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REAL PROPERTY*

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I. INTRODUCTION

The format of this survey[1] is somewhat changed from that of past surveys. Rather than attempting to comment upon a large number of cases in brief form, the present authors have selected a fewer number of cases, treating such cases in depth through illustration of their factual and legal setting. Other sources[2] are available for those wishing to consult a compendium of all decisions covering the subject matter during the survey period.

II. VENDOR AND PURCHASER

A. *Jurisdiction*

A necessary prerequisite for the maintenance of an action either for damages or for specific performance based upon a contract for the sale of realty is the establishment of the court's jurisdiction over the person of the defendant. A serious problem arises in this regard when the prospective action is against an out-of-state purchaser, based upon his breach of contract. In *Lyster v. Round*,[3] the purchaser, a nonresident of Florida, entered into a written contract with the vendor for the sale of the vendor's home. Upon execution of the contract, the purchaser gave to the vendor his personal check in the sum of $10,700 as a good faith deposit required by the contract. Upon returning to his Michigan residence, the purchaser promptly stopped payment on the check. Vendor instituted suit praying for judgment in the full amount of the check, obtaining constructive service upon the purchaser under the "doing business" long-arm statute.[4] The purchaser filed a motion to dismiss on the ground that the court lacked jurisdiction over his person. Said motion was denied, and purchaser appealed.

The District Court of Appeal, First District, reversed the order denying purchaser's motion to dismiss. To establish jurisdiction under

1. The period covered is the 1971-73 biennium, or more specifically, from volume 250 through volume 284 of the Southern Reporter, Second Series.

2. See R. BOYER, FLORIDA REAL ESTATE TRANSACTIONS (Supp. 1973).

3. 276 So. 2d 186 (Fla. 1st Dist. 1973).

4. FLA. STAT. § 48.181(1) (1971).

the long-arm statute, the court noted that isolated acts which could not be held to constitute the operation, conduct, engagement in or carrying on of a business venture are not sufficient to warrant the application of the statute. Only with a clear showing that the transaction out of which the cause of action arises is by its very nature a business activity or a link in a chain of acts collectively comprising a business activity will jurisdiction be established. The isolated act of buying a home in Florida does not constitute such a doing of business, and, therefore, constructive service of process under the statute is inapplicable.

Given the fact that a large percentage of contracts for the sale of realty in Florida involve out-of-state residents, the above decision would appear to create a hardship on the Florida resident engaging in the sale of realty. Effective July 1, 1973, an expansion of the long-arm statute[5] provides a possible remedy. Though it is unclear whether that statute is intended to be applicable to the instant situation, it provides for jurisdiction on the basis of a single act constituting a breach of contract, and thus relieves the plaintiff of showing a course of business on the part of the defendant as required in *Lyster v. Round.*[6]

B. *Terms—Implied Warranties*

The sale of realty has historically been treated as a unique enterprise, with the result that developments in the law relating to the sale of chattels offered no shelter for the disgruntled homebuyer. Thus, there existed an incongruous situation where one who bought a chattel as simple as a walking stick was entitled to get his money back if the article was not of merchantable quality, but the purchaser of a $50,000 home ordinarily had no remedy even if the foundation proved to be so defective that the structure collapsed into a heap of rubble.[7] In *Gable v. Silver,*[8] the Supreme Court of Florida attempted to remedy this situation by providing that an implied warranty of fitness and merchantibility extends to the sale of newly built houses and condominiums.

In *Gable,* plaintiffs were purchasers of a new condominium. After moving in, the air conditioning system began to malfunction. Numerous service calls to the builder met with little success. After more than one year of such inaction, the entire air-conditioning system malfunctioned. The system was eventually replaced at a cost to the plaintiffs of over $5,000, since the one year warranty had expired.

Before reaching the dispositive question, the court decided two preliminary questions. First, it held that the express warranty is not in-

5. Fla. Laws 1973, ch. 73-179, *creating* FLA. STAT. § 48.193.

6. 276 So. 2d 186 (Fla. 1st Dist. 1973).

7. *See* Humber v. Morton, 426 S.W.2d 554 (Texas 1968).

8. 264 So. 2d 418 (Fla. 1972), *adopting* 258 So. 2d 11 (Fla. 4th Dist. 1972) [hereinafter referred to as *Gable*]. *See generally* Note, ***Implied Warranties In the Sale of Real Estate,*** 26 U. MIAMI L. REV. 838 (1972).

consistent with and in no way negates or excludes implied warranties of fitness and merchantability. Second, it held that the air-conditioning system was realty, rather than personalty, since it was attached to the freehold and immovable. With the path open, the court extended an implied warranty of fitness to the sale of realty, and the verdict for the plaintiff was affirmed.

It is to be noted that the court's decision leaves for future determination many important questions. In *Gable*, the plaintiff was the first purchaser; thus there was privity of contract. The court expressly left open the question of how far the warranty would extend:

> We ponder, but do not decide, what result would occur if more remote purchasers were involved. We recognize that liability must have an end but question the creation of any artificial limits of either time or remoteness to the original purchaser.[9]

The court also did not examine closely the exact nature of the warranty it was imposing. Although it is clear that the warranty is not limited to defects which would render the house uninhabitable, as has been the case in some other jurisdictions, the extent of the warranty in time is not stated. It is unsettled whether the warranty is breached, if at all, at the time of first occupancy, or whether the warranty is ongoing for a reasonable period of time. Such a determination is important in relation to the application of the statute of limitations. However, it is clear that the instant case is not an authoritative attempt to answer all questions in relation to the mechanics of the warranty, but rather is a much-heralded step in the renovation of some of the historical inequities found in the body of property law.

The application of *Gable* is just beginning. In *Burger v. Hector*,[10] the plaintiff purchased a lot and then selected the defendant to construct a house according to plans approved by the purchasers. After occupancy, drainage problems became apparent. Following heavy rains, water ponded on plaintiff's lot and rose into their house, causing substantial damage. In bringing suit, the plaintiffs relied upon *Gable*, asserting that there existed an implied warranty of suitability. Subsequent to a jury verdict, the court entered judgment notwithstanding the verdict and plaintiffs appealed.

The court noted that the plaintiff's complaint was not with the house that the defendant had constructed, but with the lot they had chosen. Although a warranty of fitness and merchantability existed with regard to the house, the court refused to find that there was any warranty, either express or implied, regarding the lot upon which the house was constructed, to the effect that said lot would have average or high percola-

9. Gable v. Silver, 258 So. 2d 11, 18 (Fla. 4th Dist. 1972).
10. 278 So. 2d 636 (Fla. 1st Dist. 1973).

tion soil such as would withstand flooding waters. Since no warranty could be found, a judgment in favor of the defendant was proper.

C. *Notice*

The recording acts protect only subsequent bona fide purchasers without notice against unrecorded instruments. A person with notice gets no protection; therefore, a determination as to what constitutes sufficient notice is vitally important.[11] In *Humble Oil & Refining Co. v. Laws*,[12] the land in question was in possession of a lessee with an option to purchase. Neither the lease nor the option was recorded. The lessee cultivated the land and was in possession for 30 to 45 days. Approximately six months after the lessee entered into possession, the lessor entered into a lease of oil, gas and mineral rights with Humble Oil.

In affirming the cancellation of Humble's oil and gas lease, the court rejected the contention that the cultivation of land was not sufficient to put Humble on notice as to the option. Under the facts of the instant case, the exclusive possession by the lessee was more than adequate to put third parties upon inquiry as to his interest in the occupied lands. As stated by the court, "[a]ctual possession is constructive notice to all the world of whatever rights the occupants have in the land."[13] It is of note that such a finding does not seem to be predicated on the possession being inconsistent with record title.

D. *Formalities*

Considerable dispute has arisen as to the formalities required of a contract to convey real property, particularly relating to the requirement of two subscribing witnesses. Florida Statutes section 725.01 (1971) applies specifically to contracts to convey, stating that such contracts must be signed by the party to be charged. The statute makes no reference as to the necessity of subscribing witnesses. However, it was argued in *Radabaugh v. Ware*,[14] that such contracts must also comply with the requisites of Florida Statutes section 689.01 (1971). On its face this statute does not apply to contracts, but merely requires that instruments creating or transferring an estate or freehold interest must be signed in the presence of two subscribing witnesses. The court in *Radabaugh* argued that such statute of necessity had to apply to contracts to convey, for:

> [t]o hold otherwise would be to effect the transfer of property by a decree of specific performance although the contract

11. *See* 1 R. BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 27.01, at 713 (1972) [hereinafter cited as BOYER].

12. 272 So. 2d 841 (Fla. 1st Dist. 1973).

13. *Id.* at 842.

14. 241 So. 2d 738 (Fla. 4th Dist. 1970) [hereinafter referred to as *Radabaugh*].

> forming the basis of the transfer would have small resemblance to the formality with which it was intended that conveyances of real property should be accomplished.[15]

In *Koplon v. Smith*,[16] the Supreme Court of Florida rejected this broad conclusion. The purchasers brought an action for specific performance of a deposit receipt contract for non-homestead property. However, the deposit receipt did not contain the signature of two subscribing witnesses. The trial court entered judgment for the purchasers, and said judgment was affirmed.[17] The vendors filed a petition for writ of certiorari, alleging conflict with the decision in *Radabaugh*. In denying the writ, the court noted that the broad language of *Radabaugh* went beyond the facts of that case. Its holding should be limited to homestead specifically. Thus, as to non-homestead property, there is no requirement of subscribing witnesses as a predicate for specific performance.[18]

In *Koplon*, the court apparently has sorted out previous conflict regarding the requirement of subscribing witnesses. However, since the issue was not presented to the court, the opinion failed to consider the validity of the distinction given to homestead property. Such distinction was supported by *Zimmerman v. Diedrich*.[19] Relying upon article X, section 4 of the old constitution,[20] providing that homestead property could only be alienated through instruments "duly executed," and upon the provisions of Florida Statutes section 708.07 (1969),[21] relating to coverture as an impediment to decrees of specific performance, the court concluded that as much formality was required in the execution of contracts for the sale of homestead property as must be followed in the execution of contracts for the sale of the separate property of a married woman or the relinquishment of her dower, and, therefore, the signature of two subscribing witnesses was required.

Today, the basis for the above distinction may no longer exist. There is no longer any constitutional provision stating that homestead property can only be alienated through instruments duly executed. Further, Florida Statutes section 708.07 (1969)[22] has been repealed. Thus, when presented with the proper case, the distinction made in *Zimmerman* may be questioned by the court. Unless the court wishes to adopt the rationale of *Radabaugh*, indirectly repudiated in *Koplon*, perhaps the logical position is that a contract for the sale of realty, whether homestead or non-homestead, need only comply with Florida

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15. *Id.* at 739.
16. 271 So. 2d 762 (Fla. 1972) [hereinafter referred to as *Koplon*].
17. Koplon v. Smith, 264 So. 2d 73 (Fla. 3d Dist. 1972).
18. *See* Zimmerman v. Diedrich, 97 So. 2d 120 (Fla. 1957).
19. Zimmerman v. Diedrich, 97 So. 2d 120 (Fla. 1957) [hereinafter referred to as *Zimmerman*].
20. FLA. CONST. art. X, § 4 (1898).
21. FLA. STAT. § 708.07 (1969) *repealed by* Fla. Laws 1970, ch. 70-4.
22. *Id.*

Statutes section 725.01 (1971) and, therefore, that it need be signed only by the party to be charged in order to be specifically enforceable.

E. *Reformation*

In *General Development v. Kirk*,[23] the court had before it, in a case of first impression, the question of whether one not a party to a deed has standing to seek reformation of that deed. The facts of the case are at the least confusing. Suffice it to say that beginning with a tract of 337 acres, the Trustees of the Internal Improvement Fund (TIIF) intended to convey a tract of 20 acres to one Conway, and the remainder, or 317 acres, to General Development's predecessor in title. Approximately fifteen years after these conveyances, it was discovered that the description used in Conway's deed covered not twenty but 57.8 acres, the excess acreage covering land which was thought to have been owned by General Development. General Development therefore brought suit to reform not their own deed, but the deed given by the TIIF to Conway. The trial court ruled that the corporation lacked standing to reform the Conway deed and granted summary judgment.

In reversing the trial court, the second district rejected a solution based on the concept of privity. Rather than privity, the legitimate interest of the party bringing suit should be the determinative factor. As stated by the court:

> Standing is, in the final analysis, that sufficient interest in the outcome of litigation which will warrant the court's entertaining it. It is beyond doubt that standing is, in most states, no longer determined by first determining some abstract question such as "privity". In this case it is clear that General Development reasonably contends that the extent of the property conveyed to the Conways determined the extent of that conveyed to . . . its predecessor in title. We think the courts of Florida should be open to the presentation of such a contention as this.[24]

F. *Damages*

Following the law applicable to all contracts, it has been held that a stipulation for the payment of liquidated damages in a contract to purchase real property is valid and will be enforced, whereas a provision for a penalty or a forfeiture is invalid and unenforceable.[25] Florida cases have agreed upon the proposition that if damages are "readily ascertainable," a liquidated damages provision in a contract is

23. 251 So. 2d 284 (Fla. 2d Dist. 1971).
24. *Id.* at 286.
25. Pembroke v. Caudill, 160 Fla. 948, 37 So. 2d 538 (1948).

in essence a penalty and must therefore be struck down.[26] However, conflict has arisen as to when such damages must be readily ascertainable; one case holding that the damage provision will be a penalty if the damages are readily ascertainable at the time of breach,[27] and another holding that it was necessary for the damages to be readily ascertainable at the time the contract was formed in order for the damage provision to be viewed as a penalty.[28]

Such conflict has been expressly resolved by the Supreme Court of Florida in *Hutchison v. Tompkins*.[29] The contract in question contained a liquidated damages clause which provided that, upon the purchaser's breach, the vendor could elect to retain a cash deposit of $10,000 held in escrow. The vendor alleged that the purchasers had failed to perform, and that the escrow without authorization had returned the deposit to the purchasers. The vendors sought damages in the amount of $10,000 from the purchasers. The trial court, however, dismissed the complaint for failure to state a cause of action.

On the authority of *Pembroke v. Caudill*,[30] the District Court of Appeal affirmed[31] and held that the liquidated damages provision of the contract constituted a penalty as a matter of law. The supreme court rejected this approach. It noted that in real estate transactions, the measure of damages is determined by calculating the difference between the contract price and the market value of the land at the time of breach. This measure is nearly always ascertainable at the time a contract is breached. Thus, if the *Pembroke* rule is followed, the liquidated damages provision would be a penalty as a matter of law. However, such approach must of necessity have a chilling effect on contract negotiations for the sale of land, where the parties wish to include a provision for liquidated damages. Noting that the court had no desire to invalidate the liquidated damages provisions of nearly all contracts for the sale of land, the *Pembroke* rule was specifically rejected in favor of a holding that the damages must be ascertainable at the time the contract is made in order for the liquidated damages provision to be viewed as a penalty.

As opposed to the *Pembroke* rule, this rule would validate almost any liquidated damages provision in a sales contract. The court went so far as to realize that in light of the present status of the land sale market in Florida, it is generally impossible to say at the time a contract for sale is drawn what the vendor's loss will be if the purchaser fails to close. This is not to say, however, that any liquidated damages clause can be enforced. The forfeiting party can always look to equity to relieve against forfeiture if the liquidated damages provision appears

26. *Id.*
27. *Id.*
28. Hyman v. Cohen, 73 So. 2d 393 (Fla. 1954).
29. 259 So. 2d 129 (Fla. 1972).
30. 160 Fla. 948, 37 So. 2d 538 (1948) [hereinafter referred to as *Pembroke*].
31. Hutchison v. Tompkins, 240 So. 2d 180 (Fla. 4th Dist. 1970).

unconscionable in light of the circumstances existing at the time of breach.

The law in regard to liquidated damages, previously discussed, applies generally to those situations where no deposit or deferred payments have actually been received by the nondefaulting party, or where the deposit has been inadvertantly returned,[32] and where the nondefaulting party brings suit to enforce the provision. However, in many cases where the vendee makes a deposit or deferred payment, and upon his own default, sues to recover all or part of the money paid, the courts have not considered the liquidated damages rule, but rather have applied the rule that a vendee in default cannot recover from the vendor monies paid in part performance of the contract.[33] Thus, by generally upholding the validity of most liquidated damages provisions in sales contracts, the court has effectively resolved the conflict between the two rules, since the utilization of either rule will in most instances allow the vendor to retain monies paid in part performance by the vendee.

It is not to be concluded that, as a result of the "no recovery" rule and the validity of liquidated damages provisions, the defaulting vendee will of necessity be in a completely remediless situation. In many instances, such defaulting vendee will have an equity of redemption, forcing a seller to bring foreclosure proceedings to eliminate the interest of the vendee. Though most properly descriptive of the interest of a mortgagor, it seems proper to apply the principles of equity of redemption to any situation where a contract is essentially a substitute for a mortgage, or where a contract is really nothing more than a security device.[34]

In *H & L Land Co. v. Warner*,[35] a purchaser brought suit against the vendor for specific performance of an installment land sale contract, and the vendor counterclaimed for removal of the contract as a cloud on its title. The term of the contract was ten years. The purchaser was entitled to a deed only upon payment of all installments plus interest. The purchaser paid the required installments for approximately six years, but then fell into default. After four years of silence, the purchaser tendered all monies due under the contract, and demanded the deed. The vendor refused to accept such payment. The contract provided that upon failure of the purchaser to pay any installment, the seller was entitled to terminate the contract, repossess the land, and keep all monies already received. The trial court held that the parties were essentially in the same position as if the vendor held a purchase money mortgage, thus finding for the purchaser.

32. *See* Hutchison v. Tompkins, 259 So. 2d 129 (Fla. 1972).
33. *E.g.*, Mulford v. Knight Center, Inc., 258 So. 2d 462 (Fla. 3d Dist. 1972).
34. *See* BOYER, *supra* note 11, § 4.07[3], at 64.
35. 258 So. 2d 293 (Fla. 2d Dist. 1972).

In affirming the decision of the lower court, the District Court of Appeal, Second District, found that the substance, not the form, of the transaction should be controlling. Thus, there should not be substantial difference based solely upon whether a purchaser's obligation to pay monies due under a contract is secured by a purchase money mortgage or an installment land sales contract. The vendor's rights under such an installment land sales contract are therefore limited:

> We hold that the vendor under a specifically enforceable installment land sales contract, who has received part of the purchase price and has given the vendee possession of the land and the benefits and burdens of ownership, is in essentially the same position as a vendor who has conveyed the legal title and taken back a purchase money mortgage, and he cannot unilaterally and summarily extinguish the vendee's equitable title upon the vendee's default.[36]

Thus, in looking to the substance of the transaction, it appears that an equity of redemption will exist under a sales contract only where the contract is essentially a security for an obligation to pay the purchase price. The court indicated that the above holding does not apply to short-term sales contracts, intended solely to govern the rights and obligations of the parties during the period precedent to closing. Similarly, it would not apply to a situation in which the purchaser does not have the right to possession or the benefits and burdens of ownership, for in such situation the contract would necessarily evidence something more than a mere security interest on the part of the vendor.[37]

G. *Legislation*

In 1972, the legislature adopted the General Uniform Partnership Act to become effective on January 1, 1973.[38] Under the Act, all property originally brought into the partnership, or subsequently acquired by purchase or otherwise on account of the partnership, is considered partnership property.[39] When title to real property is in the partnership name, any partner may convey partnership property in the partnership name as long as his act will bind the partnership. If the title to the property is in all the partners' names, then all must execute the conveyance.[40] If the title to the property is not in all of the partners' names, then those partners of record title may convey the land, but the partnership may retrieve the land if the conveyors did not have authority to bind the partnership, unless the purchaser or his assignee

36. *Id.* at 295.
37. *Id.*
38. Fla. Laws 1972, ch. 72-108, *creating* FLA. STAT. §§ 620.560-.770.
39. Fla. Laws 1972, ch. 72-108, § 8.
40. *Id.*, § 10(1).

is a holder for value without knowledge that the partners had exceeded their authority.[41] A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin.[42] Hence, it is not necessary for partners' wives to join in conveyances of partnership property.

In order to correct developer abuses in the sale of subdivided land via telephone, the legislature has enacted various provisions to protect the purchaser.[43] The legislation provides in part that no person may dispose of any interest in subdivided land by solicitation of sales by long distance telephone unless the prospective purchaser has either personally inspected the property or the subdivider has furnished the prospective purchaser both a synopsis of the sales script used and a public offering statement which have been approved by the land sales division of the state. Failure to comply with these provisions will entitle the purchaser to a refund of the total amount paid and a reasonable attorney's fee if suit has been filed.

III. Estates and Related Interests

A. *Dower*

A woman may relinquish her dower right in any real property by joining in the conveyance or mortgage thereof, or by a separate instrument without the joinder of her husband.[44] In *In re Estate of Hiley*,[45] the husband and wife had conveyed entireties property to the husband. The deed expressly stated that the conveyance included any dower right of the wife. Upon the husband's death, the wife nevertheless filed a claim for dower.

Holding that the wife had a valid dower claim, the court noted that the purported conveyance of the dower right was ineffective. Since the property was held as an estate by the entireties, the wife before conveyance had no right of dower. This result is predicated on Florida Statutes section 689.15 (1971) which was interpreted by the court as implying that the right of survivorship in the surviving widow is preferable to her dower right, and, therefore, a right of survivorship precludes any dower right. Thus, in the instant case the wife's dower right was not existant until after the conveyance of the entireties property to the husband and consequently could not be relinquished through that conveyance.

Article 10, section 5 of the Florida constitution provides that there shall be no distinction between married men and married women

41. *Id.*, § 10(2)
42. *Id.*, § 25(e).
43. Fla. Laws 1973, ch. 73-175, *amending* Fla. Stat. § 478.23 (1971).
44. Fla. Stat. § 694.02 (1971).
45. 262 So. 2d 476 (Fla. 4th Dist. 1972).

in the holding, control, and disposition of their property, except that dower and curtesy may be established and regulated by law. Although the legislature apparently had the power to authorize separate treatment of men and women with regard to dower and curtesy, they acted to abolish such distinction. By the amendment of various statutes[46] relating to dower rights, two significant steps were accomplished. First, a woman's inchoate dower right was eliminated—thus, the dower right consists only of one third in fee simple of the real and personal property owned by the deceased spouse at the time of death, and does not include a one third interest conveyed without joinder of the widow. Second, a right of curtesy for married men, referred to as a dower right by the statute, was established, such right to consist also of one third in fee simple of the real and personal property owned by the deceased spouse at time of death.

B. *Concurrent Estates*

In *La Pierre v. Kalergis*,[47] a deed from a father and mother to the mother and daughter provided for the right of survivorship between the parties. Holding that said deed created a joint tenancy, the District Court of Appeal, First District,[48] discussed the applicability of Florida Statutes section 689.15 (1971). Since that statute purports to abolish the common law doctrine of the right of survivorship,[49] the court reasoned that it also abolished the requirements of the four unities—time, title, interest, and possession. The Supreme Court of Florida expressly rejected the language of the district court, finding that the statute had no such effect, and that any viable joint tenancy must always possess the characteristics of unity of possession (joint ownership and control), unity of interest (the interests must be the same), unity of title (the interests must originate in the same instrument), and unity of time (the interests must commence simultaneously).[50]

C. *Reverters and Restrictive Covenants*

1. IN GENERAL

The desire to obtain a protected community, developed according to the plan and design of the individual sponsor, has led to various techniques for the private regulation of land use. The development of

46. Fla. Laws 1973, ch. 73-107, *amending* FLA. STAT. §§ 731.34, .35(1)-(3), .36, 733.09, .10, .11, .13, .14 (1971).

47. 257 So. 2d 33 (Fla. 1971).

48. La Pierre v. Kalergis, 251 So. 2d 885 (Fla. 1st Dist. 1971).

49. The statute provides in pertinent part that "[t]he doctrine of the right of survivorship in cases of real estate and personal property held by joint tenants shall not prevail in this state . . . unless the instrument creating the estate shall expressly provide for the right of survivorship . . . ." FLA. STAT. § 689.15 (1971).

50. La Pierre v. Kalergis, 257 So. 2d 33 (Fla. 1971).

governmental zoning activity has augmented but not supplanted the practice of privately controlling the use of land, for the two are not necessarily incompatible; cooperatively employed they can be more effective than the sole use of either. Private regulation is accomplished primarily through one of two devices: (1) A limitation placed upon the estate granted, whereupon a termination of the estate results in the event the regulation is breached, and (2) a covenant or promise as to the use of the land conveyed, a breach of which results in liability for damages or appropriate equitable enforcement.[51]

During the survey period, Florida courts have been faced with numerous attempts to regulate the use of land utilizing the devices outlined above. Faced with conflicting and competing interests, generally in the form of the public as opposed to the private interest, the courts have held that such regulatory devices are not immune from attack, *i.e.*, there are limitations on the extent to which one can privately regulate the use of land.

In *University Park Civic Association, Inc. v. Ansbacher*,[52] a land use control in the form of a limitation upon the estate granted was utilized. The civic association had opposed the rezoning of property adjacent to their community for commercial purposes. To induce the association to withdraw their opposition, the developer of the commercial property agreed to convey to the association a buffer strip between the subdivision and the commercial property. Said grant was in the form of a fee simple determinable, whereby title to the property would revert to the developer if the association ceased to use the strip for "bona fide civic association purposes." At all times subsequent the land was left vacant by the civic association. Approximately eight years after this conveyance, the successor to the reversionary interest brought suit to quiet title. In granting summary judgment in favor of the successor, the trial court held that the conveyance to the civic association required by its terms that some affirmative use be made of the property, such as the erecting, constructing, or installing on the land buildings, facilities, or other improvements. The continued use of the land in its natural vacant state as a buffer area could not be considered such an affirmative use.

In reversing the trial court, the District Court of Appeal, First District, broadly interpreted the requirements of a "bona fide civic association purpose," holding that the accepted and widely utilized planning technique of buffer zones could be considered such a use. The court could find no difference between the use of the land as a park or playground and the use of the land as a buffer in the instant application:

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51. *See generally* 1 BOYER *supra* note 11, § 24.02, at 568.
52. 259 So. 2d 748 (Fla. 1st Dist. 1972).

> Such land use serves to separate and set apart residential areas from commercial or industrial areas and protect the former against the depreciating influences which flow from activities permitted in the latter. The use of the strip of land involved in this case as a buffer area to protect the value and integrity of the residential property in the subdivision is just as much a bona fide civic association purpose as would the use of the land for a park, playground, or other similar facility.[53]

A fee simple determinable can effectively control the use of land even when the grant is to the state or a subdivision thereof. In *Metropolitan Dade County v. Leslie Enterprises, Inc.*,[54] a conveyance by respondent to Dade County provided that if the land should ever not be used for public park or recreational purposes, then title would revert to respondent. The county failed to use the land for such purpose and suit was brought to enforce the reverter clause. By way of defense, the county claimed that it was immune from suit, since Florida Statutes section 69.041 (1967) provided that an action to quiet title could be brought only when the state had or claimed a mortgage or other lien on the property. In the instant case, there was no allegation of such mortgage or lien.

The supreme court rejected this contention, noting that effective July 1, 1970, the above statute was amended to provide that a suit to quiet title may be brought whenever the state has or claims any adverse interest in the title to the property involved.[55] Since the amendment was remedial, in conferring a remedy or means to be employed in enforcing a right or in redressing an injury, rather than upsetting vested rights, it could be applied retrospectively. Therefore, no claim to sovereign immunity could be sustained.

Leslie in no way implies that such planning devices are always effective as against the state or a subdivision thereof. In *Kosanke v. City of St. Petersburg Beach*,[56] the city proposed construction of recreational facilities on land that had been dedicated as a horticultural park. The situation was further complicated by the fact that a portion of the park area carried a restrictive covenant whereby such land could only be used for villa sites and a church site. The proposal of the city was opposed by a group of local property owners, contending that they had a private right to have the property continually maintained as a horticultural park and also to have certain designated areas restricted for use as villa sites and a church site respectively.

In rejecting the contention that the surrounding owners had a right to have the property maintained as a horticultural park, the court

53. *Id.* at 750.

54. 257 So. 2d 29 (Fla. 1972) [hereinafter referred to as *Leslie*].

55. Fla. Laws 1970, ch. 70-326, *amending* FLA. STAT. § 69.041 (1969).

56. 256 So. 2d 395 (Fla. 1972).

developed an expanding concept of the public park. While at one time a park was understood to be an open square or plaza, containing merely shade trees and seating, today a park must be viewed not only as ornamental, but also as a place for amusement and recreation. Thus, while the entire area of a park may not be converted to playground or recreational uses, it is nevertheless proper and legitimate that a reasonable portion of a park area be set aside for recreational purposes, considering the size and location of the park, its environment, the density of the population and the needs of the public.[57] The court went on to indicate that such recreational facilities might include tennis courts, playgrounds, swimming facilities, areas for athletic sports, and adjacent parking facilities for the convenience of the public. However, any such development must be balanced against the traditional function of the park, and, therefore, a substantial portion of the park area must remain in grass, trees, shrubs, and flowers.

As to the restrictive covenants on the use of the land for villa and church sites, the court relied on *Board of Public Instruction v. Town of Bay Harbor Island*,[58] holding that such restrictive covenants are not generally enforceable to prevent a governmental entity from erecting, establishing, and operating a public building or facility on the premises involved. This result is predicated on the fact that the right to enforce a restrictive covenant, as against a governmental unit, is not a property right within the constitutional guarantees.

Although the above-described forfeiture provisions and restrictive covenants may provide an effective tool for the developer in controlling the structure and design of the development, such provisions may become a trap for the unwary, in that the court has shown a willingness to look beyond the formalities involved to prevent overreaching on the part of the developer. In *Baggett v. Boege*,[59] the developer sold lots in a subdivision for use by mobile homes. A recorded instrument entitled "Covenants Restricting Use of Land" provided in pertinent part that the developer reserved the right to furnish water to the lots at a cost of $8.00 per month. The developer undertook his right to furnish water to the lots for a period in excess of five years, at which time he discontinued the water supply. Thereupon a group of landowners filed suit to enjoin the developer from discontinuing service.

At first glance, the action by the lot owners would seem unsupported in that the restrictive covenant at least on its face created no enforceable right on their part. However, the court noted that it would not be bound by the face of the covenant, but would look to the circumstances surrounding the transaction. In the instant case, the developer's sales brochures stated as a feature of the development an un-

57. *See* McLauthlin v. City and County of Denver, 131 Colo. 222, 280 P.2d 1103 (1955).
58. 81 So. 2d 637 (Fla. 1955).
59. 264 So. 2d 97 (Fla. 2d Dist. 1972).

metered supply of pure fresh water. The brochure further noted that the restrictions were designed to protect the purchaser, in that the provisions could not be changed for thirty years without a vote of the lot owners. In light of these circumstances, the court found that the covenant gave the developer only an initial election as to the supply of water. Once such election was made, the covenant provided the developer no further election to discontinue the water service. Therefore, the discontinuance by the developer constituted a breach of an assumed legal obligation, entitling the lot owners to relief.

2. REVERSIONARY INTERESTS

It is generally held that when an owner of land has it mapped and platted, showing subdivisons with spaces for intervening streets, and then conveys parcels of said subdivision subject to the map or plat, the owner evinces an intention to dedicate an easement in the streets or other highways to the public use, the title to the land remaining in the owner or the grantees.[60] Further, it is generally held that the title of the grantees of subdivisions abutting on such streets extends, in the absense of a contrary showing, to the center of such street, subject to the public easement.[61]

At times, developers have attempted to defeat the operation of this rule, claiming title to the street when it has been abandoned by the public.[62] Generally, however, Florida courts have ruled against such claims, holding that the reversionary interest in the streets was held by the grantees of the abutting property.[63]

In *Peninsular Point, Inc. v. South Georgia Dairy Co-op, Inc.*,[64] the court recognized that the grantees of the abutting property will generally hold title extending to the center of the street, but that such rule can be defeated where there is a clear intention on the part of the grantor to retain the reversionary interest. The recorded plat in that case bore a dedication which stated in material part that the grantor "does hereby dedicate to the perpetual use of the public, as public highways, the streets as shown hereon, reserving unto itself, its heirs, successors, assigns, or legal representatives, the reversion or reversions of the same, whenever abandoned by the public or discontinued by law."[65] It was held that such reservation was sufficient to overcome the presumption that the grantees of abutting property took title to the

60. Smith v. Horn, 70 Fla. 484, 70 So. 435 (1915).
61. *Id.*
62. *E.g.*, Servando Building Co. v. Zimmerman, 91 So. 2d 289 (Fla. 1956); Smith v.
63. *E.g.*, Servando Building Co. v. Zimmerman, 91 So. 2d 289 (Fla. 1956); Smith v.
64. 251 So. 2d 690 (Fla. 1st Dist. 1971).
Horn, 70 Fla. 484, 70 So. 435 (1915).
Horn, 70 Fla. 484, 70 So. 435 (1915).
65. *Id.* at 691.

center of the street. Thus, when the street was abandoned, title reverted to the developer, and not to the grantees.

The above result may be avoided in many cases as a result of legislation enacted in 1972.[66] Florida Statutes section 177.085 (Supp. 1972) provides that a conveyance of lots abutting streets dedicated in a plat shall carry the reversionary interest in the abutting street to the center line unless the owner clearly provides otherwise in the conveyance. Thus, if the owner desires to retain the reversionary interest in the streets, a reservation in the plat alone may not be sufficient. The statute further provides that anyone holding a reversionary interest in the abutting streets of lands platted before the effective date of the statute, other than owners of the abutting lots, must bring suit to establish their right within one year of the effective date of the statute, and failure to do so will result in the loss of such reversionary interest.[67]

D. *Easements and Prescriptive Rights*

1. IN GENERAL

An easement has been defined as an interest in land in the possession of another which entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists; entitles him to protection as against third persons from interference in such use or enjoyment; is not subject to the will of the possessor of the land; is not a normal incident of the possession of any land possessed by the owner of the interest; and is capable of creation by conveyance.[68] Although the interest must be of a type capable of creation by conveyance, the actual creation of the interest by conveyance is not essential. Thus, in addition to creation by express grant, easements may also be created by prescription or adverse user, or by implication or necessity.[69]

In *Reyes v. Perez*,[70] the appellate court was faced with a somewhat unique situation. Initially, one Burch owned all the land in question, said land bordering on two roads. First, Burch conveyed a parcel bordering on one of the roadways to Reyes. The Burches then conveyed an adjoining parcel which lacked road access to Perez. Access to Perez's property could have been realized either across Reyes' property, a distance of 235 feet, or across Burch's property, a distance of 570 feet. The trial court granted an easement across Reyes' property, notwithstanding the fact that Reyes was not the grantor.

The appellate court refused to accept such an extension of the

66. Fla. Laws 1972, ch. 72-257, *creating* FLA. STAT. § 177.085.

67. FLA. STAT. § 177.085(2) (Supp. 1972).

68. RESTATEMENT OF PROPERTY § 450 (1944). *See generally* 1 BOYER, *supra* note 11, § 23.01, at 499.

69. 1 BOYER, *supra* note 11, § 23.02, at 506.

70. 284 So. 2d 493 (Fla. 4th Dist. 1973).

principles applicable to an easement by implication. If the land conveyed is shut off or entirely surrounded partly by land of the grantor and partly by that of a stranger, the way of necessity arises over the adjoining land of the grantor, even though a shorter or better way may exist over the land of the stranger. Such is consistent with the principle that the easement arises by implication from the grant; as to the stranger, there is no such grant from which the easement can arise.[71]

It is of note that the easement in the instant case was pursuant to common law, as adopted in Florida Statutes section 704.01(1) (1971), rather than pursuant to statute as defined in Florida Statute sections 704.01(2) (1971). Although an easement created by statute would entitle the burdened party to reasonable compensation, an easement created under the common law invokes no such right.[72]

An easement may also be created through operation of law by adverse user.[73] Such adverse user may be by a private individual, in which case the resultant easement would be held by such individual, or the adverse user may be by the public at large, in which case the easement would be in favor of the general public. The creation of easements in favor of the public through adverse use has proved to be an effective restraint to the private development of Florida's diminishing shoreline open space areas. An example of such control is found in *City of Daytona Beach v. Tona-Rama, Inc.*[74] Desiring to build an observation tower in connection with a recreational pier which they owned, Tona-Rama applied to the city for a building permit. After much deliberation, the application was approved and the permit issued. Objection to the construction and the city's right to grant the permit was brought by a group of citizens and taxpayers. Before construction was commenced, the city brought suit seeking declaratory relief as to the ownership of the land on which the tower was to be constructed. After extensive discovery, the trial court determined that for more than twenty years the general public had used the beach area in question for sunbathing, picnicking, frolicking, and generally as a recreation area. Such use was open, notorious, visible, and adverse under an apparent claim of right and without challenge by anyone purporting to be the owner of the land. Further, the city had constantly policed the area, had controlled automobile traffic there, and had otherwise exercised its police power over the area.

From these facts the trial court found that there had accrued in favor of the general public a prescriptive right to an easement for thoroughfares, bathing, recreation, and playground purposes. Due to

71. *See* R. THOMPSON, REAL PROPERTY § 362, at 413 (1961).
72. FLA. STAT. § 704.04 (1971).
73. *See generally* 1 BOYER, *supra* note 11, § 23.03(4), at 529.
74. 271 So. 2d 765 (Fla. 1st Dist. 1972) [hereinafter referred to as *Tona-Rama*].

the existence of such easement, the city therefore had no lawful authority to issue a building permit to authorize construction of the tower.

In affirming the trial court's holding that a prescriptive right to the soft sand area of the beach could arise in favor of the general public, the District Court of Appeal, First District, was careful to limit the extent of its holding. First, the court made clear the fact that its holding was based exclusively on the common law notions of prescriptive easements; it was not a broad expropriation of private property without compensation by judicial fiat, motivated by social policy. Second, the court noted that not all use of private beaches or shorelines gives rise to a prescriptive easement. "Neither occasional use by a large number of bathers nor frequent or even constant use by a smaller number of bathers gives rise to a prescriptive right in the public to use privately owned beaches."[75] A key element in the determination as to whether a prescriptive right has arisen is the degree to which facilities of local government are called into play:

> It is only when the use during the prescribed period is so multitudinous that the facilities of local governmental agencies must be put into play to regulate traffic, keep the peace and invoke sanitary measures that it can be said that the public has acquired a prescriptive right to use privately owned beaches.[76]

Although it is clear that the first district in no way intended *Tona-Rama* to be a panacea in gaining access to a dwindling shoreline, courts might show a willingness to resort to this device. In *City of Hollywood v. Zinkil*,[77] a question arose as to whether two blocks of unimproved oceanfront beach property had been dedicated to public use. In remanding the case for reconsideration of the issue of dedication, the court pointed out that the trial court should consider the applicability of *Tona-Rama* in the event that the city's claim of dedication should fail.

2. STANDING TO RAISE PUBLIC PROPERTY RIGHTS

The realization that certain rights can become vested in the public at large, as in *Tona-Rama*, affords a powerful tool for the protection of public interest. However, the establishment of the right alone is not sufficient to fully protect that interest—the courts must allow competent parties to bring suit on behalf of the general public to preserve and protect those rights.

Traditionally, an action to enforce a public right could be brought by a private individual only if that individual could show his injury

75. *Id.* at 770.
76. *Id.* at 770.
77. 283 So. 2d 581 (Fla. 4th Dist. 1973).

to be different in degree and kind from that suffered by the community at large.[78] If no such injury could be shown by any single indivdual, then enforcement was left to governmental authorities. However, where the antagonistic party was a governmental body, such a holding effectively precluded the controversy from being heard.

Askew v. Hold the Bulkhead—Save Our Bays, Inc.[79] presents an example of the failure of this traditional approach. A park was donated to the state specifically for the purpose of public recreation and as a wildlife sanctuary. The state began construction of various improvements designed to develop camping and restaurant facilities in the park. Plaintiffs, a private citizen and a non-profit corporation, brought suit to enjoin the state from going through with construction, alleging that such activities would substantially destroy the park as a wildlife sanctuary in breach of the public trust. The trial judge dismissed the non-profit corporation due to lack of standing.

On appeal, the District Court of Appeal, Second District, not only affirmed the dismissal of the corporation, but also reversed the trial court as to the private citizen, holding that said party should also have been dismissed due to lack of standing. Since neither party had alleged or shown that one or the other would suffer a special injury or that either had a special interest in the outcome of the litigation, neither had standing. Such a result was predicated on the fear that any other result would present a threat of interminable litigation against any public official, since no one individual would be bound by res judicata as a result of prior suits.[80] However, at the same time, the court refused to consider the fact that precluding the present parties from bringing suit in the instant case insured that there would be no one to adequately represent the interest of the plaintiffs.

The second district reconsidered the above question, and in *Save Sand Key, Inc. v. United States Steel Corp.*,[81] expressly repudiated the special injury rule in favor of a broadened concept of standing. A non-profit citizens' group brought suit to enjoin a steel corporation from interfering with alleged vested rights of members of the group in a portion of sand beach. Finding that the plaintiffs had failed to show in what manner they had been damaged as private citizens differing in kind from the general public, the trial court held that the plaintiffs had no standing to sue.

In analyzing the historical development of the "special injury" concept, the court of appeal realized that an intolerable result had come about. Initially designed to avoid multiplicity of litigation, the special injury limitation resulted in many situations where relief, if sought at

78. *See, e.g.*, Town of Flagler Beach v. Green, 83 So.2d 598 (Fla. 1955).
79. 269 So. 2d 696 (Fla. 2d Dist. 1972).
80. *Id.* at 697.
81. 281 So. 2d 572 (Fla. 2d Dist. 1973).

all, had to be sought by a public official. However, a policy of judicial passivity arose whereby the courts apparently considered as unreviewable the inaction of public officials in failing to exercise their discretion in favor of enforcing public rights. Thus, in many situations, relief was never obtained by the public or anyone else. The necessity for change was clear:

> [I]t is anathema to any true system of justice to proclaim that a right may be enjoyed by all yet none may protect it. Accordingly, except in strictly nuisance cases to date, the obvious recent trend is to open the courts to afford relief to many more parties . . . than were heretofore entitled thereto under the "special injury" rule so broadly applied.[82]

Rejecting the necessity of special injury, the court then turned to the formulation of the United States Supreme Court in *Sierra Club v. Morton*[83] to ascertain whether Save Sand Key would be a proper party. Traditionally, the customary criteria for standing are first, the existence of a bona fide justiciable controversy presented in an adversarial context, and second, that the party whose standing is challenged has such a personal stake in the outcome thereof so as to ensure that he will adequately and expeditiously represent the interest he asserts.[84] As to this second aspect, an organization will be deemed to have a personal stake in the outcome if all or some of its members have been or will be directly and personally aggrieved in some manner relating to, and within the scope of, the interests represented and advanced by the organization.

It is to be noted that the above analysis of standing does not eliminate all traditional limitations. Not all organizations will be able to bring suit on behalf of its members. Where the organization merely represents a special interest of its members in a public problem, or an assumed position as spokesman or representative of the public, their interest is not sufficient.[85]

Having established that Save Sand Key, Inc. met the above requirements as to the interest of its members, the court then considered whether a cause of action had been stated. The court found that the facts of the instant case fit within the rationale of *City of Daytona Beach v. Tona-Rama, Inc.*,[86] recognizing vested prescriptive rights of the public to a portion of the soft sand area, and thus were sufficient to defeat a motion to dismiss.

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82. *Id.* at 574.

83. 405 U.S. 727 (1972).

84. *Id.* at 731.

85. Save Sand Key, Inc. v. United States Steel Corp., 281 So. 2d 572, 577 (Fla. 2d Dist. 1973).

86. 271 So. 2d 765 (Fla. 1st Dist. 1972).

3. MINERAL EASEMENTS

In recent years, the Florida legislature has enacted legislation intended to increase the marketability and validation of titles. One such effort is the Marketable Record Title Act.[87] In 1970, the legislature attempted to supplement that act, and further increase the marketability of titles, by limiting the duration of easements and rights of entry relating to mining activities.[88] Florida Statutes section 704.05(1) (1971) provided in pertinent part that

> the rights of entry, or of an easement, given or reserved in any conveyance or devise of realty, when given or reserved for the purpose of mining, drilling, exploring, or developing, shall be limited to a twenty (20) year period beginning with the recording of such conveyance or devise if such rights are not exercised during this twenty (20) year period.

The statute further provided that after the expiration of the twenty year period, the owner of such property, burdened by an easement or right of entry, may bring suit to quiet title, resulting in a decree removing from the title easement rights.[89]

In *Trustees of Tufts College v. Triple R. Ranch, Inc.*,[90] the supreme court held that this statute could only be applied prospectively, and could not be used to retrospectively invalidate property interests which had been created prior to the effective date of the statute. The court noted that a statute should not be given retrospective effect when such construction would jeopardize the constitutional validity of the statute. Since valuable vested property rights would be destroyed by the retrospective application of the statute, and since the destruction of those rights is not necessarily expedient to conserve the rights of others or of the public welfare, the statute would not be construed retrospectively unless such construction was clearly and plainly intended by the legislature. The court distinguished the retroactive application given to the Marketable Record Title Act[91] in that said act did not absolutely eliminate vested rights, but provided a savings clause[92] whereby such rights could be preserved by filing proper notice.

The constitutionality of the statute was again before the supreme court in *Williston Highlands Development Corp. v. Hogue*.[93] The trial court had attempted to apply the statute retrospectively and found the statute to be unconstitutional in such application. The supreme court, relying upon *Tufts College*, found that a determination of the constitu-

87. FLA. STAT. ch. 712 (1971).
88. Fla. Laws 1970, ch. 70-100, *creating* FLA. STAT. § 704.05.
89. FLA. STAT. § 704.05(2) (1971).
90. 275 So. 2d 521 (Fla. 1973) [hereinafter referred to as *Tufts College*].
91. *See* Marshall v. Hollywood, Inc., 236 So. 2d 114 (Fla. 1970).
92. FLA. STAT. § 712.05 (1971).
93. 277 So. 2d 260 (Fla. 1973).

tional question was unnecessary in light of its ruling that the statute would only be applied prospectively.

The statute was amended in 1973[94] to reduce the initial duration of such unexercised rights of entry or easements to a period of ten years, and also to provide for the preservation of such unexercised rights beyond the ten year period by the person claiming such right and filing a notice of such claim in the circuit court of the county where the land is located. Under the amended statute, such rights of entry or easements can be preserved indefinitely by refiling a notice every ten years.[95] Such notice can be filed on behalf of persons under a disability and by members of a class on behalf of another member whose identity is uncertain.

The amended act specifically states it is intended to operate both prospectively and retrospectively,[96] and, thus, is intended to overcome the precise holding of *Tufts College*. Further, the provision for preserving such rights by re-recording a notice thereof every ten years, follows the technique of the Marketable Record Title Act,[97] and hopefully overcomes constitutional objections as to retroactivity. At any rate, the legislature adopted the suggestion of the supreme court in *Tufts College* and provided such technique.

E. *Adverse Possession*

In the absence of a controlling statute, payment of taxes by an adverse possessor on the land he claims is not necessary to his perfecting title.[98] In such instances, payment of taxes has only evidentiary value material to whether the holding was hostile.

Florida, however, requires that an adverse possessor file a return on any disputed property held without color of title and pay all taxes presently and previously assessed on that land during each year of his adverse claim.[99] Thus, as a requisite to claim title through adverse possession without color of title, the adverse party must file a return and pay taxes for seven consecutive years. No such requirement with regard to taxes exists as to title claimed through adverse possession under color of title.[100] Thus, it is important to determine whether a particular claim is with or without color of title.

In *Meyer v. Law*,[101] the respondents, relying upon an incorrect survey, built and maintained a fence for 25 years which enclosed a

94. Fla. Laws 1973, ch. 73-140, *amending* FLA. STAT. § 704.05 (1971).
95. FLA. STAT. § 704.05(3) (1973), *created by* Fla. Laws 1973, ch. 73-140.
96. FLA. STAT. § 704.05(4) (1973), *created by* Fla. Laws 1973, ch. 73-140.
97. See note 87 *supra* and accompanying text.
98. Day, *The Validation of Erroneously Located Boundaries by Adverse Possession and Related Doctrines*, 10 U. FLA. L. REV. 245, 260 (1957).
99. FLA. STAT. § 95.18 (1971).
100. FLA. STAT. § 95.16 (1971).
101. 287 So. 2d 37 (Fla. 1973).

portion of petitioner's land contiguous to their own. The deeds of both parties reflected the true boundary. The question before the court was whether respondents could, through adverse possession, gain title to the enclosed strip, even though they did not pay taxes for that strip.

On its face, Florida Statutes section 95.17(2) (1971) purports to deal with this situation.[102] The second district[103] interpreted this statute literally, holding that when a person claims certain specific land under color of title, such claimant may enclose the properties of contiguous owners for seven years, without returning or paying taxes, and without having color of title to the land encroached upon, and thus perfect his claim to the property of adjoining owners.

The supreme court rejected this interpretation of Florida Statutes section 95.17(2) (1971):

> We believe that, in enacting the foregoing subsection, the legislature intended to provide that, where one has color of title to a larger area than is fenced or cultivated, and he pays no taxes on any of the land described in the title, he may acquire title by adverse possession only to that portion of the land shown on the paper title which he actually fences or cultivates.[104]

Thus, respondent in the instant case could only claim title to the extent he made a return on the land or paid taxes. Since he did neither, his claim was invalid.

Of note is the dissent of Justice Adkins, concurred in by Justice's Carlton and Ervin.[105] He argued that the legislative intent of the statute, relied upon by the majority, indicates that said statute was an extension of the definition as to what constitutes color of title. Further, although the position of the court is in accord with the traditional definition of color of title, it fails to account for the language of Florida Statutes section 95.17(2) (1971), and in fact ignores the literal meaning of that language.

It can only be concluded that although the decision of the supreme court resolved the apparent conflict in the decisions of the district courts of appeal,[106] the apparent conflict between the decision and the statute remains.

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102. The statute provides in pertinent part that

> [f]or the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, . . . land shall be deemed to have been possessed and occupied . . . [w]here it has been protected by a substantial enclosure. *All contiguous land protected by such enclosure shall be deemed to be premises included within the written instrument* . . . .

FLA. STAT. § 95.17 (1971) [emphasis added].

103. Meyer v. Law, 265 So. 2d 737 (Fla. 2d Dist. 1972).

104. Meyer v. Law, 287 So. 2d 37, 40 (Fla. 1973).

105. *Id.* at 41.

106. *E.g.*, Holley v. May, 75 So. 2d 696 (Fla. 1954); Palmer v. Greene, 159 Fla. 174, 31 So. 2d 706 (1947).

IV. WATER LAW

A. *Submerged Lands*

Florida courts have generally recognized, in accord with the civil law view, that when a nonnavigable lake is under private ownership, owners of property with portions thereof under the lake have a right to use all of the lake for boating, bathing, and fishing so long as they do not interfere with the rights of others.[107] Further, it has been held that such owners do not have exclusive dominion over the water overlying their land.[108]

Exceptions to the above rule have been made, however, where the land involved is not strictly a lake, but rather would be classified as marsh or swamp. Thus, where the land involved is dry part of the time, a landowner is permitted to maintain dikes, spillways, and dry wells to control the water flow, and in such situation, other landowners do not have an absolute right to utilize the waters.

The latter rule was applied in *McMullen v. Ramsey Stock Farms, Inc.*,[109] where an action was brought to restrain owners of bottomland from ditching, diking, and draining portions of the swamp or marsh area. Rather than finding an absolute right to exist in the other marshland owners, the court applied a "reasonable use" theory. Since the diking and ditching operations did not substantially impair the other landowner's use of the portions of the area, said use being primarily recreational in nature, such operations were reasonable in light of the attendant circumstances, and would not be enjoined.

B. *Accretions*

By the great weight of authority, title to accreted lands vests in the riparian owners of abutting lands.[110] Exception is made to this rule where the riparian himself causes the accretion; in such instance, title to the accreted land vests in the state.[111] Since land below the high water mark is owned by the state, to permit the riparian owner to cause accretion and gain title to such land would be tantamount to allowing him to take state land.

In *Board of Trustees of the Internal Improvement Fund v. Medeira Beach Nominee, Inc.*,[112] a second exception to the above rule was proposed, *i.e.*, that where accretions are caused by the state, title should vest in the state rather than in the riparian owner. This rule was rejected by the court. Accretions had formed in front of appellee's ri-

107. *See* 1 BOYER, *supra* note 11, § 25.03, at 629.
108. *Id.* § 25.03[2], at 634.
109. 272 So. 2d 844 (Fla. 1st Dist. 1973).
110. *See* Brickell v. Trammell, 77 Fla. 544, 82 So. 221 (1919).
111. *See, e.g.*, Brundage v. Knox, 279 Ill. 450, 117 N.E. 123 (1917).
112. 272 So. 2d 209 (Fla. 2d Dist. 1973) [hereinafter referred to as *Medeira Beach*].

parian uplands, apparently as a result of an erosion control program of the state. The trial judge made no findings as to what extent the accretions were the result of natural processes, finding that appellee would hold title to the accreted lands even if no accretion would have occurred but for the state project.

On appeal, the court was therefore presented with the question of whether a strip of accreted land belongs to the adjoining riparian owner, as opposed to the state, where such accretion was the result of a lawful exercise of the police power by a governmental unit to prevent beach erosion.

The court noted that the doctrine of accretion, holding that title to accreted lands vests in the adjoining riparian, is supported by four reasons:

> (1) *de minimis non curat lex;* (2) he who sustains the burden of losses and of repairs imposed by the contiguity of waters ought to receive whatever benefits they may bring by accretion; (3) it is in the interest of the community that all land have an owner and, for convenience, the riparian is the chosen one; (4) the necessity of preserving for the riparian the right of access to the water.[113]

These four policy reasons clearly indicate that the interest of the riparian in accreted land is superior to that of the state. Florida, therefore, followed the majority of states in holding that such land vests in the riparian owner.

The legislature has arrived at a result opposite to that above. Florida Statutes section 161.051 (1971) purports to vest title to accretions caused by public works in the state. In *Medeira Beach,* the court noted that this statute would not be applied retroactively, and since the erosion control projects were begun before the effective date of the statute, the statute was of no effect. Though the statute would apparently supercede the ruling of *Medeira Beach* as to erosion control projects begun after 1965, its use would appear open to constitutional challenge. The riparian or littoral right to future accretions is a vested right which is an inherent and essential attribute of the original property.[114] By passage of such statute, the state cannot be permitted to defeat the constitutional prohibition against taking of property without due process of law and just compensation.[115] Therefore, the statute could divest riparian owners of their vested right to accretions only if compensation were made for the taking.

C. *Pollution*

As part of an ongoing effort to control pollution via statutory means, the Florida legislature in 1973 enacted procedures whereby

113. *Id.* at 212-13.
114. County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46 (1874).
115. Hughes v. Washington, 389 U.S. 292 (1967) (concurring opinion).

property owners abutting or constituting the bottom of small inland lakes of 150 acres or less can obtain relief from water pollution and shore erosion.[116] The act defines certain activities as constituting a nuisance, and provides that owners of more than fifty percent of the land may file a petition with their respective county commissioners. The chairman of the commissioners shall then notify the state department of pollution control, the Trustees of the Internal Improvement Fund, and the department of natural resources. Such agencies shall then submit recommendations to the county commissioners, and if the commissioners determine that a statutory nuisance exists, they may enact an ordinance to abate it.

V. MORTGAGES

A. *Assumption Agreements*

The grantee of mortgaged property who assumes the mortgage debt becomes personally liable therefor, and as between him and the grantor, becomes primarily liable. Upon default, therefore, the grantor can maintain an action against an assuming grantee, and, under the majority view, such action can be maintained without satisfaction of the mortgage debt.[117]

It has been recognized that an action may be maintained under a theory of subrogation even in the absence of an assumption agreement. In *Fortenberry v. Mandell*,[118] lessors executed a 99 year lease providing that improvements made by the lessee would immediately become the property of the lessors, and providing further that the lessors, without assuming any personal liability, would join with the lessee in executing a mortgage. The lessees defaulted on the note accompanying the mortgage, and the lessors voluntarily made payment to extinguish the principal and interest due on the note. It was held that the lessors succeeded to the rights of the mortgager through such payment, including the right to recover judgment on the note. Although the trial court found for the lessee on the ground that the lessor had not shown the value of the improvements by the lessee, in order that such might be set off against the amount of the subrogation claim, the lessor had a legal right to the improvements by virtue of their lease, and such right was separate and distinct from their right to enforce the note through subrogation.

B. *Marshalling*

One principle generally encompassed within the definition of marshalling is known as the "inverse order of alienation" rule. The rule

116. Fla. Laws 1973, ch. 73-147.
117. *See generally* 2 BOYER, *supra* note 11, § 34.12, at 1050.
118. 271 So. 2d 170 (Fla. 4th Dist. 1972).

requires that when lands are mortgaged to secure a debt, and a part of said lands are subsequently sold and conveyed by the mortgagor, the portion unsold is primarily liable under the mortgage.[119] Only if the debt cannot be satisfied out of the unsold portion can the mortgagee resort to the alienated portion; said debt must then be applied to the parcels alienated in the inverse order of their alienation.[120]

The above principle of marshalling was employed without specific identification in *Palatka Federal Savings and Loan Ass'n v. Raczkowski*.[121] In this case a savings and loan association held a mortgage on fifteen acres of real property owned by *R*. This property was then sold by *R* to *T*. Subsequently, *T* sold two acres, containing a house, to defendants, the deed reciting that the conveyance was made subject to the outstanding mortgage which *T*, the grantor, agreed to pay from the purchase price. Later, the mortgagee sought foreclosure against the entire fifteen acre parcel, including the house and two acres sold to defendants.

The District Court of Appeal, First District, held that the mortgage could be foreclosed against both parcels of land since no challenge was made to the validity of plaintiff's mortgage, which had been duly recorded and remained unsatisfied at the time of the above conveyances. Nevertheless, the court also held that the parcel retained by *T* must be sold first and the sale proceeds applied in payment of the mortgage debt. If the sale of the parcel held by the grantor *T* should yield a sufficient amount to discharge the mortgage, then the property purchased by defendants would be free and clear of the mortgage lien. If not, then defendant's parcel would be sold and so much of the proceeds as may be necessary should be applied in payment of the balance of the mortgage indebtedness.[122]

The result is eminently fair and the equities required the application of the general inverse alienation rule. First, *T* knowingly purchased the whole tract subject to the mortgage, and in all probability, the amount of the mortgage was taken into consideration in determining the consideration paid by *T* to *R*. Thus, as between *T* and *R*, *T* should pay or lose the land. Then, when *T* conveyed a portion to defendants, *T* exacted the full purchase price and promised to pay the mortgage debt. Thus, as between *T* and the defendants, *T* should pay the entire debt. The mortgage, however, is in fact a valid lien on defendant's property until the debt is paid. Thus, by requiring the mortgagee to first go against the land of *T*, defendants will be protected to the fullest extent possible. Marshalling should be applied not by rote pursuant to stated principles, but rather in a judicious manner to accomplish the purpose of the rules and to achieve the most equitable result.

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119. Ellis v. Fairbanks, 38 Fla. 257, 21 So. 107 (1897).
120. G. OSBORNE, MORTGAGES 580 (2d ed. 1970).
121. 263 So. 2d 842 (Fla. 1st Dist. 1972).
122. *Id.* at 845-46.

C. *Foreclosure*

The Supreme Court of Florida had indicated by prior decision that an unsatisfied judgment on a note constituted a bar to a subsequent foreclosure action on the security.[123] Thus, an action on the note constituted an election of remedies on the part of the mortgagee. However, in a growing list of decisions by various district courts of appeal, this conclusion has been consistently attacked.[124]

In *Floorcraft Distributors, Inc. v. Horne-Wilson, Inc.*,[125] the lender had obtained a final judgment against guarantors on their personal guaranty of the debt. However, the guarantors had made no payments on their indebtedness. The court rejected the principle that an action on the note evidenced an election of remedies and found that there had been no election of remedies as between an action on the guaranty and an action on the mortgage and notes covering the same debt. The underlying rationale that a mortgage lien is not extinguished until the mortgage debt is actually satisfied supports such a conclusion. Thus, the lender was not precluded from a subsequent mortgage foreclosure action, notwithstanding the unsatisfied judgment.

Recognizing the inconsistency between its earlier position and the latter decisions of the district courts of appeal, the supreme court, in *Junction Bit & Tool Co., v. Village Apartments, Inc.*,[126] reversed its earlier position,[127] and held that an unsatisfied judgment stemming from an action at law on the note does not constitute an election of remedies, and does not bar a subsequent foreclosure action. Further, although section 702.06 of Florida Statutes (1971), relating to deficiency suits arising out of foreclosures, suggests a contrary result, said statute has no application to a suit on a note brought independently of any attempt at foreclosure.

An acceleration clause in a note calling for payment in installments and/or in a mortgage given as security therefor has been deemed to confer a contract right upon the mortgagee which he may elect to enforce upon default.[128] Based on the constitutional necessity of safeguarding the validity of contracts and the right of enforcement thereof, such a contract for acceleration should not be abrogated or impaired except under exceptional circumstances. Past decisions disclose that foreclosure on an accelerated basis may be denied where the right to accelerate has been waived or the mortgagee estopped to assert it, where the mortgagee failed to perform some duty upon which the exercise of the right was conditioned, where the mortgagor tenders payment after default but before notice of the mortgagee's election to accelerate has

123. State ex rel. Teague v. Harrison, 138 Fla. 874, 190 So. 483 (1939).

124. *E.g.*, Klondike, Inc. v. Blair, 211 So. 2d 41 (Fla. 4th Dist. 1968); Lisbon Holding & Inv. Co. v. Village Apts., Inc., 237 So. 2d 197 (Fla. 3d Dist. 1970).

125. 251 So. 2d 139 (Fla. 1st Dist. 1971).

126. 262 So. 2d 659 (Fla. 1972).

127. See note 123 *supra* and accompanying text.

128. Campbell v. Werner, 232 So. 2d 252 (Fla. 3d Dist. 1970).

been given, or where payment was not made due to a misunderstanding or excusable neglect, in part due to some conduct of the mortgagee.[129]

Sufficient grounds for the denial of foreclosure on an accelerated basis were found in *Walsh v. Combs*.[130] The record indicated that the second mortgagees filed foreclosure upon failure of the mortgagor to make the first mortgage payments. However, there was some disagreement as to the mortgage agreement, the mortgagor contending that payments on the first mortgage were to be made by the second mortgagees with reimbursement to be made by the mortgagor. Further, there was no attempt on the part of the second mortgagee to ascertain whether there was some real possibility that the first mortgagee would initiate foreclosure, nor was there a bona fide effort on the part of the second mortgagee to secure the compliance of the mortgagor. Under such circumstances, the mortgagor could raise the inequity of the accelerated foreclosure as an affirmative defense to the foreclosure action.

The above situation should be compared with the extended factual situation of *Guynn v. Brentmoore Farms*.[131] In that case, the court could find no conduct on the part of the mortgagees which resulted in any detriment to the mortgagor, and thus estoppel against accelerated foreclosure was not invoked.

D. *Judicial Sales and Redemption*

The right of redemption as applied to the mortgagor is the right to have the mortgaged property restored free and clear of the mortgage lien. Under Florida law, the mortgagor remains the owner of the property until title is divested as a result of foreclosure. Thus, the "equity of redemption" exists after default for non-payment, but before issuance of the deed resulting from the judicial sale.[132]

Florida Statutes section 45.031 (1971) establishes a procedure for judicial sale. Prior to the amendment of said statute in 1971, no mention was made regarding the right of redemption. Effective January 1, 1972, an amendment[133] provides that in all cases where a person has an equity of redemption, the court shall not specify a time for redemption, but the person may redeem the property at any time before the sale.[134]

In *Allstate Mortgage Corp. v. Strasser*,[135] the question before the court was whether the above amendment precluded the possibility of redemption subsequent to the day of sale. In answering the above question in the negative, a strict construction was given to the statute, based

129. *Id.* at 256.
130. 255 So. 2d 565 (Fla. 2d Dist. 1971).
131. 253 So. 2d 136 (Fla. 1st Dist. 1971).
132. *See generally* 2 BOYER, *supra* note 11, § 32.18, at 1061.
133. Fla. Laws 1971, ch. 71-5, *amending* FLA. STAT. § 45.031 (1971).
134. FLA. STAT. § 45.031(1) (1971).
135. 277 So. 2d 843 (Fla. 3d Dist. 1973) [hereinafter referred to as *Strasser*].

on the fact that it stands in derogation of the common law. As stated above, the common law rule provides that redemption could be made at any time prior to entry of the order confirming the sale, unless otherwise directed by the court. Inasmuch as that portion of the statute pertaining to time of redemption does not clearly change the common law right of redemption up until confirmation of the sale, the court concluded that the common law rule must still prevail.

It should be noted that the above decision is at odds with prior dicta of the third district interpreting the statute. In *Akeley v. Miller*,[136] in holding that a junior mortgagee who was not made a party to the foreclosure proceeding has a right to redeem from the senior mortgagee, and that such right of redemption may be freely exercised until the sale is confirmed by execution and filing of a certificate of title, the court discussed the amendment to section 45.031 of Florida Statutes (1971). The court in *Akeley* felt that this situation would be unlikely to arise in the future, in that the amendment to the above statute eliminated the ten day period after a sale during which redemption may occur. The clear conflict in the above two views must therefore be resolved. Perhaps the view of *Strasser* is preferable in that it provides the mortgagor additional time in which to redeem, without really jeopardizing the interest of the mortgagee.

Although redemption will result in the restoration of the mortgaged property free and clear of the mortgage lien, the property will still be subject to any general lien which had attached prior to foreclosure.[137] In *Roy v. Matheson*,[138] the plaintiff had obtained a writ of execution on a judgment unrelated to the mortgage in question, said judgment being levied against the mortgaged property. Upon default, the mortgagee instituted foreclosure proceedings, joining the judgment lienholder. After sale but prior to confirmation, the mortgagor redeemed the property. Subsequently, the mortgagee acquired by assignment the judgment lien, and undertook to sell the property to satisfy the judgment. The mortgagor moved to stay execution, claiming that the judgment of mortgage foreclosure cut off and barred the judgment lien.

Rejecting such contention, the court differentiated general liens, those which may attach to any property owned by the debtor, from specific liens, those which are attached to specific property. While the lien of a specific mortgage is not revived by redemption, the redeemed property remains subject to a general lien. Such general liens are not extinguished until title in the mortgagor is divested by the clerk's certificate of title.[139] In the instant case, since no such certificate was ever issued due to the redemption, an action to foreclose such general lien

136. 264 So. 2d 473 (Fla. 3d Dist. 1972) [hereinafter referred to as *Akeley*].
137. Roy v. Matheson, 263 So. 2d 604 (Fla. 4th Dist. 1972).
138. *Id.*
139. *See* FLA. STAT. § 45.031(4) (1971).

was proper. It is to be noted that such a conclusion is further supported by Florida Statutes section 702.08 (1971) which provides that when a foreclosure decree is rescinded, set aside, or vacated, title to the foreclosed property and the interest of the parties revert to the same status as existed prior to foreclosure.

As stated above, specific claims against the property will be extinguished upon issuance of the certificate of title; therefore, it is necessary that any such claim be made prior to that time. In *Confederate Point Partnership, Ltd. v. Schatten,*[140] a public sale was held whereby land improved by an apartment complex was sold. Subsequent to the issuance of the certificate of title, the purchaser filed a complaint for declaratory judgment seeking payment from the former owners for portions of rental payments received by them prior to the issuance of the certificate of title, and various deposits of the tenants held by them. The trial court granted a motion to dismiss on the grounds that, *inter alia,* the complaint showed on its face that the matters complained of and sought to be declared and determined were res judicata, the same having been adjudicated by the foreclosure sale.

Affirming the trial court, the first district held that the purchaser's claims could have and should have been made only in the action which gave rise to the sale wherein the purchaser's rights were determined. Confirmation of a judicial sale has the effect of a final conclusive judgment and cures all irregularities in the making of the sale. Since the purchasers of property at a judicial sale are regarded as privies to the judgment authorizing the sale, they are bound by such judgment.

E. *Usury*

Under certain circumstances, usury may constitute a valid defense to a foreclosure action.

Florida Statutes section 687.071(7) (1971) provides that any debt created by a transaction involving an extension of credit as defined in that statute of greater than twenty-five percent per annum is unenforceable. If violation of such statute results in forfeiture of the debt, the mortgage secured thereby necessarily terminates, and hence no foreclosure can be obtained.

Prior case law has established that a transaction is usurious within the scope of the above statute if there is a loan, either express or implied, an understanding between the parties that the money lent shall be returned, that for such a loan a greater rate of interest than is allowed by law shall be paid or agreed to be paid as the case may be, and there exists a corrupt intent to take more than the legal rate for the use of the money loaned.[141]

140. 278 So. 2d 661 (Fla. 1st Dist. 1973).
141. Stewart v. Nangle, 103 So. 2d 649 (Fla. 2d Dist. 1958).

Controversy has existed as to the element of intent necessary to establish usury. In *Dixon v. Sharp*,[142] the supreme court established that such intent cannot be determined solely from a mathematical computation of the consequences of the agreement, but must be determined from the entire circumstances surrounding the loan. Sharp entered into a contract to purchase certain real estate from a real estate firm in which Dixon was a broker. Lacking necessary funds, Sharp induced Dixon and his wife to lend him $10,000 for sixty days. To promote such an agreement Sharp offered Dixon a $500 bonus, and later increased this sum to $700. After an initial refusal, the agreement was finally consumated. Upon Sharp's failure to repay the $10,000, Dixon instituted an action for the face value of the note. By way of affirmative defense, Sharp charged usury and counterclaimed seeking cancellation of the obligation, both principal and interest.

Initially, the trial court found insufficient evidence that the plaintiffs were guilty of willfully and knowingly charging or accepting interest in excess of twenty-five percent. On appeal, the fourth district reversed,[143] finding that the trial court had construed the intent element to require an intent to violate the statute rather than an intent to charge an amount of interest in excess of that prohibited by the statute. Thus, it remanded the case for determination as to whether the lenders had an intent to charge or receive excess interest at the time of execution of the note.

On remand, the trial court reversed its earlier position and found in favor of the defendant Sharp, holding that the subject note was unenforceable. As stated by the trial court, "the court construes the decision of the District Court of Appeal in this case to indicate that the requisite intent to establish the defense of usury can be determined from a *mathematical computation of the consequences of the agreement entered into between the parties.*"[144] This holding was affirmed without opinion by the district court of appeal.[145]

On certiorari, the supreme court reversed, finding that the element of intent is not fully determined by the fact that the lender actually receives more than the law permits, but is determined by the existence of a corrupt purpose in the lender's mind to get more than legal interest for the money. It is to be concluded, therefore, that the difference between a lawful transaction and a usurious one is *"the difference between 'good faith' and 'bad faith'. The parties are permitted to testify as to their purposes and intentions, and the question of intent is to be gathered from the circumstances surrounding the entire transaction."*[146] Thus, the court could not accept the trial court's finding that the requi-

142. 276 So. 2d 817 (Fla. 1973).
143. Sharp v. Dixon, 252 So. 2d 805 (Fla. 4th Dist. 1971).
144. Dixon v. Sharp, 276 So. 2d 817, 819 (Fla. 1973).
145. Dixon v. Sharp, 265 So. 2d 105 (Fla. 4th Dist. 1972).
146. Dixon v. Sharp, 276 So. 2d 817, 821 (Fla. 1973).

site intent could be determined solely from mathematical consequences of the agreement entered into between the parties, and, it reinstated the original judgment of the trial court.

Both Justice Ervin and Justice Boyd issued strong dissents to the above opinion. As stated by Justice Boyd,

> [t]he majority opinion reaches the unique conclusion that the usury laws of Florida are directed only against persons who loan money at an unconscionable rate of interest while being aware that such conduct is a violation of the law. All citizens are presumed to know the law. Practically all normal adults know there are maximum interest rates fixed by law. Ignorance of the law is no excuse for crime or other misconduct.[147]

While a usurious loan will result in forfeiture of the principal and interest, due to the fact that the debt created is unenforceable,[148] no other relief can be provided. Thus, in *Morette v. Sussman*,[149] a claim for punitive damages was denied. Since usury is a creature of statute, usury violations give rise only to those penalties and relief provided by statute. Other damages, either compensatory or punitive, are not recognized or permitted.

VI. MECHANICS' LIENS

A. *General Operation*

When a laborer, materialman, or other person entitled under the Mechanics' Lien Law[150] contributes to the enhancement of real property, and the contractor or owner defaults in payment, such person may obtain a lien under specified conditions. When the contractor fails to pay, the owner, upon receipt of proper notice, is required to withhold payment from the contractor, and channel such payment to the lienor. When the owner fails to pay, a lien is placed against his interest in the improved property.[151] Upon the owner's failure to pay the lien, his interest in the property may be sold and the proceeds used to satisfy the liens.[152]

Although there is no express provison within the act, it has been held that a lien may be allowed only when there has been a substantial performance of the contract on the lienor's part.[153] Substantial performance is generally found if the lienor's omission is not so serious

147. *Id.* at 823 (dissenting opinion).

148. FLA. STAT. § 687.071(7) (1971).

149. 274 So. 2d 259 (Fla. 4th Dist. 1973).

150. Fla. Stat. ch. 713 (1971). *See generally* 2 BOYER, *supra* note 11, § 33.02, at 1069 as to the general operation of mechanic's liens.

151. FLA. STAT. § 713.05 (1971).

152. FLA. STAT. §§ 713.26, 713.28 (1971).

153. American Motor Inns, Inc. v. Bell Electric Co., 260 So. 2d 276 (Fla. 4th Dist. 1972)

that it cannot be remedied by reducing payment on the contract price.[154] In such situation, the owner will be allowed credit for such reasonable sum as he had to pay in correcting work included in the lienor's claim.

An example of the allowance of a credit is found in *Berkowitz v. Anderson & Wallace Construction Co.*[155] The homeowners were required to pay a sum of money for the repair of defects and for the completion of the work after the contractor left the job. The trial court's failure to consider the amount expended to correct the contractor's work was held to be error; the landowners were entitled to a set-off, equal in amount to that portion of their expenditure attributable to repair of the contractor's defects.

Circumstances may arise in which the failure of the contractor to complete performance will not result in a set-off against his lien. In *Reitano v. Peninsular Building Supply Co.*,[156] the contractor had removed the roof of the owner's house pursuant to contract. The house was left uncovered for over a week, during which time it rained. The owner thereupon informed the contractor that she would make no further payments under the contract since her property had been damaged by the rainstorm while uncovered. The contractor thereafter stopped performance. The house was then left in an uncovered condition for several months. The contractor brought an action to foreclose its mechanic's lien, and the homeowner counterclaimed, which claim was denied. Although uncertainty as to the amount of damage will not prevent recovery, uncertainty as to the cause of the damage will defeat such recovery. In the instant case there was uncertainty as to the extent of damage attributable to the roofer; in the absence of such evidence, the counterclaim must be dismissed.

B. *Privity*

By express provision of the Mechanics' Lien Law, privity is not required in order to establish a lien. Thus, a materialman who is not in privity with the owner shall have a lien on the real property improved for any money that shall be owing to him for labor, services or materials furnished in accordance with his contract and with the direct contract.[157] It is further provided that if such person shall fail, for any reason, to establish a lien for the full amount due him, he may recover a judgment against any party liable for the lien, or against a party from which such sums are due him under a contract.[158]

The interpretation of the above requirements was before the court

154. *Id.*
155. 260 So. 2d 551 (Fla. 3d Dist. 1972).
156. 262 So. 2d 710 (Fla. 2d Dist. 1972).
157. FLA. STAT. § 713.06(1) (1971).
158. FLA. STAT. § 713.28(1) (1971).

in *Logan Construction Co. v. Warren Brothers Construction Co.*[159] In an action at law to foreclose a mechanic's lien against a property owner, the court committed itself to a literal interpretation of the above provisions in holding that an unpaid materialman of a subcontractor cannot recover a personal judgment against the general contractor in the absence of privity. Clearly, a money judgment could be authorized against the owner of the property since the statute expressly provides for such judgment.[160] However, there is no such provision for a money judgment against the contractor, for there was no contract or privity between these two parties. Thus, a statutory predicate exists only for a lien against the property and any personal judgment against the owner.

Provision is made within the statute for lien resulting from the rendering of personal services.[161] An architect, landscape artist, engineer or land surveyor shall have a lien on real property improved, for money owed him for his services in preparing plans, specifications or drawings used in connection with improving real property.[162] Where the intended improvement of the property is not made, then the engineer has a lien for services rendered only when resulting from a "direct" contract with the owner, as distinguished from a subcontract.[163]

In *Warshaw v. Pyms*,[164] a letter of agreement was signed by the architect and an engineer, whereby the engineer agreed to perform specified services for a fixed sum. The engineer attempted to enforce a lien against the owner for the value of such services. In reversing the trial court, it was held that in order for an engineer to have a lien for services, it was not necessary that there be a face-to-face personal confrontation between the owners and engineer to constitute a "direct" contract. The owners could become obligated through acts of an authorized agent. Whether the architect was authorized to act for the owners was a question of fact precluding summary judgment.

C. *Lienor's Notice*

The statute requires non-privity lienors, other than laborers, to file a notice to the owner as a prerequisite to the perfection of the lien.[165] The purpose of said section is to prevent the owner from being surprised by the assertion of liens from persons not contracting directly with him and of whom he had no notice.

It is now well established that the notice requirement simply provides for a category of priority lienors who do in fact file such timely

159. 268 So. 2d 369 (Fla. 1972).
160. FLA. STAT. § 713.28(1) (1971).
161. FLA. STAT. § 713.03 (1971).
162. FLA. STAT. § 713.03(1) (1971).
163. FLA. STAT. § 713.03(2) (1971).
164. 266 So. 2d 355 (Fla. 3d Dist. 1972).
165. FLA. STAT. § 713.06(2) (1971).

notice.[166] The failure to give the notice does not preclude recovery on the part of the lienor. If funds remain available after all lienholders filing timely notice have been discharged, then the tardy lienholder can also receive payment.[167] However, where all funds due to the prime contractor have been paid out, as in *W. W. Gay Mechanical Contractors, Inc. v. B. J. Case*,[168] a subcontractor failing to give timely notice will not be entitled to a lien. Since the owner was not put on notice, he will not be required to pay for services for which the prime contractor has already received payment.

D. *Perfection of Liens*

The procedures established for the perfection of liens by claimants is designed to afford protection to the owner. One such procedure requires the contractor to give the owner, at the time of final payment, a statement under oath to the effect that all lienors have been paid in full, or in the alternative the name of each lienor who has not been paid in full and the amount due.[169] Failure to provide this statement prevents the contractor from perfecting a lien or having a right of action against the owner.[170]

In *Stenholm v. Calbeck*,[171] the court considered the time period in which such affidavit must be filed. A claim of lien must be filed within ninety days after completion of labor or services.[172] The affidavit, on the other hand, must be filed at least five days before instituting suit.[173] The trial court had dismissed an action by the contractor to foreclose his lien on the grounds that the affidavit was filed more than ninety days after the last items of service and materials were furnished. This was held to be error in that only the claim of lien, not the affidavit, must be filed within that period. Thus, if the claim of lien was timely filed, and the affidavit was filed five days prior to the commencement of the action, the action could be maintained, notwithstanding the fact that the affidavit was filed subsequent to the ninety day period.

The affidavit procedure protects the owner against the possibility of a lien for the same labor or services filed by both a contractor and subcontractor. It affords no protection against a lien solely of a subcontractor or of a materialman supplying the subcontractor. Thus, in *Fountainbleau Hotel Corp. v. Lowry Electric Co.*,[174] it was held that a sub-

166. Crane Co. v. Fine, 221 So. 2d 145 (Fla. 1969).

167. *See* Moretrench Corp. v. Bronson & Veal Enterprises, 262 So. 2d 206 (Fla. 4th Dist. 1972); Midway Shipping Mall, Inc. v. Corky Corp., 257 So. 2d 905 (Fla. 3d Dist. 1972).

168. 275 So. 2d 570 (Fla. 1st Dist. 1973).

169. FLA. STAT. § 713.06(3)(d)(1) (1971).

170. *Id.*

171. 265 So. 2d 531 (Fla. 2d Dist. 1972).

172. FLA. STAT. § 713.08(5) (1971).

173. FLA. STAT. § 713.06(3)(d)(1) (1971).

174. 269 So. 2d 738 (Fla. 3d Dist. 1973).

contractor was not required to furnish an affidavit stating that all lienors had been paid in full as a condition of recovery in an action to foreclose his mechanic's lien.

In addition to the affidavit procedure, it is provided that in order to perfect his lien, every lienor, including laborers and persons in privity, must record a claim of lien.[175] The statute details those items which must be included in the claim of lien. It also provides that the omission of any of the prescribed details shall not, within the discretion of the trial court, prevent the enforcement of the lien as against one who has not been adversely affected to a substantial extent.[176]

The extent of this discretion was considered in *Adobe Brick & Supply Co. v. Centex-Winston Corp.*[177] As a result of the fact that the claim of lien did not contain a correct legal description of the property as required by statute, the trial court granted a motion for judgment at the close of the plaintff's case in an action for foreclosure. Since the defendant had not presented his case, there was no showing that he had been adversely affected by the misdescription, and thus the trial court had erred in granting the motion. Although the enforcement of the lien is within the discretion of the court, such discretion should not be exercised to deny enforcement unless it appears from a preponderance of the evidence that the owner was adversely affected by the error.

E. *Enforcement of Liens*

A lien is enforced by bringing an action to subject the real property to the lien and to have it sold to satisfy the claim. Prior to such action, however, the owner or any interested party may bring suit to have the lienor show cause why his lien should not be either enforced by action or cancelled of record.[178] It has been held that when subjected to such suit, the lienor may file a counterclaim to foreclose along with his answer, instead of filing a separate suit to foreclose.[179]

The statute of limitations for bringing an action to enforce a mechanic's lien is one year.[180] The owner may, however, shorten the time for commencement of the action to sixty days by recording a notice of contest of lien.[181] Notwithstanding a strong dissent, the supreme court held that the filing of an amended claim of lien does not toll the running of the sixty day period.[182]

Although the right to a lien may be waived expressly or by impli-

175. FLA. STAT. § 713.08 (1971).
176. FLA. STAT. § 713.08(4)(a) (1971).
177. 270 So. 2d 755 (Fla. 3d Dist. 1973).
178. FLA. STAT. § 713.21(4) (1971).
179. Wesley Const. Co. v. Yarnell, 268 So. 2d 454 (Fla. 4th Dist. 1972).
180. FLA. STAT. § 713.22(1) (1971).
181. FLA. STAT. § 713.22(2) (1971).
182. Jack Stilson & Co. v. Caloosa Bayview Corp., 278 So. 2d 282 (Fla. 1973).

cation, it has been held that a provision in the contract for arbitration of controversies does not in itself constitute a waiver of the contractor's rights to judicial enforcement of his mechanic's lien for amounts found due under the contract.[183] Thus, although the contractor may be required to arbitrate the issue of its entitlement to final payment and the amount thereof because of the arbitration agreement, he nevertheless retains the right to enforce the amount ultimately determined to be due by means of a mechanic's lien.

F. *Attorney's Fees*

Florida Statutes section 713.29 (1971) provides that in any action brought to enforce a mechanic's lien, the prevailing party shall be entitled to recover a reasonable fee for services rendered by his attorney, which fee shall be taxed as part of the costs. Considerable litigation has involved the interpretation as to who is the "prevailing party" under varied factual circumstances.

It is clear that one successfully resisting the assertion of a mechanic's lien will be considered the prevailing party, and thus entitled to attorney's fees. In *Dominguez v. Benach*,[184] the plaintiff brought an action on an architect's contract and the defendant filed a counterclaim which attempted to assert a mechanic's lien. The final judgment dismissed both the complaint and counterclaim. Since the plaintiff had successfully resisted the claim for a mechanic's lien as asserted by the counterclaim, he was the prevailing party and, therefore, the failure to award him attorney's fees was improper.

In *Houdaille-Duval-Wright Co. v. Charldon Construction Co.*,[185] the subcontractor brought an action to foreclose his mechanic's lien against the owner, and joined the contractor as a defendant. In his answer, the defendant contractor counterclaimed alleging delay in delivery of the materials and claiming damages therefor. It was found at trial that the amount owed the defendant contractor was greater than the amount of the lien; thus, there was a net judgment in favor of the contractor. Pursuant to such judgment, the court awarded attorney's fees to the contractor, as well as to the defendant owner.

Though the award of attorney's fees to the defendant owner was proper, since the subcontractor failed to prove a basis for the enforcement of the lien with the result that the owner was the prevailing party in the lien foreclosure action, the award of attorney's fees to the contractor was error. The contractor was a prevailing party on a collateral issue between the subcontractor and the contractor, but it was not a prevailing party in the cause of action presented to enforce the lien, as re-

183. Mills v. Gottfried, Inc., 272 So. 2d 837 (Fla. 4th Dist. 1973).
184. 277 So. 2d 567 (Fla. 3d Dist. 1973).
185. 266 So. 2d 106 (Fla. 3d Dist. 1972).

quired by statute.[186] Such cause of action was solely against the owner, not against the contractor, therefore, the owner was the only party who could properly recover attorney's fees.

When judgment is entered in favor of the lienor, he will be considered the prevailing party, regardless of the fact that the amount awarded is less than the amount claimed to be due. In *Foxbilt Electric Inc. v. Belefant*,[187] a materialman brought suit to foreclose his lien, and the owners counterclaimed for damages based on their dissatisfaction with the work done by the materialman. Final judgment in the trial court was entered for the materialman after deducting certain amounts established by the counterclaim, but the award of attorney's fees was in favor of the owner. Such award was held to be error by the court of appeal, in light of the fact that the materialman would be considered the prevailing party under the statute, and therefore entitled to such fees.

The above case also established that attorney's fees should be awarded for the successful prosecution of an appeal. Since the section providing for the award of attorney's fees is primarily designed to preclude any diminution of the claimant's full compensation for which he is suing while, at the same time, discouraging specious claims or defenses, the purpose of the provision can only be met by awarding fees for services rendered on appeal.[188]

To meet the intent of the provision awarding attorney's fees, it has been held that such fees should only be awarded at the conclusion of the action. In *Midway Shopping Mall, Inc. v. Airtech Conditioning, Inc.*,[189] the trial court had dismissed one count of a complaint for foreclosure of a mechanic's lien by releasing the land and transferring the lien asserted to the fund created by the construction bond, and released the lis pendens which had been filed. Such action did not constitute the landowner as the "prevailing party" within the provision of the statute, for it did not adjudicate all claims. Thus, there was no favorable determination of such finality as would entitle the owner to attorney's fees under the statute.

VII. Taxes and Tax Liens

A. *Valuation*

The Florida constitution provides that all land is to be assessed at a just valuation, according to such regulations as are prescribed by general law.[190] In arriving at such just valuation, the legislature has provided that the tax assessor shall consider the following factors: the pres-

186. Fla. Stat. § 713.29 (1971).
187. 280 So. 2d 28 (Fla. 4th Dist. 1973).
188. *Id.*
189. 253 So. 2d 900 (Fla. 3d Dist. 1973).
190. Fla. Const. art. VII, § 4.

ent cash value of the property, the highest and best use to which the property can be expected to be put in the immediate future, the present use of the property, the location of the property, the size of the parcel, the cost of the property, the condition of the property, the income received from the property, and the net proceeds from the sale of the property.[191] The implementation of these factors has led to much controversy, the interest of the landowner competing with those of the general public as vocalized by the tax assessor.

One common device employed by those holding land for speculation is to arrange for such lands to be used for agricultural purposes, and thus, hopefully realizing the benefit of a decreased rate of tax on such property. In *Chapman v. Cassady*,[192] the court in effect validated the above procedure, holding that an owner of agricultural property is entitled to the protection of an agricultural assessment even though he places or causes to be placed "for sale" signs on the property, and offers to sell the land for commercial purposes. As long as the actual use is for a bona fide agricultural purpose, any speculative intent of the landowner is of no consequence.

A similar result is found in *Atlantic Richfield Co. v. Walden*,[193] where the land was used as a cattle ranch, and the owner's intention to mine the land had not been carried out. The fact that the land was acquired with the thought of mining it does not negate the bona fides of an agricultural use any more than does the anticipation of speculative profits.

It is not to be implied from the above that any agricultural operation on the land is sufficient to qualify that land for an agricultural assessment. In *Greenwood v. Oates*,[194] the trial court had found that certain lands were not agricultural lands for tax purposes. Reversing the district court of appeal,[195] the supreme court found there was sufficient evidence to support the trial court's finding that the land was not used for a bona fide forestry operation entitled to agricultural treatment. Such evidence included the fact that the tract contained large stands of unmerchantible timber, that improvements had not been made for forestry purposes, and that there had been no forestry management operations.

This result was predicated on a consideration of two statutes. Florida Statutes section 193.071(3) (1971) provides that all lands being used for agricultural purposes shall be assessed as agricultural lands upon an acreage basis, and that such agricultural purposes shall include only lands being used in bona fide farming, pasture, grove or forestry operations. To supplement this statute, Florida Statutes section 193.461(3) (1971) provides that all lands which are used primarily for

191. FLA. STAT. § 193.011 (1971).
192. 278 So. 2d 665 (Fla. 2d Dist. 1973).
193. 277 So. 2d 815 (Fla. 2d Dist. 1973).
194. 251 So. 2d 665 (Fla. 1971) [hereinafter referred to as *Oates*].
195. Oates v. Bailey, 241 So. 2d 730 (Fla. 1st Dist. 1970).

bona fide agricultural purposes shall be zoned agricultural, and Florida Statutes section 193.461(5) (1971) provides that agricultural lands shall include among other things forestry operations.

In arriving at its conclusion, the court established that the existence of a "bona fide forestry operation" is not to be tested by the subjective intention of the operator, but rather is to be ascertained objectively on the basis of all available characteristics of the situation. Such objective considerations include the opinions of forestry or other appropriate experts, the tax assessor's expert opinion, the business or occupation of the landowner, the nature of the terrain, the density of the marketable timber, the past usage of the land, the economic merchantibility of the agricultural product, the reasonably attainable economic salability of the product within a reasonable future time, and the use or not of recognized care, cultivation, harvesting, and like practices.[196]

Further, the court stated that although a claim for agricultural assessment might be "bona fide," it might not meet any standards sufficient to qualify it as an operation. However, once the qualities of a forestry operation are met, it would be a rare case in which the claim would not be bona fide. Incidental objectives such as increases in land values would not disqualify the land for such consideration. It is clear that negative factors are also of no concern—the fact that the land is not being put to its best use, or that the landowner is not making a profit does not demand that an agricultural assessment be denied.

In *Oates,* the court realized that past usage of the land is one factor to be considered in determining whether an agricultural assessment is proper. Thus, in *Greenwood v. Firstamerica Development Corp.*,[197] it was held that since the tax assessor could consider the condition of the land and the bona fide use to which it was put both in the tax year immediately preceeding as well as the tax year in question, he was entitled to have the taxpayer produce all pertinent documents relating to the land for those years.

Traditionally, the purpose of the special agricultural assessment is to protect a segment of the economy from high tax rates which it cannot afford. However, the use of the special assessment can also be an effective planning device. This latter fact is especially true in light of Florida Statutes section 193.461 (1971), which provides, *inter alia,* that the county agricultural zoning board can reclassify lands previously classified agricultural as nonagricultural when there is contiguous urban or metropolitan development on two or more sides of the parcel in question, and when the board finds that the continued use of such lands for agricultural purposes will act as a deterrent to the timely and orderly expansion of the community.

196. Greenwood v. Oates, 251 So. 2d 665, 668 (Fla. 1971).
197. 265 So. 2d 89 (Fla. 1st Dist. 1972).

In *Rainey v. Nelson*,[198] the constitutionality vel non of the above statute was before the supreme court as a result of a finding of unconstitutionality on the part of the trial court. Upholding the constitutionality of the statute, the court first dismissed any claim of violation of due process. Since there is no right to special tax treatment in the first instance, the denial of such special treatment can involve no deprivation of a property right, and hence no denial of due process. The possible denial of equal protection raises a more serious question, and this necessarily depends on whether the legislative classification is reasonably expedient for the protection of the public health, safety, welfare or morals. The court broadly defined such police power as a power which

> embraces its whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizen with citizen those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others.[199]

Under this broad definition, the statute was found to be a valid exercise of the police power by the legislature. The court further rejected the notion that the application of the statute was in effect a forced sale and thus a taking, for an owner's relative worth and thus his ability to pay the tax would not invalidate an otherwise valid tax.

The use of the above statute is clearly dependent upon a finding by the Agricultural Zoning Board that the continued use of the land in question for agricultural purposes will act as a deterrent to the timely and orderly expansion of the community. Though no guidelines are given as to how such determination is to be made, the court nevertheless held that the statute was not vague or uncertain. Further, the court did not consider the extent to which such a finding will be open to judicial review. Therefore, it remains for future decisions to determine whether the statute can be effectively employed to control the growth of the urban fringe.

As illustrated by the above decisions, the role of the appellate court is limited in reviewing a judicial determination as to whether an agricultural assessment is warranted. Since a judgment, order, decree or ruling of a trial court comes to the appellate court with a presumption of correctness, it is not the function of an appellate court to substitute its judgment for that of the trier of fact. Although the appellate court might have reached a different conclusion if it had been the initial arbiter, if a review of the record reflects competent substantial evidence

198. 257 So. 2d 538 (Fla. 1972).

199. *Id.* at 539, *citing* T. COOLEY, CONSTITUTIONAL LIMITATIONS 1223 (8th ed. 1927).

supporting a determination that certain lands were not entitled to an agricultural assessment, that judgment should be affirmed.[200]

The right to challenge the assessment as entered on the tax rolls is not an unlimited one, for it is provided by statute that any suit to challenge the assessment must be brought within sixty days after the assessment roll is certified.[201] However, under certain circumstances, an assessment may be challenged even after the termination of the sixty day period. In *Lake Worth Towers, Inc. v. Gerstung*,[202] the Supreme Court of Florida differentiated a voidable assessment, one which is made in good faith but is irregular or unfair,[203] from a void assessment, one not authorized by law, where the property is not subject to the tax assessed, or where the tax roll is illegal due to some affirmative wrongdoing by the taxing official.[204] While a voidable assessment cannot be challenged after the statute of limitations has run, the running of the statute of limitations will not bar a challenge to an assessment which is unauthorized and void. In the instant case, the value of improvements had been included in the assessment, even though such improvements were not substantially completed on January 1 of that year. Since Florida Statutes section 192.042 (1971) provides that all land on which improvements are being made shall be assessed as unimproved land if on January 1 such improvements are not substantially completed, the assessment in question was without statutory authority and void, and, therefore, could be challenged subsequent to the sixty day period.

In order to secure a just valuation for ad valorem tax purposes and to provide for a uniform assessment as between property within each county and property in every other county, the legislature has enacted comprehensive legislation for property assessment administration.[205] The principle features include standards of classification to be used based upon the use of the property,[206] an information exchange between the department of revenue, the assessors' office and the auditor general,[207] provisions for the auditing of assessment rolls of each county by the department of revenue and the auditor general,[208] and a review commission which shall have adjudicatory authority to hear complaints relating to the approval or disapproval of assessment rolls.[209]

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200. Harbor Ventures, Inc. v. Hutches, 278 So. 2d 328 (Fla. 2d Dist. 1973).

201. FLA. STAT. § 194.151 (1971).

202. 262 So. 2d 1 (Fla. 1972).

203. *See* Hackney v. McKenny, 113 Fla. 176, 151 So. 524 (1933).

204. *See* C.D. Utility Corp. v. Maxwell, 189 So. 2d 643 (Fla. 4th Dist. 1966).

205. Fla. Laws 1973, ch. 73-172.

206. Fla. Laws 1973, ch. 73-172, *creating* FLA. STAT. § 195.072.

207. Fla. Laws 1973, ch. 73-172, *creating* FLA. STAT. § 195.084.

208. Fla. Laws 1973, ch. 73-172, *creating* FLA. STAT. § 195.096.

209. Fla. Laws 1973, ch. 73-172, *creating* FLA. STAT. § 195.098.

B. *Exemptions From Taxation*

In *Dade County v. Pan American World Airways, Inc.*,[210] the Supreme Court of Florida held that where an airline served a public purpose which justified leases of public property to the airline, where there was use of public financing through the issuance of revenue bonds for facilities used by the airline, and where the property was leased and used for the public purpose of transportation and necessary supporting activities such as an air terminal, the requirement of a public purpose was met and all leasehold interests held by the airline in such property were exempt from ad valorem taxation.

It is first to be noted that the above conclusion may have a limited viability for the future. Article VII, section 10(c) of the Florida constitution, effective January 7, 1969, provides in pertinent part that when any project financed through the issuance of any county or municipal bonds is occupied by a private corporation pursuant to a lease or contract, the property interest created by such lease or contract shall be subject to taxation to the same extent as other privately owned property. Although the court held that the above provision would not apply in the instant case, in that the leases in question were created prior to the effective date,[211] it would seem to be applicable to such a case arising in the future. Further, the court's assumption that the above provision is not self-executing is open to challenge.[212]

The court arrived at its conclusion only after a series of strained interpretations of constitutional provisions. Article VII, section 3(a) of the Florida Constitution provides that all property owned by a municipality and used exclusively by it for municipal or public purposes shall be exempt from taxation. Under the old constitution, article XVI, section 16 provided in part that the property of corporations shall not be subject to taxation if used exclusively for municipal purposes. Although it is clear that the property in question is used in part for a public purpose, the court argued that it is used exclusively for such purpose, in that the term "public purpose" is a legal concept which includes incidental private purposes, such as the profit motive of the private corporation. Such reasoning is at best strained, and renders meaningless the term "exclusive" as used in the above provisions. The difficulties inherent in the majority opinion are criticized by Justice Ervin in his dissent:

> There is much confusion in the majority holding and a sub silentio departure from taxation precedents which will give trouble. The Court seems to be saying that because a public

210. 275 So. 2d 505 (Fla. 1973).
211. *Id.* at 508-09.
212. *Id.* at 513 (dissenting opinion of Justice Ervin).

> airport qualified for public bond financing and serves a predominantly public transportation purpose, it follows that the private airline leaseholds on the airport properties essential to commercial aviation likewise serve a public purpose and therefore are exempt from taxes. This is indeed a far-reaching, court-generated tax exemption discriminatory to other taxpayers without benefit of specific statutory or constitutional authority.[213]

An easier case of exemption from taxation is presented by *Tre-O-Ripe Groves, Inc. v. Mills*,[214] where the taxpayer leased land from an agency of the federal government for use in growing citrus fruit. Affirming the imposition of ad valorem personal property taxes, the court made clear that the determinative factor for tax liability is not the character or nature of the property's owner, but the use made of the property. Since the purposes for which the groves were utilized were essentially private to the taxpayer, no exemption from taxation could be found.

C. *Tax Deeds and Sales*

It is provided by statute that at the sale of a tax deed, if the property is purchased for an amount in excess of the statutory bid of the certificate holder, the excess shall be used to discharge any tax liens of equal dignity of an appropriate municipality or other taxing district.[215] If the amount is not sufficient to pay such liens in full, they shall be paid pro rata and the units shall retain liens on the property for the remaining unpaid amount.[216]

In *Pinellas County v. S & A Land Co.*,[217] the property in question was acquired under a tax deed providing that the property would continue to be subject and liable for any unpaid general taxes of equal dignity with county taxes. Prior to the sale, the county had filed a lien against the property for unpaid intangible personal property taxes pursuant to statute.[218] The purchaser brought suit to quiet title, claiming that any rights represented by the tax lien had been extinguished by the tax deed. Therefore, the court was faced with a question of first impression as to whether intangible personal property taxes are of equal dignity with county taxes assessed against real property.

Florida Statutes section 197.011 (1971) provides in part that all taxes imposed pursuant to the laws of the state shall be a first lien, superior to all other liens on any property against which such taxes have been assessed. This should be compared to Florida Statutes section

213. *Id.* at 518.
214. 266 So. 2d 120 (Fla. 1st Dist. 1972).
215. FLA. STAT. § 197.535(2) (1971).
216. *Id.*
217. 271 So. 2d 230 (Fla. 2d Dist. 1972).
218. FLA. STAT. § 199.251 (1971).

199.241 (1971) which provides in part that all intangible personal property taxes shall constitute a lien on all real and personal property owned by the taxpayer, and shall be superior to all other liens except liens for other taxes, and prior recorded liens on real estate.

It is thus clear that intangible personal property taxes are not assessed against real property. Thus, the lien for taxes assessed against real property is superior to intangible personal property tax liens, based on the clear language of the above statutes, and the latter lien is therefore extinguished by the tax sale.[219]

VIII. LANDLORD AND TENANT

A. *Legislation*

The 1973 session of the Florida legislature has produced landmark legislation affecting two of the most prevelant types of residential dwellings—rental apartments and mobile homes.[220] The Florida act is not a complete codification of the landlord-tenant relationship in residential settings, but it does prescribe some principal features of the relationship and attempts to compensate for imbalances in the relative bargaining power of the parties. The specific provisions of this legislation are discussed at length elsewhere.[221]

B. *Covenants*

The landlord, in the absence of an agreement to the contrary, is under no obligation to repair or maintain the premises under the control of the tenant during the term of the tenancy. However, a covenant to repair or improve the property is enforceable as any other contract.[222] In addition to being a term of the contract, a covenant might also be construed as a condition precedent to the existence of the lease itself.

An example of the latter situation is found in *Meiselman v. Seminole Drug Corp.*[223] Due to the lessor's failure to complete the building on time, the lessee entered into an agreement whereby he would accept the building subject to certain deficiencies being corrected at least 30 days prior to the opening date. These repairs were never completed on time. Upon the tenant's failure to pay rent due, the landlord instituted an action to recover such delinquent rents. Affirming the trial court judgment in favor of the tenant, it was held that the lease never came into being as a binding contract. The subsequent agreement entered into between the parties was conditioned upon certain repairs on the part of

219. Pinellas County v. S & A Land Co., 271 So. 2d 230 (Fla. 2d Dist. 1972).

220. Fla. Laws 1973, ch. 73-330, *creating* FLA. STAT. §§ 83.40 *et seq.*

221. A full discussion of the act is found in Comment, *Up From Feudalism—Florida's New Residential Leasing Act*, 28 U. MIAMI L. REV. (to be published).

222. *See generally* 2 BOYER, *supra* note 11, § 35.10, at 1269.

223. 260 So. 2d 226 (Fla. 1st Dist. 1972).

the landlord. Since these were never accomplished, the terms of the agreement never became effective, and thus the provisions of the lease which required that the tenant give notice of defects before he could cancel the lease were never operative.

In *University Plaza Shopping Center, Inc. v. Stewart*,[224] the Supreme Court of Florida was faced with the interpretation of a lease provision whereby the tenant agreed to indemnify the landlord against any and all claims arising in and about the demised premises. Following institution of suit against the landlord for wrongful death which occurred when a gas line beneath the leased barbershop exploded, the landlord filed a third party complaint against the tenant and his insurer for indemnity. Finding that the above lease provision would not apply, it was held that such a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting solely from his own negligent acts unless such intention is expressed in clear and unequivocal language. In the instant case, the use of the general terms "indemnify . . . against any and all claims" did not disclose any clear intent to that effect. Since there was no indication of negligence on the part of the tenant, the claim of indemnity against him could therefore not be sustained .

C. *Options*

In *State ex rel. Metropolitan Dade County v. Askew*,[225] the supreme court had before it the status of the Aerojet tract located on the border of the Everglades. In 1961, Aerojet-General Corp. entered into a ten year lease with the Trustees of the Internal Improvement Fund and the Board of Education of the State of Florida. The agreement gave Aerojet an option to purchase at any time during the ten year period. In 1969, Aerojet attempted to exercise its option, but the lessors refused to convey. Aerojet thereupon sued for specific performance in federal court, where it was determined that Aerojet had performed all conditions precedent to the exercise of its option.[226] Specific performance was therefore ordered. In the instant case, Metropolitan Dade County petitioned for a writ of mandamus, alleging that it has a right of first refusal to the disputed tract, as conferred by statute.[227]

Although the statutory provision was enacted subsequent to the lease agreement, the court held that the statute was still applicable, due to the fact that the lease agreement was expressly made sub-

224. 272 So. 2d 507 (Fla. 1973).

225. 267 So. 2d 827 (Fla. 1972).

226. Aerojet General Corp. v. Askew, 453 F.2d 819 (5th Cir. 1971), *affirming* 318 F. Supp. 55 (N.D. Fla. 1970).

227. FLA. STAT. § 253.11 (1971), providing in pertinent part that "[t]he board of trustees of the internal improvement fund of the state shall not sell or convey any land to which they hold title unless and until they shall afford an opportunity to the county in which such land is situated to receive such land for public purposes . . . ."

ject to applicable statutory rights and reservations in effect on the date of conveyance. Florida Statutes section 253.11 (1971) must therefore be complied with before the parties may complete their transaction, and thus the Board of Trustees of the Internal Improvement Fund must first offer the land to Dade County before the land can be conveyed to Aerojet.

D. *Rent*

After making a determination that an inflationary spiral and a housing shortage existed in the city which required the control and regulation of rents, the City Council of Miami Beach enacted a rent control ordinance.[228] The constitutionality vel non of said ordinance was before the Supreme Court of Florida in *City of Miami Beach v. Fleetwood Hotel, Inc.*[229]

The basic issue for determination by the court was whether the city had the power in the first instance to enact the ordinance. In answering this question in the negative, several factors had to be considered. First, the city charter does not give to the city the explicit power to enact a rent control ordinance, but only the power to adopt all ordinances necessary or expedient for promoting or maintaining the general welfare, comfort, morals, peace, education, etc., and to exercise all of the powers and privileges conferred upon cities and towns by the laws of the state.[230] Since a city cannot enact a rent control ordinance either incident to its specific municipal powers or under its general welfare provisions without specific authorization from the state,[231] whether such authorization existed must therefore be considered. Although the home rule provisions[232] have given local government broad powers, such governments have not been made omnipotent; there are certain affairs which are exclusively those of the states and are not properly subjects for local regulation. Thus the court discussed at length the fact that the landlord-tenant relationship has always been considered a matter of state, rather than local, concern. Therefore, no authority for the enactment of a rent control ordinance will be found under the home rule provisions.

Despite its determination that the ordinance was invalid for lack of specific authorization, the court went on to consider the other issues involved. In addition to lack of authorization, the court found the ordinance to be invalid in that it involved an unlawful delegation of legislative authority by the city council without appropriate guidelines,[233] and

228. Miami Beach, Fla., Ordinance 1791, October 15, 1969.

229. 261 So. 2d 801 (Fla. 1972). *See generally* Note, *Rent Control By Municipal Ordinance—Not Within Home Rule Power*, 27 U. MIAMI L. REV. (1973).

230. MIAMI BEACH CHARTER, § 6(x).

231. *See* Warren v. City of Philadelphia, 387 Pa. 362, 127 A.2d 703 (1956).

232. FLA. STAT. § 167.005 (1971), *repealed by* Fla. Laws 1973, ch. 73-129.

233. Miami Beach, Fla., Ordinance 1791, October 15, 1969, §§ 16A.2, A.4.

also in that it conflicts with certain material provisions of state statutes.[234]

It is to be noted that the home rule provisions have been amended subsequent to the instant case,[235] and a new rent control ordinance enacted pusuant thereto.[236] It is to be questioned, however, whether the constitutional objections raised by the court can be met by a statutory amendment in the absence of constitutional authorization.

IX. ZONING

A. *Procedure*

The authority of a municipality to enact zoning and similar regulations may be conferred either by implication from the grant of express powers, by special acts of the legislature, including but not limited to the act incorporating the municipality, or a general act of the legislature.[237] One requirement contained in the general act of the legislature demands that any zoning regulation be made in accordance with a comprehensive plan, with such plan designed to meet certain enumerated public objectives.[238] Although the procedure whereby such comprehensive plan is developed is left to each municipality, nevertheless, certain limitations apply as to the type of procedure which may be employed.

In *IDS Properties, Inc. v. Town of Palm Beach*,[239] the town had entered into a contract with a land planning firm for the purpose of preparing and submitting to the town council a comprehensive plan. The contract provided that said planner would meet and work with either a planning commission or the town council during the preparation of the plan. Subsequently, a Citizen's Planning Committee was appointed to work with the planners in such capacity. During the course of this work, the above committee met with the planners at various times in an advisory capacity. Upon completion of the plan, it was submitted to the town council for approval.

Although the plan was approved by the council, it was challenged in the instant case on the grounds that the meetings between the citizen's committee and the town council violated the Government in the Sunshine Law[240] in that the committee never gave any notice of its meetings with the planner, nor were the meetings open to the public, nor were minutes taken. Asserting its reluctance to engraft exceptions on the application of the Sunshine Law, the court upheld the above contention. The court reasoned that if the town council had met with the planner,

234. FLA. STAT. §§ 83.03, .04, .06, .20 (1971).
235. Fla. Laws 1973, ch. 73-129, *creating* FLA. STAT. § 166.031.
236. Miami Beach, Fla., Ordinance 1978, December 31, 1973.
237. *See generally* 2 BOYER, *supra* note 11, § 38.05, at 1409.
238. FLA. STAT. § 176.04 (1971).
239. 279 So. 2d 353 (Fla. 4th Dist. 1973).
240. FLA. STAT. § 286.011 (1971).

such meetings would clearly have fallen within the purview of the law. Since public officials cannot do indirectly what they are prevented from doing directly, such officials cannot delegate de facto authority to act on their behalf in the formulation, preparation and promulgation of plans on which foreseeable action will be taken by such public officials without the appointed individuals falling within the scope of the Sunshine Law. As stated by the court,

> [i]t would be ludicrous to invalidate the actions of a *public body* which are the result of secret meetings of *that* body or members thereof while at the same time giving approval to actions which result from the secret meetings of *committees designated by such public body*.[241]

B. *Factors Affecting Validity*

It is clear that any zoning regulation limits the rights and privileges of the owner. However, the deprivation of such privileges and rights need not be compensated as long as the restriction is deemed a proper exercise of the police power. Zoning regulations have been held confiscatory, and thus not a proper exercise of the police power, when the restriction imposed is too burdensome in that it completely deprives the owner of the beneficial use of his property by precluding the only use to which it is reasonably adopted.[242]

An extreme example of unreasonable zoning is found in *New Products Corp. v. City of North Miami*.[243] The land in question was purchased from the city under a contract which provided that it would be rezoned from public park use to multiple family dwellings. Although the agreement to sell was upheld, the provision obligating the city to rezone was not.[244] Subsequently, the land was purchased nevertheless, and the landowner applied for the rezoning of same to multiple family dwellings. The application was denied. Suit was filed, the landowner claiming that the present zoning (public park) was unconstitutional, arbitrary and unreasonable. The claim was upheld on the basis that land zoned for public park use and owned by a private party presents an untenable position in that it completely deprives the owner of any beneficial use of his property by precluding all possible uses. Although the trial court had ordered the city to either rezone the property, acquire it by eminent domain, or remove it from the tax rolls, such order was found to be error in that eminent domain was not the subject of the instant cause, and that removing the property from the tax rolls would not remedy the confiscatory nature of the present zoning classification.

241. IDS Properties, Inc. v. Town of Palm Beach, 279 So. 2d 353, 356 (Fla. 4th Dist. 1973).

242. Forde v. City of Miami Beach, 146 Fla. 676, 1 So. 2d 642 (1941).

243. 271 So. 2d 24 (Fla. 3d Dist. 1972).

244. New Products Corp. v. City of N. Miami, 241 So. 2d 451 (Fla. 3d Dist. 1970).

In *City of Miami v. Silver*,[245] the landowner brought suit challenging a single-family residential restriction on his property as confiscatory. The evidence revealed that the city had, over a period of years, consistently resisted any attempt to change the zoning classification, while at the same time publicly announcing its intention to acquire the property for use as a park. Such evidence was sufficient to sustain a finding on the part of the trial court that the restrictive zoning was adhered to for the obvious purpose of allowing the city to acquire the property at as low a price as possible. When used for such a purpose, the zoning restriction is unreasonable and arbitrary to the point of confiscation, and, as applied to the property in question, invalid and unconstitutional. Therefore, the city was estopped to resist a higher classification of the property.

A question of reasonableness arises not just in the application of the zoning regulation to the property in question, but also in the classification which the zoning ordinance establishes. Thus, a restriction placed upon land in a given classification must bear a rational and reasonable relationship to the nature of the classification itself.

Such a reasonable relationship was found in *City of Miami Beach v. Arthree, Inc.*[246] An ordinance[247] of the city provided that hotels consisting of more than 100 rooms could have certain accessory uses, including a stockbroker's office, a sundry shop, an art gallery, a beauty salon, and the like. No such provision was made for apartment hotels. In the instant case, the owners of a certain apartment hotel wished to maintain such stores and offices. The trial court found that the above ordinance attempted to restrict the use of the apartment hotel so as to prevent them from using it in a manner similar to that of its immediate neighbor hotels, and, therefore, was unreasonable, arbitrary, confiscatory and unconstitutional insofar as its application to this hotel was concerned.

Reversing the trial court, the third district found that the distinction drawn between apartment hotels and other hotels is a reasonable one; it is both logical and useful for the city to legislate that hotels may operate service facilities for transient guests which are not as essential to the more permanent guests found in an apartment hotel. Further, since it had previously been established that the restriction of service stores and other accessory uses was a valid exercise of the police power as implemented through zoning regulation,[248] the zoning regulation in question must be upheld.

Reasonableness is also a factor to be considered in weighing complaints directed against the implementation of zoning regulations by the appropriate public officials. In *Dade County v. Jason*,[249] the landowners

245. 257 So. 2d 563 (Fla. 3d Dist. 1972).
246. 269 So. 2d 699 (Fla. 3d Dist. 1972).
247. Miami Beach, Fla., Ordinance 289, March 1, 1969.
248. Oceancoast Corp. v. City of Miami Beach, 203 So. 2d 640 (Fla. 3d Dist. 1967).
249. 278 So. 2d 311 (Fla. 3d Dist. 1973).

made formal application for a building permit. The proposed construction was in accord with existing zoning and building regulations. After repeated efforts to secure said permit, the landowners were finally notified that they were entitled to pick up the permit upon deposit of the necessary fee. Upon their appearance, the clerk refused to issue the permit and delayed such issuance until after a building moratorium encompassing the land in question went into effect, at which time they were informed that no permit would be issued.

In affirming the trial court's holding directing the issuance of the permit, the court of appeal found that the county had delayed the issuance of the permit in an obvious attempt to permit the county manager to issue a moratorium. The actions of the county were in bad faith and, therefore, unreasonable, thus, the county should be estopped, under the circumstances, to deny the issuance of the permit.

Although the municipality as well as adversely affected landowners can challenge the validity of a zoning ordinance, such parties can under certain circumstances be estopped from asserting same. For example, in *O.P. Corp. v. Village of North Palm Beach*,[250] the city enacted an ordinance zoning land in question as limited commercial, which would authorize the construction of apartment houses. No use of the land was attempted until ten years after the enactment of the above ordinance, when the landowner applied for and was issued a foundation building permit for a multi-story apartment house. A second permit for another apartment house was also issued shortly thereafter. Pursuant to said permits, construction on the foundations commenced, at an ultimate expense of $64,000. When the foundations were substantially completed, the city filed for a declaratory judgment, asserting its doubt as to the validity of the ordinance in question. An adjacent landowner intervened in this suit, claiming a real interest in the subject matter of the litigation. Holding that the city was estopped from challenging the validity of the ordinance, the District Court of Appeal, Fourth District, noted that the actions of the city in accepting the fee and issuing the foundation permit had caused the owner and builder to change their position in such a way that they would suffer substantial injury if the city were permitted to deny the right to the final permit.[251] However, that same court found a different situation to exist with respect to the surrounding landowners—they had done nothing to induce or cause the owner to apply for a permit or to expend money in reliance on the permit. Therefore, they were not estopped to assert the invalidity of the ordinance.

The supreme court, reversing in part, upheld the Fourth District as to the claim of estoppel against the city.[252] However, the court also found that the intervenors would be estopped from asserting the claim.

250. 278 So. 2d 593 (Fla. 1973).
251. O.P. Corp. v. Lewis, 266 So. 2d 676 (Fla. 4th Dist. 1972).
252. O.P. Corp. v. Village of N. Palm Beach, 278 So. 2d 593 (Fla. 1973).

Since they had purchased their homes four years prior to their challenge of the validity of the ordinance, knowing at the time of their purchase that the adjacent property had been zoned for limited commercial use, the doctrine of estoppel by acquiescence would apply to defeat their claim.

It is not to be implied from the above that the issuance of a building permit will in all circumstances estop the city from asserting the invalidity of the ordinance under which the permit was issued. In *City of Boynton Beach v. Carroll*,[253] an application for a building permit was denied by the building official because the city had passed a resolution prohibiting the building official from issuing a permit for any proposed buildings higher than 45 feet. Subsequent to such denial, a new master plan and zoning map were adopted which provided that no building higher than 45 feet could be constructed. The landowner then sought to compel the issuance of the permit allowing construction of a building in excess of 45 feet. The fourth district reversed the granting of the preemptory writ by the trial court, finding that the city was under no legal duty to issue the permit for the taller building.

Following the general rule that the zoning law in effect at the time of the final decision governs, notwithstanding the fact that there has been a change in the law since the time of application,[254] no duty to issue the permit could be found, since to do so would violate the newly enacted master plan. Further, the possession of a building permit of itself does not create a vested right,[255] and, therefore, the mere application for the permit cannot create such a right. In the instant case there is no basis to support a claim of equitable estoppel, for no detrimental reliance can be found on the part of the landowner. Therefore, the application for issuance of a building permit which would allow construction in excess of the height limitation must be denied.

Although the issuance of a building permit does not create a vested property right, where the landowner has in good faith made some substantial change in position or incurred extensive obligations in reliance on the zoning law, the doctrine of equitable estoppel will create a vested right and the permit may, therefore, not be revoked by a change of zoning. The continuance of the vested right so created depends on the circumstances of each case. Generally, if the landowner's reliance took the form of substantial expenditures that did not physically involve improvements to the land, the landowner may lose his vested right by expiration of the building permit. However, if the reliance took the form of substantial expenditures that physically involved the land, *i.e.*, the beginning of construction, the landowner cannot lose his vested right and it cannot be revoked by a change of zoning.[256]

253. 272 So. 2d 171 (Fla. 4th Dist. 1973).

254. Broach v. Young, 100 So. 2d 411 (Fla. 1958).

255. Sharrow v. City of Dania, 83 So. 2d 274 (Fla. 1955).

256. *See* City of Hollywood v. Hollywood Beach Hotel Co., 283 So. 2d 867 (Fla. 4th Dist. 1973).

An example of the former situation is found in *City of Hollywood v. Hollywood Beach Hotel Co.*[257] The landowners had procured a building permit and spent almost $200,000 in good faith reliance on the city's rezoning of the land in question. Based on the above principles, such actions created a vested right in the continuation of that zoning. However, the city then notified the landowners that they could proceed with construction, at which time the landowners declined to commence construction due to the poor economic conditions. In affirming the trial court, it was held that the failure of the landowners to proceed with construction constituted a forfeiture of their vested right. The city could, therefore, validly rezone the landowner's property to another classification.

A claim of estoppel can arise from the failure of the city to raise an issue in the course of litigation as well as from a detrimental reliance on the part of the landowner. In *State ex rel, Outrigger Club, Inc. v. Barkdull,*[258] plaintiff had brought suit seeking a declaration that it was entitled to a building permit allowing construction in excess of a 40 foot height limitation. The third district found that the landowners were entitled to a permit[259] and held that when property is located in a zoning district which incorporates by reference the provisions of another zoning district, these provisions incorporated by reference are controlling, rather than an ordinance providing for a height limitation generally. Upon remand, the city raised other alleged violations of the zoning ordinance which had not been raised in the first hearing before the trial court. Although the trial court refused to consider these new matters, on appeal, the third district ordered further consideration of the claims of the city with regard to these alleged violations.[260] The supreme court, however, overruled the finding of the third district, and held that once the city had an opportunity to litigate all of the issues with respect to the zoning violations, and failed to do so, they would be estopped from presenting these arguments the second time around. Therefore, the alleged violations claimed by the city could not be considered.

C. *Review of Zoning Regulations*

Procedures for review of decisions by administrative bodies involved in the zoning process are provided for by statute. Specifically, Florida Statutes section 176.16 (1971) provides that any person or persons aggrieved by any decision of the board of adjustment, or any taxpayer, may present to a circuit court a petition for issuance of a writ of certiorari, claiming that such decision is illegal, in whole or in part. Although

257. 283 So. 2d 867 (Fla. 4th Dist. 1973).

258. 277 So. 2d 15 (Fla. 1973).

259. City of N. Miami v. Outrigger Club, Inc., 269 So. 2d 12 (Fla. 3d Dist. 1972).

260. Although this decision has not been reported the supreme court in State *ex rel.* Outrigger Club, Inc. v. Barkdull, 277 So. 2d 15 (Fla. 1973) overruled the third district decision.

the statute declares that "any person" may bring suit, by judicial decision the scope of those allowed to challenge zoning actions has been limited by the doctrine of standing.

In *Renard v. Dade County*,[261] petitioner and respondents owned adjoining parcels. Respondents applied for a rezoning of their parcel to multi-family residence, which was ultimately granted. During the stages of administrative appeal, petitioner was an objector. Following adverse rulings, petitioner sought certiorari before the circuit court, which ruled against petitioner on the basis that having alleged no special interest, he had no standing to prosecute the matter. On appeal, the district court held that petitioner had sufficient standing to institute the suit, but since the rezoning question was fairly debatable, the decision of the trial court should be affirmed. The court, nevertheless, certified its decision as passing on a question of great public interest.[262]

In passing on the question, the supreme court discussed the requirements for standing to sue in three different types of cases. In cases involving the enforcement of a valid zoning ordinance, the rule requiring special damages still applies. However, increased population growth and density require a lenient application of that rule. Cases involving an attack upon a validly enacted zoning ordinance as being an unreasonable exercise of legislative power demand a different result. Although special damages need not be shown in such case, the attackers must, nevertheless, have a legally recognizable interest which is adversely affected by the proposed zoning action. The third type of case involves an attack upon a zoning ordinance which is void because not properly enacted, as where required notice was not given. Here, any affected resident, citizen or property owner of the governmental unit in question may bring suit to challenge such ordinance.[263]

The instant case involves a challenge to the rezoning. Since the rezoning was validly enacted, the case falls within the second category above. Therefore, a showing of special damages is not needed. Further, since petitioners were within the area where actual notice was required to be sent prior to any rezoning hearing, they had a legally recognizable interest. Thus, they had sufficient standing to bring suit.

In *Wagner v. City of Green Cove Springs*,[264] the landowners intervened in a suit challenging the rezoning of property across the street from their own. Since the suit involved a challenge to the validity of a zoning ordinance, it fell into the second category above and, therefore, a showing of special damages was not required. Further, since they were allowed to intervene in the original suit, any question of their interest was thereby decided. The dismissal of their complaint for lack of standing was, therefore, improper.

261. 261 So. 2d 832 (Fla. 1972).
262. 249 So. 2d 500 (Fla. 3d Dist. 1971).
263. Renard v. Dade County, 261 So. 2d 832, 837-38 (Fla. 1972).
264. 261 So. 2d 827 (Fla. 1972).

An example of a situation involving the first category above is found in *Continental Con-Dev Co. v. Shallberg*.[265] A building permit was issued to landowners across the street from the plaintiff, allowing construction of a building in violation of a set-back requirement of the city code. Suit was filed seeking injunctive relief and damages. Reversing the trial court, the fourth district found that from the record the plaintiff did not have any damages which were different in kind from those of all other property owners in the general area. At most there could only be a difference in the degree of damages. Thus, plaintiff was barred from seeking injunctive relief. However, the complaint alleged alternatively a cause of action for damages, and plaintiff would have proper standing to maintain such an action.

Although the circuit may hear the claim of any person aggrieved by a zoning action,[266] assuming such person has the requisite standing, the court is limited as to the relief which may be granted. In *City of Miami Beach v. Breitbart*,[267] the district court considered the propriety of the trial court order prohibiting the city from restricting the property in question so that it could not be used for professional office and motel use. Such order was found to be invalid, in that it was an expression of the trial judge's legislative intent upon the rezoning of the property. By this order, the trial court invaded the legislative field, a prohibited use of power under the doctrine of separation of powers. Thus, the order of the trial court was modified so as not to apply to a specific use.

An amendment to a zoning ordinance can be challenged in the voting booth as well as in the courts, as demonstrated by *City of Coral Gables v. Carmichael*.[268] The City Commission enacted an ordinance which amended the city's comprehensive zoning ordinance allowing multi-family uses on a tract known as the Cocoplum Beach property. Thereafter, a petition was prepared and submitted pursuant to the city charter to challenge the action of the commission by a referendum of the city's voters. After the referendum petition was filed but before the clerk had declared the sufficiency of the petition, the city clerk was enjoined from certifying the sufficiency of the petition until further order of court. It was alleged, *inter alia*, that the referendum as provided for in the charter would constitute a denial of due process and a denial of equal protection of the laws, that the petition was not in accord with certain material requirements of the charter, and that the ordinance was not legislative but rather quasi-judicial and, therefore, not subject to referendum. Following final hearing, the trial court permanently enjoined the clerk from certifying the petition, stating only that "the equities of this cause are found to be with the plaintiff."[269]

265. 267 So. 2d 40 (Fla. 4th Dist. 1972).
266. FLA. STAT. § 176.16 (1971).
267. 280 So. 2d 18 (Fla. 3d Dist. 1973).
268. 256 So. 2d 404 (Fla. 3d Dist. 1972) [hereinafter referred to as *Carmichael*].
269. *Id.* at 407.

On appeal, all material allegations of the plaintiff were found to be wanting, the injunction was quashed, and the referendum allowed to proceed. First, a long line of cases clearly establish that an amendment to a comprehensive zoning ordinance is legislative, rather than quasi-judicial in nature—it would be clearly inconsistent to hold that the enactment of an ordinance is legislative, while the amendment of that ordinance is not.[270] Further, a city charter may provide that any ordinance passed by the commission may be subjected to referendum vote.[271] Such referendum vote is cumulative and alternative to the legislative power that is conferred on the commission. Since it is legislative in nature, under the doctrine of separation of powers such process should not be impeded or prevented by the courts in the absence of demonstrated illegality.

Similarly, in *Carmichael,* the claims of denial of due process and equal protection were dismissed. As stated by the court,

> The proponents and opponents are given all the privileges and rights to express themselves in an open election that a democracy or republican form of government can afford to its citizens upon any municipal or public affair.[272]

Therefore, in the absence of any showing of illegality, the court should not interfere.

D. *Exceptions*

Although the zoning ordinance must be drawn pursuant to a comprehensive plan,[273] it is not to be inferred that all development must be in conformity with the use districts resulting from such plan. In *Jefferson National Bank v. City of Miami Beach,*[274] the landowner applied for a permit to use its lot for parking purposes, but was refused. It then filed its action in the trial court and suffered an adverse ruling. On appeal, the landowner urged, *inter alia,* that the trial court denied it the equal protection of the law and discriminated against it in that the zoning ordinance would have permitted the city to operate a public parking lot on the parcel if it so desired. This contention was rejected on the grounds that the zoning authority has the right, upon adoption of a comprehensive zoning ordinance, to exempt itself from the regulations applicable to private interests. The erection of a parking garage has been held to be a governmental function,[275] and governmental functions

270. *E.g.,* City of Miami Beach v. Schauer, 112 So. 2d 838 (Fla. 1959), *discharging cert. to* 104 So. 2d 129 (Fla. 3d Dist. 1958).

271. MIAMI BEACH CHARTER § 21.

272. City of Coral Gables v. Carmichael, 256 So. 2d 404, 409 (Fla. 3d Dist. 1972), *quoting* Dwyer v. City Council of Berkeley, 200 Cal. 505, 508, 253 P. 932, 936 (1927).

273. FLA. STAT. § 3176.04 (1971).

274. 267 So. 2d 100 (Fla. 3d Dist. 1972).

275. Stott v. City of Manchester, 109 N.H. 59, 242 A.2d 58 (1968).

are usually considered exceptions to general use limitations permitted in a zoned use district. Therefore, no denial of equal protection could be found.

In *Metropolitan Dade County v. Parkway Towers Condominium Assoc.*,[276] the above rule was seemingly extended to those situations where there is no express exemption within the zoning ordinance in favor of the governmental body. The county decided to locate a facility for the housing of prisoners on a parcel which did not provide for such use. Suit was filed by adjoining landowners to enjoin construction. Dissolving the temporary injunction that had issued, it was held that the county was not required to seek a zoning change on the property involved in order to construct such facility. This result was predicated on the recognition of a common law privilege on the part of a governmental entity to place a governmental facility without regard to a comprehensive zoning ordinance or its procedures. Although this privilege may be waived, waiver will only be found on a showing of affirmative action by the governmental entity in the adoption of the zoning ordinance, such as an express provision for the location of the facility in question within another zone. Since in the instant case the zoning ordinance contained no provision for the location of prisoner facilities, a claim of waiver could not be supported.

X. CONDOMINIUMS

A. *Statutory Provisions*

It is provided by statute that a condominium may be created on lands owned in fee simple or held under a lease having a term in excess of ninety-eight years by recording a declaration of condominium in the appropriate records.[277] In *Ackerman v. Spring Lake of Broward, Inc.*,[278] it was held that such statute did not preclude the submission of the recreation area to condominium ownership for a term of 99 years where the housing part of the condominium property was submitted to condominium ownership in fee simple. However, the submission of the recreation area to condominium ownership presented a question as to the validity of recreation leases entered into between the developer and the unit owners. Once the recreation area was submitted to condominium ownership, the recreation area became part of the common elements of the condominium during the term of the estate for years. The developer, then, had no present possessory interest in the property which it could validly lease to the individual unit owners. Therefore, the finding of the trial court that such leases were valid was reversed.

By statute, the administration and management of the condominium

276. 281 So. 2d 68 (Fla. 3d Dist. 1973).
277. FLA. STAT. § 711.08(1) (1971).
278. 260 So. 2d 264 (Fla. 4th Dist. 1972).

property is the responsibility of the condominium association, such association to be composed of owners of units in the condominium.[279] In *Point East Management Corp. v. Point East One Condominium Corp.*,[280] the court had before it the question of whether such responsibility could be delegated by contract to one outside of the association.

Prior to the sale of the condominium units to the purchasers thereof, the developers caused long-term contracts to be made between the association and the developer-controlled management corporation for the management of the condominium associations. The individual condominium units were then sold subject to these long term management contracts. The trial court held, *inter alia,* that these management contracts were invalid in that they contained provisions contrary to the direction and intent of the Condominium Act.[281] The third district affirmed, holding that the contract in question operated to divest from the condominium association in a material and substantial degree the power and privilege granted it by statute to operate the condominium, and, thus, was invalid.[282] The supreme court, however, found that the legislature, by placing in the condominium associations the power and duty to manage the condominium properties, did not intend to restrict the ability of the associations to contract for the management of the associations.

The supreme court summarily dismissed the argument presented by the association, the trial court, and the district court of appeal. After declaring that recission of the contracts would not lie merely because they arose from dealings of the developers with themselves while they constituted all of the members of the condominium associations and of the management corporations, the court stated:

> We cannot agree with the District Court of Appeal that the Legislature, by placing in the condominium associations the power and duty to manage the condominium properties, intended to restrict the ability of the associations to contract for the management of the associations.[283]

In support of this conclusion, it was argued that since the legislature enacted a remedial statute which allowed the owners of condominium units to cancel initial management contracts by a vote of 75 percent,[284] it must be assumed that the legislature recognized the existence of and chose not to abolish such management contracts.

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279. FLA. STAT. §§ 711.03(2), 711.12(1) (1971).

280. 282 So. 2d 628 (Fla. 1973).

281. FLA. STAT. ch. 711 (1971).

282. Point East Mgmt. Corp. v. Point East One Condominium Corp., 258 So. 2d 322 (Fla. 3d Dist. 1972).

283. Point East Mgmt. Corp. v. Point East One Condominium Corp., 282 So. 2d 628, 630 (Fla. 1973).

284. FLA. STAT. § 711.30 (1971). By its express terms, this statute is applicable only to original management contracts entered into by the association subsequent to January 1, 1971, and thus does not provide a basis of relief to the association in the instant case.

The court's reasoning is at best a non sequitur. Though this argument might support the proposition that the association has the power to contract, it offers no answer as to whether that power is limited. As argued by Justice Ervin in his dissent, the fact that the legislature became more aware of the problem inherent in such management contracts and acted to provide remedies against future injustices does not mean that the courts are powerless to strike down a contract clearly violative of other provisions of the Condominium Act.[285] Finally, the court concluded that since the terms of the management contract were available to all who purchased units in the condominium, enforcement of the contract against them cannot be said to work a hardship.

B. *Rentals*

In the absence of an express use limitation contained within the declaration of condominium, there appears to be no restriction on the unit owner's right to lease the condominium unit to a tenant. However, the operation of such lease would be subject to the limitation contained within the declaration of condominium and rules promulgated by the condominium association.[286] Further, since the lessee is not a member of that association, his ability to interject himself into the affairs of the condominium is limited.

A situation involving the above principles is found in *Tietig v. Kusik*.[287] A condominium unit was rented to the tenant for a term. After several months, the tenant began to be harassed by two officers of the condominium association and warned against the use of certain facilities. The tenant thereafter abandoned the premises, and the owner of the unit brought an action for rent due.

In finding for the owner, the court rejected the tenant's counterclaim based on a constructive eviction and denial of quiet use and enjoyment of the leased premises. Since the alleged constructive eviction fell short of actual eviction, and was susceptible to remedy, the tenant had to give timely notice to the landlord of the objectionable act and demand rectification.[288] Under the facts of this case, the notice requirement was even more compelling; the landlord is owner of the condominium unit and therefore has authority on his tenant's behalf to interject himself into the affairs of the condominium.[289] Finally, the landlord and unit owner is seemingly protected by Florida Statutes section 711.18(2) (1971), which precludes a unit owner's personal liability from

285. Point East Mgmt. Corp. v. Point East One Condominium Corp., 282 So. 2d 628, 630 (Fla. 1973) (dissenting opinion).

286. FLA. STAT. § 711.12 (1971).

287. 279 So. 2d 890 (Fla. 3d Dist. 1973).

288. Richards v. Dodge, 150 So. 2d 477 (Fla. 2d Dist. 1963).

289. Point East Mgmt. Corp. v. Point East One Condominium Corp., 282 So. 2d 628. 630 (Fla. 1973) (dissenting opinion).

any damages caused by the association in connection with the use of the common elements.

The right of a unit owner to lease his condominium unit is not an unlimited one, for the declaration of condominium can restrict such right. In *Holiday Out in America v. Bowes*,[290] a provision of the declaration of condominium granted the developer the exclusive right to rent the units, and to retain a percentage of the rental as a fee for such services. Such provision was held to be valid and not an unreasonable restraint on alienation. Although the property may be less desirable and hence less valuable than it would be if not subject to the rental restrictions, the unit owners are, nevertheless, free to convey the fee title to the property at any time and to any one in exactly the same state they acquired it. Thus, no restraint on alienation could be found. However, it was also held that the manager could not extract his percentage fee, due to the fact that he was not registered as a real estate broker. Although an exemption from the licensing provisions applies to the activities of the manager of a condominium in relation to the renting of individual units when acting on behalf of an owner who has an interest in no more than one unit,[291] such provision did not apply in the instant case since the plaintiff owned two units.

290. 285 So. 2d 63 (Fla. 4th Dist. 1973).
291. FLA. STAT. § 475.131 (1971).