

# Anchoring Away

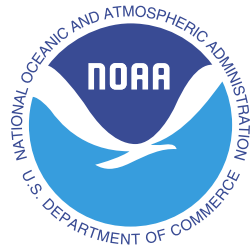
Government Regulation  
and the Rights of  
Navigation in Florida

  
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**ANCHORING AWAY:  
GOVERNMENT REGULATION AND  
THE RIGHTS OF NAVIGATION IN FLORIDA**

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# I. Introduction

*It's official! The U.S. Coast Guard's recommended equipment list has been revised. Now, in addition to anchors, fire extinguishers, emergency signals and personal flotation devices, American boaters are advised to pack a lawyer.<sup>1</sup>*

Florida boasts one of the most complex and environmentally productive systems of coastal bays, bights, sounds, passes, inlets, cuts, canals and harbors in the United States, as well as an extensive network of inland waterways. More than 1.3 million vessels used this resource in 2003,<sup>2</sup> and a recent study indicates that the recreational boating industry contributed more than 18.4 billion dollars to Florida's economy in 2005.<sup>3</sup> As commercial and recreational use of the Florida waterway system expands and the population of the state increases, the potential for conflicts between boaters and the environment and among different user groups will also grow.<sup>4</sup> State and local governments can be caught in the middle, forced to reconcile conflicting demands for the same limited geographic space and natural resources. One such area of state and local conflict involves the practice of transient and live-aboard anchoring by watercraft. It is an area that has engendered considerable litigation, both in Florida and elsewhere. More recently, state and local governments, in conjunction with regional bodies such as the inland navigation districts and regional planning councils, have sought to reconcile the navigation interests of boaters with governmental interests in protecting the coastal environment and shoreside land uses.

This report addresses the federal, state and local regulatory regime for anchoring and mooring in Florida.<sup>5</sup> For the purposes of the report, anchoring refers

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<sup>1</sup> See William K. Terrill, Note, *LCM Enterprises v. Town of Dartmouth: Can Recreational Mariners Protect Their Right to Navigate?*, 2 Ocean & Coastal L.J. 167 (1996) (quoting Bob Weimer, Boaters New Problem: No Parking Zones, *Newsday* (Nassau and Suffolk ed.), Feb. 15, 1993, at 32)[Hereinafter Terrill].

<sup>2</sup> There were 978,225 vessels registered in Florida in 2003. Florida Fish and Wildlife Conservation Commission, 2003 *Boating Accident Statistics*, at <http://myfwc.com/lawboating/2003stats/summary.htm> (last visited Feb. 10, 2006). The Florida Department of Environmental Protection estimates another 400,000 vessels visited the state. Florida Department of Environmental Protection, *Safe Boating Habits*, at <http://www.dep.state.fl.us/law/grants/cmp/cleanboatinghabits.htm> (last visited Feb. 10, 2006).

<sup>3</sup> Marine Industries Association of Florida, Inc., *Boating is Big Business in Florida*, at [http://www.boatflorida.org/custom\\_pages/site\\_page\\_2708/index.html](http://www.boatflorida.org/custom_pages/site_page_2708/index.html) (last visited March 31, 2006).

<sup>4</sup> Florida is not the only state experiencing such conflicts. See Barbara A. Vestal, *Dueling with Oars, Dragging Through Mooring Lines: Time for More Formal Resolution of Use Conflicts in States' Coastal Waters?*, 4 Ocean & Coastal L. J. 1-79 (1999).

<sup>5</sup> Support for this research was made possible by a grant from the U.S. Department of Commerce, National Oceanic and Atmospheric Administration, through the Florida Sea Grant College Program, to the Center for Governmental Responsibility at the University of Florida College of Law. The project entitled "Legal Issues in Non-Regulatory Boating Management to Achieve Sustainable Waterway Use," Sea Grant No. NA36RG0070

to the boater's practice of seeking and utilizing safe harbor on the public waterway system for an undefined duration. This may be accomplished utilizing an anchor carried on the vessel, or through the utilization of moorings permanently affixed to the bottom. Anchorages are areas that boaters regularly use for anchoring or mooring, whether designated or managed for that purpose or not. Mooring fields are areas designated and used for a system of properly spaced moorings. The regulation of marinas, docks and other facilities affixed to the shore is not discussed, except to the extent it may relate to the practice of anchoring.

We first present the jurisdictional bases for anchoring and anchorage management and limitations on these activities, beginning with the federal navigation servitude, federal statutes and federal supremacy considerations. State and local efforts to address anchoring in Florida are then examined, along with the judicial opinions construing them. We conclude that while anchoring is considered to be a "right incidental to navigation," and hence protected by federal law, reasonable local regulation of anchoring is probably permissible. Unfortunately, in the absence of judicial clarification, there is little agreement on what constitutes reasonable regulation. The Trustees of the Internal Improvement Trust Fund are authorized to regulate anchoring on sovereignty submerged lands in Florida, but have not done so except for the establishment of mooring fields. In addition, the Florida Legislature has limited the authority of local governments to regulate anchoring, but the statute is ambiguous. Boaters are thus faced with considerable uncertainty when anchoring in Florida. Consensus-based efforts to develop managed anchorages and mooring fields may provide the best strategy to reconcile the competing interests of boaters and other waterway users.<sup>6</sup>

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provided research support to an effort by concerned boaters and representatives of state agencies and local governments in Southwest Florida to develop regional ecosystem-based solutions to the inconsistent regulation of anchorages in the Southwest Florida waterway system. These interested parties formed the Southwest Florida Regional Harbor Board and launched a "pilot project" designed to ensure that anchorages are managed in the least restrictive manner that reconciles conflicting interests and protects the resources these sites provide. The Regional Harbor Board recognized the need to understand the existing legal framework that addresses these issues. This report was initially prepared for this purpose and published in 1999 as Florida Sea Grant Technical Paper 99. Further work on recreational boating issues revealed increasing interest in the topic and a need for updating, which was supported through the Florida Sea Grant project "Waterways and Waterfronts: The Legal Framework for Public Access", R/C-P-27. The authors are grateful for the research assistance provided by Todd Trexler, J.D. 1996, Ken Tinkler, J.D. 1997, Shawn Arnold, J.D. 1999, Melissa Gross-Arnold, J.D., 1999 and Ryan Baya, J.D. candidate at the University of Florida Levin College of Law.

<sup>6</sup> See Section IV of this report.

## II. Federal Authority: Concurrent State Jurisdiction and the Reservation of Federal Navigation Rights

This section discusses the federal constitutional and statutory provisions that serve as the basis for federal jurisdiction over anchoring. In addition, the section addresses federal limits on state and local authority to regulate anchorages.

### A. Federal Constitutional Authority over Navigable Waters

Under the Commerce Clause of the United States Constitution,<sup>7</sup> the federal government has authority to control the navigable waters of the nation.<sup>8</sup> There are two related aspects to this authority. First, there is a federal power to regulate activities affecting navigable waters because of their relationship to interstate commerce. Second, there is a federal navigational servitude, which was recognized in some of the earliest decisions examining the scope of Congressional authority under the Commerce Clause. The navigational servitude encompasses the power of Congress to regulate navigation, prohibit or remove obstructions to navigation, and improve or destroy the navigable capacity of the nation's waters.<sup>9</sup> When Congress acts within the scope of the navigational servitude, state regulatory power and private riparian rights must give way.<sup>10</sup>

One purpose of the navigational servitude is to protect the rights of private parties to access and use navigable waters.<sup>11</sup> In that sense it constitutes a right of navigation. Congress can protect those rights, but the extent to which private parties can assert a right of navigation under the navigation servitude is not as clear.<sup>12</sup> Even if private parties could bring an action to assert rights to navigate

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<sup>7</sup> See U.S. Const. art. I, sect. 8.

<sup>8</sup> *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *United States v. Twin City Power Coop.*, 350 U.S. 222, 224 (1956). See generally, 4 Robert E. Beck (Ed.), *Waters and Water Rights* \*35.02 (1996).

<sup>9</sup> See *United States v. Willow River Power Co.*, 324 U.S. 499 (1945); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913). In *Gilman v. Philadelphia*, the Court declared the "power to regulate commerce comprehends the control . . . of all navigable waters of the United States which are accessible to the State . . . [f]or this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress." 70 U.S. (3 Wall.) 713, 724-725 (1865).

<sup>10</sup> See *Id.*

<sup>11</sup> See *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *United States v. Rands*, 389 U.S. 121 (1967). See generally, Eva H. Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 Natural Resources J. 1 (1963).

<sup>12</sup> A student commentator has interpreted a California case involving the scope of the state public trust doctrine, *Marks v. Whitney*, 491 P.2d 374, 381 (Cal. 1971), as giving a mariner "facing an obstruction to navigation . . . standing to assert the navigational servitude." Terrill, *supra* note 1, at 174. *Marks*, however, involved the public

under the federal navigational servitude, they may still be subject to reasonable regulation. The right to navigate, moor or anchor a vessel has never been recognized as a “fundamental right.” Restrictions on the exercise of that right will therefore be upheld if there is any rational basis for them.<sup>13</sup>

## **B. Federal Statutory Authority over Anchoring and Anchorages**

Numerous federal statutes affect management and use of the navigable waters of the United States. The Submerged Lands Act (SLA) transferred title to the states of land underlying navigable waters,<sup>14</sup> but it reserved certain federal interests, including navigation.<sup>15</sup> The U.S. Coast Guard is charged with regulating various aspects of the right of navigation.<sup>16</sup> The U.S. Army Corps of Engineers and the Environmental Protection Agency regulate dredging, filling, and placement of structures in navigable waters.<sup>17</sup> The U.S. Fish and Wildlife Service and the National Marine Fisheries Service are required to protect endangered and threatened species, including marine mammals.<sup>18</sup> Finally, federal lands, including those beneath navigable waters, are administered by several agencies, including the National Park Service (national parks and monuments),<sup>19</sup> the Fish and

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trust doctrine, not the federal navigational servitude. See generally, David C. Slade, *Putting the Public Trust Doctrine to Work* 295 (1998).

<sup>13</sup> See *Murphy v. Department of Natural Resources*, 837 F. Supp. 1217, 1220-21 (S.D. Fla. 1993); *Barber v. State of Hawaii*, 42 F.3d 1185, 1196-97 (9th Cir. 1994); *Hawaiian Navigable Waters Preservation Soc. v. State of Hawaii*, 823 F. Supp. 766, 769-70 (Haw. D. 1993). Fundamental rights are among those rights which are explicitly or implicitly guaranteed by the Federal Constitution, for example the right of free speech. See *Black's Law Dictionary* 674 (6th ed. 1990). A regulation infringing on a fundamental right must be able to withstand “strict scrutiny,” which means it is narrowly tailored to promote a compelling state interest. On the other hand, regulation affecting other rights need only be reasonably related to a legitimate government interest. See *Murphy* at 1220-1221. Because the right to navigate is not a fundamental right, a private party must demonstrate that regulations affecting lack any possible reasonable basis.

<sup>14</sup> See 43 U.S.C. § 1301, *et seq.* (2005).

<sup>15</sup> See 43 U.S.C. § 1311(d) (2005).

<sup>16</sup> See 14 U.S.C. § 81 (2005) (relating to aids to navigation and other signage); 33 U.S.C. § 471 (2005) (relating to anchorage grounds and harbor regulations); 6 U.S.C. § 468 (2005) (relating to preservation of Coast Guard functions in the Department of Homeland Security).

<sup>17</sup> See 33 U.S.C. § 403 (2005) (U.S. Army Corps of Engineers); 33 U.S.C. § 1319 (2005) (Environmental Protection Agency).

<sup>18</sup> See 16 U.S.C. § 1531- § 1544 (2005); 50 C.F.R. § 402.01(b) (2005) (designating which endangered and threatened species fall under the jurisdiction of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service).

<sup>19</sup> See 16 U.S.C. § 668dd (2005).

Wildlife Service (national wildlife refuges),<sup>20</sup> and the National Oceanic and Atmospheric Administration (marine protected areas).<sup>21</sup>

## 1. The Submerged Lands Act (SLA)

Under the Submerged Lands Act (SLA),<sup>22</sup> ownership of submerged lands and control of the overlying waters was transferred to the states, subject to a reservation of significant power by the federal government.<sup>23</sup> The SLA recognized, confirmed, and established each state's claim of title and ownership<sup>24</sup> as well as management and administrative responsibility<sup>25</sup> over submerged lands beneath navigable waters. The Supreme Court has characterized the SLA as a transfer to the states of rights to "submerged lands and waters."<sup>26</sup> Congress' goal in passing the SLA was to decentralize management of coastal areas and foster greater local control to better meet the needs of the state and boaters.<sup>27</sup> Congress stated that because management of submerged lands is directly tied to local activities, "any conflict of interest arising from the use of the submerged lands should be and can best be solved by local authorities."<sup>28</sup> The SLA, however, expressly reserved in the federal government the power to regulate these lands for the purposes of

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<sup>20</sup> See *Id.*

<sup>21</sup> See 16 U.S.C. § 1434 (2005).

<sup>22</sup> See 43 U.S.C. § 1301, *et seq.* The legislative history of the Submerged Lands Act indicates Congressional endorsement of the state's ownership rights. Brief of Amicus Curiae at 5, *Hawaiian Navigable Waters Preservation Society v. State of Hawaii*, 823 F.Supp. 766 (D. Haw. 1993), *aff'd* 42 F.3d 1185 (9th Cir. 1994) (citing Submerged Lands Act, H.R. Rep. No. 215, 83d Cong., 1st Sess. (1953), *reprinted in* 1953 U.S.C.C.A.N. 1385, 1436-37). The states probably already owned the submerged lands at issue by virtue of the public trust and equal footing doctrines. See *Phillips Petroleum Company v. Mississippi*, 484 U.S. 469, 474 (1988). Under the "equal footing doctrine," as each state entered the Union it obtained rights in its submerged lands equal to those possessed by the original thirteen states. See *Shively v. Bowlby*, 152 U.S. 1, 57 (1894).

<sup>23</sup> See 43 U.S.C. § 1314(a) (2005).

<sup>24</sup> See 43 U.S.C. § 1311(a)(1) (2005).

<sup>25</sup> See 43 U.S.C. § 1311(a)(2) (2005).

<sup>26</sup> See *United States v. California*, 436 U.S. 32, 37 (1978); *Murphy v. Department of Natural Resources*, 837 F. Supp. 1217, 1221 (S.D. Fla. 1993).

<sup>27</sup> See *Id.*

<sup>28</sup> See H.R. Rep. No. 215, 83d Cong., 1st Sess. (1953), *reprinted in* 1953 U.S.C.C.A.N. 1385, 1436-37.

“commerce, navigation, national defense, and international affairs.”<sup>29</sup> The statutes discussed below implement that authority.

## 2. The Rivers and Harbors Act

Through the Rivers and Harbors Act, the federal government exercises control over activities which relate to maritime commerce and navigation.

**a. Special Anchorage Areas and Anchorage Grounds.** The Secretary of Transportation, through the Coast Guard, is authorized to establish both “anchorage grounds” and “special anchorage areas.” Anchorage grounds may be established on navigable waters of the United States wherever “the maritime or commercial interests of the United States require such anchorage grounds for safe navigation.”<sup>30</sup> In addition, the Secretary is granted the authority to adopt “suitable rules and regulations” governing their use.<sup>31</sup> The Coast Guard has established nine anchorage grounds in Florida, primarily for large commercial vessels using major ports.<sup>32</sup>

Of more significance to recreational boaters, the Act also provides for special anchorage areas, in which vessels less than sixty-five feet in length are not required to display the anchorage lights otherwise required by the Coast Guard's Navigation Rules.<sup>33</sup> Other rules may also apply to these areas.<sup>34</sup> The Coast Guard

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<sup>29</sup> See 43 U.S.C. § 1314(a) (2005).

<sup>30</sup> See 33 U.S.C. § 471 (2005).

<sup>31</sup> See *id.* The rules are contained in 33 C.F.R. Part 110 (2005).

<sup>32</sup> See 33 C.F.R. §§ 110.73-.74b. Anchorage grounds are established for a variety of reasons. For example, the St. Johns River anchorage grounds were established “to disestablish grounds with poor bottom holding capabilities and to disestablish the portions of anchorage grounds which currently extend to the federal channel.” § 60 F.R. 14220 (Mar. 16, 1995). The anchorage grounds at the Port of Palm Beach was necessary “to provide defined anchorage areas to protect local environmentally sensitive reefs presently being subjected to damage by ships’ anchors and chains.” § 51 F.R. 11726 (April 7, 1986). Finally, the rule regarding the Port Everglades anchorage grounds states “[t]he primary purpose for establishing the federally designated anchorage grounds is to require commercial vessels to anchor within the anchorage grounds’ boundaries to avoid causing reef damage with their anchors.” 58 F.R. 36356 (July 7, 1993).

<sup>33</sup> See 33 C.F.R. § 110.1(a) (2005).

<sup>34</sup> For example, in the Indian River special anchorage at Vero Beach, Florida, the rules provide that “[v]essels shall be so anchored so that no part of the vessel obstructs the turning basin or channels adjacent to the special anchorage areas.” § 110.73b(c) (2005). Other rules contain “notes.” For example, the rule for the Marco Island, Florida, special anchorage area contains the following note: “The area is principally for use by yachts and other recreational craft. Fore and aft moorings will be allowed. Temporary floats or buoys for marking anchors in place will be allowed. Fixed mooring piles or stakes are prohibited. All moorings shall be so placed that no vessel, when anchored, shall at any time extend beyond the limits of the area.” See 33 C.F.R. § 110.74 (2005).

has designated a number of special anchorage areas in Florida.<sup>35</sup> Beyond designating special anchorages and anchorage grounds, however, the Coast Guard has construed its jurisdiction relatively narrowly under the Rivers and Harbors Act and has deferred to local law with regard to the regulation of anchorages in Florida.<sup>36</sup>

**b. Obstructions to Navigation.** The Corps of Engineers also exercises jurisdiction under the Rivers and Harbors Act.<sup>37</sup> Under the Act the Corps has authority to regulate the creation of “any obstruction ... to the navigable capacity of any of the waters of the United States,” including the building of any “structure.”<sup>38</sup> Corps regulations define “permanent mooring structures” and a “permanently moored floating vessel” as structures subject to regulation.<sup>39</sup> Although the limits for defining when a temporarily anchored vessel becomes permanent have not yet been established, several decisions have upheld the regulation of moored houseboats.<sup>40</sup> In recognition that these activities sometimes have minimal impacts, the Corps has established Nationwide Permits for installation of some types of moorings.<sup>41</sup> Permanent moorings and moored vessels that do not qualify for Nationwide Permits must be individually permitted.<sup>42</sup> In Florida, special provisions for consultation with the U.S. Fish and Wildlife Service are intended to

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<sup>35</sup> See 33 C.F.R. § 110.73-74b (2005).

<sup>36</sup> Memorandum No. 16501 from the Chief, Maritime and International Law Division, U.S. Coast Guard to the Chief Counsel, U.S. Coast Guard (Dec. 30, 1992).

<sup>37</sup> See 33 U.S.C. § 403 (2005).

<sup>38</sup> See 33 C.F.R. § 320.2(b) (2005).

<sup>39</sup> See 33 C.F.R. § 322.2 (2005).

<sup>40</sup> See *United States v. Estate of Boothby*, 16 F.3d 19 (1st Cir. 1994); *United States v. Boyden*, 696 F.2d 685 (9th Cir. 1983). See also, *United States v. Oak Beach Inn Corp.*, 744 F. Supp. 439 (S.D.N.Y. 1990) (permanently moored barge and ferry subject to regulation under the Rivers and Harbors Act). Numerous cases have concluded that sunken vessels may constitute obstructions. See *Agri-Trans Corp. v. Gladders Barge Line, Inc.*, 721 F.2d 1005 (5th Cir. 1983); *U.S. v. Raven*, 500 F.2d 728 (5th Cir. (Fla.) 1974), *cert. denied*, 419 U.S. 1124 (1975); *U.S. v. Cargill, Inc.*, 367 F.2d 971 (5th Cir. 1966); *aff. Wyandotte Trans. Co. v. United States* 389 U.S. 191 (1967).

<sup>41</sup> See 61 F.R. 65,913 (1996). Nationwide Permits are a type of general permit which require less time and paperwork than other permits. See 33 C.F.R. § 330.1(b) (2005). Non-commercial, single-boat mooring buoys are authorized under Nationwide Permit 10. See 61 F.R. 65,913 (1996). Structures, buoys, floats and other devices placed within Coast Guard established anchorage or fleeting areas are authorized by Nationwide Permit 9. See *id.*

<sup>42</sup> See 33 C.F.R. 322.3 (2005).

ensure protection of manatees in the construction and operation of boating-related facilities.<sup>43</sup>

### 3. Coastal Zone Management Act

The Coastal Zone Management Act<sup>44</sup> encourages states to take an active role in the management and control of the submerged lands and coastal waters within the territorial boundaries of the state. The Act authorizes states to develop Coastal Zone Management Plans and provides incentives for states with approved plans.<sup>45</sup>

The State of Florida has successfully argued in one federal district court case involving anchoring that the Coastal Zone Management Act authorizes local regulations such as prohibitions on anchoring.<sup>46</sup> In *Murphy v. Dept. of Natural Resources*, residents of an area known as “houseboat row” in Key West filed a suit seeking a declaratory judgment that Florida Statutes Sections 253.67 through 253.71<sup>47</sup> were unconstitutional because the “State’s control over the water column is narrowly circumscribed by federal law.”<sup>48</sup> The state maintained that it had authority to regulate anchoring because the water and the land underneath the water had been passed on to the state by the federal government in the Submerged Lands Act.<sup>49</sup> The court agreed with the state, finding that the state’s exercise of control over the water column as an incident to its ownership of sovereign submerged lands was specifically sanctioned in the Coastal Zone Management Act.<sup>50</sup>

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<sup>43</sup> <http://www.fws.gov/northflorida/Manatee/manatees.htm> (visited May 13, 2006); [http://www.saj.usace.army.mil/permit/Endangered\\_Species/Manatee%20Update%20Aug%202005/contents\\_dAug05.htm](http://www.saj.usace.army.mil/permit/Endangered_Species/Manatee%20Update%20Aug%202005/contents_dAug05.htm) (visited May 13, 2006).

<sup>44</sup> See 16 U.S.C.A. § 1451 *et seq.* (West 2005).

<sup>45</sup> See 16 U.S.C.A. § 1452 (West 2005). See generally Ronald J. Rychlak, *Coastal Zone Management and the Search for Integration*, 40 DePaul L. Rev. 981 (1991) (discussing the process of the effort to integrate government coastal activities through the Coastal Zone Management Act); Daniel W. O’Connell, *Florida’s Struggle for Approval Under the Coastal Zone Management Act*, 25 Nat. Resources J. 61, 65-68 (1985) (criticizing the federal approval process of state plans pursuant to the Coastal Zone Management Act).

<sup>46</sup> *Murphy v. Dept. of Natural Resources*, 837 F. Supp.1217 (S.D. Fla. 1993).

<sup>47</sup> These statutes authorize the Board of Trustees of the Internal Improvement Trust Fund to issue leases for the use of submerged lands and the associated water column. See § 253.128, Fla. Stat. (2005).

<sup>48</sup> *Murphy*, 837 F. Supp. at 1219.

<sup>49</sup> See *Murphy*, 837 F. Supp. at 1220; *Barber v. State of Hawaii*, 42 F.3d 1185 (9th Cir. 1994).

<sup>50</sup> See *Murphy*, 837 F. Supp. at 1223.

The court noted that the Coastal Zone Management Act encourages “the states to effectively exercise their responsibilities in the coastal zone through the development and implementation of [federally approved] management programs.”<sup>51</sup> The court found that Congress considered navigation, including regulation of anchoring, “as one of the areas the States should include in their management plans.”<sup>52</sup> The court reasoned that because the state’s Coastal Zone Management Plan was approved by the Secretary of Commerce, the plan did not encroach on any federal power over navigation.<sup>53</sup>

### **C. Federal Limits on State and Local Authority to Regulate Anchorages**

This section addresses potential federal limitations on the state’s authority to regulate anchorages. To understand these limitations, it is necessary to review the basis for federal supremacy in this area of law. As previously noted, the U.S. Congress has authority to regulate matters affecting interstate commerce, and the federal navigational servitude is constitutionally derived from the Commerce Clause.<sup>54</sup> Under the Supremacy Clause of the U.S. Constitution, federal law governs over conflicting state law,<sup>55</sup> and Congress may preempt local laws pursuant to this authority.<sup>56</sup>

Three distinct limits on state regulatory authority are derived from these principles. First, where a state law regulating anchorages actually conflicts with a federal law, the state law will be void.<sup>57</sup> Second, where the Congress has “spoken” so as to preclude state regulation in a given area of law, state regulation is

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<sup>51</sup> See *id.*

<sup>52</sup> *Murphy*, 837 F. Supp. at 1223-24 (citing Commerce Committee, Coastal Zone Management Act, S. Rep. No. 753, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.C.A.N. 4776, 4786).

<sup>53</sup> *Id.* at 1223. Florida’s Coastal Zone Management Act simply references existing environmental statutes and rules and has been incorporated into the State’s comprehensive plan. See Fla. Stat. § 380.21(2) & (3)(b) (2005). Apparently, this was sufficient to merit federal approval. Several State law provisions specifically address anchorages, and these statutes have been incorporated into the Coastal Zone Management Plan. See also, *infra* Sections I.C.1-3.

<sup>54</sup> See Section I.A.

<sup>55</sup> U.S. Const. art. VI.

<sup>56</sup> See Sections I.C.1-.3.

<sup>57</sup> See *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Pacific Gas and Electric Co. v. State Energy Commission*, 461 U.S. 190 (1983).

preempted.<sup>58</sup> Third, even where local regulation is neither in conflict nor preempted, the Dormant Commerce Clause prohibits states from unduly burdening interstate commerce.<sup>59</sup> The following sections address the potential impact of these limits on state and local efforts to regulate anchoring and anchorages.

## **1. Actual Conflict with Federal Laws**

The Supremacy Clause of the U.S. Constitution places federal law above state law when conflicts arise between the two. Therefore, any state regulation of anchorages that conflicts with validly exercised federal law will be invalid. A conflict will be found either when it is not possible to comply with both the state and federal law at the same time,<sup>60</sup> or the state law prevents implementation of the federal law.<sup>61</sup>

At present, there are few federal anchorage regulations with which state laws and regulations might conflict. In a legal opinion, the Coast Guard asserted that neither the Rivers & Harbors Act nor its implementing regulation provide any substantive anchorage regulation, and characterized its own authority as merely “the authority to establish general and special anchorage areas where and when needed.”<sup>62</sup> In *Murphy v. Department of Natural Resources*, the Coast Guard’s position was accepted to mean that “no Federal law exists in the area of anchorage and mooring.”<sup>63</sup>

## **2. Preemption: *Barber v. State of Hawaii* and Local Anchoring Regulations**

Preemption, like actual conflict, is founded on the supremacy of federal regulatory authority.<sup>64</sup> Preemption occurs where Congress has evidenced an intent to

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<sup>58</sup> See *Silkwood v. Kerr-McGee Corp.*, 465 U.S. 1074 (1984); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Hillsborough County v. Florida Restaurant Assoc.*, 603 So. 2d 587, 590 (Fla. 2d DCA 1992).

<sup>59</sup> See *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945).

<sup>60</sup> *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

<sup>61</sup> *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Pacific Gas and Electric Co. v. State Energy Commission*, 461 U.S. 190 (1983).

<sup>62</sup> Memorandum No. 16501 from the Chief, Maritime and International Law Division, U.S. Coast Guard to the Chief Counsel, U.S. Coast Guard (Dec. 30, 1992).

<sup>63</sup> 837 F. Supp. 1217, 1224 (S.D. Fla. 1993).

<sup>64</sup> Several sources discuss state regulations that “actually conflict” with federal regulation as being “preempted.”

exclusively occupy an area of law.<sup>65</sup> If such intent is contained in the language of the federal law at issue, the preemption is said to be express.<sup>66</sup> If, however, such intent is inferred from a pervasive legislative scheme dominating an entire field of law, the preemption is considered implied.<sup>67</sup> In either case, preemption will not occur unless it is determined to be “the clear and manifest purpose of Congress.”<sup>68</sup>

The relatively sparse body of federal law concerning anchoring does not contain any provision expressly preempting state authority. Several analysts have extensively surveyed federal law and concluded that Congress never intended to preempt state authority to regulate anchorages.<sup>69</sup> The Coastal Zone Management Act of 1972,<sup>70</sup> and Executive Order 12612 of October 26, 1987<sup>71</sup> support that conclusion.

State authority to regulate anchorages was upheld against a preemption challenge in a landmark case originating in the Hawaiian Islands.<sup>72</sup> In *Barber v. State of Hawaii*, a citizens group known as the Hawaiian Navigable Waters Preservation Society (Preservation Society), acting on behalf of boaters, brought suit challenging the constitutionality of state regulations affecting their rights of navigation, including anchoring.<sup>73</sup> The state’s Department of Transportation had prom-

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While the result is the same in either case (invalid state regulation), the two concepts will be treated separately to minimize any confusion.

<sup>65</sup> *Silkwood v. Kerr-McGee Corp.*, 465 U.S. 1074 (1984).

<sup>66</sup> See *Hillsborough County v. Florida Restaurant Association*, 603 So.2d 587, 590 (Fla. 2d DCA 1992).

<sup>67</sup> *Id.* at 590-91.

<sup>68</sup> See *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Goodlin v. Medtronic, Inc.*, 167 F.3d 1367, 1371 (11th Cir. 1999).

<sup>69</sup> Memorandum No. 16501 from the Chief, Maritime and International Law Division, U.S. Coast Guard to the Chief Counsel, U.S. Coast Guard (Dec. 30, 1992) (reviewing an “extensive scheme of federal regulations over navigable waterways, maritime safety, and the marine environment” to include 14 U.S.C. §§ 81-91; 33 U.S.C. § 471, 33 U.S.C. § 4421 *et seq.*; Title 46, U.S.C.; Title 33, C.F.R.). See also, The Florida Bar, *Maritime Law and Practice* § 14.17 (2004).

<sup>70</sup> 16 U.S.C. §§ 1451 *et seq.* The Act encourages states to take an active role in managing their coastal zones through the development of extensive land and water use programs. See also Section I.B.3.

<sup>71</sup> The Executive Order directs federal agencies to avoid preemption of state action, except where state regulation clearly conflicts with agency action and policies.

<sup>72</sup> *Barber v. State of Hawaii*, 42 F.3d 1185 (9th Cir. 1994).

<sup>73</sup> *Id.* at 1189.

ulgated rules requiring boaters to obtain a permit and moor only in designated locations if the vessel were to remain for longer than seventy-two hours.<sup>74</sup> The rules were adopted to provide for the safety of boaters and other recreational users of the area.<sup>75</sup> The district court granted summary judgment in favor of the state, and the Preservation Society appealed.<sup>76</sup>

On appeal, the Preservation Society argued that Hawaii's regulations were in conflict with federal regulations, and that even absent conflict, federal regulation was so extensive that Congress intended to preempt state action.<sup>77</sup> The United States Court of Appeals, Ninth Circuit, found neither argument persuasive.<sup>78</sup> The court noted that the Submerged Lands Act was not intended to reserve exclusive federal jurisdiction over waters above submerged lands, but to confer concurrent jurisdiction on the state.<sup>79</sup> The court was also unwilling to find implicit preemption based on what it deemed the "far from extensive" body of federal law affecting anchorages.<sup>80</sup> The court indicated that the Secretary of Transportation and the Coast Guard had discretionary authority and "may act to affect all navigational issues, but they need not and they have not."<sup>81</sup>

As discussed above, it is unlikely that federal law expressly preempts local anchorage regulation (except, for example, as with special anchorage areas established by the Coast Guard). However, an implied intent to preempt may not be as clear. While the Ninth Circuit found no implied preemption in *Barber*, it is unclear how other federal circuits or the Supreme Court would rule, especially if faced with different facts. For example, a stronger set of facts supporting preemption would have existed if the anchorage at issue was a Coast Guard designated "special anchorage area" or "anchorage grounds."

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 1188.

<sup>77</sup> *Id.* at 1189.

<sup>78</sup> *Id.* at 1190.

<sup>79</sup> *See id.*

<sup>80</sup> *See id.* at 1192.

<sup>81</sup> *Id.* at 1193.

### 3. Dormant Commerce Clause Impact on State Regulation of Anchorages

Even in the absence of direct conflict or express or implied preemption by Congress, the Commerce Clause may still restrict state laws that operate to excessively burden interstate commerce.<sup>82</sup> In this instance, the Commerce Clause is said to be “dormant” because Congress has not made active use of its power; however, courts interpret the Dormant Commerce Clause to limit states’ ability to regulate interstate commerce.<sup>83</sup> In order to evaluate whether state regulation violates the Dormant Commerce Clause, courts have followed a fact-based balancing test which weighs the local benefits of the state regulation against the burden on interstate commerce.<sup>84</sup> To determine the local benefits, courts evaluate whether the state had a rational basis, such as safety, for enacting the law.<sup>85</sup> Courts then assess the local need for the law against the burden of the law on interstate commerce.<sup>86</sup> Finally, courts also evaluate whether the state law is even-handed in its application or whether it applies differently to intrastate commerce than to interstate commerce.<sup>87</sup>

In addition to not finding direct conflict or express or implied preemption with federal law, the Ninth Circuit in *Barber* refused to invalidate the state regulation based on the Dormant Commerce Clause.<sup>88</sup> The court found that the state’s interest in the regulation was substantial, while the burden on interstate commerce was minor.<sup>89</sup> The court was swayed by evidence of the substantial threat to public safety that the regulations were designed to avoid.<sup>90</sup> The court evaluated the direct and indirect impact on interstate commerce of Hawaii’s anchoring

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<sup>82</sup> See Daniel A. Farber et al., *Constitutional Law Themes for the Constitution’s Third Century* 863 (1993).

<sup>83</sup> See *id.*

<sup>84</sup> See *id.* at 881.

<sup>85</sup> See *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959).

<sup>86</sup> See *id.*

<sup>87</sup> See *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

<sup>88</sup> See *Barber v. State of Hawaii*, 42 F.3d 1185, 1195 (9th Cir. 1994).

<sup>89</sup> See *id.*

<sup>90</sup> See *id.* These threats included the substantial threat to public safety by the mooring activities of recreational boaters on heavily traveled seaways. See *id.*

and mooring regulations.<sup>91</sup> First, the court determined that there was no direct regulation of interstate commerce because the regulation did not specifically target interstate vessels.<sup>92</sup> The court next explained that, even if there was an indirect impact on interstate commerce, it would be per se invalid if it was applied in a discriminatory manner.<sup>93</sup> The court concluded, however, that the fee differentials prescribed by the regulations were not discriminatory toward out-of-state vessels.<sup>94</sup> Finding no discriminatory impact, the court applied a balancing test to determine whether any indirect impact on interstate commerce outweighed the state's interest.<sup>95</sup> The court found that Hawaii's public safety interest in regulating "the conflicting uses between recreational ocean users and vessels conducting passive mooring activities" outweighed any small burden on interstate commerce.<sup>96</sup> Therefore, the court concluded that the mooring regulation was not a violation of the Commerce Clause.<sup>97</sup>

Overall, the results in this case indicate that local regulation of anchoring is not preempted by federal law. Judicial decisions addressing the various enactments have consistently indicated that Congress has not occupied the field, thereby refusing to find an implied intent to preempt state regulation.<sup>98</sup> The position of the Coast Guard is that "[u]p to this point, Congress has not demonstrated an express or implied intent to preempt state regulation of anchorages."<sup>99</sup> On the other hand, the Dormant Commerce Clause may generate different re-

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<sup>91</sup> See *id.* at 1194-95 (citing *Oregon Waste Sys., Inc. v. Department of Env'tl. Quality*, 114 S.Ct. 1345, 1350 (1994)).

<sup>92</sup> *Id.* at 1194.

<sup>93</sup> *Id.* at 1194-95.

<sup>94</sup> *Id.* at 1195 (citing *Hawaii Boating Ass'n v. Water Transp. Facilities Div., Dep't of Transp.*, 651 F.2d 661, 666 (9th Cir. 1981) (holding that fee differentials serve to equalize increased costs for accommodation of nonresidents)).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Bass River Associates v. Mayor of Bass River Township*, 743 F.2d 159 (3d Cir. 1984) (46 U.S.C.A. § 12109); *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483 (9th Cir. 1984) (Ports and Waterways Safety Act); *Beveridge v. Lewis*, 939 F.2d 859 (9th Cir. 1991) (Ports and Waterways Safety Act); *Murphy v. Department of Natural Resources*, 837 F.Supp. 1217 (S.D.Fla. 1993) (Submerged Lands Act); *Hawaiian Navigable Waters Preservation Soc. v. State of Hawaii*, 823 F.Supp. 766 (D. Haw. 1993) (Submerged Lands Act), *aff'd* 42 F.3d 1185 (9th Cir. 1994).

<sup>99</sup> Memorandum No. 16501 from the Chief, Maritime and International Law Division, U.S. Coast Guard to the Chief Counsel, U.S. Coast Guard (Dec. 30, 1992); Memorandum No. 16500 from the Commandant, U.S. Coast Guard to the Commander, Thirteenth Coast Guard District (Jan. 19, 1993).

sults depending on the type of state or local regulation involved and its impact on interstate commerce.

### III. State and Local Authority over Anchoring and Anchorages

This section discusses the organic sources of state jurisdiction over activities on lands underlying navigable waters and the Florida statutes which are relevant to anchoring. This section also reviews Florida laws that restrict local regulation of anchoring.

#### A. The Proprietary and Regulatory Source of State Authority

Florida's authority to regulate activities on the navigable waters has two fundamental foundations. The first is the public trust doctrine, under which the state was vested with the ownership of the beds of all navigable waters. Under this doctrine the state has a special duty to protect the trust resources for the benefit of the public. Second, the state's inherent police power provides authority to regulate a broad range of activities.

##### 1. The State's Proprietary Interest in Submerged Lands and the Public Trust Doctrine

Under the public trust doctrine, the state of Florida gained title to the beds of all navigable waters in the state upon gaining statehood.<sup>100</sup> These lands must be managed for the use and benefit of the public.<sup>101</sup> Management responsibility has been delegated to the Board of Trustees of the Internal Improvement Trust Fund (Trustees).<sup>102</sup> The state thus has greater authority to restrict the use of both the submerged lands and overlying waters than would be the case on private

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<sup>100</sup> *Phillips Petroleum v. Mississippi*, 484 U.S. 469 (1988); *Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So.2d 339 (Fla. 1986). The federal Submerged Lands Act (SLA) confirmed state ownership. See 43 U.S.C.A. § 1301 *et seq.* (West 2005); see Section I.B.1.

<sup>101</sup> See Fla. Const. art. X, § 11; *Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So.2d 339 (Fla. 1986); Sid Ansbacher & Susan C. Grandin, *Local Government Riparian Rights and Authority*, 87 Fl. Bar J. (June, 1996).

<sup>102</sup> See Fla. Stat. § 253.03(1) (2005).

lands.<sup>103</sup> The public trust doctrine may also serve as a limitation on the power of the trustees.<sup>104</sup>

Because anchoring is viewed as a right incidental to the right of navigation, and navigation has been traditionally protected as a trust purpose,<sup>105</sup> efforts by the state or local governments to unduly restrict that right could potentially be viewed as a breach of the state's trust obligations. No cases have been found in Florida or elsewhere which articulate the trust doctrine as a limitation on state or local authority to regulate anchoring or mooring. The right to navigate must be balanced against other trust purposes.<sup>106</sup> Moreover, the Trustees have been accorded considerable discretion in their decisions concerning the management of trust lands.<sup>107</sup>

## 2. The State's Inherent Police Power

States have an inherent police power to protect the public's health, safety, and welfare through regulation.<sup>108</sup> As political subdivisions of the state,<sup>109</sup> local governments in Florida share the police power,<sup>110</sup> including the authority to

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<sup>103</sup> Without owning the submerged lands under navigable waters, an individual must obtain both permission to use the submerged land and an environmental permit for any activities involving submerged land. See Fla. Stat. § 373.422 (2005); Fla. Admin. Code § 40E-4.041 (2005); Fla. Admin. Code § 18-21.005 (2005).

<sup>104</sup> See *Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So.2d 339 (Fla. 1986).

<sup>105</sup> See *Hayes v. Bowman*, 91 So. 2d 795, 799 (Fla. 1957); *Broward v. Mabry*, 50 So. 826, 829 (Fla. 1909); State ex rel. *Ellis v. Gerbing*, 42 So. 353 (Fla. 1908); *State v. Black River Phosphate Co.*, 13 So. 640-46 (Fla. 1893).

<sup>106</sup> Other express trust purposes include commerce, fishing, bathing and swimming. See Slade, *supra* note 11, at 170-73. More recently, the public trust doctrine has been viewed as protective of environmental values of trust lands. See *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971); Slade at 173-74. For an argument in favor of balancing navigation with other trust purposes, see Kelly Lowry, Note, *Zoning the Water: Using the Public Trust Doctrine as a Basis for a Comprehensive Water-Use Plan in Coastal South Carolina*, 5 S.C. Envtl. L.J. 79, 91 (Spring 1996). See also, *St. Croix Waterway Ass'n v. Meyer*, 178 F.3d 515, 1999 WL 153030 (8th Cir. 1999) (navigation can be regulated under the public trust doctrine to protect public waters and the public).

<sup>107</sup> See *Hayes v. Bowman*, 91 So. 2d 795, 799 (Fla. 1957).

<sup>108</sup> See *Florida East Coast Ry. Co. v. City of Miami*, 79 So. 682, 685 (Fla. 1975); 16A Am. Jur. 2D, Constitutional Law 366 (1979).

<sup>109</sup> Fla. Const. art. 8, § 1(a).

<sup>110</sup> See *Amos v. Mathews*, 126 So. 308 (1930). The case law of Florida is clear that the Constitution of Florida is a limitation on the power of the state government. *Id.* at 311. The court in *Amos* wrote, "it should be further borne in mind that our State Constitution is not a grant of power to the Legislature, but is voluntarily imposed by the people themselves upon their inherent lawmaking power, exercised under our Constitution through the Legislature, which power would otherwise be absolute save as it transcended the powers granted by the state to the federal government." *Id.* However, the Florida Supreme Court has steadfastly held to the belief that state

regulate anchorages. Local regulations affecting navigation have long been upheld.<sup>111</sup> The United States Supreme Court in 1858 addressed whether a local government could prohibit vessels from remaining in a “harbor thoroughfare” or require those vessels to display a light after dark.<sup>112</sup> The Court called such regulations “necessary and indispensable in every commercial port, for the convenience and safety of commerce.”<sup>113</sup> The Court also noted that “local authorities have a right to prescribe at what wharf a vessel may lie, and how long she may remain there, ...where she may anchor in the harbor, and for what time.”<sup>114</sup>

Local governments may only invoke their police power to regulate anchorages, however, if the regulation is necessary to protect the public health, safety and welfare. Anyone challenging such an ordinance has the burden of proving it is not even “fairly debatable” that the ordinance bears a rational relationship to a legitimate objective of the police power.<sup>115</sup> Challenges of that nature are thus rarely successful. In *Dennis v. Key West*, however, the court struck down a local regulation that prohibited live-aboard vessels that were not moored or docked within a local yacht club or public dock.<sup>116</sup> The Florida Third District Court of Appeals ruled that the regulation was an abuse of police power because “there was no discernible relationship between the regulation and the health, safety, or welfare of the general populace.”<sup>117</sup> The court upheld two sections of the ordinance, however, which required approved sanitation equipment on all live-aboard vessels because of their clear relationship to public health.<sup>118</sup> No other courts have reached this conclusion, and in a subsequent decision, the same court

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and local governments owe a duty of care to the citizens of the state to exercise its police power to protect the health, safety and welfare of citizens when necessary. See *Florida East Coast Ry. Co. v. City of Miami*, 79 So. 682, 685 (Fla. 1975).

<sup>111</sup> See *Mobile County v. Kimball*, 102 U.S. 691 (1881); *Huse v. Glover*, 119 U.S. 5453 (1886).

<sup>112</sup> See *The James Gray v. The John Fraser*, 62 U.S. 184, 187 (1858). A reasonable fee may also be levied. *Clyde Mallory Lines v. Alabama*, 296 U.S. 261 (1935).

<sup>113</sup> See *id.*

<sup>114</sup> See *id.* However, the Court upheld the regulations only after concluding that the regulations were not in conflict with any federal laws.

<sup>115</sup> See *Nance v. Town of Indialantic*, 419 So.2d 1041 (Fla. 1982); *Dade County v. United Resources*, 374 So.2d 1046 (Fla. 3d DCA 1979).

<sup>116</sup> See 381 So. 2d 312, 315 (Fla. 3rd DCA 1980).

<sup>117</sup> See *id.* at 315.

<sup>118</sup> See *id.*

upheld a ban on live-aboard vessels in the City of Miami.<sup>119</sup> In *Dozier v. City of Miami*, the court found from testimony before the City Commission and from the language of the ordinance that it was designed to address problems of water pollution, navigational hazards and visual intrusion, thus justifying regulation under the police power.<sup>120</sup>

## **B. Statutory Basis for Regulating Anchoring in Florida**

### **1. Chapter 253, Florida Statutes: State Authority to Regulate Anchoring and Manage Anchorages**

Under Chapter 253, Florida Statutes, the Governor and Cabinet, sitting as the Board of Trustees of the Internal Improvement Trust Fund,<sup>121</sup> hold sovereignty submerged lands in trust for the public.<sup>122</sup> To the extent anchoring activities are conducted in navigable waters over sovereignty submerged lands, the Trustees are vested with general authority to regulate the activity.<sup>123</sup> Chapter 253, however, provides more specific and limited regulatory authority.

Section 253.03(7)(b), Florida Statutes, authorizes the Trustees to:

*adopt rules governing all uses of sovereignty submerged lands by vessels, floating homes, or any other water craft, which shall be limited to regulations for anchoring, mooring, or otherwise attaching to the bottom; the establishment of anchorages; and the discharge of sewage, pumpout requirements, and facilities associated with anchorages. The regulations must not interfere with commerce or the transitory operation of vessels through navigable water, but shall control the use of sovereignty submerged lands as a place of business or residence.*<sup>124</sup>

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<sup>119</sup> See *Dozier v. City of Miami*, 639 So.2d 167 (Fla. 3d DCA 1994).

<sup>120</sup> See *id.*, at 169.

<sup>121</sup> The Board of Trustees is comprised of the Governor, the Attorney General, the Commissioner of Agriculture, and the Chief Financial Officer. Fla. Stat. ch. 253.02(1) (2005).

<sup>122</sup> See Fla. Stat. ch. 253.03(1) (2005). For a discussion of the “public trust doctrine” see Section II.A.1 of this report.

<sup>123</sup> In some instances, submerged lands may have been alienated, or artificially created, and they may be subject to non-state ownership.

<sup>124</sup> Fla. Stat. ch. 253.03(7)(b) (2005).

The Trustees have not exercised their authority to adopt rules regulating anchoring. The Department of Environmental Protection (DEP), which staffs the Trustees,<sup>125</sup> began a rule-making process in 1994. That process was held in abeyance pending implementation of an administrative effort in Southwest Florida to develop a non-regulatory solution to anchorage management;<sup>126</sup> this regulatory effort has not been resumed.

## **2. State Authority to Allow Local Anchorage Management**

While no rules have been promulgated specifically regulating anchoring or anchorages, the Trustees require some form of approval for any “activity” on sovereignty submerged lands.<sup>127</sup> The term “activity” is defined to include the construction of mooring pilings or docks.<sup>128</sup> The term “dock” is defined to mean “a fixed or floating structure, including . . . mooring pilings, lifts, davits and other associated water-dependent structures used for mooring and accessing vessels.”<sup>129</sup> Rule 18-21 provides a framework for various forms of consent to conduct activities on sovereignty submerged lands.<sup>130</sup> The relevant forms of consent include consent by rule,<sup>131</sup> letter of consent,<sup>132</sup> and a lease,<sup>133</sup> each applicable under different circumstances. Consent by rule allows use of sovereign submerged lands for relatively small scale activities, e.g. the installation of mooring pilings associated with private docking facilities or the construction of a single small dock for a private home. A letter of consent is required for docks too large to qualify for consent by rule and minimum-size public piers, boat ramps, and channels. A lease is required for “all revenue-generating activities,” “open-water

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<sup>125</sup> DEP and the water management districts are responsible for “all staff duties and functions related to the acquisition, administration, and disposition of state lands,” held by the Board of Trustees. Fla. Stat. ch. 253.002 (2005); Fla. Admin. Code § 18-21.002(1) (2005). In addition, DEP and the water management districts are responsible for environmental permitting and water quality protection on sovereign lands. Fla. Stat. §373.414 (2005).

<sup>126</sup> See Section IV A of this report.

<sup>127</sup> See Fla. Admin. Code § 18-21.005(1) (2005).

<sup>128</sup> See Fla. Admin. Code § 18-21.003(2) (2005).

<sup>129</sup> See Fla. Admin. Code § 18-21.003(16) (2005).

<sup>130</sup> See Fla. Admin. Code § 18-21.005(1) (2005). For activities conducted in an aquatic preserve, Rule 18-20 is also applicable.

<sup>131</sup> See Fla. Admin. Code § 18-21.005(1)(b) (2005)

<sup>132</sup> See Fla. Admin. Code § 18-21.005(1)(c) (2005)

<sup>133</sup> See Fla. Admin. Code § 18-21.005(1)(d) (2005).

mooring fields,” and for structures that don’t qualify for the consent by rule or letter of consent.<sup>134</sup> Thus, both a commercial marina and a municipal mooring field in waters above sovereignty lands would require a lease from the state.<sup>135</sup>

### **3. Chapter 327, Florida Statutes: State Preemption of Local Anchorage Regulation**

Chapter 327 of the Florida Statutes, known as the “Florida Vessel Safety Law,”<sup>136</sup> is administered by the Florida Fish and Wildlife Conservation Commission (FWC). This law primarily relates to various safety considerations, such as safe operation, accident procedures, and personal water craft requirements. However, Chapter 327 also addresses jurisdiction over anchorages in Florida. Two provisions of the Act are especially important for purposes of this report. The first relates to local government regulations concerning resident vessels, while the second relates directly to mooring and anchoring. Each provision both preserves and limits regulatory authority for local governments.<sup>137</sup>

The first provision affects local efforts to regulate the operation and equipment of vessels.<sup>138</sup> The Act preserves a local government’s authority to regulate “resident vessels” where the county or municipality spends money on boating-related activities such as the patrol and maintenance of water bodies.<sup>139</sup> A resident vessel is “one that is normally stored within the city or county imposing the regulation, and not one that is merely being operated on waters within that jurisdiction.”<sup>140</sup> Section 327.22(1) provides:

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<sup>134</sup> See Fla. Admin. Code § 18-21.005(1)(d) (2005).

<sup>135</sup> See *id.* It is also conceivable that a mooring field could be considered a “marina” for purposes of management by the Trustees. The term “marina” is administratively defined as “a small craft harbor complex used primarily for recreational boat mooring or storage.” See Fla. Admin. Code § 18-21.003(31) (2005). Mooring fields are also subject to regulation under the state’s Environmental Resource Permit (ERP) system. Fla. Stat. § 373.413 (2005). In 2005 the Legislature required DEP to develop a rule to allow the installation of mooring fields less than 50,000 square feet pursuant to a general permit. Fla. Stat. § 373.118(5) (2005). The Florida Department of Environmental Protection is holding workshops to develop proposed rule 62-341.425. Few mooring fields, however, will meet the size limit.

<sup>136</sup> See Fla. Stat. § 327.01 (2005).

<sup>137</sup> See Section IA of this report, discussing the rights of navigation and the Federal Navigational Servitude.

<sup>138</sup> See Fla. Stat. § 327.22 (2005).

<sup>139</sup> See Fla. Stat. § 327.22(1) (2005).

<sup>140</sup> See *City of Winter Park v. Jones*, 392 So. 2d 568, 572 (1980).

*Nothing in this chapter shall be construed to prohibit any municipality or county that expends money for the patrol, regulation, and maintenance of any lakes, rivers, or waters, and for other boating-related activities in such municipality or county, from regulating vessels resident in such municipality or county. Any county or municipality may adopt ordinances which provide for enforcement of noncriminal violations of restricted areas which result in the endangering or damaging of property, by citation mailed to the registered owner of the vessel. Any such ordinance shall apply only in legally established restricted areas which are properly marked as permitted pursuant to SS. 327.40 and 327.41. Any county and the municipalities located within the county may jointly regulate vessels.*

The import of this provision for local regulation of anchorages is unclear. It could be read to approve comprehensive local government regulation of resident vessels, including limitations on anchoring. Local enforcement authorities would thus have to distinguish resident from non-resident vessels. Everything else in this section relates to safety or the protection of property<sup>141</sup> and the only thing it specifically authorizes is the enforcement of restrictions to protect property in properly marked restricted areas. As discussed below, the regulation by local governments of anchoring is directly addressed in another section. The most expansive interpretation is probably not what the Legislature intended.

Local government regulation of the operation and equipment of vessels is further addressed in section 327.60(1) of the Florida Statutes. This provision expressly prohibits local regulations applying to the Florida Intracoastal Waterway and also prohibits any ordinances in conflict with the Florida Vessel Safety Law.<sup>142</sup> To the extent that anchoring relates to the operation of a vessel, this suggests that anchoring within the Florida Intracoastal Waterway could not be regulated by local governments.<sup>143</sup>

The second provision, section 327.60(2), Florida Statutes, relates directly to mooring and anchoring and lies at the heart of the continuing controversy over

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<sup>141</sup> See Fla. Stat. § 327 *et seq.* (title of statute is Florida Vessel Safety Law and majority of provisions deal with safe vessel operation).

<sup>142</sup> See Fla. Stat. § 327.60(1) (2005).

<sup>143</sup> However, the U.S. Army Corps of Engineers, Jacksonville District, issued a policy and guidance memorandum establishing setback restrictions for various activities within 100 feet of the channel of the Intracoastal Waterway (on the east and west coasts of Florida), Atlantic Intracoastal Waterway, and Okeechobee Waterway. The setback applies to moorings but does not expressly refer to anchoring. See Memorandum re: Setback Criterion, November 23, 1998, CESAJ-RD (1145) (on file with the authors). In addition, it is unlawful to operate or anchor a vessel "in a manner which shall unreasonably or unnecessarily constitute a navigational hazard or interfere with another vessel. Anchoring under bridges or in or adjacent to heavily traveled channels shall constitute interference if unreasonable under the prevailing circumstances." Fla. Stat. § 327.44 (2005).

the scope of local government authority to restrict anchoring. As amended in 2006, it states:

Nothing contained in the provisions of this section shall be construed to prohibit local governmental authorities from the enactment or enforcement of regulations which prohibit or restrict the mooring or anchoring of floating structures or live-aboard vessels within their jurisdictions or of any vessels within the marked boundaries of mooring fields permitted as provided in s. 327.40. However, local governmental authorities are prohibited from regulating the anchoring of non-live-aboard vessels in navigation.<sup>144</sup>

The Act defines a live-aboard vessel as any vessel “used solely as a residence”<sup>145</sup> or “represented as a place of business, a professional or other commercial enterprise, or a legal residence.”<sup>146</sup> The Act expressly excludes a commercial fishing boat from this definition.<sup>147</sup> The Florida Attorney General has concluded that a vessel may qualify as a live-aboard if it can be proven with objective facts that the operator intends to use the vessel as a legal residence.<sup>148</sup>

Thus, with reference to live-aboard vessels, non-live-aboards not in navigation or any vessel in a legally marked mooring field, the Act has no effect on local government authority to regulate anchoring and mooring. Local governments would thus be free to use existing regulatory authorities.<sup>149</sup> Regarding local regulation outside of mooring fields, anchoring may be restricted if the vessel is 1) a live-aboard, or 2) a non live-aboard which is not in navigation. With respect to the first part, the validity of local ordinances may turn on whether a local ordinance’s definition of live-aboard vessel is broader than the statutory definition provided for in Section 327.02(16).<sup>150</sup> Several local ordinances have attempted to

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<sup>144</sup> Fla. Stat. § 327.60(2) (2005), as amended by Section 3, HB 7175, 2006 Regular Session, Florida Legislature (emphasis added). The primary effect of the amendment may be to clarify that local governments have authority to prohibit anchoring in legally marked mooring fields.

<sup>145</sup> See Fla. Stat. § 327.02(16)(a) (2005); *Brault v. Florida*, Case No. 89-0075 AC (A) 02 (Palm Beach County App. Ct. 1991) (vessel found to be a live-aboard because it was where the owner kept his clothing, cooked food, slept, and where his dog lived).

<sup>146</sup> See Fla. Stat. § 327.02(16)(b) (2005).

<sup>147</sup> See Fla. Stat. § 327.02(16) (2005).

<sup>148</sup> See Fla. AGO 85-45, 1985 WL 190102 (Fla.A.G.)

<sup>149</sup> This interpretation is supported by the Preamble to the 1993 amendments to the Act, which states that local governments should be free to regulate the mooring or anchoring of floating structures and live-aboard vessels. 1983 Fla. Laws ch. 83-20.

<sup>150</sup> A live-aboard vessel is “a) Any vessel used solely as a residence; or b) Any vessel represented as a place

define live-aboard differently from the state statute. One local government, for example, defines “on-board” living as “eating, sleeping and carrying on other living activities for a period in excess of forty-eight (48) hours aboard any vessel while it is moored or docked on the waters within the city.”<sup>151</sup> This definition could be interpreted as being broader than the residency test established by Chapter 327, and thus sweep non-live-aboards under its ambit. If so, the ordinance could be struck down as conflicting with Chapter 327.<sup>152</sup>

The anchoring of “non-live-aboard vessels in navigation” cannot be regulated by local governments. Prior to 2006, Section 327.60(2) prohibited local governments from regulating non-live-aboards “engaged in the exercise of rights of navigation.”<sup>153</sup> While that term had not been defined judicially or statutorily, the Florida Attorney General has stated that the right of navigation includes the right to anchor or moor.<sup>154</sup> However, the Attorney General noted that such a right does not include the right to anchor indefinitely.<sup>155</sup> In addition, the Coast Guard has stated:

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of business, a professional or other commercial enterprise, or a legal residence. A commercial fishing boat is expressly excluded from the term “live-aboard vessel.” Fla. Stat. § 327.02(16) (2005)

<sup>151</sup> Code of Ordinances of the City of Sanibel, Florida, Chapter 74-136.

<sup>152</sup> See Fla. Const. Art. VIII, Section 2(b). Florida’s test establishing the supremacy of state law over local law is similar to the federal test vis-a-vis a state. In this instance, however, a statute specifically describes the ambit of local government authority, and it is unnecessary to engage in a detailed preemption analysis.

<sup>153</sup> Fla. Stat. § 327.60(2) (2005). Section 327.60(2) provides no definition of the “rights of navigation” or “in navigation.” The right to navigate has been only loosely defined in Florida. See A.G.O. Report 85-45, 1985 WL 190102 (Fla.A.G.). In *Ferry Pass Inspectors’ & Shippers’ Association v. White’s River Inspectors’ & Shippers’ Association*, 57 Fla. 399, 48 So. 643 (1909), the Supreme Court of Florida set forth the following dicta, “The rights of the public in navigable streams for purposes of navigation are to use the waters and the shores to high-water mark in a proper manner for transporting persons and property thereon subject to controlling provisions and principles of law. The right of navigation should be so used and enjoyed as not to infringe upon the lawful rights of others. All inhabitants of the state have concurrent rights to navigate and to transport property in the public waters of the state.” See also 65 C.J.S. *Navigable Waters* § 22 (“The public right of navigation entitles the public generally to the reasonable use of navigable waters for all legitimate purposes of travel or transportation, for boating or sailing for pleasure, as well as for carrying persons or property gratuitously or for hire, and in any kind of water craft the use of which is consistent with others also enjoying the right possessed in common.”) Several Florida cases involving the construction of bridges or water control structures have upheld interference with navigation. See e.g., *State ex rel. Wilcox v. T.O.L.*, 206 So.2d 69 (Fla. 4th DCA 1968); *Carmazi v. Dade County*, 108 So.2d 318 (Fla. 3d DCA 1959). Restrictions on navigation in airboats have been upheld as to the general public, but invalidated as to the owners of island property with no other reasonable access to their estates. *Game and Freshwater Fish Commission v. Lake Islands*, 407 So.2d 189 (Fla. 1981).

<sup>154</sup> See Fla. AGO 85-45, 1985 WL 190102 (Fla.A.G.).

<sup>155</sup> See *id.* (citing *Hall v. Wantz*, 57 N.W.2d 462 (Mich. 1953)). A similar concept was incorporated into the Law of the Sea to define the right of innocent passage that the ships of all nations enjoy in navigating through territorial waters. United Nations Convention on the Law of the Sea (UNCLOS), Section 3. Navigation under the right of innocent passage must be “continuous and expeditious.” It “includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or

While a right to remain aboard the vessel for a reasonable period appurtenant to transit, anchoring and navigation is part of the navigational servitude, this does not extend to utilizing a vessel as a residence. Such usage may be regulated by the City as long as reasonable provision is made for those individuals who reside aboard vessels appurtenant to navigation.<sup>156</sup>

At least two Florida trial courts have addressed local restrictions on anchoring in the context of the statute prior to 2006.<sup>157</sup> In *State v. Hager*,<sup>158</sup> the court upheld a 72 hour length-of-stay restriction, giving deference to Clearwater's determination that a vessel anchored for greater than 72 hours during any thirty-day period was no longer engaged in navigation. After determining that the vessel was a non-live-aboard, the court examined whether anchoring for more than 72 hours was "anchorage . . . in the exercise of the rights of navigation," pursuant to section 327.60(2), Florida Statutes. The court stated "[n]o authority has been cited which establishes a legal time frame within which to determine when, if ever, an anchored vessel is under navigation."<sup>159</sup> The court concluded that while 72 hours "may appear unnecessarily restrictive," the will of the legislative body should stand.

More recently, however, the court in *State v. Frick*,<sup>160</sup> reached the opposite conclusion, refusing to define the rights of navigation in terms of an "arbitrary time period of 72 hours." The court noted that "[t]he length of time that a boat remains anchored may be only one criteria determining whether it is involved in navigation." In striking the Riviera Beach ordinance, the court determined that innocent boaters, genuinely exercising the rights of navigation or forced "out of necessity, weather, or unforeseen conditions" to stop for longer than 72 hours would violate the ordinance. Although these cases do not resolve the length-of-stay issue, it does appear that length-of-stay restrictions are more likely to be up-

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for the purposes of rendering assistance to persons, ships or aircraft in danger or distress." *Id.*, Art. 18.

<sup>156</sup> Memorandum No. 16612 from the District Legal Officer, U.S. Coast Guard to the Chief, Marine Safety Division, U.S. Coast Guard (Apr. 16, 1982).

<sup>157</sup> Another court has interpreted whether the statute preempts a local government from banning navigation with a specific type of vessel, i.e. airboats. See *Moore v. State*, 6 Fla. Law Weekly Supp. 8, 98 ER FALR 276 (10th Cir., Polk County, Sept. 8, 1998). The court concluded that Section 327.60(2), Florida Statutes, only preempts local government regulation of anchoring. *Id.*

<sup>158</sup> See Case No. 90-19207MOANO (County Ct., Pinellas Co., Nov. 27, 1990).

<sup>159</sup> See *id.*

<sup>160</sup> See Case No. 91-6860 M0 A08 (May 28, 1991).

held if they permit vessels to remain for a longer time frame and make adequate provision for contingencies such as safe harbor during storms.<sup>161</sup>

Recent amendments may alter the analysis. The 2006 Legislature amended section 327.60(2) to substitute the term “in navigation” for “engaged in exercise of rights of navigation.”<sup>162</sup> The staff reports on the proposed legislation do not explain the change in terminology and are inconsistent in their explanation of the effect of the amendments.<sup>163</sup> One interpretation is that it was intended to incorporate into Florida law certain jurisdictional concepts from admiralty and maritime law.

Admiralty jurisdiction extends to “vessels” that are “in navigation.”<sup>164</sup> In addition, the phrase has been used for the purpose of defining jurisdiction under statutes that provide remedies for injured maritime workers, the Jones Act,<sup>165</sup> and the Longshore and Harbor Workers Compensation Act.<sup>166</sup> For purposes of admiralty and maritime law, a vessel must be “used or capable of being used as a means of transportation on water.”<sup>167</sup> That use must be a “practical possibility”

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<sup>161</sup> See Letter from Mark P. Barnebey, Senior Assistant County Attorney, Manatee County to Commissioner Kathy Snell (June 5, 1992). A Lee County ordinance, which made it a criminal offense to use a boat as a live-aboard for greater than 72 hours, was struck down as unconstitutional because it was found to be “overbroad and not reasonably tailored to address its stated purpose.” See *State v. Moncure*, Case No. 92CO-636, 637, 638, 639, 640, 641, 642, 643, 92MM-333, 92MM-552 (Feb. 20, 1992). The court noted several aspects of the ordinance which made “seemingly harmless actions illegal.” For example, the ordinance did not require that anyone be on board the vessel at all times during the 72 hour period giving rise to a violation. Although the stated purpose was to prevent the unlawful discharge of waste, no actual discharge was required for a violation to occur. Further, the ordinance did not require that the 72 hour use of the vessel as a live-aboard occur at the same anchorage; nor did the ordinance allow for emergency situations (such as mechanical breakdown or a hurricane) which might require keeping a vessel in County waters for greater than 72 hours. Concluding that innocent boaters legitimately exercising the rights of navigation might also be subject to criminal penalties, the court struck the ordinance as overbroad.

<sup>162</sup> Ch. 2006-309, Section 3, Laws of Florida, amending Fla. Stat. §327.60(2005).

<sup>163</sup> The staff analysis prepared for the House of Representatives describes the effect of Section 3 as “to allow local regulation of anchoring within mooring fields.” House of Representatives Staff Analysis, HB 7175CS, April 6, 2006, p. 6. The Senate staff analysis simply concludes that local governments are “specifically prohibited from the regulation of non-live-aboard vessels that anchor outside of a permitted mooring field.”, but provides no explanation of the effect of the change in terminology. Summary, Senate Staff Analysis and Economic Impact Statement, Judiciary Committee, CS/CS/SB 2128, May 5, 2006.

<sup>164</sup> Thomas J. Schoenbaum, Admiralty and Maritime Law, §1-6 (4<sup>th</sup> ed. 2004); The Florida Bar, Maritime Law and Practice, §§1.4, 3.4 (4<sup>th</sup> ed. 2004).

<sup>165</sup> 46 U.S.C. §§688, 801.

<sup>166</sup> 33 U.S.C. §902(3)(G).

<sup>167</sup> 1 U.S.C. §3.

rather than “merely a theoretical one.”<sup>168</sup> A vessel that has sat idle for an extended period of time and lacks the proper equipment or integrity to serve as a means of transportation on water may be deemed to be a “dead ship” or “with-drawn from navigation.”<sup>169</sup>

Whether the Legislature intended for this body of law to be used in interpreting the extent of local government jurisdiction is debatable. Without better evidence of legislative intent, a specialized field of law used for determining the rights of injured maritime workers or the applicability of a particular type of lien seems unsuited for determining the scope of local government regulatory authority.<sup>170</sup> Florida courts may decide to determine whether a vessel is “in navigation” by reference to Florida law or the dictionary. The definition of navigation in Webster’s New International Dictionary (2d ed 1954) supports the interpretation that a vessel that is anchored for very long is not “in navigation.” According to this dictionary, which the Supreme Court regards as authoritative on the plain meaning of English<sup>171</sup>, “navigation” is “the art or practice of navigating.” To “navigate” is “to go from one place to another by water.” None of the alternative meanings support the interpretation that navigation means to stay in one place on the water. This interpretation is also consistent with the limitations the Legislature has placed on the authority of the Trustees to regulate anchoring, which prohibit the interference with “commerce or the transitory operation of vessels through navigable water.”<sup>172</sup> Until the courts rule or the Legislature clarifies its intent, local government authority to regulate anchoring outside of established mooring fields is questionable.

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<sup>168</sup> *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 125 S.Ct. 1118 (2005).

<sup>169</sup> George Rutherglen, *Dead Ships*, 30 J. Mar. L. & Com 677 (1999).

<sup>170</sup> The policy argument against incorporating federal law in this area is buttressed by inconsistencies and conflicts in federal interpretation of the terms, characterized by one commentator as “confused.” John Munch, *From the “Dead Ship” Doctrine to Vessels “In Navigation”: One Changing Aspect in Determining Admiralty Jurisdiction and Available Remedies*, 70 Tul. L. Rev. 717 (1995).

<sup>171</sup> See e.g., *Rapanos v. U.S.*, 126 S.Ct. 2208, 2220 (2006); *Alaska v. U.S.*, 125 S.Ct. 2137, 2153 (2005); *Engine Mfrs. Assoc. v. South Coast Air Quality Mgt. Dist.*, 124 S.Ct. 1756, 1761 (2004).

<sup>172</sup> See Fla. Stat. §253.03(7)(b)(2005).

#### 4. Anchorage Management and the Inland Navigation Districts

In addition to the foregoing, the Florida Legislature has granted nonregulatory anchorage management authority to the state's inland navigation districts. The Florida Inland Navigation District (FIND) and the West Coast Inland Navigation District (WCIND) serve as the local sponsors for the Atlantic Intracoastal Waterway and the Gulf Intracoastal Waterway.<sup>173</sup>

The FIND is an independent special taxing district which covers an area extending along Florida's east coast from Duval to Dade Counties.<sup>174</sup> FIND is governed by a twelve-member board with one representative from each county within the district.<sup>175</sup> Florida's governor appoints the board members to staggered four-year terms.<sup>176</sup> The WCIND is also a special taxing district, but it only covers four counties: Manatee, Sarasota, Charlotte and Lee.<sup>177</sup> The WCIND is governed by a four-member board comprised of one county commissioner from each of the four counties within its jurisdiction.<sup>178</sup>

In 1998, the Florida legislature added anchorage management to the list of activities for which the FIND and the WCIND are permitted to aid and cooperate with the federal government, state, member counties and local governments.<sup>179</sup> However, even before this legislation, the WCIND was involved in anchorage management by becoming a charter member of the Southwest Florida Regional Harbor Board.

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<sup>173</sup> See Fla. Stat. § 374.976(1)(a) (2005).

<sup>174</sup> See Fla. Stat. § 374.982 (2005).

<sup>175</sup> See Fla. Stat. § 374.983(1) (2005).

<sup>176</sup> See Fla. Stat. § 374.983(2) (2005).

<sup>177</sup> See Ch. 23770, Laws of Florida (1947); Fla. Admin. Code § 66A-1.001(1) (2005).

<sup>178</sup> See Fla. Admin. Code § 66A-1.002(1) (2005).

<sup>179</sup> See Fla. Stat. § 374.976(1)(c) (2005); see also Fla. Admin. Code § 66B-2.001 (2005).

## IV. Emerging Approaches to Anchoring and Anchorage Management in Florida

### A. The Southwest Florida Regional Harbor Board (SWFRHB)

The Southwest Florida Regional Harbor Board (SWFRHB) was created in July 1995 by a memorandum of agreement among a local organization of boaters, state and regional agencies, and the Florida Sea Grant College Program to resolve conflicts that arose from inconsistent local government regulation of anchorages.<sup>180</sup> Many of the boaters felt that length-of-stay restrictions were unnecessary in most of the anchorages of Southwest Florida and that overly burdensome regulations would discourage cruising in the region. The Board's non-regulatory approach focused on boater education to achieve the greatest ecosystem benefit. The group was also involved in an effort to identify anchorages in Southwest Florida which require more active management based on current conflicts and to provide technical assistance in the development of appropriate anchorage management plans. The Board's philosophy was to maintain the widest possible degree of freedom for boaters consistent with appropriate environmental and safety concerns and based upon active participation by boaters. To this end, the SWFRHB developed a set of guiding principles for anchorage management, which are included in Appendix A. In addition, the SWFRHB encouraged municipalities in Southwest Florida to enter into memoranda of agreement endorsing a non-regulatory, consensus-based approach based on these principles, and to relax their length of stay restrictions. The term of the Regional Harbor Board ultimately expired and it was replaced by a regional advisory council with broader jurisdiction. The use of voluntary measures to manage anchorages continues to be an important element of management in Southwest Florida.

### B. Managed Anchorage and Mooring Fields (MAMF)

Nonregulatory measures are not always sufficient; to better manage and accommodate anchoring activities within their jurisdictions, at least eight local governments around the state of Florida have established Managed Anchorage and Mooring Fields (MAMFs).<sup>181</sup> These MAMFs range in size from 9 to 80 acres,

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<sup>180</sup> See Memorandum of Agreement Among the Boaters' Action and Information League, Florida Department of Environmental Protection, Florida Sea Grant College Program, Southwest Florida Regional Planning Council, and the West Coast Inland Navigation District Relating to Anchoring of Vessels in Southwest Florida (July 13, 1995) (unpublished agreement on file with the authors).

<sup>181</sup> A MAMF is an area specially designated and managed by a local government or some other entity for the mooring and anchoring of vessels. Local governments with established MAMFs include Fort Myers, Fort Myers Beach, Key West, Marathon, Sarasota (City Park and the Sarasota Sailing Squadron), Stuart, and Vero Beach. Many others are in the process of establishment. There is a difference between "anchorages" and "mooring fields." Anchorages are areas designated for the anchoring of vessels using ground tackle carried on the vessel; mooring fields are areas where vessels tie up to a buoy attached to ground tackle that is maintained in place.

accommodating 49 to 109 vessels. MAMFs are often used to encourage tourism by creating convenient and safe opportunities for cruisers to stop in an area by either anchoring or tying to a mooring. Those mooring closest to shore, and the restaurants, shops and pubs of a waterfront community, may be reserved for short term use. Those staying for a longer duration or merely storing vessels, do not require the easiest access. A well-designed MAMF includes amenities such as dingy docks, fueling stations, holding tank pump-out stations, garbage disposal facilities, and shower and restroom facilities. Many MAMFs provide 24 hour security through an on-site harbormaster.

A local government may choose to operate the MAMF itself,<sup>182</sup> enter into a concession agreement with a private company allowing for private management,<sup>183</sup> or allow management by a non-profit organization.<sup>184</sup> The operation of a MAMF is typically governed by the adoption of an ordinance or resolution. Appendix B is a Model Municipal Harbor Management Ordinance developed for Florida Sea Grant in 2001 to provide guidance to municipalities interested in establishing MAMFs.<sup>185</sup> Activities typically addressed in ordinances include the length of time a vessel may remain in the MAMF, the establishment of fees, safety and insurance, operational hours for noise and machinery, the display of signs, sanitation requirements, fishing, swimming, and other recreational activities, and the feeding of wildlife. Anchoring within the mooring field is typically prohibited. Anchoring outside of the mooring field may also be regulated, subject to the limitations of state law.

Local governments face a number of regulatory hurdles before they can establish MAMFs. Initially, the ownership of the beds underlying the water in question must be determined. In most cases, ownership of the beds will lie in the hands of the State and the use of it for a MAMF must be authorized.<sup>186</sup> The local comprehensive plan must be evaluated and amended if necessary to ensure the

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For current information on the implementation of MAMFs and other issues regarding waterway and waterfront management, see <http://www.law.ufl.edu/conservation/waterways> (last visited October 13, 2006).

<sup>182</sup> Vero Beach MAMF is administered by the municipality.

<sup>183</sup> Fort Myers Beach has entered into a concession agreement with a private marina.

<sup>184</sup> The Sarasota Sailing Squadron is a member-based organization that has leased its historic anchorage.

<sup>185</sup> See Appendix B, Thomas Ankersen and Christopher H. Pearce, An Annotated Model Municipal Harbor Management Ordinance (Aug. 2001).

<sup>186</sup> Some form of authorization to use sovereign submerged lands may be required, usually a lease. See Section III.B. The relevant political jurisdiction over the area must also be determined.

MAMF will be consistent.<sup>187</sup> All applicable regulatory authorizations from the state and federal governments must also be obtained.<sup>188</sup> The establishment of a mooring field currently requires an Environmental Resource Permit (ERP), usually issued by the Department of Environmental Protection. In 2005, the Florida Legislature directed DEP to adopt a general permit for marinas and mooring fields occupying less than 50,000 sq. ft.<sup>189</sup> The regulation is currently being drafted by DEP and is expected in 2006.<sup>190</sup> Any signs, buoys or other markers posted to delineate a managed area must be approved by the Florida Fish and Wildlife Conservation Commission.<sup>191</sup>

## V. Conclusion

Federal rights to navigation are protected by the Commerce Clause and the federal navigation servitude. Anchoring that is incidental to the exercise of the rights of navigation remains protected by federal law. However, in *Barber*, the Ninth Circuit Court of Appeals concluded that while the federal government may preempt state and local anchorage regulation, it has not done so. In fact, there is ample federal authority which suggests that Congress intended for states to assume a substantial role in the regulation of navigation, including anchoring, as long as it does not unduly circumscribe the protected federal interests. However, federal law offers little guidance concerning how far a state or local government may regulate anchoring before it interferes with the federal navigation interest.

In Florida, the Legislature has authorized the Board of Trustees to regulate anchoring, but the Board has not exercised this authority. The Legislature has also, however, preempted local government regulation of anchoring by non-live-aboards. Until 2006, the preemption extended to “non-live-aboard vessels engaged in the exercise of rights of navigation.” It now preempts regulation of

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<sup>187</sup> See Fla. Stat. § 163.3194 (2005).

<sup>188</sup> Regulatory authorizations might include a federal permit under Section 10 of the River and Harbors Act, 33 U.S.C. § 403, 33 C.F.R. Part 320; and an Environmental Resource Permit from DEP, see Fla. Stat. § 373.422 (2005); see also Fla. Admin. Code § 40E-4.041 (2005); see also Fla. Admin. Code § 18-21.005 (2005). Consultation with the U.S. Fish and Wildlife Service regarding potential impacts to manatees is usually required in many parts of Florida.

<sup>189</sup> See Fla. Stat. § 373.118(5) (2005). The Legislature also directed DEP to adopt an expedited general permit scheme for boat ramps and courtesy docks.

<sup>190</sup> It should be published as Rule 62-341.425.

<sup>191</sup> See Fla. Stat. § 327.40 AND .41; Fla. Admin. Code § 68D-23 (2005). The rule is currently being revised through workshops.

those vessels “in navigation.” Although a definition of live-aboard is provided, the Legislature has not defined the term “in navigation.” Prior to the 2006 amendment, two Florida circuit courts addressed the validity of local government regulations and arrived at conflicting decisions. The Attorney General has opined that the earlier provision probably required a “case-by-case” analysis. Until some clarity is brought to the issue by the appellate courts or the Legislature, the validity and extent of local anchorage regulation of non-live-aboards outside of managed mooring fields will be questionable. The authority of local governments to regulate anchoring and mooring within legally marked mooring fields, however, is not in doubt.



## VI. Appendices

### APPENDIX A

#### Standards for Anchorage Management

"The Southwest Florida Regional Harbor Board's Regional Umbrella: Standards for Anchorage Management," set forth below, should represent the basic management approach for anchoring in Florida.

##### I. Principles of Anchoring

1. All federal and state laws apply to all vessels, including laws concerning overboard discharge of petroleum products, waste, garbage and litter. Local laws regarding nuisance, noise, etc to all persons, including those at anchor.
2. Vessels may not anchor in a manner that: a. Jeopardizes other vessels at anchor or underway; b. Might cause damage to other property or persons; c. Impedes access to docks, slips or public or private property
3. Areas of seagrass, living coral or rock outcroppings as identified by Florida Sea Grant (FSG), the Department of Environmental Protection (FDEP) or the regional National Estuary Programs, cannot be used for anchoring. Special care must be taken to avoid anchoring impacts in aquatic preserves.
4. Vessels must be capable of navigating under their own sail or power, or have ground tackle capable of holding vessel until winds are fair or a tow or repairs can be arranged. A reasonable amount of time must be allowed for such situations.
5. In emergencies, the safety of the crew and the vessel will be of paramount importance until the emergency is past or the vessel has been moved to safety. Each mariner remains responsible for damages caused by his vessel or its wake.

[Note: There are no third part beneficiaries under these standards. No third party has any rights or cause of action based upon any failure to enforce any of these standards.]

Further restrictions should not be placed on anchoring in Florida in the absence of environmental damage or user conflicts that cannot be otherwise resolved.

##### II. Harbor Management

1. When environmental damage or user conflict have been demonstrated by objective standards, consideration should be given to the development of a local harbor management plan.

2. Objective standards should be based on planned, periodic inventories of all natural and cultural resources within the harbor and adjacent shoreline.

3. Local harbor management plans should be developed utilizing consensus building processes that include representation among all stakeholders.

4. Local harbor management plans should be implemented by a local harbor board that includes broad-based stakeholder representation, including boater representation from within the anchorage.

5. Local harbor management plans should consider the appointment of a harbor master, who should be competitively selected based on qualifications established by the local harbor board and who reports to it.

6. Local harbor management plans should ensure that there is adequate anchoring and/or mooring capacity for transient boaters and that adequate provision is made for "safe harbor" shelter during storms.

7. Local harbor management plans should ensure that adequate support facilities are available to boaters. At a minimum this should include dedicated dinghy facilities. Where resources are available, consideration should also be given to restrooms, showers, laundry facilities and other amenities.

8. Local harbor management plans should include appropriate aids to navigation and other signage, as necessary to distinguish anchorage, mooring fields, restricted areas and navigation channels.

9. Local harbor management plans should consider appropriate means to obtain financing or capital improvements and management activities, including government grants and reasonable user fees.

10. For managed anchorages, consideration should be given to seeking Special Anchorage Area designation by the Coast Guard.

11. Local harbor management plans should consider appropriate mechanisms to resolve disputes within the anchorage.

12. For managed anchorages, local harbor management plans should seek the appropriate approval from the State of Florida or other legal owners of the bottomlands beneath the anchorages.

## **APPENDIX B**

### **An Annotated Model Municipal Harbor Management Ordinance**

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August 2001

#### **Introduction**

The Southwest Florida Regional Harbor Board (SWFRHB) was created in July 1995 by a memorandum of agreement among a local organization of boaters, state and regional agencies and the Florida Sea Grant College Program to resolve conflicts that arose from local government regulation of anchorages. Many of the boaters felt that length-of-stay restrictions were unnecessary in most anchorages of Southwest Florida and that overly burdensome regulations would discourage cruising in the region. The Board's non-regulatory approach focuses on boater education to achieve the ecosystem benefit. The foundation established for this approach is set forth in a set of broad principles adopted by the SWFRHB as an appropriate guide to anchorage and mooring management in Southwest Florida.<sup>1</sup> Working with the Florida Sea Grant Program, SWFRHB has also been involved in an effort to identify anchorages in Southwest Florida which require more active management based on current conflicts and to provide technical assistance in the development of appropriate anchorage management plans where warranted.

In continuance of these efforts, the SWFRHB commissioned the development of a Annotated Model Harbor Ordinance ("MHO") for adoption at the local level. To date, the MHO has been adopted in substantial part by the City of Fort Myers Beach and The City of Venice. The Model Harbor Ordinance sets forth the SWFRHB's principles in a two-tiered Harbor Management Plan. Part A. of the Harbor Management Plan sets forth minimal rules and regulations of anchoring and mooring that shall be adopted for the Waters of the City. Part A. will remain in effect as the primary restrictions on anchoring and mooring in the waters of the City, unless additional action is required as detailed in Part B. Enactment of additional rules and regulations under Part B. will be warranted only when objective evidence of environmental damage or use conflicts, and upon recommendation of the Harbor Advisory Board.

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<sup>1</sup> Refer to Appendix I, page 52: SWFRHB Principles of Anchoring and Harbor Management.

**MODEL MUNICIPAL HARBOR ORDINANCE**

City of Sunshine, Florida

Chapter XX.

HARBOR MANAGEMENT PLAN ORDINANCE

**Article 1. Basis Of Ordinance**

- Section I. Findings of Fact
- Section II. Ordinance Goals and Purpose
- Section III. Definitions
- Section IV. Jurisdiction and Authority
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- Section I. Rules and Regulations

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**ARTICLE 1. BASIS OF ORDINANCE**

This ordinance shall be referred to as the City of Sunshine Municipal Harbor Management ordinance.

Section I. Findings of Fact

Whereas, the City of Sunshine has registered boats and significant seasonal and transient boaters; and

Whereas, the City of Sunshine’s economy and quality of life are enriched by an abundance of recreational boating; and

Whereas, boat ownership and use in City of Sunshine and across Southwest Florida continues to experience a high annual rate of growth; and

Whereas, the City of Sunshine has limited boater resources, including appropriate safe harbors, anchorages and moorings sites; and

Whereas, the City of Sunshine desires to protect the environment while reducing the potential for user conflicts on its waterways; and

Whereas, the City of Sunshine desires to encourage safe and enjoyable recreational boating within the City; and

Whereas, the City of Sunshine desires to accommodate anchoring and mooring by recreational boaters in a manner that ensures the greatest degree of regional consistency in Southwest Florida; and

Whereas, the City of Sunshine desires to do accommodate anchoring and mooring by recreational boaters in a manner that in consistent with its particular circumstances and citizen needs;

NOW, THEREFORE, BE IT ORDAINED, BY THE BOARD OF THE CITY OF SUNSHINE on this DAY OF \_\_\_\_, 20\_\_ .

## Commentary

*Accurate and substantiated Findings of Facts are invaluable indicators that ordinances or regulations are warranted exercises of the police power by governments for the protection of the health, safety and welfare of the citizenry.*

*The above Findings of Fact should be custom tailored to be consistent with the adopting municipalities normal formalities and procedures. Also, the information below can be used to supplement the language above when the City of Sunshine proposes and adopts the Municipal Harbor Ordinance. Specific Findings of Fact should be custom tailored to the individual municipality with respect to its specific boating communities, resources, environmental conditions, and reason(s) for adopting the ordinance. Specific annual statistics on boating by region and county can be researched at the website listed in footnote 3.*

*For Florida' 14 million residents and 43 million annual visitors, the coast and its resources are a major attraction and an important part of their environment.<sup>2</sup>*

*Florida's marine resources are used by over 1,010,370 state-registered boats.<sup>3</sup>*

*Southwest Florida's economy and quality of life are enriched by an abundance of recreational boating. Boaters in the is subtropical region enjoy year-round fishing, cruising, and anchoring in inshore waters populated with dolphins, manatees, and a wide variety of fishes and other marine life.<sup>4</sup>*

*Boating and fishing make a significant annual contribution, roughly \$500 million dollars (1993), to southwest Florida's regional economy.<sup>5</sup>*

*Boater registration in Florida have approximately doubled in fifteen years, a rate three times greater than the population increase.<sup>6</sup>*

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<sup>2</sup> *Florida Sea Grant College Program Strategic Plan 1998-2001*, Sea Grant Publication No. TP-90, pg. 3, April 1998.

<sup>3</sup> *Boating Accidents 2005 Statistical Report*, Florida Fish and Wildlife Conservation Commission (2005), available at [www.myfwc.com/law/boating/2005Stats/2005BoatAccidentsPart1.pdf](http://www.myfwc.com/law/boating/2005Stats/2005BoatAccidentsPart1.pdf) (last visited October 13, 2006).

<sup>4</sup> *Feasibility of Non-Regulatory Approach to Bay Water Anchorage Management for Sustainable Recreational Use*, Sea Grant Publication TP- 74, pg. 1, March 1994.

<sup>5</sup> *Id.*

<sup>6</sup> *Florida Sea Grant College Program Strategic Plan 1998-2001*, Sea Grant Publication No. TP-90, pg. 3, April 1998.

*In 1989, recreational boat registrations in southwest Florida totaled 74, 538 -- a 309% increase since 1970.<sup>7</sup>*

*In 1994, there were 19,758 boats that potentially use recreational anchorages in southwest Florida. This represented 39% of all resident-owned and transient recreational boats with overnight accommodations in Florida.<sup>8</sup>*

*Eighty-five to ninety percent of sport and commercially harvested shellfish and fin-fish species in Florida depend on estuaries.<sup>9</sup>*

*Coastal mangrove systems present in southwest Florida provide valuable habitat for a wide range of species of animals including those listed as threatened or endangered by the U.S. Fish and Wildlife Service.<sup>10</sup>*

*Seagrass meadows are one of Florida's most important marine habitats and are critically important to marine productivity in the shallow-water areas of the state.<sup>11</sup>*

*In terms of maintaining wide-ranging species that make up an important component of wildlife diversity in Florida, the Southwest Florida region probably represents the most important region in Florida.<sup>12</sup>*

*The quality of Florida's surface waters can be degraded by boat sewage, gray water, cleaning products, spilled fuel, trash and the introduction of exotic organisms. These materials not only degrade Florida's environment, but also hamper the enjoyment of Florida's recreational areas.*

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<sup>7</sup> Feasibility of Non-Regulatory Approach to Bay Water Anchorage Management for Sustainable Recreational Use at 83.

<sup>8</sup> Feasibility of Non-Regulatory Approach to Bay Water Anchorage Management for Sustainable Recreational Use at 83.

<sup>9</sup> Florida Sea Grant College Program Strategic Plan 1998-2001 at 3.

<sup>10</sup> *Ecosystems of Florida*, pg. 544, University of Central Florida Press, 1990.

<sup>11</sup> *Ecosystems of Florida*, pg. 544, University of Central Florida Press, 1990.

<sup>12</sup> *Closing the Gaps in Florida's Wildlife Habitat Conservation System*, Office of Environmental Services, Florida Game and Freshwater Fish Commission, pg. 173, 1994.

*The rapid increase in the number and type of boating activities has led to degradation of coastal waters by destruction of sea grass beds, from propeller damage and boat groundings, and the introduction of human, chemical, and noise pollution.*<sup>13</sup>

## Section II. Ordinance Goals and Purpose

The Model Harbor Ordinance is intended to preserve the ecological and recreational values of the City of Sunshine's waterways in a manner that maintains the widest possible degree of freedom for users through a regional framework that relies heavily on participation by boaters. This framework should be based on the Principles of Anchoring and Harbor Management adopted by the SWFRHB on January 22, 1999.<sup>14</sup>

It is the purpose of this ordinance to accommodate the anchoring and mooring needs of as many responsible boaters while safeguarding environmental resources, navigational access and the general health safety and welfare of the people of the City of Sunshine.

### **Commentary**

*These above MHO Goals should be supplemented by and coordinated with the appropriate elements of the City of Sunshine's Comprehensive Plan such as the natural resources element, recreation element, coastal element, etc. As the MHO program is established, relevant portions may be incorporated into the Comprehensive Plan during future Evaluation and Appraisals Review(s).*

## Section III. Definitions

To the extent possible, the terms below track applicable language from the 1999 Florida Statutes, 1999 Florida Administrative Code, and/or have been adapted from learned treatises and other research documents. In customizing the City of Sunshine's Municipal Harbor Ordinance care should be taken use similar language where possible without creating conflicts with terminology previously adopted by the City of Sunshine in its ordinances or Comprehensive Plan.

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<sup>13</sup> *Coastal Currents*, "Alternative Approaches to Anchorages in the Southwest," Florida Coastal Management Program, pg. 1, Fall 1996.

<sup>14</sup> Based on the Principles of Anchoring and Harbor Management adopted by the SWFRHB on January 22, 1999. Copy of MOA on file with authors.

(1) Anchorage - A customary, suitable, and designated harbor area in which vessels may anchor.<sup>15</sup>

(2) Anchoring - The use of heavy device fastened to a line or chain to hold a vessel in a desired position.<sup>16</sup>

(3) Designated Special Anchorage Areas - Coast Guard designated anchorage areas where the Secretary of Transportation determines such an anchorage grounds are necessitated due to maritime or commercial interests.<sup>17,18</sup>

(4) Emergency - Any occurrence, or threat thereof, whether natural, technological or manmade, in war or in peace, which results or may result in substantial injury or harm to the population or substantial damage to or loss of property.<sup>19</sup>

(5) Harbor - A natural or man-made anchorage providing protection from most storms, maybe with breakwater and jetties; a place or docking and loading.<sup>20</sup>

(6) Harbor Management Plan - A two-part plan, prepared by the Harbor Advisory Board, adopted by the City Council, and as an amendment to the Local Government Comprehensive Plan.<sup>21</sup> Part A shall address all anchoring and mooring within Waters of the City. Part B shall address the establishment and management of a Harbor Management Plan (HMP).

(7) Harbormaster - Designated City staff member charged with implementation of the Harbor Management Plan.

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<sup>15</sup> [Adapted from] Chapman's Piloting, Seamanship and Boat Handling, 63rd Edition, pg. 618, Hearst Marine, William Morrow and Companies, 1999.

<sup>16</sup> [Adapted from] id. at 618. Developing technological advances may require revision of the traditional definition to include "anchoring systems" that rely on electronic devices to hold a boat in position without actually attaching to the submerged lands.

<sup>17</sup> 33 C.F.R. 471 (1997).

<sup>18</sup> Such anchorage areas exist in Southwest Florida include: Marco Island at Marco River, Manatee River at Bradenton, and Apollo Beach at Tampa Bay. 33 C.F.R. 110.74, 110.74a, 110.74b (1997).

<sup>19</sup> Fla. Stat. 252.34(3) (1999).

<sup>20</sup> [Adapted from] Chapman's Piloting at 624.

<sup>21</sup> Refer to Fla. Stat. 163.3164(4) (1999).

(8) Mooring - Permanent ground tackle, a place where vessels are kept at anchor.<sup>22</sup>

(9) Mooring Field - Designated area where permanent ground tackle is utilized to provide multiple vessel moorings in accordance with the Harbor Management Plan.

(10) Vessel - Under the Florida Vessel Registration and Safety Law, a term synonymous with the word “boat” as referenced in section 1(b), Section VII of the Florida Constitution and that includes every description of watercraft, barge, and airboat, other than a seaplane on the water, used or capable of being used as a means of transportation on water.<sup>23</sup>

(11) Live-aboard Vessel - Any vessel used solely as a residence; or a professional or other commercial enterprise, or a legal residence. A commercial fishing vessel is expressly excluded from the term “live-aboard vessel.”<sup>24</sup>

(12) Transient Vessel - Any vessel, outside of its home port, engaged in the legal exercise of its of the rights of navigation.

(13) Stored Vessel - Any uninhabited vessel moored or anchored for a period exceeding days within the Waters of the City, excluding vessels at private docks.

(14) Waters of the City - Navigable waters within the territorial limits of the City or Waters of the State.<sup>25</sup> This includes areas below the mean high water line within the corporate limits of the city extending 1,000 feet in the Gulf of Mexico and 1,000 feet in the inland bays and waters parallel with the City shore line.<sup>26</sup>

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<sup>22</sup> Chapman's Piloting at 628.

<sup>23</sup> Fla. Stat. 327.02(36) (1999). See also *City of Tampa Bay v. Tampa Shipbuilding & Engineering Co.*, 136 Fla. 216 (1939).

<sup>24</sup> Fla. Stat. 327.02(16) (1999). The Board of Trustees of the Internal Improvement Fund has adopted an alternative definition relating to “live-aboard” vessels that is to be used in future submerged lands leases for marinas entered into pursuant to Fla. Stat. 253.03(7)(b) (1999) and Fla. Admin. Code 18 - 21.005(e)(1). (1999). In these agreements, the term “live-aboard” is defined as a vessel docked at the facility and inhabited by a person for any five (5) consecutive days or a total of ten (10) days within a thirty (30) day period. If live-aboards are authorized by the lease, in no event shall a “live-aboard” status exceed six (6) months within any twelve (12) month period, nor shall any such vessel constitute a legal or primary residence.

<sup>25</sup> Fla. Stat. 327.02(37) (1999).

<sup>26</sup> [Adapted from] Matanzas Harbor Action Plan, Ordinance 00-14

## Commentary

*As indicated by footnote 27, the most criticized definition in the regulation of mooring and anchoring in Florida may well be that of “live-aboards.” Many local governments have adopted their own definitions of “live-aboards” for the purposes of exercising police power jurisdiction over certain vessels. However, to the extent that these locally generated definitions are broader than those use by the State of Florida, these definitions may arguably contradict the State’s preemptive exercise of its police power and controlling interest in state submerged lands.*

## Section IV. Jurisdiction and Authority

The waters included under the jurisdiction and authority of this ordinance are the waters of the City of Sunshine.

This ordinance is enacted pursuant to the provisions of Chapter 95-494, Laws of Florida, Chapter 166, Florida Statutes, and other applicable provisions of law.<sup>27</sup>

## Commentary

*Local governments in Florida possess concurrent jurisdiction and authority with state and federal governments to regulate the navigable waters within the territorial limits of the City of Sunshine. Local jurisdiction is derived from their police power and local home rule<sup>28</sup> as adopted by the 1968 Florida Constitutional amendments.*

*State authority and jurisdiction is derived from the police power and its ownership of state submerged lands.<sup>29</sup> In Florida, the Legislature has authorized the Board of Trustees<sup>30</sup> to regulate anchoring, but the Board has not exercised this authority. The Legislature has, however, preempted local government regulation of anchoring by non live-aboards engaged in the exercise of the rights of navigation. Although a definition of live-aboard is provided, the Legislature has not clarified what it means by engaged in the exercise of the rights of navigation. Federal authority and jurisdiction is derived from the*

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<sup>27</sup> *Id.*

<sup>28</sup> Art. VIII(1)(g) of the Florida Constitution and Fla. Stat. 125.01(1) (1999) gives counties home rule authority to “protect the health, safety, welfare and morals of its citizens.” Likewise, Art. VIII(2)(b) of the Florida Constitution and Fla. Stat. 166.021 (1999) gives counties the powers of municipalities.

<sup>29</sup> Under the public trust doctrine, the state of Florida gained title to the beds of all navigable waters in the state upon statehood. See federal Submerged Lands Act (SLA), U.S.C.A. 1301 et seq. (West 1998).

<sup>30</sup> See Fla. Const. art. X, 10, Fla .Stat., 253.07(a)-(b) (1999).

*Commerce Clause<sup>31</sup> and federal navigational servitude both of which address protection of federal rights to navigation. Anchoring that is incidental to the exercise of the rights of navigation remains protected by federal law. However, in Barber v. State of Hawaii, 42 F.3d 1185, 1195 (9th Cir. 1994), the Ninth Circuit Court of Appeals concluded that while the federal government may preempt state and local anchorage regulation, it has not done so. In fact, there is ample federal authority that suggests that Congress intended for states to assume a substantial role in the regulation of navigation, including anchoring, as long as it does not unduly circumscribe the protected federal interests. However, federal law offers little guidance concerning how far a state or local government may regulate anchoring before it interferes with the federal navigation interest.*

*At issue in Barber was Hawaii's state-wide approach to anchoring and mooring regulation exercised through Hawaii Revised Statute (HRS) Chapter 200 - Ocean Recreation and Coastal Areas Program. HRS Chapters 200-4 and 200-6 (1998) delegate substantial control of anchoring and mooring to Hawaii's Department of Transportation, Harbors Division which it exercised in relevant part through the promulgation of Hawaii Administrative Rules, Title 19, Chapters 41 and 42 (1998). The Hawaii legislature and administrative agencies clearly placed limits on the private use of streams and navigable waters without running afoul of the commerce clause or rights of navigational servitude.*

*For complete discussion of on local, state and federal regulatory jurisdiction and authority see Anchoring Away: Government Regulation and The Rights of Navigation in Florida.*

## Section V. Organizational Structure, Procedures, and Duties <sup>32</sup>

This section provides the organizational structure, duty descriptions and procedures for the establishment and function of the Municipal Anchoring and Mooring Plan.

(1) Harbor Advisory Board. A City agency known as the City of Sunshine Harbor Advisory Board is hereby established.<sup>33</sup>

(2) Composition and Appointment.<sup>34</sup> The Harbor Advisory Board shall con-

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<sup>31</sup> See U.S. Const., art. I, § 8[3].

<sup>32</sup> [Adapted from] Guidelines for the Development of Municipal Harbor Plans, State of Rhode Island, Coastal Resources Management Council, June 1997.

<sup>33</sup> Harbor Advisory board meetings and actions should be conducted in accordance with Fla. Stat. 286.011 (1999) and Fla. Const., art. I, 24(b). For further discussion on advisory board duties to operate "in the Sunshine," see *Monroe County v. Pigeon Key Historical Park*, 647 So. 2d 857 (1994).

<sup>34</sup> Refer to SWFRHB Section II, Principles #3 and #4. See Appendix I.

sist of \_\_ members appointed by the City Council. The Harbormaster shall be a non-voting ex officio member.

(3) Qualifications and Members. No voting members of the Harbor Advisory Board shall be salaried officials of the City. \_\_ members shall be representatives of the boating community. At least \_\_ of the boating community members shall own a vessel that utilizes the managed harbor. \_\_ members shall be representatives of institutions dedicated to the conservation of the marine environment. \_\_ members shall be shoreside residents and property owners.

(4) Members, Terms and Vacancies.<sup>35</sup> The term of office of a member of the Harbor Advisory Board shall be \_\_ year(s) or until a successor has been appointed and has qualified. Vacancies shall be filled by the City Council within 30 days for the remainder of the term.

(5) Selection of Officers. Upon appointing the initial members of the Harbor Advisory Board, the City Council shall select a temporary Chair for the purposes of presiding over the meeting to select a permanent Chair. Thereafter, a Chairperson and an Alternate will be selected by the members of the Board to serve for a period of \_\_ year(s). The Chair shall preside over meetings of the Board.

(6) Clerk. The City Manager or its designee shall be the Clerk of the Harbor Advisory Board. It shall be the duty of the Clerk to keep a record of all proceedings of the Harbor Advisory Board, transmit the Board's formal actions to the City Council when directed to do so, and perform such other duties as are usually performed by the clerk of a deliberative body.

(7) Rules and Procedures.

The Harbor Advisory Board shall meet at regular intervals to be determined by the Board, but not less than \_\_\_\_ [quarterly], and at such other times as the Chair deems it necessary for the orderly conduct of business.

The Harbor Advisory Board shall adopt rules for the transaction of its business and shall be governed in accordance with Chapters 119 and 125 of the Fla. Stat. concerning public records and open meetings. The rules may be amended upon notice to the members that amendments shall be acted upon at a forthcoming meeting.

A majority vote shall be required for all decisions of the Board.

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<sup>35</sup> *Id.*

(8) Jurisdiction. The Harbor Advisory Board shall exercise jurisdiction over all the waters of the City concerning matters related to mooring and anchoring.<sup>36</sup>

(9) Purpose and Scope. The Harbor Advisory Board shall advise the City Council concerning all matters relevant to the management and use of the waters of the City for mooring and anchoring.

(10) Duties of the Harbor Advisory Board.

(a) The Harbor Advisory Board shall prepare and submit the Municipal Anchorage and Mooring Plan and any amendments thereto for review and approval by the City Council.

(b) The Harbor Advisory Board shall make recommendations for the establishment of managed municipal anchorages and mooring fields where warranted by environmental damage or user conflicts.

(c) The Harbor Advisory Board shall make recommendations for establishment and revision of the Fee and Penalties Schedule and amendments under a Harbor Management Plan (“HMP”).

(d) The Harbor Advisory Board shall recommend the Harbormaster for appointment by the City Council and shall review the performance of the Harbormaster on a \_\_ basis.

(e) The Harbor Advisory Board shall serve as the forum of first resort for disputes arising out of activities in the waters of the City related to mooring and anchoring.<sup>37</sup>

(f) The Harbor Advisory Board shall manage, operate, and maintain the Municipal Anchorage property in an efficient and satisfactory manner.

(g) The Harbor Advisory Board shall submit to the City a proposed operating budget and a proposed capital budget setting forth in detail an estimated profit-and-loss statement for the next four quarterly periods including a schedule of revenues. Each such budget shall also include a detailed management and marketing plan.

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<sup>36</sup> While the duties of the Harbor Advisory Board has been narrowly tailored to mooring and anchoring, in many cases, local governments have already established advisory Board's to address these and other marine issues. If so, the efforts of these Board's should be coordinated.

<sup>37</sup> Refer to SWFRHB Section II, Principle # 11. See Appendix I.

(h) The Harbor Advisory Board shall also perform any other duties which lawfully may be assigned to it by resolution of the City, including, but not limited to review, holding public hearings, and making recommendations to the City on regulations, codes, and other documents as may be necessary to promote public safety.<sup>38</sup>

(11) Duties of the City Council.

(a) Except in the case of emergencies, as defined herein, the City Council shall consult with the Harbor Advisory Board concerning all matters within the jurisdiction of the Harbor Advisory Board, prior to initiating final action on such matters.

(b) The City Council shall approve the Harbor Management Plan and any amendments thereto.

(c) The City Council shall approve the Harbor Management Plan Fee and Penalties Schedule and amendments thereto.

(d) The City Council shall hear appeals from disputes brought before the Harbor Advisory Council.

(12) Appointment of the Harbor Master. Based on the Harbor Advisory Board's recommendation, the City shall contract with a harbormaster.<sup>39</sup>

(13) Duties of the Harbormaster. The Harbor Master shall be responsible for implementing the Harbor Management Plan, and all other applicable federal, state and local law. The specific duties of the Harbormaster shall be determined by the Harbor Advisory Board and approved by the City Council.

(14) Qualifications of the Harbormaster.<sup>40</sup> Qualifications of the Harbormaster shall be determined by the Harbor Advisory Board and approved by the City Council.

(15) Forfeiture of Office. A Harbor Advisory Board member shall forfeit office if the member:

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<sup>38</sup> Subsection f, g, and h [Adapted from] Matanzas Harbor Action Plan, Ordinance 00-14.

<sup>39</sup> [Adapted from] Matanzas Harbor Action Plan, Ordinance 00-14.

<sup>40</sup> Refer to SWFRHB Section II, Principle # 5. See Appendix I.

(a) Lacks any qualification for the office prescribed by the City ordinance or state law;

(b) Violates any standard of conduct or code of ethics established by law for public officials; or

(c) Is absent from three (3) consecutive regularly scheduled Harbor Advisory Board meetings without being excused by the Board.

(16) Member Compensation. The members of the Harbor Advisory Board shall serve without compensation. However, Harbor Advisory Committee members may be reimbursed from funds appropriated by the City Council for expenses that are necessary to conduct the work of the agency.

(17) Employment and Supervision of Staff and Experts. The Harbor Advisory Board may, subject to the approval of the City Council and within the financial limitations set by appropriations made or other funds available, recommend the city manager employ such experts, consultants, technicians, and staff as may be deemed necessary to carry out the functions of the Harbor Advisory Board. Staff personnel of the Harbor Advisory Board shall be under the day-to-day supervision of the city manager.

(18) Cooperation with the Harbor Advisory Board. Each officer and employee of the city is hereby directed to give all reasonable aid, cooperation, and information to the Harbor Advisory Board or to the authorized assistants of such agency when so requested.<sup>41</sup>

### **Commentary**

*The duties and qualifications of the Harbormaster may vary greatly depending on the City of Sunshine's resources and need for coordination with other City staff or departments. Specifically, duties that require the ability to initiate contracts, enforce laws, make arrests, carry firearms or board vessels should be addressed in the duties and qualifications sections.*<sup>42</sup>

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<sup>41</sup> Sections (15) through (18) [adapted from] Matanzas Harbor Action Plan, Ordinance 00-14.

<sup>42</sup> For comments on these and similar issues, see *The Right Tack: Charting Your Harbor's Future*, Maine Coastal Program, Maine State Planning Office, July 1995. Copy on file with Authors.

## ARTICLE 2. HARBOR MANAGEMENT PLAN

### PART A. ANCHORING AND MOORING WITHIN THE WATERS OF THE CITY OF SUNSHINE

#### Section I. Rules and Regulations

When a vessel entered the Waters of the City, the vessel, crew and guests shall comply with the rules and regulations set out herein.

(1) Only boats is good operating condition and under their own power with proper registration may anchor or moor in Waters of the City.

(2) It shall be the responsibility of the vessel and its crew to comply with all local, state, and federal laws that apply concerning safe operation of vessels, protection of wildlife and natural resources, discharges of petroleum products, septic waste, garbage and litter.<sup>43</sup> This also includes all applicable local ordinances regarding nuisance, noise, etc.

(3) Vessels may not anchor in a manner that:

- a. Jeopardizes other vessels at anchor or underway;
- b. Might cause damage to other property or persons; and/or
- c. Impedes access to docks, slips or public or private property.

(4) Areas of seagrass, living coral or rock outcroppings as identified by Florida Sea Grant (FSG), the Department of Environmental Protection (FDEP) or the regional National Estuary Programs, cannot be used for anchoring. Special care must be taken to avoid anchoring impacts in aquatic preserves.

(5) Vessels must be capable of navigating under their own sail or power, or have ground tackle capable of holding vessel until winds are fair or a tow or repairs can be arranged. A reasonable amount of time must be allowed for such situations.

(6) In emergencies, the safety of the crew and the vessel will be of paramount importance until the emergency is past or the vessel has been moved to safety.

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<sup>43</sup> Including, but not limited to the following. Petroleum Control: Fla .Stat. 403.161 (1999), 33 CFR 153.305; Solid Waste: Fla . Stat. 403.413(4)(b) (1999), 33 CFR 151.63,.65,.67,.69,.71,.73 and Annex A; Sewage Management: Fla . Stat. 327.53-4(a) (1999), Fla . Stat. 327.53-5(5) (1999); Vessel Safety: Fla . Stat. ch. 327 (1999); Anchoring/Mooring Damage: 15 CFR Subpart P;

(7) Each mariner remains responsible for damages caused by his vessel or its wake.<sup>44</sup>

## PART B. HARBOR MANAGEMENT PLAN

### Section I. Establishment of a Harbor Management Plan

Where warranted by objective evidence of environmental damage or use conflicts, and upon recommendation of the Harbor Advisory Board, the City of Sunshine shall begin proceedings to establish a Harbor Management Plan (HMP).

The minimum the HMP should include the following Elements:<sup>45</sup>

- (1) Initial Natural and Cultural Resource Inventory and Assessment;
- (2) Physical and/or Temporal Zoning;
- (3) Anchoring and Mooring Locations & Layout;
- (4) Anchoring and Mooring Tackle Specifications;
- (5) Landside Facilities Plan;
- (6) Navigational Aids Assessment, Maintenance and Improvement Plan;
- (7) Storm and Emergency Preparedness Plan;
- (8) A Dispute Resolution Process;
- (9) Annual Natural and Cultural Resource Inventory and Assessment Updates;
- (10) Initial Cost of Implementation Estimate; and
- (11) Projected Annual Budget.<sup>46</sup>

### Section II. HMP Fees and Penalties

(1) Fees and Penalties under the HMP and amendments thereto shall be recommended by the Harbor Advisory Board and approved by the City Council. Reasonable notice shall be given to the public prior to enforcement of the Fees and Penalties Schedule.

(2) All applications for mooring permits shall be accompanied by the appropriate fee. All such monies are non-refundable. These fees shall be reviewed an-

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<sup>44</sup> [Adapted from] Principles of Anchoring and Harbor Management adopted by the SWFRHB on January 22, 1999. Copy of MOA on file with authors.

<sup>45</sup> Also Refer SWFRHB Principles Section II. See Appendix A.

<sup>46</sup> For more information on these topics, refer to: *The Right Tack: Charting Your Harbor's Future; Guidelines for the Development of Municipal Harbor Plans; Hurricane Manual for Marine Interests in Flagler County*, Florida Inland Navigation District and Flagler County; *Recommendations for Hurricane Preparations and Responses for Boating Communities and Industries*, Florida Sea Grant College Program, TP-75, June 1994.

nually by the Harbor Advisory Board and amendments thereto recommended for approval by the City Council.

### Section III. Harbor Management Fund

A Harbor Management Fund will be created for fees and penalties collected under the HMP. All monies shall be deposited into a Harbor Management Plan Fund earmarked for implementing and ongoing operations of the Model Harbor Ordinance.

### Section IV. Harbor Management Plan Regulations

As part of the HMP development process, the Harbor Advisory Board shall recommend such further regulations as deemed necessary to be implement the plan.

#### **Commentary**

*These rules and regulations should be in accord with the Principles of Anchoring and Harbor Management adopted by the SWFRHB and not in conflict with other local, state, and federal laws. The City Council shall adopt the recommended rules and regulations as an integral part of the HMP.*

### Section VI. Liability

Persons using the Waters of the City of Sunshine shall assume all risk of personal injury and damage or loss to their property. The City of Sunshine assumes no risk on account of accident, fire, theft, vandalism, or acts of god.<sup>47</sup>

#### **Commentary**

*For an overview of recent judicial interpretation of municipal and state liability see Natural Resources v. Garcia, 25 FLW 124a (2000). The Supreme Court of Florida held that governmental entities that operate public facilities, such as swimming facilities on public beaches, assumes the common law to operate the facility safely, same as a private individual would have to invitees under similar circumstances. The governmental entity has a duty to warn the public of any dangerous conditions of which it knew or should have known.*

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<sup>47</sup> [Adapted from] Guidelines for the Development of Municipal Harbor Plans, State of Rhode Island. See also, *Natural Resources v. Garcia*, 25 FLW 124a, (2000), Fla. Stat. 768.28 (18) (1999).

## Section V. Severability

If any Article, Part or Section of this ordinance is invalidated for any reason, the effected portion may be eliminated or modified to correct the reason of invalidation, if feasible without materially altering or negating the Ordinance Goals and SWFRHB Principles.

## Section VI. Effective Date

The Model Harbor Ordinance shall become effective upon recommendation by the City of Sunshine's Harbor Advisory Board and approval of the City Council.

### **APPENDIX I.**

#### **SWFRHB PRINCIPLES OF ANCHORING AND HARBOR MANAGEMENT<sup>48</sup>**

The Southwest Florida Regional Harbor Board's Regional Umbrella: Standards for Anchorage Management, as set forth below, should represent the basic management approach for anchoring in Florida.

#### **I. PRINCIPLES OF ANCHORING**

(1) All federal and state laws apply to all vessels, including laws concerning overboard discharge of petroleum products, waste, garbage and litter. Local laws regarding nuisance, noise, etc to all persons, including those at anchor.

(2) Vessels may not anchor in a manner that: a. Jeopardizes other vessels at anchor or underway; b. Might cause damage to other property or persons; c. Impedes access to docks, slips or public or private property.

(3) Areas of seagrass, living coral or rock outcroppings as identified by Florida Sea Grant (FSG), the Department of Environmental Protection (FDEP) or the regional National Estuary Programs, cannot be used for anchoring. Special care must be taken to avoid anchoring impacts in aquatic preserves.

(4) Vessels must be capable of navigating under their own sail or power, or have ground tackle capable of holding vessel until winds are fair or a tow or repairs can be arranged. A reasonable amount of time must be allowed for such situations.

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<sup>48</sup> Principles of Anchoring adopted January 22, 1999 by unanimous vote by the quorum of SWFRHB members in attendance.

(5) In emergencies, the safety of the crew and the vessel will be of paramount importance until the emergency is past or the vessel has been moved to safety. Each mariner remains responsible for damages caused by his vessel or its wake.

Note: There are no third part beneficiaries under these standards. No third party has any rights or cause of action based upon any failure to enforce any of these standards. Further restrictions should not be placed on anchoring in Florida in the absence of environmental damage or user conflicts that cannot be otherwise resolved.

## II. HARBOR MANAGEMENT

(1) When environmental damage or user conflict have been demonstrated by objective standards, consideration should be given to the development of a local harbor management plan.

(2) Objective standards should be based on planned, periodic inventories of all natural and cultural resources within the harbor and adjacent shoreline.

(3) Local harbor management plans should be developed utilizing consensus building processes that include representation among all stakeholders.

(4) Local harbor management plans should be implemented by a local harbor board that includes broad-based stakeholder representation, including boater representation from within the anchorage.

(5) Local harbor management plans should consider the appointment of a harbor master, who should be competitively selected based on qualifications established by the local harbor board and who reports to it.

(6) Local harbor management plans should ensure that there is adequate anchoring and/or mooring capacity for transient boaters and that adequate provision is made for safe harbor during storms.

(7) Local harbor management plans should ensure that adequate support facilities are available to boaters. At a minimum this should include dedicated dinghy facilities. Where resources are available, consideration should also be given to restrooms, showers, laundry facilities and other amenities.

(8) Local harbor management plans should include appropriate aids to navigation and other signage, as necessary to distinguish anchorage, mooring fields, restricted areas and navigation channels.

(9) Local harbor management plans should consider appropriate means to obtain financing or capital improvements and management activities, including government grants and reasonable user fees.

(10) For managed anchorages, consideration should be given to seeking Special Anchorage Area designation by the Coast Guard.

(11) Local harbor management plans should consider appropriate mechanisms to resolve disputes within the anchorage.

(12) For managed anchorages, local harbor management plans should seek the appropriate approval from the State of Florida or other legal owners of the bottomlands beneath the anchorages.