

Use of Future Interests in Land as a Sea-Level Rise Adaptation Strategy in Florida

By: Thomas Ruppert, Esq.¹

In a 2011 paper, James Titus of the U.S. EPA spends considerable time discussing the potential for the use of defeasible estates and future interests in land as potential tools for adaptation to sea-level rise (SLR). Defeasible estates and future interests in land—such as a fee simple determinable and fee simple subject to a condition subsequent—offer many potential strengths as tools for adaptation to SLR. As Titus indicates, for example, a fee simple determinable would allow a developer (D) to grant land to a buyer (B) “for so long as B does not attempt to armor the shoreline.” D thus has a possibility of reverter should B seek to protect B’s property from SLR via use of armoring.

In theory this is an excellent idea as it would allow maximum use of land and would only impact B once SLR or erosion reaches a point that construction on the land is at the water-land interface and negatively impacting the coastal system—one of the harms that regulation often seeks to avoid. In reality in Florida, the situation presents more difficulties. Titus’ discussion mostly involves a generalized version of the common law of property. However, as property law is a state issue, we must specifically examine Florida’s property law.

The most typical scenarios envisioned for potential use of future interests are either large-scale developments seeking permits or individual properties seeking development permits. In the latter case, it would be difficult to use a defeasible estate as the current owner wants to continue holding the estate and does not contemplate a transfer that could be include a future interest.

In the case of a large development, the local government could condition the permit on a requirement that all transfers of property from the developer to individual purchasers contain a possibility of reverter for the grantor or an executory interest in a local land trust or

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government agency.²

Florida Statute §689.18(1) states that it is the policy of the state that “reverter or forfeiture provisions of unlimited duration in the conveyance of real estate or any interest therein in the state constitute an unreasonable restraint on alienation and are contrary to the public policy of the state.” The crucial term here is “unlimited duration.” Are all the future interests in the grantor potentially created by use of defeasible estates for SLR adaptation in Florida of “unlimited duration”? The example in the first paragraph above creates a possibility of reverter that is unlimited in duration as the trigger giving rise to reverter is never guaranteed to occur. A careful review of case law is required to determine if this issue is settled. A similar analysis applies to Titus’ example of granting land “until sea level rises 4 feet” as this also creates a possibility of reverter that is never “guaranteed” to occur even though sea levels are currently rising and projected to rise up to four feet any time approximately within the next 50 to 150 years.

Florida Statute §689.18(4) makes the situation even more difficult as it indicates that

No reverter or forfeiture provision contained in any deed conveying real estate or any interest therein in the state, executed on and after July 1, 1951, shall be valid and binding more than 21 years from the date of such deed, and upon the expiration of such period of 21 years, the reverter or forfeiture provision shall become null, void, and unenforceable.

Still, §689.18(5) seems to offer some possibility since “Any and all conveyances of real property in this state heretofore or hereafter made to any governmental, educational, literary, scientific, religious, public utility, public transportation, charitable or nonprofit corporation or association are hereby excepted from the provisions of this section.” The question would then be: What constitutes a qualifying “conveyance of real property”? There might be an argument that a transfer of a current interest to a non-qualifying entity with the future interest to a governmental, charitable or other qualifying entity might bring the future interest within the exception of §689.18(5).

The problem with this argument is that then the original *grantor* would also have to be the same qualifying entity that would hold the future interest. This is so because a future interest in anyone other than the grantor is an executory interest rather than a reverter required in §689.18(4). Yet §689.18 only applies to future interests in the grantor, not in future interests in third parties.³ Thus, unless a qualifying entity is the original grantor of a defeasible estate and maintains a possibility of reverter, a reversion, or a right of termination, §689.18 prevents the use of the defeasible estates of fee simple determinable or fee simple subject to condition subsequent.

Under Florida statutory law’s apparent dichotomy between future interests based on whether the future interest remains in the grantor or in a third party, the provisions of §689.18 only apply to possibilities of reverter and powers of termination (a.k.a. “right of entry”). This leaves the possibility of using executory interests—future interests in third parties—as a tool for sea-level rise adaptation. Executory interests are subject to Florida Statute §689.225 rather than

² This particular article does not directly consider the property takings issue that might arise under federal or state constitutional law or state statutory or common law that might arise under such a policy. Attorneys are advised to consider that *Nollan* and *Dolan* would likely apply. It might be possible to reasonably assert that *Nollan*’s requirement of “significant nexus” is fulfilled, *Dolan*’s requirement of “rough proportionality” could prove more challenging.

³ *Cf.*, e.g. 2-22 Florida Real Estate Transactions, §22.03[2] (noting that reversionary interests in the grantor are not governed by the rule against perpetuities).

§689.18. Section 689.225 is Florida's statutory version of the common law rule against perpetuities. The statute codifies the common law rule that an executory interest must vest, if at all, within 21 years of a life in being. With clever drafting, it might be possible to create a future interest that would last as long as 100-120 years (for example, using a class of infants born shortly before creation of the future interest). The statute expands the common law rule against perpetuities to also allow a non-vested interest that actually vests or fails within ninety years after its creation is valid. Thus, up to ninety years may pass before it possible to determine whether the interest is valid.

The ninety year timetable could make it possible for a local government, when appropriate under the *Nollan* and *Dolan* standards for exactions and other takings considerations, to exact from a large developer an executory future interest for the government or land trust. The executory interest could arise from a grant such as: "Owner grants to Purchaser until such time as the local sea level rises by three feet, then to the local government." Or: "Owner grants to Purchaser unless Purchaser constructs or attempts to construct coastal armoring, at which time the property goes to the local government." If the events contemplated in the grants occur within 90 years, then the future interest would be valid. If 90 years were to pass without the contemplated condition occurring, the future interest fails entirely and the purchaser and her heirs hold the land in fee simple.

Thus, the best that can be hoped for when using future interests in land as an adaptation tool for sea-level rise in Florida is that a local government, might—subject to other takings law considerations—be able to exact a future interest based on events that, if they occur within 90 years, would cause the property to go to the local government or some other third party. As noted above, further consideration and analysis of the takings issues, such as *Nollan* and *Dolan* is important.

While it may not be impossible to develop a valid executory future interest as a tool for adaptation to SLR in Florida, use of future interests generally represents a complex, arcane, and limited ability to aid local governments in efforts to improve their long-term coastal resilience and efforts to adapt to rising sea levels. Conservation (environmental) easements and long-term leases may provide more flexibility for creative solutions and also facilitate property owner cooperation through the possibility of direct payments to current owners. For example, a local government might want to consider the option of purchasing vulnerable land from current owners and immediately leasing the land back to the former owner for 90 years, maybe even making the lease subject to conditions such as a prohibition on armoring, the need to relocate structures further landward if they come into contact with the active beach, or other limitations. In such a case, the local government could seek willing sellers for such a transaction based on appraisals of the property with a fee simple title versus with the 90-year lease. The local government could then offer the property owner the difference in value.