C.F.R. § 10.12 (1999). Return to text.

[440] *See* 50 C.F.R. § 10.13; *see also* United States v. Van Fossen, 899 F.2d 636, 637 (7th Cir. 1990) (noting that the MBTA applies to common birds). Return to text.

[441] *See* United States v. Corbin Farm Serv., 444 F. Supp. 510, 536 (E.D. Cal. 1978). Return to text.

[442] *See id.* Return to text.

[443] *See id.* Return to text.

[444] *See* United States v. FMC Corp., 572 F.2d 902, 908 (2d Cir. 1978). Return to text.

[445] *See* United States v. Moon Lake Elec. Ass'n, Inc., 45 F. Supp. 2d 1070 (D. Colo. 1999). Return to text.

[446] *See id.* Return to text.

[447] *See id*. at 1085. The court concluded that its holding would not produce a result that would offend reason and common sense. *See id.* The defendant questioned whether constructing an office building, driving an automobile, piloting an airplane or living in a residential dwelling with a picture window would not result in liability under the MBTA if birds were killed as an incidental consequence. *See id.* The court held that the "death of a protected bird is not a probable consequence" of any of these activities, and therefore its holding should not lead to absurd results. *Id.* Return to text.

[448] Erin C. Perkins, *Migratory Birds and Multiple Use Management: Using the Migratory Bird Treaty Act to Rejuvenate America's Environmental Policy*, 92 Nw. U.

L. Rev. 817, 845 (1998), *citing FMC Corp*., 572 F.2d at 908. *But see*Benjamin Means, Note: *Prohibiting Conduct, Not Consequences: The Limited Reach of the Migratory Bird Treaty Act*, 97 Mich. L. Rev. 823, 830-32 (1998) (contending that statutory language and legislative history of MBTA limits act to migratory bird deaths caused by hunting). Return to text.

[449] *See* Sierra Club v. United States Dep't of Agric., No. 94-CV-4061-JPG (S.D. Ill. 1995), *aff'd*, 116 F.3d 1482 (7th Cir. 1997). Return to text.

[450] Sierra Club v. Martin, 933 F. Supp. 1559, 1564 (N.D. Ga. 1996). Return to text.

[451] *Id.* Return to text.

[452] *See id. But see* Mahler v. United States, 927 F. Supp. 1559, 1579 (S.D. Ind. 1996) (stating that "Congress did not intend the MBTA to be applied to any and all human activity that may result in unintended and accidental deaths of migratory birds."). Return to text.

[453] *See* Sierra Club v. Martin, 933 F. Supp. at 1564-65. Return to text.

[454] *See* Sierra Club v. Martin, 110 F.3d 1551, 1555 (11th Cir. 1997). Return to text.

FLORIDA BEACH ACCESS: NOTHING BUT WET SAND?

S. BRENT SPAIN[*]

"No part of Florida is more exclusively hers, nor more properly utilized by her people than her beaches."[1]

I. INTRODUCTION

In *City of Daytona Beach v. Tona-Rama, Inc.*,[2] the Florida Supreme Court recognized the doctrine of custom[3] as a means by which the public can establish rights to utilize the dry sand areas of Florida beaches for traditional recreational uses.[4] Although twenty-five years have passed since the Supreme Court's decision, the issue of adequately preserving public beach access in Florida persists.[5] In particular, Florida cities continue to struggle with balancing the tension between the rights of private beachfront landowners to exclude persons from their property and the rights of the public to utilize the dry sand areas of Florida beaches.[6]

Public beach access is especially important in a state such as Florida that has approximately 1,200 miles of general coastline, and more than 2,200 miles of tidal shoreline.[7] An estimated eighty-percent of Florida's population lives near the coast, illustrating the significance and beauty of Florida's beaches.[8] In addition, more than forty-one million people visit Florida annually.[9] Indeed, while tourists visiting Florida have the opportunity to experience a multitude of diverse attractions, Florida's beaches remain one of the most popular attractions.[10]

To save public access to this critical resource, this Comment argues that in the absence of any state legislation adequately preserving public beach access, local governments should adopt ordinances protecting the public's customary right to utilize the dry sand areas of their beaches.

II. BEACH ACCESS IN FLORIDA

The Florida State Constitution states, in pertinent part, that:

[t]he title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest. Private use of portions of such lands may be authorized by law, but only when not contrary to the public interest.[11]

Thus, like most states, Florida recognizes the mean high water line as the boundary between public trust land and private property.[12] Florida law also provides that a

policy of the State Comprehensive Plan shall be to "[e]nsure the public's right to reasonable access to beaches."[13] While this provision does not mandate public easements in the dry sand areas of beaches, it does represent legislative acknowledgement of the significance of public beach access in Florida.

Additional statutes provide varying degrees of mandated public beach access in Florida.[14] For example, perpendicular public beach access is a requirement for construction within a coastal building zone "[w]here the public has established an accessway through pri vate lands to lands seaward of the mean high tide or water line by prescription, prescriptive easement, or any other legal means."[15] If the developer impedes on this accessway, he or she must provide a comparable alternative.[16]

Likewise, section 161.053, *Florida Statutes*, which deals with the regulation of construction control setback lines, contains language that promotes the protection of public beach access.[17] In particular, section 161.053(1)(a) states that:

the beaches in this state and the coastal barrier dunes adjacent to such beaches . . . represent one of the most valuable natural resources of Florida and . . . it is in the public interest to preserve and protect them from imprudent construction which can jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection to upland structures, endanger adjacent properties, or *interfere with public beach access*.[18]

Florida courts have also recognized the importance of Florida's beaches to the public. For example, in *White v. Hughes*,[19] the Florida Supreme Court stated that:

[t]here is probably no custom more universal, more natural or more ancient, on the sea-coasts, not only of the United States, but of the world, than that of bathing in the salt waters of the ocean and the enjoyment of the wholesome recreation incident thereto. The lure of the ocean is universal; to battle with its refreshing breakers a delight. . . . The attraction of the ocean for mankind is as enduring as its own changelessness. *The people of Florida—a State blessed with probably the finest bathing beaches in the world—are no exception to the rule*. . . . *We love the oceans which surround our State*. *We, and our visitors too, enjoy bathing in their refreshing waters*.[20]

Recently, however, scholars have noted an increased tension between private property rights and public access to beaches. In particular, one commentator has remarked that:

[p]rivate ownership and control of the dry sand and uplands threatens public enjoyment of beaches in two ways. First, private littoral owners can restrict the use of the dry-sand area. This part of the beach is essential to recreation. Without it the

public is left only the wet-sand portion of the beach to support its normal beach activities . . . . Second, owners can isolate many beaches by denying public access across private uplands.[21]

In Florida, perhaps an augmented tension between private and public rights regarding adequate public beach access and the use of the dry sand areas exists because the majority of Florida's beaches are privately owned.[22]

Scholars and legal practitioners have used several legal theories to address the lack of public beach access including eminent domain,[23] express or implied dedication,[24] prescription,[25] the public trust doctrine,[26] and custom.[27] Florida courts have recognized implied and express dedication as means to secure public rights in the dry sand areas for traditional recreational activities and foreshore access.[28]

Unfortunately, dedication has not proven to be effective in adequately providing the public with a right to utilize the dry sand areas of Florida beaches.[29] Dedication is ineffective for two reasons: first, because public use of the dedicated property is regarded as a license, revocable by the private landowner; and second, because dedication involves a time-consuming tract-by-tract process.[30] Thus, prescription and customary rights are the two primary ways to establish public beach access to Florida beaches.[31]

A. Prescription

In *Downing v. Bird*,[32] the Florida Supreme Court set forth the elements required to establish a prescriptive easement in Florida. According to *Downing*, to establish a prescriptive right a user must prove by clear, definite, accurate, and positive proof:

(1) that the user has made a certain particular and actual use of lands owned by another, (2) that such use has been continuous and uninterrupted for the full prescriptive period of 20 years, (3) that during the whole prescribed period such use has been either with the actual knowledge of the owner or so open, no torious and visible that knowledge of the use is imputed to the owner, (4) that such use related to a certain limited and defined area of land or, if for a right-of-way, the use was of a definite route with a reasonably certain line, width and termini, (5) that during the whole prescribed period such use has been adverse to the owner; that is, (a) the use has been made without the permission of the owner and under some claim of right *other than permission from the owner*, (b) the use has been either exclusive of the owner or inconsistent with the rights of the owner of the land to its use and enjoyment and (c) the use has been such that, during the whole prescribed period, the owner had a cause of action against the user for the use being made.[33]

Furthermore, the court in *Downing* stated that "[a]cquisition of rights by one in the lands of another, based on possession or use, is not favored in the law and the acquisition of such rights will be restricted."[34] Consequently, courts must resolve any doubts concerning the creation of a prescriptive right in favor of the private landowner.[35]

Moreover, it is well established in Florida law that a person cannot acquire a prescriptive easement where the use is by the express or implied permission or license of the private landowner.[36] Still, "[a]lthough there is a presumption that a use is permissive, that presumption is not conclusive. Rather, the courts should look to whether the use was beneficial to the actual owner, or was instead an interference with the owner's rights."[37]

Florida courts have, however, recognized that the public may establish a right to use the dry sand areas of beaches through prescription.[38] However, in *City of Miami Beach v. Undercliff Realty & Investment Co.*,[39] the court stated that "[t]he fact that the upland owners did not prevent or object to such use is not sufficient to show that the use was adverse or under claim of right."[40] Similarly, in *City of Miami Beach v. Miami Beach Improvement Co.*,[41] the court held that a prescriptive right to use the beach had not been established because "the public use of the beach was consistent with and not antagonistic to the ownership of the property."[42] Thus, while some courts have recognized a public prescriptive easement in beach land, Florida courts have consistently adhered to a strict adversity requirement. The courts' strict adherence to an adversity requirement has made satisfying the elements for a prescriptive easement difficult under Florida law.[43]

In *City of Daytona Beach v. Tona-Rama, Inc.*,[44] the Florida Supreme Court specifically addressed whether the public had acquired a prescriptive easement in a certain dry sand area of Daytona Beach. The plaintiffs in the case sought declaratory and injunctive relief to prevent the construction of an observation tower on the beach's dry sand area.[45] The observation tower was to complement a pre-existing public pier located on the subject property.[46]The tower's circular foundation was to be seventeen feet in diameter, while the diameter of the actual tower was to be four feet.[47] According to the court, the tower was to occupy only 225-230 square feet of the 15,300 square feet that the defendant actually owned.[48] By the time the Florida Supreme Court heard the case, the City of Daytona Beach had already issued the building permit, and the property owner had completed construction of the $125,000 tower.[49]

In attempting to block construction of the observation tower, the plaintiffs alleged, in part, that through continuous use for more than twenty-years, the public had acquired

a prescriptive right to use the dry sand area that the observation tower would occupy.[50] In addressing this issue, the court noted that:

[t]he beaches of Florida are of such a character as to use and potential development as to require separate consideration from other lands with respect to the elements and consequence of title. The sandy portion of the beaches are [sic] of no use for farming, grazing, timber production, or residency—the traditional uses of land—but has served as a thoroughfare and haven for fishermen and bathers, as well as a place of recreation for the public. The interest and rights of the public to the full use of the beaches should be pro tected.[51]

Furthermore, the court recognized:

the propriety of protecting the public interest in, and right to utilization of, the beaches and oceans of the State of Florida. *No part of Florida is more exclusively hers, nor more properly utilized by her people than her beaches*. And the right of the public of access to, and enjoyment of, Florida's oceans and beaches has long been recognized by this Court.[52]

Nevertheless, the court held, based on the facts of the case, that the use of the dry sand area was "not against, but was in furtherance of, the interest of the defendant owner. Such use was not injurious to the owner and there was no invasion of the owner's right to the property."[53] Furthermore, the court proclaimed that the public cannot obtain an easement by prescription unless a landowner loses something.[54] Accordingly, the court reversed the district court and held that the public had not established a prescriptive easement.[55]

B. Customary Use

The doctrine of custom[56] first arose in medieval England where, by immemorial custom, citizens would acquire the right to use land in specific localities.[57] The leading legal treatise discussing the doctrine of custom is Sir William Blackstone's *Commentaries on the Laws of England*.[58] Blackstone specifically identified seven requirements for every custom:

(1) It must have been used so long, that the memory of man runneth not to the contrary.

(2) It must have been continued. There must have been no interruption of the right, though there may have been of the possession.

(3) It must have been peaceable and acquiesced in.

(4) It must be reasonable, or at least no good reason can be assigned against it.

(5) It ought to be certain.

(6) It ought to be compulsory, although originally established by consent. It ought to be left to the option of every man, whether he will use it or not.

(7) Customs must be consistent with each other, and must be construed strictly and submit to the king's prerogative.[59]

Historically, however, the doctrine of custom has never been widely accepted in American law.[60] Despite historical reluctance to apply the doctrine, several courts have recently utilized the doctrine of custom to establish public beach access.[61]

1. Oregon

The Oregon case of *State ex rel. Thornton v. Hay*,[62] is the leading case applying the doctrine of custom to establish public beach access.[63] *In Thornton*, owners of a tourist facility at Cannon Beach appealed an order enjoining them from constructing fences or other improvements in the dry sand area between the elevation line and the mean high-tide line.[64] The issue was whether the State had the authority to prevent the landowners from fencing in the dry sand area included within the legal description of their property.[65] The State asserted two arguments: first, that the landowners' record title to the disputed area was encumbered by a superior right in the public to use the land for recreational purposes; and alternatively, that if the disputed area was not encumbered by the asserted public easement, then the State had the power under applicable State zoning regulations to prevent construction of the fences.[66]

In addressing the facts, the Oregon Supreme Court noted that "[t]he dry-sand area in Oregon has been enjoyed by the general public as a recreational adjunct of the wet-sand or foreshore area since the beginning of the state's political history."[67] Moreover, "from the time of the earliest settlement to the present day, the general public has assumed that that dry-sand area was a part of the public beach. . . ."[68] *The Thornton* court also noted that state and local officials had policed the dry sand areas in Cannon Beach, and that local municipal sanitary crews had worked to keep the area free from litter.[69] Despite the court's conclusion that the requirements for a prescriptive easement were met, the court *sua sponte* applied the doctrine of custom.[70]

In particular, the Oregon Supreme Court stated:

The most cogent basis for the decision in this case is the English doctrine of custom. Strictly construed, prescription applies only to the specific tract of land before the court, and doubtful prescription cases could fill the courts for years with tract-by-tract litigation. An established custom, on the other hand, can be proven with reference to a larger region. Ocean-front lands from the northern to the southern border of the state ought to be treated uniformly.

The other reason which commends the doctrine of custom over that of prescription as the principal basis for the decision in this case is the unique nature of the lands in question. This case deals solely with the dry-sand area along the Pacific shore, and this land has long been used by the public as public recreational land according to an unbroken custom running back in time as long as the land has been inhabited.[71]

Paraphrasing the elements required to establish a custom according to Blackstone, the court recognized a customary use to be (1) ancient, (2) exercised without interruption, (3) peaceable and free from dispute, (4) reasonable, (5) certain, (6) obligatory, and (7) not repugnant.[72] In addition to finding that the seven requirements were met by the facts presented, the court added that "the record shows that the custom of the inhabitants of Oregon and of visitors in the state to use the dry sand as a public recreation area is so notorious that notice of the custom on the part of persons buying land along the shore must be presumed."[73] Moreover, the court noted that the rule of the decision, based upon custom, "takes from no man any thing which he has had a legitimate reason to regard as exclusively his."[74]By resting its decision on custom, several commentators have suggested that the court "breathed life into what had been for prac tical purposes a dead doctrine" since "[c]ustom never had any wide adherence in the United States."[75]

Several years later, the Oregon Supreme Court clarified *Thornton* in *McDonald v. Halvorson*.[76] *In McDonald*, the court addressed whether an inland cove was the same as the Pacific Coast for purposes of applying the doctrine of custom as enunciated in *Thornton*.[77] After a lengthy discussion of the facts and the appellate court's decision, the Oregon Supreme Court held that "the record persuades us that Little Whale Cove is not a part of the ocean and, therefore, the narrow beach east of it is not a part of the 'dry-sand area along the Pacific shore,'" which, under*Thornton*, the public has a customary right to use.[78] In addition, the court explained that *Thornton* applies only to those areas that "abut the ocean . . . if their public use has been consistent with the doctrine of custom as explained in [*Thornton*]."[79] Accordingly, the court reversed the appellate court's decision and held that *Thornton* was inapplicable to the inland cove.[80]

Subsequent to *McDonald*, the Oregon Supreme Court once again revisited *Thornton* in *Stevens v. City of Cannon Beach*.[81] *In Stevens*, beachfront

property owners filed an inverse condemnation action against the City of Cannon Beach and the Oregon Department of Parks and Recreation.[82] The property owners alleged that the denial of their applications for permits to construct a seawall constituted an uncompensated taking under both the State and Federal Constitutions.[83] Relying on *Thornton*, the trial court granted the defendants' motion to dismiss and the appellate court affirmed.[84] On appeal, the Oregon Supreme Court confronted the issue of whether the rule announced in*Thornton* survived the United States Supreme Court's takings analysis established in *Lucas v. South Carolina Coastal Council*.[85] Drawing analogies between the facts presented in the present case and *Thornton*, the court summarized the legal significance of *Thornton* and *McDonald* in Oregon law.[86] Applying *Lucas* to the facts presented, the court concluded that "the common-law doctrine of custom as applied to Oregon's shores in *Thornton*is not 'newly legislated or decreed'; to the contrary, . . . it inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already placed upon land owner ship."[87]Furthermore, the court stated "[w]hen plaintiffs took title to their land, they were on notice that exclusive use of the dry sand areas was not a part of the 'bundle of rights' that they acquired."[88] Accordingly, the Oregon Supreme Court held that neither the City's actions, nor the Department's rules, constituted a taking of the beachfront landowners' property.[89]

2. Florida

Although the Florida Supreme Court in *City of Daytona Beach v. Tona-Rama, Inc.*,[90] reversed the lower court's finding of a public prescriptive easement in the dry sand,[91] it did recognize the doctrine of custom as a means to establish public beach access in Florida.[92] In particular, the court noted:

If the recreational use of the sandy area adjacent to mean high tide has been ancient, reasonable, without interruption and free from dispute, such use, as a matter of custom, should not be interfered with by the owner. However, the owner may make any use of his property which is consistent with such public use and not calculated to interfere with the exercise of the right of the public to enjoy the dry sand area as a recreational adjunct of the wet sand or foreshore area.

This right of customary use of the dry sand area of the beaches by the public does not create any interest in the land itself. Although this right of use cannot be revoked by the land owner, it is subject to appropriate governmental regulation and may be abandoned by the public. . . .[93]

Further, the court stated:

[t]he general public may continue to use the dry sand area for their usual recreational activities, not because the public has any interest in the land itself, but because of a right gained through custom to use this particular area of the beach as they have without dispute and without interruption for many years.[94]

In recognizing the doctrine of custom, the court relied on decisions from Oregon and Hawaii.[95]

Shortly after *Tona-Rama*, the customary rights issue was once again raised in a Florida courtroom. In *Wymbs v. Arvida Corp.*,[96] the court addressed whether a class of persons had acquired public rights either under the doctrine of prescriptive use or custom to continue using a path, and sandy beach accessed by traversing through private property.[97] The court noted that "[t]he establishment of customary rights requires proof as to a longer period of time than prescriptive rights as the former requires proof of use from 'time immemorial' whereas the latter requires proof of use for twenty years."[98] Moreover, the court clearly summarized the requirements necessary to establish a customary right under Florida law. In particular, the court stated that "[c]ustomary public rights require a showing that the use of land is (1) ancient, (2) reasonable and peaceful, (3) exercised without interruption, (4) of certain boundaries, (5) obligatory or compulsory, (6) not inconsistent with other customs or law, and (7) by a multitudinous number of persons."[99] Although the court ultimately found that the plaintiffs failed to establish either a prescriptive or customary right, the case signifies the acceptance by at least one lower state court of the doctrine of custom recognized in *Tona-Rama*.

Nevertheless, some commentators have suggested that there are short-comings in the Florida Supreme Court's opinion in *Tona-Rama*. In particular, one commentator has noted that, although the decision seems to demonstrate a judicial policy favoring public use of privately owned beaches, the court did not adequately define the period of time required to establish a customary right.[100] In addition, the court did not clearly indicate the geographic scope of its decision.[101]

More recently, however, in *Reynolds v. County of Volusia*,[102] the Fifth District Court of Appeal clarified the geographic scope of the supreme court's opinion in *Tona-Rama*. The court stated that the doctrine of custom requires "courts to ascertain in each case the degree of customary and ancient use the beach has been subjected to and, in addition, to balance whether the proposed use of the land by the fee owners will interfere with such use enjoyed by the public in the past."[103] Thus, unlike Oregon,[104] the doctrine of custom according to *Reynolds* is applied on a tract-by-tract basis in Florida.[105]

Despite the Florida Supreme Court's recognition of custom, one issue not addressed in *Tona-Rama* was the potential liability, if any, of private landowners for injuries sustained by the public while utilizing the dry sand areas of privately owned Florida beaches. Liability was simply not at issue in the case.[106] However, one can easily imagine the concern beachfront landowners in Florida may have regarding potential liability for injuries, especially in light of the court's decision in *Tona-Rama* prohibiting a private landowner from interfering with the public's customary right to use the dry sand area.[107]

Analyzing the issue from a strict tort law perspective, private beachfront landowners should not have any liability, under most circumstances, for injuries sustained by members of the public while using the dry sand areas of privately owned Florida beaches. The four basic requirements for negligence under tort law are (1) duty, (2) breach, (3) causation, and (4) damages.[108] In sum, "[t]o state a cause of action in negligence, a complaint must allege ultimate facts which establish a relationship between the parties giving rise to a legal duty in the defendant to protect the plaintiff from the injury of which he now complains."[109]

There are three classes that define the duty a landowner owes to an individual: (1) trespasser, (2) invitee, and (3) licensee,[110] and generally speaking, one must not:

wil[l]fully and wantonly injure a trespasser; he must not wil[l]fully and wantonly injure a licensee, or in tentionally expose him to danger; and, where the visitor is an invitee, he must keep his property reasonably safe and protect the visitor from dangers of which he is, or should be aware.[111]

Florida courts have defined wanton and willful misconduct as "conduct in reckless disregard of the safety of others."[112]

Florida courts have defined licensees as "persons who choose to come upon the premises solely for their own convenience without invitation either expressed or reasonably implied under the circum stances."[113] In contrast, Florida courts have stated that:

a finding of invitee status turns upon the coexistence of two factors, reflecting the viewpoint of each of the two parties involved: (1) The landowner must so conduct his activities on his property, by way of carrying out his business or arranging his premises, that (2) it reasonably appears to the person coming onto them that he has been welcomed or invited there for the visitor's intended purpose and is therefore entitled to expect that the owner has taken reasonable care for his safety.[114]

As for uninvited licensees, Florida courts have held that "[a]n uninvited licensee is neither an invitee nor a trespasser, but rather, a legal status in between whose presence is neither sought nor forbidden, but merely permitted or tolerated by the landowner."[115] Accordingly, a landowner owes a duty to an uninvited licensee:

to refrain from wanton negligence or willful misconduct which would injure [the person], to refrain from intentionally exposing [the person] to danger, and to warn [the person] of a defect or condition known to the landowners to be dangerous when such danger is not open to ordinary observation by the licensee.[116]

Given the tort law principles discussed above and the Florida Supreme Court's language in *Tona-Rama* prohibiting beachfront landowners from interfering with a person's customary right to use the dry sand, members of the public should be, in most circumstances, viewed as uninvited licensees, rather than invitees.[117] Accordingly, a private beachfront landowner would have the duty to refrain from wanton negligence or willful misconduct which would injure the public, to refrain from intentionally exposing the public to danger, and to warn members of the public of defects or conditions known to the landowner to be dangerous, when such danger is not open to ordinary observation by the licensee.[118] In addition, under *Tona-Rama*, a beachfront landowner would also have a clear obligation to refrain from interfering with the public's customary use of the dry sand areas.[119] Therefore, a private beachfront landowner would not likely be liable for an injury sustained by a member of the public using the dry sand area absent direct injurious actions by the landowner.

Clearly, there are significant advantages to using the doctrine of custom to establish public beach access over other approaches, especially prescription. For example, "[c]onsent of the owner to the use, which would destroy the adverseness necessary to establish pre scription, is not similarly effective to defeat a right based on custom."[120]Thus, beachfront landowners would be unable to defeat a public easement claim, based on the doctrine of custom, by arguing that they had granted permission for past public use.[121] Furthermore, any arguments made by beachfront landowners that they will be exposed to overwhelming personal liability for injuries sustained by the public while utilizing the dry sand should not weaken the application of the doctrine.[122] In addition, the doctrine has withstood a takings challenge brought by a beachfront property owner in Oregon.[123] Accordingly, the doctrine of custom, as recognized by the Florida Supreme Court in *Tona-Rama*, remains an effective legal tool for protecting the public's right to use the dry sand areas of Florida beaches.

III. A Modern Day Example: Destin, Florida

Recent developments over the past several years in Destin, Florida, exemplify the tension between private rights of beachfront landowners and the public's right to utilize the dry sand areas of Florida beaches.[124] During spring break this past year, two fifteen-year old teenagers were chased off a beach in Destin by a landowner claiming that they were on private property.[125] Scared by their en counter with the threatening landowner, the two teenagers did not return to the beach during the remainder of their vacation in Destin.[126] Such situations are the direct result of the Florida State Legislature's failure to adequately protect the public's right to utilize the dry sand areas for traditional recreational purposes. In areas along Florida's "panhandle," the issue is especially important since tidal fluctuations are so minute that the public is basically required to constantly walk in wet sand if there is no public right to use the dry sand areas.[127]

As a result of incidents like the one described above, the Destin City Council asked the city's land use attorney to research what steps, if any, the city could take to protect the public's right to utilize the dry sand area above the mean high tide line.[128] The attorney determined that, based upon the Florida Supreme Court's decision in *City of Daytona Beach v. Tona-Rama, Inc*.,[129] he believed the public has established a customary right to utilize the dry sand areas of Destin beaches.[130] Accordingly, the attorney recommended that the city adopt an ordinance protecting the public's long-standing customary use of the dry sand areas of Destin beaches.[131] As part of the ordinance adoption process, the attorney also advised the city to gather evidence supporting the public's long-standing use of the dry sand areas, such as testimony of individuals who have used Destin beaches for decades.[132]

The findings and recommendations of the city's land use attorney were front-page news in Destin,[133] and spurred reactions from local residents. For instance, one beachfront landowner threatened litigation and proclaimed any action by the City Council to "take control of [his] private property is *unethical and immoral*."[134] In contrast, several people, both beachfront landowners and tourists, wrote in support of the City Council's actions, thereby trying to protect the public's right to utilize the dry sand area of Destin beaches.[135] Moreover, a general poll conducted by the city's newspaper showed that a majority of respondents favored unlimited access to area beaches.[136]

Despite legal precedent and the Destin City Council's initial promise to protect the public's right to utilize the dry sand areas by passing a beach access ordinance, the City Council has been somewhat slow to act.[137] The City Council's hesitancy is, in part, likely due to litigation threats from beachfront landowners.[138] Rather than pass a beach access ordinance, the City Council voted unanimously to ask State Representative Jerry Melvin to coordinate a meeting among groups and individuals affected by the beach access issue.[139] More recently, however, the City Council did

approve the sending of ordinances regarding beach vendors and the public's right to use the dry sand to the city's planning commission.[140] While the City Council should be applauded for attempting to address the tension between the rights of private beachfront landowners and the public's right to utilize the dry sand areas of Destin beaches, whether the City Council will adopt any adequate measures to protect public beach access remains unclear.

IV. RECOMMENDATION AND CONCLUSION

Despite numerous calls during the past twenty-five years for legislation at the state level to protect the public's right to utilize the dry sand areas of Florida beaches,[141] state legislators have failed to do so.[142] In the absence of adequate state legislation, local governments and the judiciary have the burden and responsibility to protect public beach access. In *City of Daytona Beach v. Tona-Rama, Inc.*,[143] the Florida Supreme Court recognized the doctrine of customary use as a means by which the public may secure rights to utilize the dry sand areas of Florida beaches for traditional recreational activities.[144] Despite the supreme court's ruling in *Tona-Rama* twenty-five years ago, the issue of whether the public has a right to utilize the dry sand areas of Florida beaches persists.[145]

In a state such as Florida, which is a favorite tourist destination[146] known for its beautiful beaches,[147] the issue of adequate public beach access should be a priority. Few, if any, of the state's tourists are probably aware that the majority of Florida beaches are privately owned.[148] One can easily imagine the surprise and shock of unsuspecting visitors to Florida who are threatened with arrest for trespassing because the beach they are enjoying is private property.[149] Indeed, the frequency of such incidents is likely to increase, absent adequate protective measures, as tourists and coastal residents place more and more pressure upon Florida's coastal resources. Florida and its residents should not, and cannot afford to, "bite the hand that feeds," so to speak. In light of the State Legislature's failure to adequately protect public beach access, local governments should adopt ordinances protecting the public's long-standing customary use of the dry sand areas of their beaches.[150] Without such measures, the Florida public may very well be left with nothing but wet sand.

APPENDIX A: DESTIN DRAFT ORDINANCE

ORDINANCE NO:

AN ORDINANCE OF THE CITY OF DESTIN PROTECTING THE PUBLIC'S LONG-STANDING CUSTOMARY USE OF THE DRY SAND AREAS OF THE BEACHES; PROVIDING FOR A BUFFER AREA AROUND PRIVATE PERMANENT STRUCTURES, PROVIDING FOR PENALTIES FOR VIOLATION

OF THIS ORDINANCE; PROVIDING FOR SEVERABILITY; PROVIDING AN EFFECTIVE DATE.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DESTIN, FLORIDA:

SECTION 1: AUTHORITY.

The authority for the enactment of this Ordinance is Article 1, Section 1.01 (b) of the City Charter, and Section 166.021, *Florida Statutes*.

SECTION 2: FINDINGS OF FACTS.

WHEREAS, the recreational use of the dry sand areas of the City's beaches is a treasured asset of the City which is utilized by the public at large, including residents and visitors to the City; and

WHEREAS, the dry sand areas of the City's beaches are a vital economic asset to the City, Okaloosa County, and the State of Florida; and

WHEREAS, the public at large, including residents and visitors to the City, have utilized the dry sand areas of the City's beaches since time immemorial; and

WHEREAS, the Florida Supreme Court in *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 75 (Fla. 1974), has expressly recognized the doctrine of customary use in the state of Florida; and

WHEREAS, the City desires to ensure that the public's long-standing customary use of the dry sand areas of the City's beaches is protected; and

WHEREAS, the City recognizes and acknowledges the rights of private property owners to enjoy and utilize their property; and

WHEREAS, the City desires to minimize conflicts between the owners of property that includes a portion of the dry sand areas of the City's beaches, and the use of such dry sand areas by the public at large; and

WHEREAS, in order to minimize such conflicts, the City desires to establish a twenty-five (25) foot buffer zone around any permanent structure owned by a private entity that is located on, or adjacent to, the dry sand areas of the City's beaches; and

WHEREAS, the public at large, including the residents and visitors to the City, shall not utilize such twenty-five (25) foot buffer zone, except to utilize an existing beach access point for ingress and egress to the City's beaches; and

WHEREAS, such twenty-five (25) foot buffer zone is not intended to constitute an abandonment of the public's right, based upon its long-standing customary use, to utilize the dry sand areas in such buffer zone, but rather is provided voluntarily and solely as an accommodation to the private property rights of those individuals who own property on which a portion of the dry sand areas of the City's beaches is located; and

WHEREAS, no entity shall interfere with the public's ability to continue its long-standing customary use of the dry sand areas located outside of the twenty-five (25) foot buffer zone; and

WHEREAS, the owners of property that contains a portion of the dry sand areas of the City's beaches may make any use of their property which is consistent with such public use and not calculated to interfere with the exercise of the right of the public to enjoy the dry sand area as a recreational adjunct of the wet sand or foreshore area.

SECTION 3: REGULATION OF DRY SAND AREAS.

1. The public's long-standing customary use of the dry sand areas of the City's beaches is hereby protected. Except as stated in Paragraph 2, no entity shall impede or interfere with the right of the public at large, including the residents and visitors of the City, to utilize the dry sand areas of the City's beaches.

2. The public at large, including the residents and visitors of the City, voluntarily agrees to not utilize a twenty-five (25) foot buffer zone around any permanent structure owned by a private entity that is located on, or adjacent to, the dry sand areas of the City's beaches, except as is necessary to utilize an existing beach access point for ingress and egress to the City's beaches.

SECTION 4: PENALTY PROVISION.

A violation of this Ordinance shall be a misdemeanor punishable according to law; however, in addition to, or in lieu of, any criminal prosecution, the City of Destin shall have the power to sue for relief in civil court to enforce the provisions of this Ordinance.

SECTION 5: SEVERABILITY.

If any section, phrase, sentence, or portion of this Ordinance is, for any reason, held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision, and such holding shall not affect the validity of the remaining portions thereof.

SECTION 6: EFFECTIVE DATE.

This Ordinance shall take effect immediately upon its adoption by the City Council and the signature of the Mayor.

---

[*] J.D., Florida State University College of Law (expected April 2000); B.A., University of California-Davis, 1995.Return to text.

[1] City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 75 (Fla. 1974). Return to text.

[2] 294 So. 2d 73 (Fla. 1974). Return to text.

[3] Also referred to within this Comment as either the doctrine of customary rights or the doctrine of customary use.Return to text.

[4] *See Tona-Rama, Inc.*, 294 So. 2d at 78. Return to text.

[5] *See generally* FLORIDA GOVERNOR'S OCEAN COMMITTEE, LOOKING SEAWARD: DEVELOPMENT OF A STATEOCEAN POLICY FOR FLORIDA, ch. XI, 17-30 (1997) (discussing the issue of beach access in Florida) [hereinafter FGOC]. Return to text.

[6] *See* John Ledbetter, *Custom Dictates Use of Dry Sand for Public Use*, DESTIN LOG, June 5, 1999, at A1 (discussing how the City of Destin City Council may protect the public's right to utilize the dry sand areas of Destin beaches); *Destin Wades into Private Beach Dispute*, TALL. DEM., June 10, 1999, at C5 (discussing recent events in Destin, Florida, concerning public beach access) [hereinafter *Private Beach Dispute*]. Return to text.

[7] *See* C. Wythe Cooke, *Size & Structure of Florida*, Florida Geological Society, Bulletin No. 7, *reprinted in* THEFLORIDA HANDBOOK: 1997-1998 541, 542 (Allen Morris & Joan Perry Morris, eds., 26th ed. 1997). General coastline is the measurement of the general outline of Florida's seacoast, whereas, tidal shoreline includes the measurement of bays, sounds, and other water bodies to where these bodies narrow to a width of three statute miles.*Id*. *See*

also BUREAU OF ECON. AND BUS. RESEARCH COLLEGE OF BUS. ADMIN., FLORIDA STATISTICAL ABSTRACT1996, Table 8.01 (Univ. of Fla., 13th ed. 1996) (noting that Florida has approximately 1,350 statute miles of general coastline). Return to text.

[8] *See* Kenneth D. Haddad, *Florida's Marine Resources*, *in* THE FLORIDA HANDBOOK: 1997-1998 518, 518 (Allen Morris & Joan Perry Morris, eds., 26th ed. 1997). Return to text.

[9] *See* THE FLORIDA HANDBOOK: 1997-1998 591 (Allen Morris & Joan Perry Morris, eds., 26th ed. 1997). (based on 1995 statistics). Return to text.

[10] *See* FGOC, *supra* note 5, at XI-18. "Figures on the number of beach visitors and the number of jobs and amount of revenue created is no longer generated at the State level. However, exit polls rate beaches as third in Florida's attraction after 'shopping and restaurants' and 'rest and relaxation.'" *Id*. at 18 n.17. Return to text.

[11] FLA. CONST. art. X, § 11. Return to text.

[12] *See id.*; *see also* FLA. STAT. § 161.051 (1999) (stating that the state holds title to lands below the mean high-water mark); Karen Oehme, *Judicial Expansion of the Public Trust Doctrine: Creating a Right of Public Access to Florida's Beaches*, 3 J. LAND USE & ENVTL. L. 75, 76 (1987) (providing historical background of the public trust doctrine). For a more detailed discussion of the public's right to utilize the foreshore, see Luise Welby, Comment,*Public Access to Private Beaches: A Tidal Necessity*, 6 UCLA J. ENVTL. L. & POL'Y 69, 71-75 (1986). Return to text.

[13] FLA. STAT. § 187.201(9)(b)2 (1999). Return to text.

[14] For a more in-depth discussion of Florida's beach access laws, see Shawn M. Willson, *Exacting Public Beach Access: The Viability of Permit Conditions and Florida's State Beach Access Laws After* Dolan v. City of Tigard, 12 J. LAND USE & ENVTL. L. 303, 305-08 (1997). *See also* Kenneth E. Spahn, *The Beach and Shore Preservation Act: Regulating Coastal Construction in Florida*, 24 STET. L. REV. 351 (1995) (discussing the impact and significance of the Beach and Shore Preservation Act). Return to text.

[15] FLA. STAT. § 161.55(6) (1999). Return to text.

[16] *See id.* Return to text.

[17] *See id*. § 161.053. Return to text.

[18] *Id.* § 161.053(1)(a) (emphasis added). Return to text.

[19] 190 So. 446 (Fla. 1939). Return to text.

[20] *Id.* at 448-49 (emphasis added). Return to text.

[21] Steve A. McKeon, Note, *Public Access to Beaches*, 22 STAN. L. REV. 564, 565-66 (1970). Return to text.

[22] According to the Florida Department of Natural Resources (currently the Florida Department of Environmental Protection), 77% of all beaches in Florida are privately owned. *See* Susan P. Stephens, *Access to the Shore: A Coast to Coast Problem*, 3 J. LAND USE & ENVTL. L. 94, 94 n.3 (1987) (citing Maloney et al., *Public Beach Access: A Guaranteed Place to Spread Your Towel*, 29 U. FLA. L. REV. 853, 853 n.3 (1977)). Return to text.

[23] *See* McKeon, *supra* note 21, at 566-67 (discussing the prohibitive expense of acquiring public beach easements either by ordinary sale or condemnation proceedings). Return to text.

[24] *See, e.g.*, Gion v. City of Santa Cruz, 465 P.2d 50 (Cal. 1970); Hollywood, Inc. v. Zinkil, 403 So. 2d 528 (Fla. 4th DCA 1981); City of Miami v. Eastern Realty Co., 202 So. 2d 760 (Fla. 3d DCA 1967). Return to text.

[25] *See, e.g.*, Hollywood, Inc. v. City of Hollywood, 321 So. 2d 65 (Fla. 1975); City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73 (Fla. 1974). Return to text.

[26] *See, e.g.*, Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355 (N.J. 1984). For an extended discussion of*Matthews*, see Charles M. Naselsky, Note, *Beach Access - The Public's Right to Cross and to Use Privately Owned Upper Beach Areas*, 15 SETON HALL L. REV. 344 (1985).

Florida courts and the State Legislature have not expanded the public trust doctrine to protect the public's right to use the dry sand areas of Florida beaches. *See generally* Oehme, *supra* note 12 (arguing for judicial expansion of the public trust doctrine in Florida in order to protect the public's right to use the dry sand). Return to text.

[27] *See, e.g.*, United States v. St. Thomas Beach Resorts, Inc., 386 F. Supp. 769 (D.V.I. 1974), *aff'd*, 529 F.2d 513 (3d Cir. 1975); City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73 (Fla. 1974); *In re* Ashford, 440 P.2d 76 (Haw. 1968);

State *ex rel*. Thornton v. Hay, 462 P.2d 671 (Or. 1969); Matcha v. Mattox, 711 S.W.2d 95 (Tx. App. 1986). Return to text.

[28] *See* Hollywood, Inc. v. Zinkil, 403 So. 2d 528 (Fla. 4th DCA 1981); City of Miami v. Eastern Realty Co., 202 So. 2d 760 (Fla. 3d DCA 1967), *cert. denied*, 210 So. 2d 866 (Fla. 1968). Return to text.

[29] *See* Oehme, *supra* note 12, at 87-88 (discussing dedication as a means to establish public beach access). *See also* W. Roderick Bowdoin, Comment, *Easements: Judicial and Legislative Protection of the Public's Rights in Florida's Beaches*, 25 U. FLA. L. REV. 586, 589-90 (1973) (discussing the short-comings of implied dedication for acquiring public beach access in Florida). Return to text.

[30] *See* Oehme, *supra* note 12, at 87-88. Return to text.

[31] While eminent domain and public acquisition of easements are possible, the prohibitive expense of acquiring public beach access by such means makes them ineffective for most local governments. *See supra* note 23 and accompanying text. Return to text.

[32] 100 So. 2d 57 (Fla. 1958). Return to text.

[33] Crigger v. Florida Power Corp., 436 So. 2d 937, 944-45 (Fla. 5th DCA 1983) (summarizing *Downing*) (emphasis in original) (footnotes omitted). Return to text.

[34] *Downing*, 100 So. 2d at 65. Return to text.

[35] *See id.*; *see also* Phelps v. Griffith, 629 So. 2d 304, 306 (Fla. 2d DCA 1993) ("All doubts as to the adverse character of a claimant's pattern of use must be resolved in favor of the lawful owner of the property."). Return to text.

[36] *See Crigger*, 436 So. 2d at 944-45 n.16. "That use with permission of the owner prevents acquisition of a prescriptive right has long been Florida law." *Id*. Return to text.

[37] *Phelps*, 629 So. 2d at 305-06 (citations omitted). Return to text.

[38] *See* City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 75 (Fla. 1974) (stating that "[i]t is possible for the public to acquire an easement in the beaches of the State by the finding of a prescriptive right to the beach land");*see also* Hollywood, Inc. v. City of Hollywood, 321 So. 2d 65, 69-70 (Fla. 1975) (noting that evidence of

prescription satisfied adverse use and that trial court on remand would be well advised to consider facts in light of*Tona-Rama*). Return to text.

[39] 21 So. 2d 783 (Fla. 1945). Return to text.

[40] *Id*. at 786. Return to text.

[41] 14 So. 2d 172 (Fla. 1943). Return to text.

[42] *Id*. at 178. Return to text.

[43] Several roadway and trail cases exemplify the difficulty in establishing a claim by prescription in Florida due to the strict adversity requirement. *See, e.g.*, Burgess v. Burd, 654 So. 2d 1028, 1028 (Fla. 1st DCA 1995) (holding that the record failed to show that appellee's use of specific trails was adverse, thereby failing to prove a required element of a prescriptive easement); Phelps v. Griffith, 629 So. 2d 304, 306 (Fla. 2d DCA 1993) (finding no prescriptive easement since implicit evidence of consent pointed to a permissive, rather than adverse, use of the road); Osceola County v. Castelli, 435 So. 2d 417, 418 (Fla. 5th DCA 1983) (holding that county failed to prove public's use of road was adverse under claim of right to establish a prescriptive easement). Return to text.

[44] 294 So. 2d 73 (Fla. 1974). Return to text.

[45] *See id.* at 74. Return to text.

[46] *See id.* Return to text.

[47] *See id.* Return to text.

[48] *See id*. Return to text.

[49] *See id*. Return to text.

[50] *See id*. Return to text.

[51] *Id.* at 77. Return to text.

[52] *Id.* at 75 (emphasis added). Return to text.

[53] *Id.* at 77. Return to text.

[54] *See id.* (citing J. C. Vereen & Sons, Inc. v. Houser, 167 So. 45 (Fla. 1936)). This language is another example of how Florida courts strictly adhere to the adversity requirement when deciding whether a prescriptive easement has been established. Return to text.

[55] *See id.* at 78. Return to text.

[56] "Custom" has been defined as a "usage or practice of the people, which, by common adoption and acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of a law with respect to the place or subject-matter to which it relates." BLACK'S LAW DICTIONARY 385 (6th ed. 1990). Return to text.

[57] *See* Bowdoin, *supra* note 29, at 591; *see also* McKeon, *supra* note 21, at 582-83. Return to text.

[58] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, (Bernard C. Gavit, ed. Washington Law Book Co. 1941) (1892). For outstanding discussions regarding the history of custom in England and its recent resurgence in the United States, see David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996) and Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986). Return to text.

[59] BLACKSTONE, *supra* note 58, at 43-44. Return to text.

[60] *See* McKeon, *supra* note 21, at 583-84 (discussing early American precedent applying the doctrine of custom and, for the most part, the rejection of the doctrine in early American case law). The primary argument used for the rejection of the doctrine of custom in early American law was that no custom in the United States has lasted long enough to satisfy the time immemorial requirement. *See id. See also* Bederman, *supra* note 58, at 1398-1407 (discussing early American treatment of customary rights). Return to text.

[61] *See generally* Bederman, *supra* note 58, at 1408-34 (discussing in depth the recent rebirth of the doctrine of customary rights and its application as a means to establish public beach access). Return to text.

[62] 462 P.2d 671 (Or. 1969). Return to text.

[63] For an excellent discussion of custom and its application in Oregon property law, see Lew E. Delo, Comment,*The English Doctrine of Custom in Oregon Property Law:* State *ex rel*. Thornton v. Hay, 4 ENVTL. L. 383 (1974).Return to text.

[64] *See Thornton*, 462 P.2d at 672. Return to text.

[65] *See id*. Return to text.

[66] *See id*. Return to text.

[67] *Id.* at 673. Return to text.

[68] *Id.* Return to text.

[69] *See id*. Return to text.

[70] *See id.* at 676. Return to text.

[71] *Id.* at 676-77. The language used by the court regarding the uniform application of the custom doctrine from the state's northern to southern border, and its application to only the Pacific coast, would be the subject of subsequent litigation. *See infra* notes 76-80 and accompanying text. Return to text.

[72] *See Thornton*, 462 P.2d at 677. Return to text.

[73] *Id.* at 678. Return to text.

[74] *Id.* This language would result in additional litigation regarding whether the Oregon Supreme Court's recognition and application of customary use amounted to a taking. *See infra* notes 81-89 and accompanying text.Return to text.

[75] McKeon, *supra* note 21, at 583. *See also* Steven W. Bender, *Castles in the Sand: Balancing Public Custom and Private Ownership Interests on Oregon's Beaches*, 77 OR. L. REV. 913, 913-14 (1998) (noting that "Oregon is credited with, and sometimes criticized for, resuscitating the custom doctrine as applied to beach rights"); Bederman,*supra* note 58, at 1417 ("Oregon is generally credited with resuscitating the doctrine of customary easements as applied to public rights of access to the beach."). Return to text.

[76] 780 P.2d 714 (Or. 1989). Return to text.

[77] *See id*. at 714-15. Return to text.

[78] *Id.* at 723. Return to text.

[79] *Id.* at 724. Return to text.

[80] *See id.* For a detailed discussion of *McDonald*, see Jo Anne C. Long, Note, McDonald v. Halvorson: *Oregon's Beach Access Law Revisited*, 20 ENVTL. L. 1001 (1990). Return to text.

[81] 854 P.2d 449 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994). Return to text.

[82] *See id.* at 450-51. Return to text.

[83] *See id*. Return to text.

[84] *See id*. Return to text.

[85] 505 U.S. 1003 (1992).

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers. . . .

Id. at 1027. Return to text.

[86] *See Stevens*, 854 P.2d at 453-55. Return to text.

[87] *Id.* at 456 (quoting, in part, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992)). Return to text.

[88] *Id*. Return to text.

[89] *See id*. at 460. *But see* Stevens v. City of Cannon Beach, 510 U.S. 1207, 1212 (1994) (Scalia, J. *dissenting*) ("To say that this case raises a serious Fifth Amendment takings issue is an understatement. The issue is serious in the sense that it involves a holding of questionable constitutionality; and it is serious in the sense that the landgrab (if there is one) may run the entire length of the Oregon coast.").

Several commentators have written on the *Stevens* decision and its impact, if any, on takings law. *See, e.g.*, Melody F. Havey, Note, Stevens v. City of Cannon Beach: *Does Oregon's Doctrine of Custom Find a Way Around Lucas?*, 1 OCEAN & COASTAL L.J. 109 (1994); Peter C. Meier, Note, Stevens v. City of Cannon Beach: *Taking Takings into the Post-Lucas Era*, 22 ECOLOGY L.Q. 413 (1995). Return to text.

[90] 294 So. 2d 73 (Fla. 1974). Return to text.

[91] *See supra* notes 44-55 and accompanying text. Return to text.

[92] *See Tona-Rama, Inc.*, 294 So. 2d at 78. Return to text.

[93] *Id*. Return to text.

[94] *Id.* Return to text.

[95] *See id*. (citing State *ex. rel*. Thornton. v. Hay, 462 P.2d 671 (Or. 1969), *In re* Ashford, 440 P.2d 76 (Haw. 1968)). Several scholarly articles commented on the Florida Supreme Court's opinion in *Tona-Rama* shortly after it was decided. *See* Patricia Ireland, Comment, *Customary Use of Florida Beaches*, 29 U. MIAMI L. REV. 149 (1974); Comment, *Doctrine of Customary Rights—Customary Public Use of Privately Owned Beach Precludes Activity of Owner Inconsistent with Public Interest*, 2 FLA. ST. U. L. REV. 806 (1974). Return to text.

[96] 48 Fla. Supp. 110 (Fla. 15th Cir.Ct. 1978). Return to text.

[97] *See id.* at 110. Return to text.

[98] *Id.* at 120. Implicit in this statement is that one must show continuous use for more than twenty-years at a bare minimum to establish a customary right since that is the time requirement to establish a prescriptive easement. *See supra* notes 32-33 and accompanying text (discussing the elements required to establish a prescriptive easement).Return to text.

[99] *Wymbs*, 48 Fla. Supp. at 121-22. Return to text.

[100] *See* Comment, *Doctrine of Customary Rights—Customary Public Use of Privately Owned Beach Precludes Activity of Owner Inconsistent with Public Interest*, *supra* note 95, at 814. As for the time requirement to establish a customary right, the court simply stated that the area in dispute had been used by "sunbathing

tourists for untold decades." City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 76 (Fla. 1974). Return to text.

[101] *See* Comment, *Doctrine of Customary Rights—Customary Public Use of Privately Owned Beach Precludes Activity of Owner Inconsistent with Public Interest*, *supra* note 95, at 814. Some of the court's language appears to support the contention that a customary right to utilize the dry sand exists generally in Florida, as in Oregon. However, the court did refer to customary rights acquired "to use this particular area." *Tona-Rama,Inc.*, 294 So. 2d at 78. Return to text.

[102] 659 So. 2d 1186 (Fla. 5th DCA 1995). Return to text.

[103] *Id*. at 1190. Return to text.

[104] *See* Bender, *supra* note 75, at 914. Return to text.

[105] Unfortunately, the Florida Supreme Court's failure to clearly apply the doctrine of customary use to the entire coastline of Florida has consequently hampered one of the doctrine's greatest benefits over prescriptive easements—that of avoiding costly and time-consuming tract-by-tract litigation to establish the public's right to use the dry sand areas of Florida beaches. Return to text.

[106] Even if liability was an issue in the case, a convincing argument could be made that, under the facts of *Tona-Rama*, members of the public were "invitees" of the private landowner since the landowner had an ocean pier on the property open to the public. Consequently, the private landowner would owe the highest duty under tort law to members of the public utilizing that specific area of the beach. *See infra* notes 111-15 and accompanying text (discussing duty owed to an invitee). Return to text.

[107] *See* City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 78 (Fla. 1974). The specific issue of potential liability, if any, of private beachfront landowners has yet to be addressed by any Florida courts. Thus, any initial concerns of private landowners appear justified. Return to text.

[108] *See* Paterson v. Deeb, 472 So. 2d 1210, 1214 (Fla. 1st DCA 1985) ("The four elements of negligence are (1) a legal duty owed by defendant to plaintiff, (2) breach of that duty by the defendant, (3) an injury to plaintiff legally caused by defendant's breach, and (4) damages as a result of the injury."). *See also* Landrum v. John Doe Pit Digger, 696 So. 2d 926, 928 (Fla. 2d DCA 1997). Return to text.

[109] Mather v. Northcutt, 598 So. 2d 101, 102 (Fla. 2d DCA 1992). Return to text.

[110] *See* Lukancich v. City of Tampa, 583 So. 2d 1070, 1072 (Fla. 2d DCA 1991). One should note that courts have also referred to a class known as uninvited licensees. Return to text.

[111] Post v. Lunney, 261 So. 2d 146, 147 (Fla. 1972); *see also* Barrio v. City of Miami Beach, 698 So. 2d 1241, 1244 (Fla. 3d DCA 1997) (discussing duty owed to an uninvited licensee); Lindsey v. Bill Arflin Bonding Agency, Inc., 645 So. 2d 565, 567 (Fla. 1st DCA 1994) (discussing duty owed to an invitee); Libby v. West Coast Rock Co., Inc., 308 So. 2d 602, 604 (Fla. 2d DCA 1975) (discussing duty owed to a licensee). Return to text.

[112] Dyals v. Hodges, 659 So. 2d 482, 485 (Fla. 1st DCA 1995). Return to text.

[113] *Libby*, 308 So. 2d at 604 (quoting Wood v. Camp, 284 So. 2d 691 (Fla. 1973). Return to text.

[114] Iber v. R.P.A. Int'l Corp., 585 So. 2d 367, 369 (Fla. 3d DCA 1991). Return to text.

[115] Bishop v. First Nat'l Bank of Florida, Inc., 609 So. 2d 722, 725 (Fla. 5th DCA 1992). Return to text.

[116] *Id.* Return to text.

[117] The court stated that "this right of [customary] use cannot be revoked by the land owner." City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 78 (Fla. 1974). Clearly, many private beachfront landowners would prefer that the public not be permitted to use the dry sand area; thus, concluding that members of the public are invitees is difficult. However, under certain situations, like those present in *Tona-Rama* where there was an ocean pier on the landowner's property open to the public, members of the public could be considered invitees. Consequently, the landowner would owe the public a greater duty in such a situation. Return to text.

[118] *See Bishop*, 609 So. 2d at 725. Return to text.

[119] *See Tona-Rama*, 294 So. 2d at 77. Return to text.

[120] Ireland, *supra* note 95, at 153.

The doctrine of custom is very useful in avoiding the question of adverseness. Florida courts have taken a hard line on finding the requisite adversity to show an easement. .

. . Not only is the element of adversity absent from the doctrine of custom, but custom requires that the use be peaceful and free from dispute.

Stephens, *supra* note 22, at 115. *But see* Welby, *supra* note 12, at 90 (noting the potential difficulty in proving 'immemorial use' for a customary use claim in comparison to adverse use for the statutory period of twenty years for a prescription claim). Return to text.

[121] *See* Ireland, *supra* note 95, at 153. Return to text.

[122] *See supra* notes 106-20 and accompanying text (discussing potential liability of landowners for injuries sustained by the public while using the dry sand areas of privately owned Florida beaches). Return to text.

[123] *See* Stevens v. City of Cannon Beach, 854 P.2d 449 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994); *see also supra* notes 81-89 and accompanying text (discussing *Stevens*). Return to text.

[124] *See Private Beach Dispute*, *supra* note 6 (discussing recent disputes between private landowners and the public over the public's use of the dry sand areas of beaches in Destin, Florida); Neel Walker, Opinion, *Don't Abandon Your Rights*, NORTHWEST FLA. DAILY NEWS DESTIN EAST, Aug. 27, 1998, at 5 (arguing in support of an ordinance protecting the public's right to utilize the dry sand areas of Destin beaches and advising beachgoers not to abandon their customary rights under *Tona-Rama*). Return to text.

[125] *See Private Beach Dispute*, *supra* note 6. Return to text.

[126] *See id*. Similarly, many residents have complained about no-trespassing signs that beachfront landowners have placed in the dry sand, as well as many beach vendors purposely set-up chairs close to the water to prevent the public from walking on the dry sand. *See* Ledbetter, *supra* note 6. Return to text.

[127] *See* John Ledbetter, *Melvin Tabbed for Question on Dry Sand Use*, DESTIN LOG, July 21, 1999, at A1 (stating that "in the panhandle, because of minimal tidal fluctuations, the strip of land that is conclusively public is minimal"). Return to text.

[128] *See* Ledbetter, *supra* note 6. Return to text.

[129] 294 So. 2d 73 (Fla. 1974). Return to text.

[130] *See* Ledbetter, *supra* note 6. Return to text.

[131] *See id.*; *see also* Appendix A (Destin Draft Ordinance). Return to text.

[132] *See* Ledbetter, *supra* note 6. Return to text.

[133] *See id.* Return to text.

[134] Letter from Earl Richards to the Destin City Council and David A. Theriaque (June 17, 1999) (on file with the City of Destin) (emphasis added). *See also Private Beach Dispute*, *supra* note 6 (noting that a beachfront property owner said there may be a legal challenge to any attempt by the City Council to pass an ordinance protecting the public's right to utilize the dry sand areas of Destin beaches). Return to text.

[135] *See* Martin Siegel, Opinion, *Florida Beaches Require Separate Consideration*, DESTIN LOG, July 17, 1999, at A4 (arguing in support of a policy protecting the public's right to utilize the dry sand areas of Destin beaches and briefly discussing the potential impacts if a "no right to sit on the beach" policy is adopted); C.J. Riets, Letter to the Editor, *Don't Cut Off the Hand that Feeds You*, DESTIN LOG, July 10, 1999, at A5 (noting that tourists support the City of Destin and private landowners should be careful not to "cut off the hands that feed them").

Letters in support of action by the City Council to protect the public's right to utilize the dry sand areas of Destin beaches were also sent to the City Council prior to the latest actions. *See, e.g.*, Letter from Anne B. Spragins-Harmuth to Dewey Destin of the Destin City Council (January 25, 1999) (on file with City of Destin) (writing in support of Mr. Destin's efforts as a member of the City Council to protect public beach access). Return to text.

[136] *See* THE LOG ONLINE, *What Do You Think?* (visited July 26, 1999) . When asked whether beachgoers in Destin and in South Walton should have unlimited access to all areas of all beaches, i.e. from water's edge to the nearest private structure, 426 of 566 voters (approximately 75%) said yes. *Id*. Return to text.

[137] *See* Editorial, *Give Us a Ruling on Beach-Use Issue*, DESTIN LOG, July 10, 1999, at A4 (arguing that the community deserves a concise response from the City Council regarding the "nagging confusion over beach use in Destin" and that the community is ready for "this issue to go away"). Return to text.

[138] *See* John Ledbetter, *Whose Beach is it? Property Owner Predicts Lawsuit*, DESTIN LOG, Aug. 21, 1999, at A1 (noting that at least one beachfront property owner believes that any ordinance recognizing the public's customary use of the dry sand areas of Destin beaches would amount to a regulatory taking and that he had been in

contact with a legal group to prepare for a legal battle with the City); *see also* Suzanne Hines, Guest Column, *Lots of People Would Object to City 'Taking Their Beach'*, DESTIN LOG, Oct. 6, 1999, at A4 (arguing that the proposed ordinance is a taking and that there "will be serious repercussions" if the Destin City Council passes the proposed beach access ordinance). More recently, the Southeast Legal Foundation, a conservative public interest law firm that fights for private property rights, informed the City Council that it intends to represent beachfront property owners if a beach access ordinance is adopted. *See* John Ledbetter, *Property Rights Firm enters Beach Dispute*, DESTIN LOG, Dec. 18, 1999, at A1. The organization alleges that the proposed ordinance is "illegal and unconstitutional" and that it will litigate the issue all the way to the Supreme Court to invalidate the measure. *See id.* A member of the City Council, as well as the city's land use attorney, however, disputed the organization's conclusions about the public's historical use of Destin beaches. *See id.* at A18. Return to text.

[139] *See* Ledbetter, *supra* note 127. In addition to seeking the assistance of State Representative Melvin, the City Council is planning to ask the Governor's office, Department of Environmental Protection, Corps of Engineers, Economic Development Council, Tourist Development Council, and other governmental agencies for assistance in resolving the dry sand issue. *See id.* The City Council's decision to involve Representative Melvin was applauded by some. *See, e.g.*, Editorial, *Council Serious About Beach Issues*, DESTIN LOG, July 24, 1999, at A4 (noting that with Representative Melvin involved there is a greater likelihood of parties reaching a consensus on the beach access issue facing the City Council). Return to text.

[140] *See* John Ledbetter, *Whose Beach is it? Destin City Council Offers Solutions*, DESTIN LOG, Aug. 21 1999, at A1. Although the City Council voted to send ordinances regarding beach vendors and the public's right to use the dry sand to the planning commission, what form the final ordinances will take is unclear. With regards to the ordinance pertaining to the public's right to use the dry sand, two City Council members expressed concerns over what constitutes "customary use" and the issue of "time immemorial." *Id*. In contrast, several members of the panel chaired by State Representative Melvin believed that Destin would be able to establish customary use. *See id*. Return to text.

[141] *See, e.g.*, Donna R. Christie, *Beach Access Legislation for Florida: A Proposal and Commentary, in* THECOMMON LAW, JUDICIAL INTERPRETATION & LEGISLATION: TOOLS TO PRESERVE ACCESS TO FLORIDA'S BEACHES 136, 136-58 (Fla. State Univ. College of Law Policy Studies Clinic, Feb. 1988) (proposing a state statute to protect public beach access in Florida); Bowdoin, *supra* note 29, at 593-96 (discussing a proposed Florida Open Beaches Act). Return to text.

[142] In contrast, both the Oregon and Texas legislatures have passed statutes recognizing the doctrine of customary use. *See* OR. REV. STAT. § 390.610(2) (Supp. 1998) (recognizing that when frequent and uninterrupted use of the ocean shore "has been legally sufficient to create rights . . . it is in the public interest to protect and preserve such public rights"); *id*. § 105.692(3) ("Nothing in this section shall be construed to diminish or divert any public right to use land for recreational purposes acquired by . . . custom or otherwise existing before October 5, 1973."); TEX. NAT. RES. CODE ANN. § 61.011(a) (West 1999) ("[I]f the public has acquired a right of use . . . or has retained a right by virtue of continuous right in the public, the public shall have the free and unrestricted right of ingress and egress. . . ."); *id*. § 61.024 ("None of the provisions of this subchapter shall reduce, limit, construct, or vitiate the definition of public beaches which has been defined from time immemorial in law and custom."). Return to text.

[143] 294 So. 2d 73 (Fla. 1974). Return to text.

[144] *See id*. at 78. Return to text.

[145] *See supra* notes 125-41 and accompanying text (discussing recent events in Destin, Florida, and the city's attempts to reach a solution that protects the public's right to use the dry sand areas of Destin beaches while also protecting the interests of private landowners). Return to text.

[146] *See* THE FLORIDA HANDBOOK: 1997-1998, *supra* note 9, at 591 (noting that Florida had approximately 41,282,314 visitors in 1995). Return to text.

[147] *See* FGOC, *supra* note 5, at XI-18. Return to text.

[148] *See supra* note 22 and accompanying text. Return to text.

[149] *See* Louis Cooper, *This Sand is My Sand*, NORTHWEST FLA. DAILY NEWS, June 9, 1999, at A1 (noting how two fifteen-year old visitors who were run off a beach in Destin by a private landowner would not return to the beach for the remainder of their spring break); *see also Private Beach Dispute*, *supra* note 6. Return to text.

[150] The Florida Supreme Court in *Tona-Rama* specifically noted that the public's customary right to use the dry sand area "cannot be revoked by the land owner" and "*is subject to appropriate governmental regulation*." City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d. 73, 78 (Fla. 1974) (emphasis added). In addition, the doctrine of customary use has already withstood a takings challenge in Oregon. *See supra* notes 81-89 and accompanying text (discussing Stevens v. City of Cannon Beach, 854 P.2d 449 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994)). Moreover, a

challenge by property owners under the Bert J. Harris, Jr., Private Property Rights Protection Act, section 70.001, *Florida Statutes*, should also fail since such an ordinance is not a new land use regulation, but rather a codification of the public's long-standing customary right to use the dry sand areas of Florida beaches. The right to the exclusive use of the dry sand areas of Florida beaches was simply never a part of a beachfront property owner's "bundle of rights."

Local governments could model their respective ordinances after the Draft Ordinance proposed by Destin's land use attorney or wait to see the final form of the ordinance, if any, adopted by the Destin City Council. *See* Appendix A (Destin's Draft Ordinance recognizing the public's customary right to use the dry sand areas of Destin beaches); *see also* Maloney et al., *Public Beach Access: A Guaranteed Place to Spread Your Towel*, 29 U. FLA. L. REV. 853, 873-880 (proposing a model public beach access ordinance). Return to text.

A REVIEW OF *DEL MONTE DUNES V. CITY OF MONTEREY* AND ITS IMPLICATIONS FOR LOCAL GOVERNMENT EXACTIONS

NANCY E. STROUD[*]

I. INTRODUCTION

On May 24, 1999, the United States Supreme Court issued a long-awaited opinion in *Del Monte Dunes v. City of Monterey*,[1] which recognized for the first time a right to a jury trial in a regulatory taking case. The 5-4 decision, authored by Justice Kennedy, upheld a $1.45 million jury award to a landowner under narrowly defined circumstances. The decision provides some guidance to future regulatory taking controversies but also raises some new uncertainties. One issue unresolved by *Del Monte Dunes* is the extent to which the "rough proportionality" test established by the Supreme Court in *Dolan v. City of Tigard*[2] and found not applicable in *Del Monte Dunes*, will be applied to land-use exactions other than land dedications.

II. FACTS[3]

Del Monte Dunes involves undeveloped beach property north of Monterey, California, which had been zoned for multi-family residential use since the early 1970s. The 37.6-acre parcel had been used as an oil company terminal and tank farm. The parcel included fifteen foot manmade dunes covered with jute matting, a sewer line, tank pads, an industrial complex, and various debris including pipe, concrete, and oil-soaked sand. The oil company had introduced a non-native ice plant to the property to prevent soil erosion; however, the ice plant spread to approximately 25% of the parcel and threatened the remaining natural vegetation. The parcel was also considered environmentally sensitive and important for its native flora and fauna, including the buckwheat plant, which is the only known habitat for the endangered Smith's Blue Butterfly. Additionally, much of the property included sand dunes "that are among the largest and best preserved in any of the Central California dune systems."[4] A state park adjoined the property to the northeast.

Ponderosa Homes ("Ponderosa") owned the property prior to its sale to Del Monte Dunes at Monterey, Ltd. ("Del Monte"). Beginning in 1981, Ponderosa made successive applications to develop the property for residences. The first application proposed a planned unit development for 344 residential units, well within the residential density permitted by the city's zoning code and general plan. The planning commission denied this proposal, advising that a proposal for 264 units would be received favorably. The planning commission later denied the revised, 264-unit project and then suggested that a plan with 224 units would be received favorably. When the revised 224-unit proposal was denied by the planning commission, Ponderosa appealed to the city council. The city council overruled the planning

commission and requested it to consider a 190-unit development. The planning commission later denied the revised 190-unit proposal which, on appeal, the city council approved. The approval granted an eighteen month conditional use permit with fifteen conditions, including protection of rare plants and approval of butterfly habitat preservation measures by the California Department of Fish and Game and the U.S. Fish and Wildlife Service.[5]

Shortly after the conditional approval in September, 1984, Del Monte purchased the property for approximately $3.7 million. Del Monte prepared a detailed site plan and a restoration plan.[6] The planning commission, acting against the planning staff recommendation, denied approval for the final development plan. With two months remaining on the expiration of the conditional use permit, Del Monte appealed this decision to the city council and sought a further twelve month extension. The city council approved the extension but, thereafter, denied the final development plan in June, 1986.

At the time of the plan denial, the plan devoted 17.9 of the 37.6 acres to public open space (including a public beach) and incorporated a buffer zone between the development and adjoining state park, view corridors, and restoration and preservation of "as much of the sand dune structure and buckwheat habitat as possible consistent with development and the city's requirements."[7] The city council's denial raised several concerns, including the adequacy of access and potential damage to the environment and, specifically, the disruption to the Smith's Blue Butterfly habitat.

After the June, 1986 denial, Del Monte filed suit against the City, alleging violations of due process and equal protection and a regulatory taking under 42 U.S.C. § 1983. The federal district court dismissed the claims as not ripe, and in 1990, the Ninth Circuit Court of Appeals reversed. As part of its decision, the Ninth Circuit found that at the time the City issued its final denial, California did not provide a compensatory remedy for a temporary regulatory taking, and thus, Del Monte was not required to pursue relief in state court as a pre-condition to federal relief. During the litigation, Del Monte sold the property to California for $4.5 million.

On remand, the district court reserved the substantive due process claim, finding that "the City did not violate Del Monte's substantive due process rights because the City asserted valid regulatory reasons for denying Del Monte's development application"[8] and, over the City's objections, submitted the taking and equal protection claims to a jury. The jury delivered a general verdict for Del Monte on its taking claims, a separate verdict on the equal protection claim, and awarded temporary taking damages of $1.45 million.

The City appealed. The Ninth Circuit Court of Appeals determined that the inverse condemnation claim was triable to a jury and upheld the verdict. Characterizing the issue of whether the City's action advanced a legitimate public purpose as "largely a reasonableness inquiry,"[9] the court of appeals, citing to *Dolan*, stated that "[s]ignificant evidence supports Del Monte's claim that the City's actions were disproportional to both the nature and extent of the impact of the proposed development."[10] The Ninth Circuit also determined that the jury could reasonably have found that the City denied Del Monte all economically viable use of its property, because the City progressively denied the use of various portions of the dune until no part remained available for use other than in its natural state. Furthermore, the court held that, even though the state bought the property for $800,000 more than Del Monte paid, the evidence was that the property was no longer commercially marketable and thus was not economically viable.

The City petitioned the Supreme Court for certiorari on the following questions: 1) whether the court of appeals erred in applying the rough-proportionality standard of *Dolan*; 2) whether the court of appeals impermissibly based its opinion on a standard that allowed the jury to re-weigh the reasonableness of the City's land-use decision; and 3) whether issues of regulatory taking liability were properly submitted to the jury.

III. The Supreme Court Opinion

Typical of the current Court, the Justices issued a split decision in *Del Monte Dunes*. All the Justices joined in deciding that the rough-proportionality test of *Dolan* did not apply in this case. On the issues of the proper regulatory taking liability standard and whether the matter was properly submitted to a jury, Justices Kennedy, Rehnquist, Stevens, and Thomas concluded that, in this narrow circumstance, the Seventh Amendment to the Constitution provided the right to a jury trial. Justice Scalia concurred in an opinion that departs from the plurality to broadly find a right to a jury trial in all section 1983 actions. Justice Souter, joined by Justices O'Connor, Ginsberg, and Breyer, dissented on the basis that the Seventh Amendment provides no right to a jury trial for section 1983 regulatory taking claims.

A. Rough Proportionality

The Court confirmed that *Dolan* established a requirement that when dedications are demanded as a condition of development, they must be roughly proportional to the development's anticipated impacts.[11] The Court firmly refused to extend the *Dolan* requirement to *Del Monte Dunes*, explaining that *Dolan* was "not designed to address, and . . . not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on

denial of development."[12] Notably, the Court described narrowly defined "exactions" as "land-use decisions conditioning approval of development on the dedication of property to public use."[13] The dissent also rejected the use of the *Dolan* standard "for reviewing land-use regulations generally."[14]

B. The Regulatory Taking Liability Standard

The City argued that allowing the jury to determine if the denial was reasonably related to a legitimate public purpose improperly allowed the jury to second-guess public land use policy.[15] The meaning of the "substantially advance," or "means-ends" test enunciated in *Agins v. City of Tiburon*[16] as the first of a two-prong regulatory taking test, has been the subject of great debate and uncertainty.[17] The Court explicitly refused to address the nature or applicability of the means-ends test, admitting that the test had not provided a definitive statement of the elements of a taking claim, nor a thorough explanation of the test outside the context of required dedications or exactions.[18] However, the Court noted that the jury's instructions were consistent with its previous general discussions of regulatory taking liability and that, because "the city itself proposed the essence of the instructions given to the jury," the City could not now contend that they were inaccurate.[19]

The Court characterized the jury question as "confined to whether, in light of all the history and the context of the case, the city's particular decision to deny Del Monte Dunes' final development proposal was reasonably related to the city's proffered justifications."[20] The Court took pains to describe what the instructions did *not* ask. The instructions did not ask whether the City's zoning ordinances or policies were unreasonable; instead, the jury was "instructed, in unmistakable terms, that the various purposes asserted by the city were legitimate public interests."[21] Nor did the instructions "allow the jury to consider the reasonableness, *per se*, of the customized, ad hoc conditions imposed on the property's development . . ."[22] The Court concluded that its decision does not allow a "wholesale interference by judge or jury with municipal land-use policies, laws or routine regulatory decisions."[23]

C. The Right to a Jury Trial

The Court clearly stated that "the controlling question is whether, given the city's apparent concession that the instructions were a correct statement of the law, the matter was properly submitted to the jury."[24] The Court rejected the Ninth Circuit's analysis finding the right to a jury trial directly in 42 U.S.C. § 1983, because neither the statute's language nor history grants such a right.[25] Rather, the Court determined that the right can be found in the Seventh Amendment, which preserves the right to a jury trial in all actions at common law that were triable at the time of the amendment's adoption.[26] The Court decided that a regulatory taking is analogous to a tort seeking

monetary relief, which was triable at common law in 1791.[27] While Justice Scalia concluded that *all* section 1983 actions are analogous to tort actions for recovery of damages for personal injuries,[28] the plurality concluded that a section 1983 regulatory taking is analogous to an action for interference with property interests.[29] The dissent rejected any tort analogy, finding the proper analogy to be to direct condemnation actions in which liability questions are not decided by a jury.[30]

Justices Kennedy and Souter extensively debated the differences between direct and inverse condemnation actions. Justice Kennedy explained that unlike direct condemnation, litigation of inverse condemnation essentially involves proof of liability, is generally more onerous to the landowner, and provides the owner a forum for compensation.[31]The plurality and the dissent also disagreed regarding the distinctions between inverse condemnation and tort actions.[32] Justice Kennedy explained that although the government's interference with property is lawful when properly authorized, the action becomes tortious when the government refuses to pay just compensation.[33] This analysis appears to severely limit jury determinations in future section 1983 cases, as this remedy has been available in all states since the decision in *First English Evangelical Lutheran Church v. County of Los Angeles*.[34]

Finally, the Court characterized the liability decision in this case as essentially fact-bound, that is, "whether, when viewed in light of the context and protracted history of the development application process, the city's decision to reject a particular development plan bore a reasonable relationship to its proffered justifications."[35] The Court emphasized that its holding does not extend either to a broad challenge to the constitutionality of the City's general land use ordinances or policies, or to the reasonableness of general regulations as applied to the property.[36] Thus, the boundaries of the jury's role regarding the reasonableness question remain substantially undefined. Furthermore, the Court held that the issue of whether property has been deprived of all economically viable use is clearly a jury question.[37] The dissent disagreed on all points, indicating the similarity in the analysis of taking liability to substantive due process liability, which is routinely decided by a judge, as it was in this case, and not by a jury.[38]

IV. Application To Exactions

An important question raised in *Del Monte Dunes* is to what extent does *Dolan's* "rough proportionality" requirement apply to exactions that are not land dedications, such as impact fees. Kennedy's opinion states:

> [W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions - land-use decisions conditioning approval of development on the dedication of property to public use. The rule applied

> in *Dolan* considers whether dedications demanded as conditions of development are proportional to the development's anticipated impacts. It was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions, but on denial of development.[39]

From this terse statement, it is difficult to tell whether the majority considers exactions to include only dedications of property, that is, the transfer of title to real property. The sentence structure in the opinion suggests that the Court views exactions and dedications to be one and the same. Indeed, *Dolan*, which originated the test, involved the required dedication of a bike path and flood plain easements to the city.[40] The Court itself in this paragraph describes *Dolan* as a dedication case.[41]

Since the *Dolan* decision, some courts have refused to apply *Dolan* to cases which do not involve land dedication.[42] For example, in *McCarthy v. City of Leawood*,[43] the Kansas Supreme Court read *Dolan* to apply only to land dedications and upheld a traffic impact fee ordinance under the "reasonable relationship" due process test.[44] *In Pringle v. City of Wichita*,[45] the court declined to apply *Dolan* to the City of Wichita's decision to close a portion of a street pending completion of an expressway, in part because plaintiffs were not required to deed property to the city.[46] Similarly, the Arizona Supreme Court rejected the application of *Dolan* to a water resource development fee in *Home Builders Association of Central Arizona v. Scottsdale*,[47] distinguishing a fee as a "more benign form of regulation" than land dedication.[48]

Both the Fifth and Tenth Circuits have explained the *Dolan* test as being limited to land dedication cases.[49] *In Clajon Production Corporation v. Petera*,[50] the Tenth Circuit concluded that *Dolan* is limited to "development exactions where there is a physical taking or its equivalent."[51] Within the circuit, in *Harris v. Wichita*,[52] the district court found that airport overlay zoning regulations were not reviewable under the *Dolan* rough proportionality test, as they do not impose an obligation to deed portions of land to the local government.[53]Likewise, *Marshall v. Board of County Commissioners*,[54] *citing Dolan,* found that subdivision regulations requiring minimum five acre lots and certain improvement restrictions were not reviewable because they did not involve dedication requirements.[55] The Fifth Circuit, in *Texas Manufactured Housing Association v. Nederland*,[56] determined that an ordinance regulating the location of manufactured homes was not reviewable under *Dolan*because it did not extract benefits in the sense of requiring dedication of property to the city.[57]

Other cases decided after *Dolan* have not limited the rough proportionality test to land dedication. The case of*Ehrlich v. City of Culver City*,[58] in particular, captured early

attention. Prior to the *Dolan* decision, a California court of appeal in *Ehrlich* upheld the city's condition of development that the developer pay a recreational fee and a fee in lieu of participating in the city's art in public places program.[59] The United States Supreme Court accepted certiorari of the case and, a day after deciding *Dolan*, vacated the California court of appeal's opinion and remanded it for further consideration in light of *Dolan*.[60] Upon further reconsideration, the California court of appeal applied*Dolan* to once again uphold the recreational mitigation fee but found that the public art fee was not reviewable under*Dolan* because it was a legislative determination applicable to all large development projects.[61] The California Supreme Court agreed that *Dolan* was not limited to land dedications and remanded the case to the trial court to determine if the recreational fee was roughly proportional to the impact caused by the proposed development.[62]

The United States Supreme Court's treatment of *Ehrlich* was read by some to indicate that *Dolan* should be read expansively to include exactions.[63] Indeed, in the courts, *Dolan* has been cited to strike down subdivision drainage requirements,[64] expanded to strike rent control provisions,[65] and used to find a taking resulting from the state construction of a beachfront boat ramp and jetty.[66] Dolan has also been applied to uphold parkland fees in Washington,[67] transportation impact fees in Illinois,[68] and street improvements as a condition to subdivision approval in Michigan[69] and Oregon.[70]

Del Monte Dunes should give more pause to this expansive reading, and initial reactions by the courts to the case suggest that a more limited application of the "rough proportionality" test is in order. For example, the New York high court, after broadly applying *Dolan* to land use controls, most recently held that *Del Monte Dunes* clarifies that rough proportionality only applies in exactions cases. In *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, the court applied a reasonable relationship test to uphold the rezoning of golf course property from residential to recreational use zoning.[71] As another example, in *Lambert v. City & County of San Francisco*,[72] the California appellate court refused to find a taking from the denial of a hotel use permit after applicants refused to comply with the condition of a monetary payment.[73] The state supreme court initially granted review, but after *Del Monte Dunes* was decided, the court dismissed the appeal as improvidently granted.[74] The dismissal was perhaps in response to the limitations expressed in *Del Monte Dunes*. Similarly, in *Benchmark Land Corp. v. City of Battle Ground*,[75] a Washington appellate court struck down a subdivision platting condition that required street improvements on the basis that the requirement did not meet *Dolan's* rough proportionality test.[76] The Washington Supreme Court granted certiorari of the case but vacated the appellate court ruling after *Del Monte Dunes* was decided and

remanded the case for further consideration in light of the Supreme Court's opinion.[77]

V. Conclusion

The Court's split decision and narrow holding in *Del Monte Dunes* portends that there will be few, if any, future section 1983 taking cases to be decided by a federal jury. Importantly, however, the decision has confirmed the necessity of first applying to state court for a just compensation remedy, as a pre-condition to a section 1983 regulatory taking claim. Additionally, the persuasiveness of "bad facts," such as repeated denials, cannot be underestimated. Indeed, the acceptance of certiorari by the Supreme Court of *Olech v. Village of Willowbrook*,[78]finding an equal protection violation based on the village's alleged ill-will toward a landowner who applied for a well permit, signals the Court's continuing concern about perceived government mistreatment in land-use actions.

The Court's analysis in *Del Monte Dunes* also leaves open a number of unresolved questions, such as: if a plaintiff must first take a taking claim to state court, whether an effective federal taking claim will remain and, if so, how it will be preserved; whether the *Agins* means-ends test has continuing viability in a regulatory taking context; and whether certain substantive due process liability claims have a right to a jury trial under the Seventh Amendment. These and other uncertainties await future cases and commentary.

---

[*] Nancy E. Stroud is a partner in the firm of Burke, Weaver and Prell, Boca Raton, Florida and Chicago, Illinois. An earlier version of this Note was prepared for the American Bar Association Sections of State and Local Government and Real Property. Return to text.

[1] 119 S. Ct. 1624 (1999).Return to text.

[2] 114 S. Ct. 2309 (1994). Return to text.

[3] This description of the facts is taken from the Supreme Court opinion, the parties' briefs, and earlier decisions. Parties' briefs can be found at 1998 WL 297462 (Petitioner), 1998 WL 457674 (Respondents), and 1998 WL 596784 (Petitioner's Reply). Earlier decisions are located at 920 F.2d 1496 (9th Cir. 1990) and 95 F.3d 1422 (9th Cir. 1996).Return to text.

[4] Petitioner's Brief, 1998 WL 297462, at *5. Return to text.

[5] Additionally, "[t]he [conditional use approval] expressly provided that, if it appeared that the final restoration plan would not adequately mitigate the environmental impacts. . . the developer would be required to modify and resubmit its site plan." *Id.* at *6-*7. Return to text.

[6] According to the City of Monterey ("City"), the U.S. Fish and Wildlife Service concluded that this "restoration plan had little chance for long term success," and the California Department of Fish and Game advised the City that it had problems with the proposed restoration plan. *Id.* at *8. The Ninth Circuit reported that the U.S. Fish and Wildlife Service indicated that it had no objection to the manner in which the habitat was preserved. *See Del Monte Dunes*, 920 F.2d at 1506. Return to text.

[7] *Del Monte Dunes*, 119 S. Ct. at 1632. Return to text.

[8] *Del Monte Dunes*, 95 F.3d at 1425. The parties did not appeal this finding. Return to text.

[9] *Id.* at 1430. Return to text.

[10] *Id.* at 1432. Return to text.

[11] *See Del Monte Dunes*, 119 S. Ct. at 1635. Return to text.

[12] *Id.* Return to text.

[13] *Id.*; *see also infra* notes 39-76 and accompanying text. Return to text.

[14] *Id.* at 1650. Return to text.

[15] *See id.* at 1635. Return to text.

[16] 100 S. Ct. 2138 (1980). *Agins* requires that to find a regulatory taking, the regulation must fail to 1) substantially advance a legitimate state interest, or 2) deny the landowner all or substantially all economically viable use of his property. *See id.* Return to text.

[17] *See, e.g.*, Thomas E. Roberts et al., *Land-Use Litigation: Doctrinal Confusion Under the Fifth and Fourteenth Amendments*, 28 URB. LAW. 765 (1996); Karena C. Anderson, *Strategic Litigating In Land Use Cases*, Del Monte Dunes v. City of Monterey, 25 ECOLOGY L.Q. 465 (1998). Return to text.

[18] *See Del Monte Dunes*, 119 S. Ct. at 1635; *see also Del Monte Dunes*, 119 S. Ct. at 1649 (Scalia, J., dissenting and refusing to express his view of the test's propriety).

The dissent also refuses to decide whether *Agins* properly assumes that the means-ends test is a part of a taking analysis. *See id.* at 1660. Return to text.

[19] *Id.* at 1636. Return to text.

[20] *Id.* at 1637. Return to text.

[21] *Id.* Return to text.

[22] *Id.* at 1636 (emphasis added). Return to text.

[23] *Del Monte Dunes*, 119 S. Ct. at 1637. This obvious intent to narrow the scope of the matters at issue may reflect the Court's discomfort in upholding the takings claim while the judge below found that substantive due process had not been violated. One Justice at oral argument admitted that "[i]t seems a little odd to me . . . that the judge would find as a matter of law that the planning action was substantively reasonable under due process but then submit the takings issue to a jury. That does seem to me somewhat inconsistent." 1998 WL 721087, at * 34-35 (U.S. Oral Argument). This inconsistency is further complicated by the return by the jury of a general verdict, which can be upheld only if the evidence supports each theory of liability. *See Del Monte Dunes*, 95 F.3d at 1428. Return to text.

[24] *Del Monte Dunes*, 119 S. Ct. at 1631. Return to text.

[25] *See id.* at 1637-38. Return to text.

[26] *See id.* at 1638. Return to text.

[27] *See id.* Return to text.

[28] *See id.* at 1658-59. Return to text.

[29] *See Del Monte Dunes*, 119 S. Ct. at 1637-38. Return to text.

[30] According to Justice Souter, this analogy is also "intuitively sensible" given the common source of direct and inverse condemnation suits in the Fifth Amendment and the link to the sovereign's power of eminent domain. *See id.*at 1650. The dissent explains that condemnation proceedings carried no uniform and established right to a common law jury trial in England or in the colonies in 1791 and are not accorded a jury trial based on well-established precedent. *See id.* at 1651. Therefore, inverse condemnation actions should not be accorded a jury trial. *See id.*Return to text.

[31] *Compare Del Monte Dunes*, 119 S. Ct. at 1639-42, *with Del Monte Dunes*, 119 S. Ct. at 1650-53. Return to text.

[32] *Compare Del Monte Dunes*, 119 S. Ct. at 1641, *with Del Monte Dunes*, 119 S. Ct. at 1651. Return to text.

[33] *See id.* at 1641. In this case, Del Monte was denied compensation because, at the time of the taking, the state court did not provide a compensation remedy. Return to text.

[34] 107 S. Ct. 2378 (1987). Return to text.

[35] *Del Monte Dunes*, 119 S. Ct. at 1644. Return to text.

[36] *See id.* Return to text.

[37] *See id.* Return to text.

[38] *See id.* at 1659-60. Return to text.

[39] *Id.* at 1635 (citations omitted). Return to text.

[40] *See Dolan*, 114 S. Ct. at 2314. Return to text.

[41] *See Del Monte Dunes*, 119 S. Ct. at 1635. Return to text.

[42] *See* Nancy E. Stroud & Susan L. Trevarthen, *Defensible Exactions* After Nollan v. California Coastal Commission *and* Dolan v. City of Tigard, 25 STETSON L. REV. 719 (1996) (discussing the earliest cases addressing application of *Dolan*); s*ee also* Jonathan Davidson & Adam U. Lindgren, *Exactions and Impact Fees* - Nollan/Dolan*: Show Me the Findings!*, 29 URB. LAW. 427 (1997).Return to text.

[43] 894 P.2d 836 (Kan. 1995). Return to text.

[44] *See id.* Return to text.

[45] 917 P.2d 1351 (Kan. App. 1996). Return to text.

[46] *See id.* Return to text.

[47] 930 P.2d 993, (Ariz. 1997), *cert. denied*, 117 S. Ct. 2512 (1997).Return to text.

[48] *Id.* at 1000. *Compare* Third & Catalina Assocs. v. City of Phoenix, 895 P.2d 115, 120 (Ariz. App. 1995) (fire sprinkler retrofitting requirement distinguished from situation in *Dolan* where private property is pressed into public service).Return to text.

[49] *See infra* notes 50-57 and accompanying text. Return to text.

[50] 70 F.3d 1566 (10th Cir. 1995). Return to text.

[51] *Id.* at 1578. Return to text.

[52] 862 F. Supp. 287 (D. Kan. 1994), *aff'd,* 74 F.3d 1249 (10th Cir. 1996). Return to text.

[53] *See id.* at 294. Return to text.

[54] 912 F. Supp. 1456 (D. Wyo. 1996). Return to text.

[55] *See id.* Return to text.

[56] 101 F.3d 1095 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 2497 (1997).Return to text.

[57] *See id.* at 1105. Return to text.

[58] 19 Cal. Rptr. 2d 468 (Cal. App. 1993), *cert. granted*, 114 S. Ct. 2731 (1994), *amended by* 911 P.2d 429 (Cal.),*cert denied,* 117 S. Ct. 299 (1996). Return to text.

[59] *See Ehrlich*, 19 Cal. Rptr. 2d at 468. Return to text.

[60] *See Ehrlich,* 114 S. Ct. at 2731.Return to text.

[61] *See* Ehrlich, 911 P.2d at 436. The distinction between legislative and adjudicative determinations of exactions in applying *Dolan* has wide currency. *See, e.g.*, Stroud & Trevarthen, *supra* note 42, at 802-806; *Scottsdale*, 930 P.2d at 999-1000; Arcadia Dev. Corp. v. City of Bloomington, 552 N.W.2d 281, 286 (Minn. Ct. App. 1996). *But see*Parking Ass'n of Ga., Inc. v. City of Atlanta, 115 S. Ct. 2268 (1995) (Thomas, J., dissenting to a denial of a petition for a writ of certiorari).Return to text.

[62] *See Ehrlich*, 911 P.2d at 433. Return to text.

[63] For the interpretation that *Dolan* applies to exactions other than land dedications, see, for example, David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan*, and What State and Federal Courts Are Doing About It*, 28 STETSON L. REV. 523, 571-76 (1999); Matthew S. Watson, *The Scope of the Supreme Court's Heightened Scrutiny Takings Doctrine and Its Impact on Development Exactions*, 20 WHITTIER L. REV. 181, 204-209 (1998) (concluding that heightened scrutiny applies to monetary exactions). Return to text.

[64] *See* Christopher Lake Dev. Co. v. St. Louis County, 35 F.3d 1269 (8th Cir. 1994). Return to text.

[65] *See* Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 115 S. Ct. 1961 (1995). The New York court reversed course, however, in *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 1999 N.Y. Lexis 3739 (N.Y. Nov. 23, 1999). *See infra* text accompanying note 71. Return to text.

[66] *See* Peterman v. Department of Natural Resources, 521 N.W.2d 499 (Mich. 1994). Return to text.

[67] *See* Trimen Dev. Co. v. King County, 877 P.2d 187 (Wash. 1994). Return to text.

[68] *See* Northern Illinois Home Builders Ass'n v. County of DuPage, 649 N.E.2d 384 (Ill. 1995). Return to text.

[69] *See* Dowerk v. Charter Township of Oxford, 592 N.W.2d 724 (Mich. Ct. App. 1998). Return to text.

[70] *See* J.C. Reeves Corp. v. Clackamas County, 887 P.2d 360 (Or. Ct. App. 1994). Return to text.

[71] *See* 1999 N.Y. Lexis 3739 (N.Y. Nov. 23, 1999). Return to text.

[72] 67 Cal. Rptr. 2d 562 (Cal. App. 1997), *rev. granted*, 950 P.2d 59 (Cal. 1998), *dismissed*, 981 P.2d 59 (Cal. 1999). Return to text.

[73] *See Lambert*, 67 Cal. Rptr. 2d at 562. Return to text.

[74] *See Lambert*, 981 P.2d 41 (Cal. 1999), *denying cert. to* 950 P.2d 59 (Cal. 1998). Return to text.

[75] 972 P.2d 944 (Wash. Ct. App. 1999). Return to text.

[76] *See id.* at 944. Return to text.

[77] *See* Benchmark Land Corp. v. City of Battle Ground, 138 Wash. 2d 1008 (Wash. 1999). Return to text.

[78] 160 F.3d 386 (7th Cir. 1998), *cert. granted*, 120 S. Ct. 10 (1999). Return to text.

RECENT DEVELOPMENTS IN LAND USE AND ENVIRONMENTAL LAW[*]

I. INTRODUCTION

This section highlights significant recent developments in federal and state environmental and land use case law. The reader is en couraged to further explore several of the sources from which these developments were drawn. Particularly useful were the Florida Legislature's web site (www.leg.state.fl.us), which includes links to the following two useful sites: the Department of Community Affairs's web site, (www.dca.state.fl.us), and the Department of Environmental Protection's web site, (www.dep.state.fl.us). Descriptions of the bills passed by the 1999 Florida Legislature are in most cases excerpts taken verbatim or directly paraphrased from one of these three sites. The Environmental and Land Use Section of the Florida Bar's web site (www.eluls.org), has many useful articles and updates that were a source of information for this section as well. Also very useful was the FLORIDAENVIRONMENTAL COMPLIANCE UPDATE, available though M. Lee Smith Publishers, LLC, (www.mleesmith.com).

This section focuses on federal cases, Florida case law and Florida legislation. Federal legislation and rulemaking were not reviewed for this edition. The reader can find an excellent comprehensive review of federal environmental law in the annually updated YEAR IN REVIEW, put out by the American Bar Association's Natural Resources, Energy and Environmental Law Section.

II. FEDERAL CASES

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 119 S. Ct. 1624 (1999)

As noted in the case note found in this issue of the *Journal*,[1] *Del Monte Dunes* principally discusses whether a takings claim may be submitted to a jury in federal court under 42 U.S.C. § 1983.[2] Of more direct interest to land use practitioners is the Court's holding that the rough proportionality of *Dolan* applies to exactions, and not to takings by inverse condemnation:

[W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions - land-use decisions conditioning approval of development on the dedication of property to public use. See *Dolan*, supra, at 385, 114 S.Ct. 2309; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). The rule applied in *Dolan* considers whether dedications demanded as

conditions of development are proportional to the development's anticipated impacts. It was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development. We believe, accordingly, that the rough-proportionality test of *Dolan* is inapposite to a case such as this one.[3]

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 149 F.3d 303 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1111 (1999)

In *Friends of the Earth*, the Fourth Circuit Court of Appeals held that plaintiffs lacked Article III standing to file suit under the citizen-suit provision of the Federal Water Pollution Control Water Act, 33 U.S.C.A. § 1365(a)(1).[4]Defendant Laidlaw appealed a district court finding that it had violated permit requirements and the Court's imposition of a $405,800 fine.[5] The Fourth Circuit reversed and remanded, holding that plaintiffs lacked standing to bring the suit.[6] Citing *Steel Co. v. Citizens for a Better Environment*,[7] the court noted that standing requires a plaintiff to have an actual or threatened injury in fact, the injury must have been caused by the defendant's complained-of conduct, and the injury must be redressable by the relief sought.[8] The court focused its' analysis on the redressability element of standing, noting:

[i]n *Steel Co.*, the Supreme Court held that a plaintiff lacked standing to prosecute a private enforcement action under the citizen-suit provision of the Emergency Planning and Community Right-To-Know Act of 1986, because the relief requested could not redress the injury plaintiff had allegedly suffered. In particular, the Court noted that any civil penalties imposed would be payable to the United States Treasury and not to the plaintiff and therefore that the penalties would not benefit the plaintiff. . . . Applying the reasoning of *Steel Co.*, we conclude that this action is moot because the only remedy currently available to Plaintiffs - civil penalties payable to the government - would not redress any injury Plaintiffs have suffered.[9]

On appeal to the U.S. Supreme Court, the petitioners claim the Fourth Circuit mistakenly applied the analysis found in *Steel Co.*[10] Petitioners state that *Steel Co.* addresses standing to sue at the initiation of a suit.[11] Thus, the appropriate guiding precedent, petitioners argue, was the Supreme Court's Clean Water Act ruling in *Gwaltney of Springfield Ltd. v. Chesapeake Bay Foundation, Inc.,[12]* , which addresses the mootness of an ongoing suit.[13]Petitioners claim that not only do the facts in *Gwaltney* more closely resemble the facts in their case, but the case also held that citizen plaintiffs have standing to seek only civil penalties under the act's citizen suit provision.[14]

The Supreme Court granted certiorari on March 1, 1999.[15] The Soliciter General requested, and was granted, leave to participate in oral argument as amicus curiae and for divided argument on September 10, 1999.[16]

Gatlin Oil Co. v. U.S., 169 F.3d 207 (4th Cir. 1999)

The Fourth Circuit vacated the district court's finding that an oil company was entitled to compensation from the Oil Spill Liability Trust Fund for all of its recovery costs and damages resulting from an oil spill and an ensuing fire.[17]The court held that the company had a complete defense under the Oil Pollution Act because the spill was caused by a third party.[18] Therefore, the company is entitled to full compensation costs for removal costs and lost wages and earnings.[19] However, the company may not recover compensation for fire damage because the fire neither caused the discharge of oil into navigable waters nor posed a substantial threat to do so.[20] Similarly, the company may not recover expenditures that were directed by state authorities.[21]

Avondale Federal Savings Bank v. Amoco Oil Co., 170 F.3d 692 (7th Cir. 1999)

The Seventh Circuit Court of Appeals held that a private party cannot recover cleanup costs incurred from the responsible party after bringing an action under the Resource Conservation and Recovery Act's (RCRA) citizen suit provision.[22] Avondale Federal Savings Bank held title to contaminated property formerly owned by Amoco Oil.[23] In order to promptly sell the land, Avondale filed suit under RCRA against Amoco, proceeded to clean up the site, and then went back to court to recover costs from Amoco.[24] The court, however, noted that RCRA's citizen suit provision is not directed at providing compensation for past cleanup efforts.[25]

General Motors v. EPA, 168 F.3d 1377 (D.C. Cir. 1999)

The United States Court of Appeals for the District of Columbia Circuit denied General Motors' petition for review of an order of the Environmental Protection Agency (EPA).[26] The issue arose when the EPA determined that General Motors violated a Clean Water Act permit issued by the State of Michigan, for which the agency imposed an administrative penalty.[27] General Motors argued that the EPA erred in refusing to consider the company's collateral attack upon validity of the state-issued permit.[28] The court held that, first, the EPA reasonably interpreted the Clean Water Act to preclude such a collateral attack in the course of an enforcement proceeding and, second, that substantial evidence supports the EPA's finding that General Motors violated the permit.[29]

American. Trucking Associations, Inc. v. U.S. Environmental Protection Agency, 175 F.3d 1027 (D.C. Cir. 1999),*reh'g granted in part and denied in part*, 195 F.3d 4 (D.C. Cir. 1999)

The D.C. Circuit Court of Appeals struck down the U.S. EPA's final rules for National Ambient Air Quality Standards (NAAQS) on particulate matter and ozone, because the rules lacked an "intelligible principle," stating:

[c]ertain "Small Business Petitioners" argue in each case that EPA has construed §§ 108 & 109 of the Clean Air Act so loosely as to render them unconstitutional delegations of legislative power. We agree. Although the factors EPA uses in determining the degree of public health concern associated with different levels of ozone and PM are reasonable, EPA appears to have articulated no "intelligible principle" to channel its application of these factors; nor is one apparent from the statute. The nondelegation doctrine requires such a principle. [30]

On EPA's subsequent request for rehearing, the court denied in part and granted in part.[31] Most importantly, the request for rehearing on "intelligible principles" failed to garner the majority of judges needed to grant a rehearing.[32] EPA argued that the Clean Air Act (CAA) provide such a principle:

[Section] 109(b)(1) requires EPA to promulgate NAAQS based on air quality criteria issued under § 108 that are "requisite to protect the public health" with "an adequate margin of safety." This language and related legislative history provide directions for EPA to follow in setting the NAAQS. Moreover, EPA has consistently interpreted § 109(b)(1) to provide further decisionmaking criteria to guide the standard setting process. Thus, the CAA provides a more than sufficient "intelligible principle" to guide EPA's dis cretion. [33]

The per curiam opinion held that EPA's statement of an intelligible principle "begged the question", because the agency had not stated of what that principle consists.[34] Although EPA had taken no further legal action on this matter at the time this summary was published, the issue is one of such significance that such action may be anticipated.

III. FLORIDA CASES

St. Johns River Water Management District v. Consolidated-Tomoka Land Co., 717 So. 2d 72 (Fla. 1st DCA 1998),*cert. denied,* 727 So. 2d 904 (Fla. 1999)

At issue was the appropriate standard of judicial review for agency rulemaking. The First District Court considered an appeal by the St. Johns River Water Management District (SJRWMD) of an administrative law judge's final order declaring a series of the SJRWMD's rules

invalid.[35] Those rules defined two areas within the SJRWMD as hydrologic basins and established more restrictive permitting and development requirements within that basin.[36]The SJRWMD cited chapter 373, *Florida Statutes*,[37] as the source of it's authority to pass those rules.[38]Specifically, the rules were based on Part IV, "Management and Storage of Surface Waters," of § 373.413, which, as cited in the case, states:

[T]he Governing Board [of the Water Management District] or the department [of Environmental Protection] may require such permits and impose such reasonable conditions as are necessary to assure that the construction or alteration of any stormwater management system, dam, impoundment, reservoir, appurtenant work or works will comply with the provisions of this part and applicable rules promulgated thereto and will not be harmful to the water resources of the district. The department or the governing board may delineate areas within the district wherein permits may be required.[39]

Tomoka challenged the SJRWMD's authority under § 373.413 to pass those hydrologic basin rules.[40] Citing a 1996 revision to the FLA. STAT., § 120.52(8) (1998), the administrative law judge determined that the proposed rules were supported by the evidence, but were invalid as a matter of law.[41] The basis for that ruling was the rules were not within the "particular powers and duties" granted by the enabling legislation, as required by § 120.52(8).[42]

The First District Court focused its' analysis on the phrase "particular powers and duties" in § 120.52(8), noting that the section was not clear and could have more than one meaning. The court stated:

The use of the term "particular" in this phrase could signify that the powers and duties conferred on the agency must be identified by some defining characteristic or that they must be described in detail.

. . . .

The administrative judge interpreted the phrase "particular powers and duties" to mean that the enabling statute must "detail" the powers and duties that will be the subject of the rule. . . . We disagree. In our view, the term "particular" in section 120.52(8) restricts rulemaking authority to subjects that are directly within the class of powers and duties identified in the enabling statute. It was not designed to require a minimum level of detail in the statutory language used to describe the powers and duties.

. . . .

We consider it unlikely that the Legislature in tended to establish a rulemaking standard based on the level of detail in the enabling statute, because such a standard would be unworkable.

. . . .

A standard based on the sufficiency of detail in the language of the enabling statute would be difficult to define and even more difficult to apply. . . . An argument could be made in nearly any

case that the enabling statute is not specific enough to support the precise subject of a rule, no matter how detailed the Legislature tried to be in describing the power delegated to the agency.[43]

The court concluded that the proper test to determine whether a rule is a valid exercise of delegated authority is a functional test based on the nature of the power or duty at issue and not the level of detail in the language of the applicable statute.[44]

As noted by several commentators, the Florida Legislature passed CS/HB 107 Administrative Procedure Act[45] to overturn the court's decision.[46] The revised APA creates the unfortunate possibility of placing many important environmental rules in jeopardy[47] and, as noted in the First District Court's opinion above, will likely lead to difficulty in developing and applying a standard of judicial review for agency rulemaking. The APA revision granted an "amnesty period" for agencies to continue under existing rules, if the agencies reported a list of rules for which they lack authority to the Legislature by October 1, 1999.[48] Rules so reported would be protected from challenge under the "unauthorized" standard while the Legislature considers whether to grant the specific authority.[49] The Department of Environmental Protection submitted twelve of its own rules and, for good measure, several of the water management districts' rules as well.[50] The Legislature has self-imposed a regulatory review deadline of these "unauthorized" rules to conclude with the end of the legislative session in 2000.[51]

Fleeman v. City of St. Augustine Beach, 728 So.2d 1178, (Fla. 5th DCA, 1998), *cert. granted,* (Fla. 1999)

Petitioner Fleeman requested the district court grant certiorari review of the Circuit Court's dismissal of his petition for certiorari review of a zoning decision involving a small parcel comprehensive plan amendment pursuant to section 163.3187(1)(c), *Florida Stautes*.[52] At issue is whether a small scale plan amendment is a legislative action, reviewable by a declaratory judgement or a quasi-judicial action, subject to certiorari review.[53]

The court, citing *Martin County v. Yusem*[54], noted the Florida Supreme Court has determined all amendments to a comprehensive land use plan are legislative decisions subject to a fairly debatable standard of review.[55] In *Martin*, however, the court had expressly stated that its' opinion did not include small scale plan amendments, noting the legislature had amended § 163.3187 (1)(c) in 1995 to revise those procedures.[56] Petitioner Fleeman argued that these small scale plan amendments are more akin to small-parcel rezoning, affecting a limited number of people and, thus should fall under the strict scrutiny standard of review for quasi-judicial actions under *Board of County Commissioners of Brevard County v. Snyder*.[57]

The Fifth District Court, rejecting the petitioner's argument, held that small scale plan amendments are legislative in nature, stating:

We cannot discern any good reason for the courts to treat small-parcel amendments differently than any other amendments or adoption of comprehensive land use plans. To do so would invite more uncertainty in this still unsettled area of law. How small must the parcel be? How many people must be affected? In all cases, the denial or granting of a small-parcel amendment to a

comprehensive plan is a legislative function. The question being asked is whether to change the plan - a matter of policy consigned to the discretion of the governing body.[58]

The court also granted petitioner's motion for certification to the Florida Supreme Court, certifying that the issue is one of great public importance and in conflict with the Third District Court's ruling on method of review in *Debes v. City of Key West*.[59]

Following this decision, two other Florida courts, the First District Court in *City of Jacksonville Beach v. Coastal Development of North Florida, Inc*.[60], and the Third District Court in *Palm Springs General Hospital, Inc. v. City of Hialeah Gardens[61]*, have considered the question of whether small scale plan amendments are legislative or quasi-judicial in nature.

In *Jacksonville Beach*, the court agreed with the conclusions of *Fleeman*. In discussing those conclusions, the First District Court noted:

[i]t seems to us that all comprehensive plan amendment requests necessarily involve the formulation of policy, rather than its mere application. Regardless of the scale of the proposed development, a comprehensive plan amendment request will require that the governmental entity determine whether it is socially desirable to reformulate the policies previously formulated for the orderly future growth of the community. . . . Such considerations are different in kind from those which come into play in considering a rezoning request. [62]

The court, following the Fifth District Court's lead, certified the question as one of great public importance to the Florida Supreme Court as to whether § 163.3187(1)(c) small scale plan amendments are legislative or quasi-judicial in nature.[63] In *Palm Springs*, the Third Circuit Court cited *Fleeman* and *Jacksonville Beach* in leaving stand a circuit court's denial for writ of certiorari.[64] The court noted that the other two districts had certified the question to the Florida Supreme Court and took the same action.[65] In *William E. Poland Jr., Trust v. The City of Jacksonville*,[66] the First District Court, noting its previous holding in *Jacksonville Beach*, denied a petition for writ of certiorari and once again recertified the question to the Florida Supreme Court.[67]

IV. FLORIDA LEGISLATION

The descriptions below are excerpts from Senate or House Committee summary reports compiled by legislative staff and listed at the Florida Legislature's web site, (www.leg.state.fl.us). Summaries for many of these bills are also available at either the Department of Community Affairs's site, (www.dca.state.fl.us), or the Department of Environmental Protection's web site, (www.dep.state.fl.us). The reader is also encouraged to review the 1999 Environmental and Land Use Section of the Florida Bar's Legislative Report, prepared by Kent Wetherell of Hopping, Green, Sams and Smith, P.A., available at (www.eluls.org/reporter_leg_june1999.html).

CS/CS/HB 17 Community Revitalization
Chapter 99-378, *Florida Statutes*

Creates the Growth Policy Act, establishing a voluntary program for local governments to designate urban infill and redevelopment areas for the purpose of holistically approaching the revitalization of urban centers, and ensuring the adequate provision of infrastructure, human services, safe neighborhoods, educational facilities, job creation and economic opportunity. The act creates an incentive program for areas designated as urban infill and redevelopment areas and creates a matching grant program for local governments.

In addition, the bill:

- Provides exceptions from transportation concurrency requirements, Development of Regional Impact substantial deviation thresholds, and limitations on amendments to comprehensive plans, for certain types of development within urban infill and redevelopment areas. The bill also amends the State Comprehensive Plan, chapter 187, *Florida Statutes*, to establish the preservation and revitalization of urban centers as a goal.
- Adopts several recommendations of the Transportation and Land Use Study Commission: defining "projects that promote public transportation" to include projects which are transit oriented; an exemption from the concurrency requirement for public transit facilities; allows local governments to establish level-of-service standards for general lanes in urbanized areas; allows certain multi-use developments or regional impact to satisfy transportation concurrency requirements by the payment of a proportionate share contribution.
- Exempts comprehensive plan amendments necessary to establish school concurrency from the twice-a-year amendment limitation and clarifies that local governments must comply with a requirement for identifying land use categories appropriate for school siting no later than October 1, 1999.
- Revises the Florida Local Government Development Agreement Act to provide certain assurances to the developer of a brownfield site.
- Authorizes the acquisition by eminent domain of property in an unincorporated enclave surrounded by a community development district.
- Revises the requirements for feasibility studies for proposed incorporations, and allows municipalities to annex unincorporated areas through a single referendum of the residents of the unincorporated area to be annexed.
- Provides procedures by which a county or a combination of counties and municipalities may develop and adopt plans to improve efficiency, accountability, and coordination of delivery of local government services. The bill provides new criteria for feasibility studies that are submitted in conjunction with proposals for incorporation of a municipality.
- Creates the State Housing Tax Credit Program authorizing tax credits to be issued against the state corporate income tax.
- Creates an Urban Homesteading Program within the Governor's Office to make single-family housing properties available to eligible low-income buyers for purchase.
- Amends chapter 190, *Florida Statutes*, regarding community development districts, and includes a number of changes to chapter 290, *Florida Statutes*, relating to Community Development Districts, which were the content of CS/SB 2456. This includes financial disclosure requirements; the imposition and collection of special assessments; revising

bidding and contracting procedures; providing additional functions authorized for CDDs; offering training for new board members; and making it easier to alter district boundaries.

- Authorizes water management districts to advertise bids, RFPs, or other solicitations in a newspaper of general circulation in the county where the principal office of the water management is located at least 7 days before the meeting, instead of the Florida Administrative Weekly.
- The bill includes appropriations of $2.5 million to the Department of Community Affairs for the Urban Infill and Redevelopment Program and $2.5 million for the State Housing Tax Credit Program.

CS/HB 107 Administrative Procedure Act
Chapter 99-379, *Florida Statutes*

Amends sections 120.52 and 120.536, *Florida Statutes*, both of which contain the required standard for the adoption of rules by agencies. Under the amendment to these sections, an agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. Further, the amendment to these sections provides that no agency has authority to adopt a rule only because it is within the agency's class of powers and duties. Statutory language granting rulemaking authority or generally de scribing the powers and functions of an agency can be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

Requires agencies to provide to the Joint Administrative Procedures Committee (JAPC) by October 1, 1999, a listing of each rule, or portion of a rule, that was adopted before the effective date of the bill, which exceeds the rule making standard. The JAPC is required to provide a cumulative listing to the President of the Senate and the Speaker of the House of Representatives. During the 2000 Regular Session, the Legislature will consider whether specific legislation authorizing the identified rules should be enacted. The bill requires agencies to initiate proceedings to repeal rules that were identified as exceeding the rule making authority permitted and for which authorizing legislation does not exist. The JAPC must submit to the Legislature by February 1, 2001, a report identifying those rules pre viously identified as exceeding the rule making standard if rule repeal proceedings have not been initiated. Any rule may be challenged as of July 1, 2001, on the basis that it exceeds the rule making authority permitted by the section.

CS/HB 223 Governmental Conflict Resolution
Chapter 99-279, *Florida Statutes*

Modifies governmental conflict resolution procedures. The purpose and intent of the Florida Governmental Conflict Resolution Act is to promote, protect, and improve the public health, safety, and welfare and to enhance intergovernmental coordination by a conflict resolution procedure that is equitable, expeditious, effective, and inexpensive. The bill provides that it is the intent of the Legislature that conflicts between governmental entities be resolved to the greatest extent possible without litigation.

Defines "local governmental entities" and "regional governmental entities." Places a duty on governmental entities to negotiate with other governmental entities to resolve disputes. The Act

encourages use of the procedures at any time there is conflict. If a governmental entity files suit against another governmental entity, court proceedings on the suit must be abated until the procedural options of the act have been exhausted. The Act specifies types of actions which do not fall under its' procedural requirements, such as some eminent domain actions, administrative proceedings, and where the governing body of the governmental entity finds by a three-fourths vote that the immediate health, safety, and welfare of the public is threatened. Issues such as municipal annexation, service provision areas, siting of hazardous waste facilities, and others, are covered by this Act.

HB 297 Florida Empowerment Zone Act
Chapter 99-342, *Florida Stautes*

Establishes a 10-year economic development program entitled the "Florida Empowerment Zone Program" within the Department of Community Affairs (DCA) in conjunction with the Federal Empowerment Zone Program.

Appropriates $3.5 million to the DCA each fiscal year, for 10 years, beginning FY 1999-2000 for the purpose of funding local government awards under the Federal Empowerment Zone designation. The bill further authorizes DCA to adopt and enforce rules necessary to administer the program.

HB 591 Transportation Department
Chapter 99-385, *Florida Statutes*

Includes the Department of Transportation's (DOT) 1999 legislative proposals as contained in CS/HB 1147. The bill addresses a number of transportation infrastructure financing issues and conforms state law to recent changes in federal transportation law, the Transportation Equity Act for the 21st Century (TEA-21). Many of the provisions in the bill are related to department operations and are intended to allow DOT to operate more efficiently. Major provisions in the bill would:

- Enhance or implement transportation finance programs related to right-of-way and bridge bonds, federal grant anticipation revenue bonds, fixed guideway project bonds, and direct federal loans for railroad rehabilitation and improvement financing.
- Conform DOT's and Metropolitan Planning Organization's (MPO) transportation planning process with new federal requirements, including placing more emphasis on freight and intermodal issues in transportation planning and project selection.
- Improve DOT contract administration process, including increasing the number of construction contract claims that can be resolved by the State Arbitration Board prior to litigation and allowing DOT to contract directly with utility company for right-of-way clearing work necessary for utility relocation.

CS/HB 2067 Environmental Protection
Chapter 99-353, *Florida Statutes*

A companion bill to CS/SB 2282, CS/HB 2067 restates the TMDL requirements. CS/HB 2067 also includes directives on the Northwest Florida Water Management District's permitting program (administered jointly by NWFWMD and FDEP) and authorizes the Secretary of DEP to reorganize the department within current statutory prescribed divisions and in compliance with section 216.292.

The bill also deletes the 3-day nonresident freshwater fishing license. The license and permit fees established under chapter 372 must be reviewed by the Legislature during its regular session every 5 years beginning in 2000.

HB 2151 Petroleum Contamination Site Rehabilitation
Chapter 99-376, *Florida Statutes*

Addresses certain glitches and other problems that have arisen since the passage of chapter 96-277, Florida Laws. This bill allows the Department of Environmental Protection to provide funding for source removal activities. Funding for free product recovery may be provided in advance of the order established by the priority ranking system for site cleanup activities; however, a separate prioritization for free product recovery must be established consistent with the priority ranking system. No more than $5 million may be encumbered from the Inland Protection Trust Fund in any fiscal year for source removal activities conducted in advance of the priority order.

Under the Petroleum Cleanup Participation Program, sites for which a discharge occurred before January 1, 1995, are eligible for rehabilitation funding assistance on a 25-percent cost-sharing basis. This bill provides that if the DEP and the owner, operator, or person otherwise responsible for site rehabilitation are unable to complete negotiations of the cost-sharing agreement within 120 days after commencing negotiations, the DEP shall terminate the negotiation; the site becomes ineligible for state funding under this program; and all liability protections provided under this program are revoked.

CS/CS/SB 662 One-Stop Permitting System
Chapter 99-244, *Florida Statutes*

Authorizes the Department of Management Services to create, by January 1, 2000, a One-Stop Permitting Internet System to provide individuals and businesses with a central source of development permit information. Certain permit fees are waived for applicants who use the One-Stop Permitting System for the first six months a permit is available on-line, and complete applications submitted on the system must be processed within 60 days, rather than 90 days. The bill also creates a Quick Permitting County Program where counties who certify that they employ certain permitting "best management practices", must be designated as Quick Permitting Counties by the Department of Management Services and become eligible for grant money of up to $50,000 per county to connect to the One-Stop Permitting Internet System.

Amends section 403.973, the expedited permitting process, to provide counties and the Office of Tourism, Trade and Economic Development (OTTED) with additional flexibility to certify projects as eligible for expedited permitting in counties where the ratio between the number of

jobs created and the number of Work and Gain Economic Self-Sufficiency Act (WAGES) clients are low. In such counties, the jobs created by the project need not be considered high wage jobs that diversify the state's economy. In addition, OTTED is authorized to delegate to a Quick Permitting County the responsibility for certifying certain projects as eligible for expedited review and the convening of regional permit teams.

Repeals permit information clearinghouse responsibilities of OTTED within the Governor's Office and repeals the Jobs Siting Act, sections 403.950-403.972.

Appropriates $100,000 to the Department of Management Services to fund the administrative costs of establishing the One-Stop Permitting System and $3 million from nonrecurring general revenue to offset revenue lost to agencies as a result of the 6-month permit fee waiver for users of the expedited One-Stop Permitting System. In addition, the Appropriations Act appropriates $550,000 to the Department of Management Services to fund the grant program for One-Stop Permitting Counties.

CS/CS/SB 864 Fish and Wildlife Conservation Commission
Chapter 99-245, *Florida Statutes*

Developed in response to an amendment to the State Constitution known as Revision 5 which was approved by voters in November 1998. This legislation was necessary to provide the details for implementation of the new Fish and Wildlife Conservation Commission.

Creates section 20.331 to establish the Fish and Wildlife Conservation Commission (FWCC). The commission shall appoint an executive director subject to Senate confirmation. The Game and Fresh Water Fish Commission and the Marine Fisheries Commission are transferred to the FWCC using a type two transfer. The Bureau of Environmental Law Enforcement, the Bureau of Administrative Support, and the Office of Enforcement Planning and Policy Coordination within the Division of Law Enforcement at the Department of Environmental Protection (DEP) are transferred to the FWCC. However, the Bureau of Emergency Response, the Office of En vironmental Investigations, the Florida Park Patrol, and any sworn positions classified as Investigator I or Investigator II positions shall remain within a Division of Law Enforcement at DEP. No boating safety related matters shall remain with DEP.

This bill also transfers the Office of Fisheries Management and Assistance Services within the Division of Marine Resources at DEP to the FWCC. A Division of Marine Fisheries is established in the FWCC. The Florida Marine Research Institute is transferred to the Office of the Executive Director at the FWCC and established as a separate budget entity. The Bureau of Protected Species Management is assigned as a bureau to the Office of Environmental Services at the FWCC. The Bureau of Marine Resource Regulation and Development is transferred from DEP to the newly created Division of Aquaculture within the Department of Agriculture and Consumer Services (DACS).

SB 906 Florida Forever Trust Fund
Chapter 99-246, *Florida Statutes*

Creates the Florida Forever Trust Fund to carry out the provisions of sections 259.032, 259.105, and 375.031,*Florida Statutes*. The Department of Environmental Protection will administer the fund. Proceeds from the sale of bonds, except proceeds of refunding bonds, issued under section 215.618, and payable from moneys transferred to the Land Acquisition Trust Fund under section 201.15(1)(a), shall be deposited into the fund. The fund shall not exceed $3 billion and is to be distributed according to the provisions of section 259.105(3), and recipients shall spend the funds within 90 days after the department initiates the transfer. The bond resolution adopted by the governing board of the Division of Bond Finance of the State Board of Administration may contain additional provisions governing disbursement of the bond proceeds.

CS/CS/SB 908 Florida Forever Program
Chapter 99-247, *Florida Statutes*

Authorizes the issuance of up to $300 million in bonds in FY 2000-2001 and thereafter with debt service paid from documentary stamp tax revenues with total debt service not exceeding $300 million for all bonds issued. The amount of debt service for the first fiscal year in which bonds are issued may not exceed $30 million. The amount of debt service is limited to an additional $30 million in each fiscal year in which bonds are issued. Funds will be distributed as follows:

- 35 percent ($105 million) for water management district (WMD) projects. Over the life of the program, at least 50 percent of the funds must be used for land acquisition. Projects will be selected and approved by WMD governing boards from a 5-year work plan.
- 35 percent ($105 million) for Conservation and Recreation Lands (CARL)-type projects. Up to 10 percent of the funds may be used for capital project expenditures. Projects will be pri oritized and recommended by the Acquisition and Restoration Council but must be approved by the Board of Trustees of the Internal Improvement Trust Fund (Trustees).
- 24 percent ($72 million) for the Florida Communities Trust (FCT). Eight (8) percent ($5.76 million) of the FCT funding will be used for the Florida Recreation Development Assistance Program (FRDAP). Thirty (30) percent of the FCT funding ($21.6 million) will be used in SMSA's with one-half of that amount being used in built-up areas, while at least five (5) percent ($3.6 million) must be used for recreational trails.
- 1.5 percent ($4.5 million) each for the Division of Recreation and Parks, Fish and Wildlife Conservation Commission (FWCC), and Division of Forestry for the acquisition of additions and inholdings.
- 1.5 percent ($4.5 million) for the Greenways and Trails Program.

SB 934 Coastal Zone Protection Act
Chapter 99-211, *Florida Statutes*

Eliminates the 5-year cumulative total provision from the definition of "substantial improvement" in the Coastal Zone Protection Act of 1985, sections 161.52-161.58. The effect of this bill is to impose less restrictive requirements to determine when "substantial im provements" have been made to existing coastal structures which do not meet elevation and other building code requirements. Stricter building code requirements are not imposed unless a single improvement or repair equals or exceeds 50 percent of a structure's market value.

CS/CS/SB 1270 Motor Vehicles and Highway Safety
Chapter 99-248, *Florida Statutes*

This bill implements numerous changes to laws relating to programs administered by the Department of Highway Safety and Motor Vehicles (DHSMV) such as:

- Amends sections 325.2135 and 325.214 to allow DHSMV to extend the current emissions inspection contracts for a period of time sufficient to implement new contracts resulting from competitive proposals. DHSMV must enter into one or more contracts by June 30, 2000. The contracts must provide for an inspection program in which vehicles 4 model years and older would be inspected every 2 years for hydrocarbon and carbon monoxide emissions (current testing procedures.) The inspection fee is capped at $19.
- Provides contracts may not exceed 7 years. In addition, contracts must provide that, after 4 years, DHSMV reserves the right to cancel a contract at any time before the conclusion of the contract term upon 6 months notice to the contractor. The bill also authorizes DHSMV to amend the contracts if the Legislature enacts legislation changing the number of vehicle model years subject to inspection. Finally, this bill also authorizes DHSMV to amend or cancel the contracts upon statewide implementation of clean fuel requirements promulgated by the United States Environmental Protection Agency.

CS/CS/SB 1566 Commerce
Chapter 99-251, *Florida Statutes*

This is a general bill creating numerous initiatives and programs in order to foster economic development in Florida.

1. Enterprise Florida Restructuring

- Revises the organizational structure of Enterprise Florida, Inc. (EFI) through the elimination of the International Trade and Economic Development Board, the Capital Development Board, the Technology Development Board, and the Enterprise Florida Nominating Council. EFI is authorized to create advisory committees or similar organizations to assist in carrying out its mission. At a minimum, EFI must, by August 1, 1999, establish advisory committees on international business and on small business, comprised of individuals with expertise in the respective fields.
- Amends section 288.9015, *Florida Statutes*, governing the mission of EFI, to specify that EFI shall aggressively market Florida's rural communities and distressed urban communities as locations for potential investment, assist in the retention and expansion of existing businesses in these areas, and assist these areas in the identification and development of new economic development opportunities for job creation. EFI is also charged with assessing, on an ongoing basis, Florida's competitiveness as compared to other states, and with in corporating the needs of minority and small businesses into its core functions of economic, international, and workforce development.

2. Economic Development Initiatives

- Certified Capital Company Act: Expands the definition of the term "transferee" for purposes of allocating unused premium tax credits under the Certified Capital Company (CAPCO) Act. The revised definition enables such credits to be utilized by a subsidiary of the certified investor; by an entity 10 percent or more of whose outstanding voting shares are owned by the certified investor; or by a person who directly or indirectly controls, is con trolled by, or is under the common control with the certified investor. The bill also specifies that the amount of tax credits vested under the CAPCO Act shall not be considered in rate-making proceedings involving a certified investor. The primary purpose of the CAPCO program, as stated in section 288.99, is expanded to include increasing access to capital by minority-owned businesses and businesses located in Front Porch communities, enterprise zones, certain distressed urban and rural areas, and historic districts. In addition, the Black Business Investment Board is specifically identified in the bill as an "early stage technology business" and as a "qualified business" for the purpose of receiving investments by CAPCOs.
- Qualified Target Industry (QTI) Tax Refund Program: Revises the QTI Program to reduce certain requirements and restrictions applicable to the tax refunds, and to establish a statutory cap on the state share of payable refunds of $24 million for fiscal year 2000-01 and $30 million for future fiscal years. The measure also authorizes OTTED to approve for tax refund an expansion of an existing business in a rural community or an enterprise zone that results in a net increase in employment of less than 10 percent. The term "rural community" is defined for purposes of the QTI program as a county with a population of 75,000 or less, a county with a population of 100,000 or less that is contiguous to a county with a population of 75,000 or less, or a municipality within either of such counties.
- Urban High-Crime Area and Rural Job Tax Credit Programs: Specifies that call centers and similar customer service operations are eligible businesses under the two job tax credit programs under sections 212.097 and 212.098, and authorizes specified retail businesses to be eligible under the urban high-crime program. In addition, OTTED is authorized to recommend to the Legislature additions to or deletions from the list of standard industrial classifications used to determine an eligible business for purposes of both programs.
- Enterprise Zone Pilot Project: Creates section 290.0069, to direct OTTED to designate a pilot project within one enterprise zone. Eligibility criteria are specified for the pilot project/enterprise zone, including, among others, that the pilot project area contains a diverse cluster or grouping of facilities or space for a mix of retail, restaurant, or service related industries. Beginning December 1, 1999, no more than four businesses in the project area may claim a credit for taxes due under chapters 212 and 220. Credits must be computed as $5,000 times the number of full-time employees of the business and $2,500 times the number of part-time employees of the business, and the total amount of credits that may be granted under this section annually is $1 million. This section further provides for prorated credit amounts in the event of excess demand. This section specifies eligibility requirements for businesses, including, among others, that the business has entered into a contract with a developer of a diverse cluster or grouping of facilities or space located in the pilot area, governing lease of commercial space in a facility. This section stands repealed on June 30, 2010.

- Economic Development Property Tax Exemptions: Amends sections 196.012 and 196.1995, to allow a business sited on property that is annexed into a municipality to continue receiving the ad valorem tax exemption that had been provided by the county.

3. Rural Economic Development

Encourages economic development in Florida's rural communities. Specifically, the bill:

- Provides that job creation and economic development shall be considered as factors in future land use plans and in designation of industrial use, notwithstanding existing population or low-density population.
- Provides that regional planning councils shall have a duty to assist local governments with economic development activities, and authorizes regional planning councils to use their personnel, consultants, or other assistants to help local governments with economic development activities.
- Codifies the Rural Economic Development Initiative (REDI) within OTTED and provides its duties and responsibilities - including coordinating and focusing the efforts and resources of state and regional agencies on the problems which affect the fiscal, economic, and community viability of Florida's economically distressed rural communities.
- Authorizes OTTED to allow a rural area of critical economic concern to retain repayments of principal and interest under the Rural Community Development Revolving Loan Fund if certain conditions are met.
- Creates the Rural Infrastructure Fund within OTTED, under which grants are authorized for infrastructure in support of specific economic development projects, including certain storm water systems, electrical, telecommunications, natural gas, roads, and nature based tourism facilities.
- Authorizes the provision of grants to rural communities to develop and implement strategic economic development plans.
- Directs the Florida Fish and Wildlife Conservation Commission to provide assistance, including marketing and product development, related to nature-based recreation for rural communities.
- Allows a rural electric cooperative to provide any energy or nonenergy service to its membership.
- Authorizes the Governor to waive the eligibility criteria of any program or activity administered by OTTED or EFI, to provide economic relief to a small community that has been determined to be in an economic emergency.
- Amends section 378.601, to expand the circumstances under which a heavy mineral mining operation that annually mines less than 500 acres and whose proposed consumption of water is 3 million gallons of water per day or less may not be required to undergo a development of regional impact (DRI) review. The bill broadens the scope of this DRI exemption to include certain cases in which the operator has received a development order under section 380.06(15)

4. Urban Economic Development

To assist in administration of the Front Porch Florida initiative, the Office of Urban Opportunity is created within the Office of Tourism, Trade, and Economic Development. The bill provides that the director of the urban office shall be appointed by and serve at the pleasure of the Governor. The measure also provides for the creation of an Institute on Urban Policy and Commerce as a Type I institute under the Board of Regents at Florida Agricultural and Mechanical University, the stated purpose of which is to improve the quality of life in urban communities through research, teaching, and outreach activities.

5. Community Assistance Initiatives

- Local Government Financial Technical Assistance Program: Created in section 163.055, provides technical assistance to municipalities and special districts to enable them to implement workable solutions to financially related problems. Under the program, the Comptroller is directed to enter into contracts with providers who shall, among other requirements, assist municipalities and independent special districts in developing alternative revenue sources, and assist them in the areas of financial management, accounting, investing, budgeting, and debt issuance.
- Florida Interlocal Cooperation Act: Amends section 163.01 to specify that a local self-insurance fund established under this section may financially guarantee certain bonds or bond anticipation notes issued or loans made under the statute.
- Small School District Stabilization Program: Created to provide technical and financial assistance to maintain the stability of the educational program in the school districts in rural communities that document economic conditions or other significant influences that negatively impact the district. As part of the program, the Office of Tourism, Trade, and Economic Development may consult with Enterprise Florida, Inc., on development of a plan to assist the county with its economic transition. The bill authorizes grants to the school districts, effective July 1, 2000, which may be equivalent to the amount of the decline in projected revenues.
- Discretionary Per-Vehicle Surcharge: Amends section 218.503 to provide that the governing authority of any municipality with a resident population of 300,000 or more, and which has been declared to be in a state of emergency within a specified period, may impose a discretionary per-vehicle surcharge of up to 20 percent on the gross revenues of the sale, lease, or rental of space at public parking facilities within the municipality.

CS/CS/SB 1672 Water Resources
Chapter 99-143, *Florida Statutes*

Provides a finding that the Comprehensive Review Study of the Central and Southern Florida Project (Restudy) is important for restoring the Everglades ecosystem and sustaining the environment, economy, and social well-being of South Florida. It is also the intent of the Legislature to facilitate and support the Restudy through a process concurrent with federal government review and congressional authorization. It is further the intent of the Legislature that all project components be implemented through the appropriate processes of chapter 373, *Florida Statutes*, and be consistent with the balanced policies and purposes of that chapter,

specifically section 373.016. Clarification is provided that the bill is not intended in any way to limit federal agencies or Congress in the exercise of their duties and responsibilities.

CS/SB 2282 Florida Watershed Restoration Act
Chapter 99-223, *Florida Statutes*

Provides a process for restoring Florida's waters through the establishment of total maximum daily loads (TMDLs) for pollutants of impaired water bodies as required by the federal Clean Water Act.

Creates section 403.067 to provide for the establishment and implementation of TMDLs. The Department of Environmental Protection (DEP) is to be the lead agency in administering and co ordinating the implementation of this program and shall coordinate with local governments, water management districts, the Department of Agriculture and Consumer Services, local soil and water conservation districts, environmental groups, regulated interests, other appropriate state agencies and affected pollution sources in developing and executing the TMDL program. The DEP shall establish a priority ranking and schedule for analyzing such waters. The list, priority ranking, and schedule cannot be used in the administration or implementation of any other regulatory program. The list, priority ranking, and schedule must be made available for public comment, but they are not subject to challenge under chapter 120, nor are they to be adopted by rule. The DEP must adopt by rule a methodology for determining those waters which are impaired. Such rules shall also set forth water quality analysis requirements, approved methodologies, data modeling, and other appropriate water quality assessment measures.

By February 1, 2000, the DEP is required to submit a report to the Governor, president of the Senate, and the Speaker of the House of Representative containing recommendations, including draft legislation, for any modifications to the process for allocating TMDLs. The recommendations must be developed by the DEP in cooperation with a technical advisory committee.

Other Recent Developments of Particular Importance

Florida, Georgia and Alabama have made significant progress in resolving a decade old water war. Recent developments were reported in two September 15, 1999 Wall Street Journal editions[68] noting that each state elected new governors last year and two of the three negotiation teams have new appointed staff. The articles note that while significant disagreements remain, negotiators are confident they will settle their differences by year's end.

The Department of Community Affairs is conducting a state-wide growth-management survey. Available directly from the agency or online at (www.dca.state.fl.us) the survey will be used as part of the agency's preparation for developing legislative proposals for the 2000 session.

---

[*] The Recent Developments Section was researched and written by I. Weston Wheeler, Research Editor, J.D., The Florida State University College of Law (expected 2001).Return to text.

[1] Nancy E. Stroud, Note, *A Review of* Del Monte Dunes v. City of Monterey *and its Implications for Local Government Exactions*, 15 J. LAND USE & ENVTL. L. 191 (1999).Return to text.

[2] *See Del Monte Dunes*, 119 S. Ct 1624.Return to text.

[3] Id. at 1635. For additional information on *Del Monte Dunes*, see Stroud, *supra* note 1, and Dwight H. Merriam,*The United States Supreme Court's Decision in* Del Monte Dunes: *The Views of Two Opinion Leaders* (Parts 1 and 2), ZONING AND PLANNING LAW REPORT, Vol. 22, No. 7, 8 (1999).Return to text.

[4] *See Friends of the Earth*, 149 F.3d at 305.Return to text.

[5] *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc., 956 F. Supp 588 (D.S.C. 1997).Return to text.

[6] *See Friends of the Earth*, 149 F.3d at 306-7.Return to text.

[7] 118 S. Ct. 1003 (1998).Return to text.

[8] *See Friends of the Earth*, 149 F.3d at 306. Return to text.

[9] *Id.* at 306-7 (citations omitted).Return to text.

[10] *See* Daily Environment Report, 12 DEN (BNA) S-29 (1999).Return to text.

[11] *See id.*Return to text.

[12] 484 U.S. 49 (1987).Return to text.

[13] *See* Daily Environment Report, *supra* note 10, at S-29.Return to text.

[14] *See id.*Return to text.

[15] *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 119 S. Ct. 1111 (1999).Return to text.

[16] *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 120 S. Ct. 32 (1999).Return to text.

[17] *See Gatlin Oil Co.*, 169 F.3d at 208-9.Return to text.

[18] *See id.* at 210.Return to text.

[19] *See id.* at 211-2.Return to text.

[20] *See* at 212.Return to text.

[21] *See* at 213.Return to text.

[22] *See Avondale*, 170 F.3d at 694.Return to text.

[23] *See id.* at 693.Return to text.

[24] *See id.* at 693-4.Return to text.

[25] *See id.* at 694.Return to text.

[26] *See General Motors Corp.*, 168 F.3d at 1378.Return to text.

[27] *See id.* at 1379.Return to text.

[28] *See id.* at 1380.Return to text.

[29] *See id.* at 1383.Return to text.

[30] *American Trucking Ass'ns, Inc.*, 175 F.3d at 1034.Return to text.

[31] *American Trucking Ass'ns, Inc.*, 195 F.3d 4 (D.C. Cir. 1999).Return to text.

[32] *See id.*Return to text.

[33] 195 F.3d at 7 (D.C. Cir. 1999).Return to text.

[34] *See id.*Return to text.

[35] *See Tomoka Land Co.*, 717 So. 2d at 72.Return to text.

[36] *See id*. at 75.Return to text.

[37] FLA. STAT. ch. 373 (Supp. 1998).Return to text.

[38] *See Tomoka Land Co.*, 717 So. 2d at 78.Return to text.

[39] *Id.*; *see also* FLA. STAT. § 373.413 (Supp. 1998).Return to text.

[40] *See id.* at 75- 6.Return to text.

[41] *See id.* at 76.Return to text.

[42] *See id.*; *see also* FLA. STAT. § 120.52(8) (Supp. 1998).Return to text.

[43] *Id.* at 79- 80.Return to text.

[44] *See id.* at 80.Return to text.

[45] *See infra* Part IV.Return to text.

[46] *See* Lawrence E. Sellers Jr., *APA: Legislature Clarifies Agency Rulemaking Authority*, SECTION REPORTER: 1999 LEGISLATURE EDITION (Fla. B. Ass'n. Envtl. & Land Use Sec.), June 1999 (visited Nov. 17, 1999) (www.eluls.org/june1999_sellers_l.html); Terrell K. Arline, *The Environmental Impacts of the Administrative Procedures Act Bill*, SECTION REPORTER: 1999 LEGISLATURE EDITION (Fla. B. Ass'n. Envtl. & Land Use Sec.), June 1999 (visited Nov. 17, 1999) (www.eluls.org/june1999_arline_l.html). Return to text.

[47] *See id.*Return to text.

[48] *See* M. Chistopher Bryant, *DEP Reports to Legislature on Unauthorized Rules*, FLORIDA ENVIRONMENTALCOMPLIANCE UPDATE, November 1999, at 5.Return to text.

[49] *See id.*Return to text.

[50] *See id.*Return to text.

[51] *See id.*Return to text.

[52] *See Fleeman*, 728 So. 2d at 1179; *see also* FLA. STAT. § 163. 3187(1)(c) (Supp. 1998).Return to text.

[53] *See Fleeman*, 728 So. 2d at 1179.Return to text.

[54] 690 So. 2d 1288 (Fla. 1997).Return to text.

[55] *See Fleeman*, 728 So. 2d at 1180.Return to text.

[56] *See id*. (citing *Martin*, 690 So. 2d at 1293, n.6).Return to text.

[57] 627 So. 2d 469 (Fla. 1993).Return to text.

[58] *Id.* at 1180.Return to text.

[59] 690 So. 2d 700 (Fla. 3rd DCA 1997).Return to text.

[60] 730 So. 2d 792 (Fla. 1st DCA, 1999).Return to text.

[61] 740 So. 2d 596 (Fla. 3rd DCA, 1999).Return to text.

[62] *Jacksonville Beach*, 730 So. 2d at 794.Return to text.

[63] *See id.* at 795.Return to text.

[64] *See Palm Springs General Hospital, Inc.*, 740 So. 2d at 596 (Fla. 3rd DCA 1999).Return to text.

[65] *See id.*Return to text.

[66] 743 So. 2d 1176 (Fla. 1st DCA. 1999).Return to text.

[67] For a thoughtful analysis on the question of the proper standard of review, see Kent Wetherell, *Small Scale Plan Amendments: Legislative or Quasi-Judicial in Nature*?, Fla. B.J., Apr. 1999, at 80.Return to text.

[68] Will Pinkston, *Hope is Seen For Resolving Water Battle*, WALL ST. J. (Fla. Journal), Sept. 15, 1999, at F1; Will Pinkston, *Signs of Hope In Battle Over Water*, WALL ST. J. (S.E. Journal), Sept. 15, 1999, at S1; Will Pinkston;*Summit Seeks to Avoid Future Problems*, WALL ST. J. (S.E. Journal), Sept. 15, 1999, at S4.Return to text.