

**M E M O R A N D U M**

**To:** Mayor Schneier and Town Commission  
**CC:** Tom Harmer, Town Manager  
**From:** Maggie D. Mooney, Esq., Town Attorney  
**Date:** September 19, 2022  
**Subject:** **Regulation of Canal Navigability - Vessel and Dock Size**

At the June 6, 2022, Town Commission meeting, the Town Attorney was asked whether Town of Longboat Key (Town) is permitted to regulate the size of vessels that are docked at private properties in the canals located within the Town’s jurisdictional boundaries. The question stems from several citizen complaints regarding the docking of large vessels that extended from canal front docks into the center (navigable) area of the canal. The complainants contend that that the envelope of a particular dock plus the docked large vessel extended too far into the navigable mid-section of the canal. The complainants asserted that the dock structure plus the vessel created visual, navigational and safety concerns for other canal front neighbors and boaters attempting to traverse the canal and access their own riparian properties. The Town Commission asked what regulatory authority does the Town have over the issues raised. The question implicates several legal issues primarily those involving municipal pre-emption, navigability, and private property owner’s riparian rights.

Florida law pre-empts local governments from regulating vessel anchoring, except in certain limited circumstances. The preemption, however, does not appear to prevent a local government from regulating vessel size for a valid public purpose like preserving navigation for the public and other surrounding riparian property owners. Florida law provides that the riparian rights of the canal front property owners are qualified rights subordinate to the public’s right to navigation, and concurrent rights of the public as to bathing, fishing, view and the like. A canal front property owner may not obstruct or unreasonably impede navigation or commerce in a way which burdens others. Accordingly, the Town may regulate vessel size in canals as long as the Town’s regulation is non-discriminatory and premised upon the preservation of navigability. Further, any Town regulation should also be balanced in such a way so as not result in total deprivation of a canal property owner’s riparian right to boat and access their respective property.

**A. Statutory Pre-Emption – Chapter 327, Florida Statutes**

Florida's Vessel Safety Laws are set forth in Chapter 327, Florida Statutes. The Chapter regulates the operation, equipment and all other matters relating to the operation of vessels upon the waters of the state. Contained in the chapter is the following preemption enumerated in Florida Statutes 327.60(2) which provides, in pertinent part the following:

*(2) This Chapter and Chapter 328 do not prevent the adoption of any ordinance or local regulation relating to the operation of vessels except that a county or municipality may not enact, continue in effect, or enforce any ordinance or local regulation:*

...

*(d) Discriminating against personal watercraft;*

...

*(f) Regulating the anchoring of vessels outside the marked boundaries of mooring fields as provided in s. 327.40, except for:*

- 1. Live-aboard vessels; and*
- 2. Commercial vessels, excluding commercial fishing vessels;<sup>1</sup>*

*(Emphasis added.)*

See, Fla. Stat. 327.60 (2).

Courts have repeatedly upheld the authority of local regulation of vessels by local governments so long as there is a valid public safety purpose for such regulation.<sup>2</sup> It does not appear that the Town is preempted from regulating vessel size within the canals of its jurisdiction when the regulation's purpose is to further a legitimate public purpose. However, Florida Statutes restricts local governments from being discriminatory in their

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<sup>1</sup> The preemption list also prohibits local regulation of: vessel safety standards, marine sanitation devices, the regulation of Intercoastal waterways, ordinances discriminating against airboats, engine or exhaust noise.

<sup>2</sup> See e.g., *Lee County v. Lippi*, 662 So.2d 1304 (Fla. 2d DCA 1995) (local government authorized to regulate personal watercraft); Attorney General opinion that Village of Royal Palm Beach was authorized to regulate resident vessels within a privately-owned, artificial canal because the municipality expends funds for patrol, regulation and maintenance within the waters of the municipality), *Fla. Beach Adver. LLC v City of Treasure Island*, 511 F. Supp. 3d 1255 (Fla. M.D. 2001) (upholding a municipal sign code ordinance against a boater with a large advertisement during a boat parade); AGO 90-60, July 30, 1990; Attorney General Opinion finding it permissible for Alachua County to impose a curfew and create vessel exclusion area for airboats if the purpose was for public safety, but not for noise abatement, 2009 FLA. AG Lexis 77; *But see*, City of Key West ordinance prohibiting mooring of live-aboard vessels struck down, noting municipal authority to regulate and presumption in favor of upholding ordinances, but "no foundation in reason or necessity" for that particular ordinance. See, *Dennis v. Key W.*, 381 So. 2d 312 (1980).

application of regulations to particular vessels and restricts the subject matter of anchoring, as outlined in Florida Statutes 327.60(2)(f). Consequently to effectively regulate this subject matter, the Town's focus and legitimate government interest should be in ensuring and protecting proper navigability within the Town's canals, rather than restricting any particular type or size of vessel or imposing an anchoring limitation. The Town Commission can, if it so chooses, regulate canal navigation and restrict vessel encroachments (due to size) and structural encroachments (focusing on dock and boat lift size) as it appears that such a regulation would not run afoul of the pre-emptions in Florida Statutes 327.60. A decision to change Town Code in this manner is a policy decision for the Town Commission.

## **B. Riparian Rights**

Under Florida law, riparian rights are waterfront property rights established by common law and further memorialized in Florida Statutes. Specifically, Florida Statutes defines such rights as follows:

*Riparian rights are those incident to land bordering upon navigable waters. They are rights of ingress/egress, boating, bathing, fishing and such others as may have been defined by law. Such rights are not of a proprietary nature. They are rights inuring to the owner of the riparian land but are not owned by him or her. They are appurtenant to and are inseparable from the riparian land. The land to which the owner holds title must extend to the ordinary high watermark of the navigable water in order that riparian rights may attach*

Fla. Stat. 253.141(1).

In addition to the above statutory definition, the Florida Supreme Court has stated that at common law, riparian rights also include: "(1) general use of the water adjacent to the property, (2) to "wharf out" to navigability, (3) to have access to navigable waters and (4) the right to accretions. *5F, LLC v. Hawthorne*, 317 So. 3d 220, 223 (Fla. 2d DCA 2021), *citing Hayes v. Bowman*, 91 So. 3d 795, 799 (Fla. 1957); *see also, Game and Fresh Water Com'n v. Lake Islands*, 407 So. 2d 189, 191-192 (Fla. 1981).

Generally speaking, riparian rights are qualified waterfront property owner rights that permits the property owner use of the water and shore along their properties. *See, Column: Administrative Laws: Local Government Riparian Rights and Authority*, 70 Fla. Bar. J. 87, 87 (1996). They are not, however, boundless. *Id.* A private riparian's rights are limited by duties to other riparians, by the public's rights in navigable waters, and by the regulatory and proprietary rights of governmental units in navigable waters. *Id.*; *see also, AG 90-37* (1990).<sup>3</sup>

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<sup>3</sup> This is an Attorney General Opinion on whether the City of West Palm Beach had the right to regulate dock location and construction, reciting the general rule that the owner of a riparian property is entitled to construct and maintain a dock, subject to the paramount rights of the public and the private rights of other riparian landowners. The Attorney General opined that the City was authorized to enact regulations dealing with dock location and construction but that a complete prohibition or limitation of the exercise of the common law riparian right would subject the City to liability for just compensation for a taking of rights.

*Game and Fresh Water Com'n v. Lake Islands*, is a leading Florida Supreme Court case on riparian rights and usages. *Game and Fresh Water Com'n v. Lake Islands*, 407 So. 2d 189(Fla. 1981). The case involved a challenge to an administrative rule in which a state agency completely prohibited the use of motorboats, including airboats, on a lake during duck hunting season. The trial court found the rule unreasonable and arbitrary, as applied to the island riparian owner appellants, because it resulted in a complete denial of their right to access their property. In striking down the regulation the Court discussed riparian rights and stated, in pertinent part:

*Subject to the **superior rights of the public as to navigation and commerce, and to the concurrent rights of the public as to fishing and bathing and the like,** a riparian owner may erect upon the bed and shores adjacent to this riparian holdings bath houses, wharfs or other structures to his business or pleasure; but **these privileges are subject to the rights of the public to be enforced by proper public authority or by individuals who are specially and unlawfully injured. Riparian owners have no exclusive right to navigation in or commerce upon a navigable stream opposite the riparian holdings and have no right to use the water or land under it as to obstruct or unreasonably impede lawful navigation and commerce by others or so as to unlawfully burden or others in their lawful rights.**"* *Id.* at 191

*(Emphasis added).*

The Court further stated "(a) waterway is often the street or public way... When one denies its use to a property owner, one denies him access to his property." Thus, a complete denial of ingress/egress, as in the case of an island, was actionable, but a ban on all boats during duck hunting season as applied to the general public was permissible. *See id.*

To the extent the Town develops an ordinance regulating canal navigability, the Town needs to be mindful of the impact the regulation has on individual riparian property owners in order to avoid takings type challenges.<sup>4</sup> Regulations that prohibit vessel usage outright will likely be struck down and/or subject to the Town to potential takings or Bert Harris Act claims.<sup>5</sup> *See*, Ch. 70. Fla. Stat. Any regulation developed by the Town should attempt to balance the public safety and navigability concerns with the riparian property owners rights.

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<sup>4</sup> The Takings Clause of the 5<sup>th</sup> Amendment to the U.S. Constitution (made applicable to the States through the 14<sup>th</sup> Amendment) prohibits the government from depriving an owner of private property for public use without "just compensation." Additionally, Art. X, § 6(a) of the Florida Constitution provides: "No private property shall be taken except for a public purpose and with full compensation therefor paid."

<sup>5</sup> In addition to the traditional constitutional takings, Chapter 70, Florida Statutes, entitled "The Private Property Rights Protection Act," (also know as the Bert Harris Act) recognizes a cause of action for private property owners against the government, aside and apart from a taking under State or United States Constitution, where a law or regulation inordinately burdens, restricts or limits private property rights.

### C. Town Code Regulations – Structures Over Water Dock

Currently the Town Code, Section 158.099, Structures over Water regulates the projection of certain structures (boat docks, accessory dock structures, boat lifts, etc.) over water. As mentioned above, the Town may amend this existing section of Town Code to require that all items protruding from the landward edge of canal front properties (inclusive of dock structures and vessels) be limited in terms of how far they collectively extend into the canal. Such a regulation would have the purpose of protecting navigability through the center (navigable) area of the canal. Such a regulation would provide flexibility for the riparian property owner to either utilize existing dock structures and vessels in such a manner that does not impair navigability, or modify their structures or vessel selection to adjust to such restrictions. Several local governments have similar local regulations in place.

Sarasota County Ordinance § 54-656 regulates the size of the dock structure, moored vessel or combination of the dock and vessel's extension to "more than 25 percent of the width of any waterway."<sup>6</sup> The County's ordinance provides for administrative authority to exceed such 25 percent limitation as an exception when unique, site specific conditions exist. The exception is not obligatory on the County and only authorizes an exception to the minimum necessary to provide access to the waterway once certain conditions are met (i.e., consideration is given to the property location, construction will meet other County Code technical requirements, the dock will not impede other adjacent property owners from constructing a dock, no alternative dock design exists, and the dock length is the minimum necessary).

City of Sarasota, Section VII-1302 (3), similarly has a restriction on the extension of docks and vessels into a waterway. The City's Ordinance prohibits the dock structure or vessel from projecting into "the middle 50 percent of any waterway."<sup>7</sup>

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<sup>6</sup> In relevant part, Sarasota County Ordinance Sec. 54-656- Construction and Technical Standards, states:

- (1) Permits shall be issues only for structures associated with Water-Dependent Activities. Water-dependent structures (including Docks, Piers, mooring piles, Davits, Boat Lifts and other similar structures) and vessels shall confirm to the following site criteria:
  - (a) No structure, moored vessel, or combination thereof may occupy more than 25 percent of any waterway. However, where unique site-specific conditions as described below occur, the Administrator or Authority has the authority, but not the obligation, to grant relief from the 25 percent width of waterway criteria.

<sup>7</sup> City of Sarasota, Sec. VII-1302 (3), provides:

- (3) No tie-off piling, vessel or boat lift shall be placed, or docked so that any portion thereof projects into the middle 50 percent of any waterway.

City of Naples, Section 58-121 (12), also includes a restriction on the allowable extension of a dock moored vessel or boat lift into a waterway, and provides a maximum width that cannot exceed “25 percent of the width of the waterway adjacent to the subject property.”<sup>8</sup> See also, Section 56-93 (5) which reiterates that the “combined width of the pier, pilings, lift and vessel to be moored to the pier does not exceed 25 percent of the distance across the waterway at the point where the pier is located.” For irregular shorelines, the City of Naples provides for a reduction greater than 25 percent to ensure that the minimum centerline channel width of 50% of the waterway is maintained to protect navigation in channels.

Similar to the above listed local governments, the Town could similarly amend Section 158.099, Structures Over Water, to include “moored vessel” into the maximum projection limits currently provided for in the Town Ordinances. A full copy of the Section 158.099 of Town Code is attached as Exhibit 1. Such an amendment could state as follows:

**158.099 Structures over water.**

...

(4) Maximum projection into the water.

(a) For properties abutting a canal, lagoon, bayou or pass, a dock, boat lift, moored vessel, piling or pile-mounted davit shall project into the water no more than 30 feet, measured from the mean high-water line, or 30 percent of the width of the navigable waterway, whichever is less. A new dock, boat lift, vessel, piling or pile-mounted davit shall not be located directly across from existing structures over water in a manner that creates a navigational hazard or interference with another vessel.

The above text is just one available option for the Town Commission to consider. Because the Section 158.099 of the Town Code is included in the Land Development Code, any ordinance amendment to this section of the Town Code will also need to be forwarded to the Planning and Zoning Board for consideration and input in the adoption process.

**D. Other Means of Enforcement**

**1. Homeowner Association Covenants**

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<sup>8</sup> City of Naples, Sec. 58-121 (12) provides:

(12) No combination of pier or dock moored vessel, or boat lift shall exceed 25 percent of the width of the waterway adjacent to the subject property. If no vessel beam is specified in the permit application a beam of 13 feet shall be assumed. In consideration of the fact that some waterways have irregular, nonparallel shorelines, the aforementioned 25 percent may have to be reduced in order to ensure that a minimum centerline channel width of 50 percent of the waterway width is maintained for the length of the subject property. Navigation in both marked and unmarked channels shall not be hindered.

Many of the complainants that brought the issues of canal navigability to the Town reside within a homeowners association subdivision with deed restrictions (“HOA”). An HOA has the authority to privately create and enforce private covenants that run with the land and can also regulate vessels that dock within their private subdivision. Accordingly, to the extent canal front properties are located within a HOA, such HOAs are able to develop appropriate, private regulations relating to dock and vessel sizes that would be applicable to the properties within their subdivision.

## **2. Privately Initiated Lawsuit**

Regardless of whether the Town advances a change to the Town Code, individual property owners who have their navigation impaired can retain their own legal counsel and explore whether they have standing to pursue private nuisance claims.<sup>9</sup> In such instances, neighboring property owners adversely impacted by an obstructive large vessel may be able to prove an injury in fact to bring such a claim. The Town could defer to the neighbors to explore their legal options separately.

## **3. Enforcement Under Florida Statutes 327.44, Interference with Navigation.**

To the extent the Town’s Police Department finds that there is an interference with navigation within the Town’s canals, the Town could enforce the following statute, which allows for the removal, relocation and recovery of costs where a moored vessel constitutes a navigational hazard. In relevant part, subsection (2) provides:

*(2) A person may not anchor, moor, or allow to be anchored or moored, except in case of emergency, or operate a vessel or carry on any prohibited activity in a manner which unreasonably or unnecessary constitutes a navigational hazard or interference with another vessel. Anchoring or mooring under bridges or in adjacent to heavily travel channels constitutes interference if unreasonable under the prevailing circumstances.*

Fla. Stat. 327.44(2)

As the Town Commission may recall, the Town’s Police Department did not find the circumstances complained by the residents triggered the above referenced statute. However, if there was such a determination by the Police Department in the future, this statutory provision and remedy is available.

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<sup>9</sup> Compliance with a zoning ordinance does not absolve a property owner from a nuisance claim. A lawful activity may be conducted in such an unreasonable manner that it can constitute a nuisance. See, *Lake Hamilton Lakeshore Owners Ass’n v. Neidlinger*, 182 So. 3d 738 (Fla. 2d DCA 2015).

## **E. Conclusion**

In summary, the Town Commission has a legitimate government interest in ensuring navigability within the Town's canals and may regulate the structures and vessels within the Town's canals for that public purpose. Any regulation advanced by the Town needs to be cognizant of private property riparian rights. The Town currently regulates dock structure projections over water and could include vessels within such Town Code regulation. Should the Town Commission wish to amend the existing Town Code to include vessels in the maximum projection regulation, the Town Commission will need to provide direction to the Town Manager, Town Staff and Town Attorney so an appropriate ordinance can be brought forward for the Planning and Zoning Board's and Town Commission's consideration. Alternatively, the Town Commission can choose to not amend the Town Code as there are potentially other means for Town residents to address navigation impediments.

If there are any questions or concerns about this Memorandum, please do not hesitate to contact me directly.

Exhibit: (1) Section 158.099, Town Code. This exhibit is available and on file with the Town Clerk's Office.



**End of Agenda Item**