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THE ENVIRONMENTAL AND LAND USE LAW SECTION REPORTER

Vol. XXXIV, No. 4
June 2013

• Erin L. Deady, Chair • Jeffrey A. Collier, Co-Editor • Anthony J. Cotter, Co-Editor

"The 2011 Community Planning Act: Certain Change, Uncertain Reform"

by Robert M. Rhodes

The Community Planning Act of 2011, Chapter 2011-139, Laws of Florida (the "2011 Act") has been praised as overdue reform that simplifies a complex intergovernmental program and returns major planning responsibility and accountability to local government. It has also been excoriated as a wholesale retreat from sound planning practice that cuts the heart out of an effective program that didn't require major surgery.

There is some validity to both views.

I don't believe it's productive to re-fight the battles over enactment of the 2011 revisions. The 2011 Act is law, and it will be judged on its results. I doubt there is much interest among state leaders to significantly change course at least until there is more experience with the Act, and most likely, not until the economy is healthier and growth returns. That said, the revisions present some practical and policy decisions challenges that merit further consideration.

State Oversight Under the 2011 Act

I'd like to focus on what I believe is the most significant and most contentious part of Florida's intergovernmental program: it's oversight role.

State oversight is important; it provides the teeth. Some call it the stick, hammer, or watch dog for the program. When properly articulated and applied, state oversight enables local governments to make better, more transparent, publicly accountable, and in some instances, more

See "Community Planning," page 17

From the Chair

by Erin L. Deady

First and foremost, I would like to report on our incredible Annual Retreat, planned and organized by Nicole Kibert, our Chair-elect. We had a great turn out, with a productive agenda and schedule. We had a couple of fun activities too, but we got some really good work done including a full vetting of the Section's new website (www.eluls.org). We also had some great brainstorming on building and retaining Section membership. Another key work product was our revamped Section Sponsorship Brochure outlining all the benefits and details of continued Section support, which was finalized by the Executive Council May 9.

On April 19, we had a very packed and successful program in which the Section partnered with UF Sea Grant Florida, Florida Department of Economic Opportunity, Community Resiliency, NOAA, UF IFAS Extension, Florida Coastal Management Program and the Palm Beach County Planning Congress to provide a new CLE program opportunity, "Adaptive Planning For Coastal Change: Legal Issues For Local Government" focused on issues for lawyers and planners. On May 30, Janet Bowman and Gary Hunter presented their "Annual Legislative Wrap Up via the 2013 Environmental and Land Use Law Audio Webcast Series.

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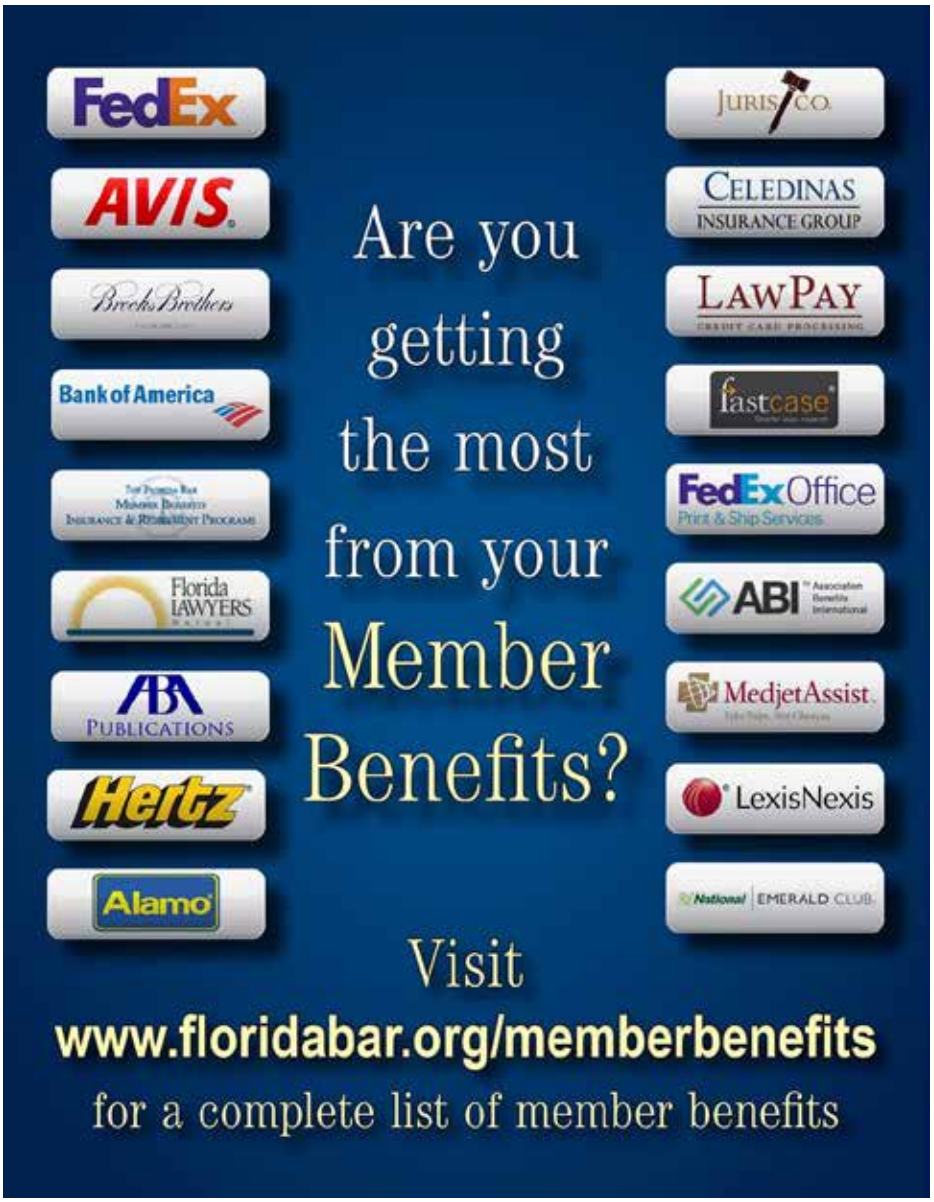

This newsletter is prepared and published by the Environmental and Land Use Law Section of The Florida Bar.

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CHAIR'S MESSAGE
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The CLE Committee has finalized the program for the Annual Update, content and speakers for the Annual Update, August 8-10 this year with our Executive Council meeting set for August 7. We hope to see you there and see you sponsor this year! As we get ready for the Annual Update a goal will be to provide the first year of reporting on the status of implementing our Strategic Plan. I look forward to gathering data to evaluate where we are one year out and hopefully reporting on numerous successes.

Our other committees are active with their activities as well as preparing for the Annual Update. The Membership Committee has recently completed an update of their web content, as well as an update of the Section's Membership Brochure. The Affiliate Committee continues to host our very popular mixers, with the last one held on June 6, 2013 at The Wine Loft in Tallahassee from 5:30 to 7:30 pm. Topics of discussion will vary, but will include the latest environmental and legal issues facing our industry.

As a reminder, we hope to see you at the next Executive Council meeting June 27, 2013 in Boca Raton Resort & Club, Boca Raton (in conjunction with The Florida Bar Annual Convention).

Proposed ASTM Standard E-1527-13 for Phase I Environmental Site Assessments: New Terminology and Decisions for Environmental Professionals, Environmental Counsel, Sellers, Buyers, and Lenders

by Robyn D. Neely, Esq. and Jarrett D. Bingemann, Esq. with Akerman Senterfitt, and J. Chris Herin, P.G. with Geosyntec Consultants

If you get involved with environmental due diligence projects – watch out! Change is coming – soon! Many in the environmental community are aware of the proposed revisions to ASTM Standard E-1527 for Phase I Environmental Site Assessments ("Phase I ESAs"). The revised standard is anticipated to be finalized and published during the Summer of 2013 as "ASTM E-1527-13." One of several issues making ASTM E-1527-13 notable is the proposed changes to the Recognized Environmental Condition ("REC") terminology. These proposed revisions will result in more challenging decisions for environmental professionals, environmental counsel, sellers, buyers, and lenders concerning RECs for properties. However, conclusions in Phase I ESA reports will, as a result of these revisions, be more up to date with current regulatory terminology and provide greater clarity.

By way of background, the current ASTM Standard E-1527-05 was promulgated in 2005 to support and assist in defining good commercial and customary practice in the United States for conducting key portions of All Appropriate Inquiry for environmental due diligence for real estate. The ASTM Standard E-1527-05 was intended to permit a user to satisfy one of the requirements to qualify for the innocent landowner, contiguous property owner, or bona fide prospective purchaser limitations under, the Comprehensive Environmental Response, Compensation and Reliability Act ("CERCLA"). Sometimes the broad ranging interpretations of what currently constitutes a REC associated with a property has resulted in inconsistencies and confusion in the marketplace for both the end users of Phase I ESA reports such as buyers, lenders and environmental counsel, as well as environmental professionals performing the Phase I ESAs.

To help improve the current ASTM Standard E-1527-05, an effort was initiated in 2009 to revise and update the standard. From 2009 through 2012, the assigned ASTM Task Group revised key portions of the standard which resulted in several rounds of ASTM subcommittee balloting of versions of the proposed new standard. As of this writing, the standard has largely passed scrutiny of involved ASTM members and is currently under review with EPA.

This article addresses just two of the more significant changes to ASTM E-1527-13, which are particularly relevant in Florida, given current cleanup regulations and trends associated with closure of contamination issues. These are a revised definition of Historical Recognized Environmental Condition ("HREC") and a new defined term called a Controlled Recognized Environmental Condition ("CREC"). Accordingly, in considering identified Phase I ESA findings under ASTM E-1527-13, the environmental professional conducting the Phase I ESA must decide: (1) if a past release on the property which has received closure through a regulatory authority has hazardous substances or petroleum products remaining at the property in concentrations that resulted in restrictions or required controls to be placed on the property, or (2) if a past release has hazardous substances or petroleum products remaining on the property, but with no associated restrictions or controls placed on the property.

If the environmental professional decides the regulatory closure met unrestricted residential use criteria without controls, then the past release may be considered an HREC. In deciding if a finding is an HREC, the environmental professional must consider if the past release would, taking into account cleanup requirements existing at the time of the Phase I ESA, constitute a REC. To clarify, if the environmental professional decides that remnants of the past release could not be closed under current regulations (at the time of completion of the Phase I ESA), because of regulatory changes since the original closure was granted, then the environmental professional should conclude that the finding is instead a REC in the Phase I ESA. A common example of this situation in Florida is that of an arsenic contaminated site which was closed when the groundwater cleanup standard was 50 ug/L whereas today, the standard is 10 ug/L.

Another scenario which is becoming very common in Florida (and other states) is a "conditional" closure wherein contamination is allowed to remain at a site. If the environmental professional decides the regulatory closure was granted and allowed hazardous substances or petroleum products to remain in place subject to property restrictions or controls, then the past release would be considered a CREC. Therefore, a release associated with a property which received regulatory closure using institutional controls, engineering controls, or any sort of restrictive covenant or deed notice would be considered a CREC.

The intent of the proposed changes is reportedly to provide clarification and assistance to involved parties including those performing

continued...

ASTM
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pre-purchase environmental due diligence as part of efforts to conduct All Appropriate Inquiry and obtain protection under the Innocent Purchaser Defense under CERCLA and applicable state law. The proposed changes attempt to make the process for conducting Phase I ESAs clearer for environmental professionals performing the Phase I ESAs, and end users of the Phase I ESAs. It is clear, however, that ASTM Standard E-1527-13 will require the environmental professional to undertake a more detailed environmental review for a Phase I ESA and to have a more thorough understanding of current and former regulatory cleanup closure options. This could lead to more challenging decisions for the average buyers and their lenders in the context of evaluating and managing the environmental risk associated with properties. While a more detailed evaluation is certainly a positive improvement to the process and will likely result in more thorough and improved Phase I ESAs, less knowledgeable involved parties may not be prepared to deal with such changes. Indeed, the average buyer and lender will likely be in the position that many Phase I ESAs will identify a REC, HREC or CREC, and the buyers and lenders will be forced to figure out what that means to the respective properties.

Additional complexity will also be added to the environmental professional's decision to call a finding a REC, HREC or a CREC because the regulatory agencies in each individual state in the United States have different standards and regulations for resolving when restrictions for closure of a release at a property are applied. This is true despite the fact that reportedly almost half of the states in the United States have adopted the Uniform Environmental Covenants Act. Therefore, under ASTM E-1527-13, the underlying facts at a site may support calling a finding an HREC in one state, but in another state, the exact same fact pattern may result in a REC or a CREC. For example, the state of Florida has not developed vapor intrusion guidance, whereas EPA does and many other states do have vapor intrusion guidance (which include specific concentration limits). For Phase I ESA's, ASTM E-1527-13 complicates the vapor intrusion issue further by indicating that the prospect of vapor migration in the subsurface of a release of hazardous substances or petroleum products is to be considered as part of a Phase I ESA.

Consequently, ASTM E-1527-13 should prompt buyers and lenders to hire highly sophisticated and experienced environmental professionals and environmental attorneys to assist them with the preparation of a Phase I ESA Report and the evaluation of associated environmental risk. ASTM E-1527-13 does bring more information to the process and should result in better Phase I ESAs. It will not, however, result in easier decisions for environmental professionals, buyers, and lenders, with respect to Phase I ESA findings at properties.

For more information, please contact the authors: Robyn Neely, Esq. (Robyn.Neely@akerman.com) and Jarrett Bingemann, Esq. (Jarrett.Bingemann@akerman.com) with Akerman Senterfitt, and J. Chris Herin, P.G. with Geosyntec Consultants (cherin@geosyntec.com).

May 2013 Florida Case Law Update

by Gary K. Hunter, Jr. and Thomas R. Philpot, Hopping, Green & Sams, P.A.

The Marketable Record Title Act's exception for easements and right-of-ways is applicable to land held as a fee estate for the purpose of a right-of-way, so long as competent, substantial evidence establishes the land is held for such a purpose. *Clipper Bay Invs., LLC v. Dep't of Transp.*, No. 1D11-5496, 2013 WL 425882 (Fla. 1st DCA Feb. 5, 2013).

Clipper Bay Investments, LLC (Clipper Bay) acquired seven acres of land adjacent to Interstate 10 (I-10) in 2006 and 2007. In 2008 Clipper Bay filed an action for quiet title and ejectment against Florida Department of Transportation (FDOT) and Santa Rosa County, arguing that under the Marketable Record Title Act (MRTA), it was entitled to a marketable title that would extinguish any claims FDOT might have in the land in question if Clipper Bay could demonstrate a valid title transaction at least thirty years ago that created an estate in its predecessor in interest. The disputed land lies outside of the I-10 fence line, but FDOT nevertheless considered the disputed land part of its I-10 right-of-way and counterclaimed for quiet title. The land was largely unused except for a portion that was leased to Santa Rosa County for the construction and maintenance of a county road. At trial, FDOT introduced an unrecorded FDOT right-of-way map from 1965 demonstrating the disputed land was part of the I-10 construction project. The trial court quieted title in favor of Clipper Bay for all land north of the limited access right-of-way line on the 1965 FDOT map, and quieted title for FDOT all land south of the line.

The First District, and the parties, recognized that the case turns on whether the MRTA exception for right-of-ways contained in section 712.03(5), Florida Statutes, can be applied to the disputed property. After extensive review of conflicting case law, the First District held that MRTA exceptions found in section 712.03(5) were ambiguous, thus required the court to construe the exception. Noting that public policy favors an interpretation that rights or easements once acquired for the use and benefit of the public are not easily lost or surrendered, the First District pointed out the obvious absurdity in a result that would find

land being utilized as a right-of-way without any fee title claim would be protected from the MRTA, yet land used for the same purpose held in fee title would be subject to forfeiture under the MRTA. Thus, the First District concluded the focus for the exceptions in section 712.03(5), must be on the reason or purpose for which the state holds the land, not the manner in which it is held. Accordingly, section 712.03(5), is applicable to rights-of-way held in fee title.

However, the First District rejected the argument that any land purchased in conjunction with a roadway project or any land owned by FDOT will automatically be protected as right-of-way under MRTA. FDOT carried the burden, according to the First District, to show that the land in question was devoted to or required for use as a transportation facility. Relying only on an unrecorded map with no supporting testimony, FDOT failed to present competent substantial evidence that the land north of the I-10 fence line was part of its right-of-way. Thus, the court reversed the trial court's award of a portion of the land north of the I-10 fence line and remanded with instruction to quiet title all of the land north of the I-10 fence line in Clipper Bay, except for the portion used by Santa Rosa County.

For Harris Act claims, the impact of a law or ordinance is not readily ascertainable for purposes of triggering a one-year limitation on claims when the provisions of the law amount to general restrictions in which a local government maintains significant discretion for their application. The one-year limitation on Harris Act claims applies only to the presentation of the claim to the issuing government body. On the other hand, the statute of limitation for filing a claim in circuit court is four years from the triggering condition. *Wendler v. City of St. Augustine*, 108 So.3d 1141 (Fla. 5th DCA 2013).

The Wendlers purchased eight parcels of property in St. Augustine between 1998 and 2006 on which were seven structures subject to City of St. Augustine Municipal Ordinances regulating historic structures. In 2005, the City amended the Ordinance, authorizing the City's Historic Architectural Review Board (HARB) to deny demolition or relocation requests regarding certain types of structures contributing to a National Register of Historic Places District. In 2007, the Wendlers decided to change the properties from residential rental structures to commercial properties due to changing market conditions, a decision which would require demolition of the structures. Applications to demolish the seven structures pursuant to the Ordinance and to rezone all eight parcels to allow for commercial use were submitted by the Wendlers, but denied by HARB based on a finding that six of the seven structures contributed to the National Historic Places District. The City affirmed the HARB determination after a hearing. The Wendlers submitted a Harris Act claim to the city, which responded with a settlement offer that the Wendlers rejected and proceeded to file a Harris Act claim in circuit court. The circuit court dismissed their claim with prejudice and held the action was untimely where the Wendlers could readily have ascertained the impact of the 2005 amendment to the St. Augustine Code of Ordinances when it was adopted.

The Fifth District Court of Appeals reversed, holding that the significant discretion afforded to the City in applying the regulations governing determinations on demolition or relocation of historic structures precluded property owners from being able to readily ascertain the impact of the 2005 amendment to the ordinances. Furthermore, the Fifth District reasoned, the provisions relating to demolition or relocation of the historic structures set forth only general standards and a procedure to follow, unlike conditions such as a clear height or density limitation which have been determined to be readily ascertainable. Thus, the Wendlers were not subject to a one-year limitation from the date of the amendment's adoption.

The Fifth District also agreed with and adopted the Fourth District rule that section 70.001(11), Florida Statutes, only applies to the presentation of the claim to the issuing agency and not to the subsequent filing in circuit court. *Russo Associates, Inc. v. City of Dania Beach Code Enforcement Board*, 920 So.2d 716 (Fla. 4th DCA 2006). The statute of limitations for filing a Harris Act claim in circuit court is four years from the triggering event. *Id.*

An inverse condemnation claim is not ripe for review absent at least one meaningful application, a final decision by the reviewing entity and a showing that additional applications to the reviewing entity would be futile. *Alachua Land Investors, LLC v. City of Gainesville*, 107 So.3d 1154 (Fla. 1st DCA 2013).

Alachua Land Investors, LLC (ALI) owned and was in the process of developing 300 acres of property as part of the Blues Creek subdivision in Gainesville, Florida. The subject of this case, the final phase of development on 127 acres, included 90 unimproved acres designated partly as a conservation area for the most environmentally sensitive area in the Master Plan. The Suwannee River Water Management District (SRWMD) initially permitted the ninety acres for retention of surface water from the surrounding land, but a third-party environmental group challenged the permit which resulted in a 1988 negotiated settlement agreement. The agreement completely restricted any construction or disturbance in the conservation area except for nature trails and similar environmentally friendly improvements. The Master Plan contained substantially the same restriction. ALI submitted a petition for a plat application to the City Commission for review and vote which indicated that a sanitary sewer line was projected to go through the 90 acre conservation area for approximately 300 feet. In May 2008, the Commission denied the application and ALI filed an inverse condemnation claim alleging a partial regulatory taking. The trial court dismissed the claim for ripeness, finding the nature and location of the proposed line violated the previous settlement agreement which ALI had negotiated as well as existing zoning regulations. The court emphasized that ALI failed to offer any revision of the application or to request a variance or change to accommodate the proposed development.

The First District affirmed the court below, holding that ALI's claim

continued...

was not ripe, absent a showing that the petition for plat approval was a meaningful application, that the City reached a final decision, and that the submission of additional applications for plat approval would be meaningless and futile. Given the trial court's unchallenged findings of fact, ALI's petition was not a meaningful application because it unreasonably sought approval of a plat application that incorporated a previously negotiated prohibited use. The record also indicated that the parties discussed alternatives to accomplishing the purposes of the proposed sanitation line, and that the City explained the procedure for seeking regulatory changes and indicated the Commission would be willing to reasonably accommodate ALI. ALI filed the inverse condemnation claim, despite reasonably viable alternatives and the Commission's willingness to consider them. Therefore, as a threshold jurisdictional issue, the claim was properly determined to be not yet ripe for litigation.

A homeowners association lacks standing to enforce restrictive covenants unless it is the direct assignee of the developer's right to enforce deed restrictions or it is a successor in interest of the developer. *Nieto v. Mobile Gardens Ass'n of Englewood, Inc.*, No. 2D11-4958, 2013 WL 1489377 (Fla. 2nd DCA Apr. 12, 2-13).

Homeowners in the Mobile Gardens mobile home subdivision in Englewood, Florida, appealed the decision of a trial court finding that deed restrictions promulgated by a homeowners association were valid and enforceable against them. In 1960, the developer of the subdivision recorded standard deed restrictions regulating construction and maintenance on the property, but did not establish requirements for membership in the homeowners association or any specific age requirements for residency in the subdivision. The developer assigned the right to enforce the deed restrictions to a homeowners association in 1972, which was subsequently dissolved in 1974. A new homeowners association was formed in 1991, but did not make efforts to revive the previously dissolved corporation which had obtained the rights to enforce deed restrictions on the property. Nevertheless, the 1991 homeowners association initiated actions to amend and enforce the original 1960 deed restrictions to transform Mobile Gardens into an age-restricted community. Citing Supreme Court precedent on standing for enforcement of restrictive covenants, the Second District Court of Appeal reversed the trial court and indicated the homeowners association could only enforce restrictive covenants if it were the assignee of the developer or the direct successor of the developer's interest in enforcing the restrictive covenants. Because the developer had already assigned rights to the original and later dissolved homeowners association in 1972, there was nothing more for the developer to assign to the 1991 homeowners association when it attempted to revive and enforce the deed restrictions in 2000. According to the Second District, the 1972 homeowners association received the right and holds it to this day.

UPDATE: Florida Supreme Court dismisses review of *Martin County Conservation Alliance v. Martin County*, 73 So.3d 856 (Fla. 1st DCA 2011). *Martin Cnty. Conservation Alliance v. Martin Cnty.*, No. SC11-2455, 2013 WL 1908644 (Fla. May 9, 2013).

The Florida Supreme Court initially accepted jurisdiction to review the decision of the First District Court of Appeal in Martin County Conservation Alliance v. Martin County, 73 So.3d 856 (Fla. 1 st DCA 2011), based on express and direct conflict, but has now dismissed the review proceeding after determining that jurisdiction was "improvidently granted." The First District's opinion in the case was originally reported in this update in February 2012. In the decision, the First District dismissed an appeal and imposed sanctions on the appellants, Martin County Conservation Alliance, for what it deemed a meritless appeal lacking a basis in fact or law under section 57.105, Florida Statutes, after bringing an appeal of an administrative law judge's determination that comprehensive plan amendments by Martin County would not cause environmental harm. The First District noted that the appellants had failed to prove with specific facts how the ALJ's order would adversely affect any of their members, and therefore, could not justify the appeal.

On Appeal

by Lawrence E. Sellers, Jr.

Note: Status of cases is as of May 8, 2013. Readers are encouraged to advise the author of pending appeals that should be included.

FLORIDA SUPREME COURT

SFWMD v. RLI Live Oak, LLC, Case No. SC12-2336. Petition for review of 5th DCA decision reversing declaratory judgment determining that RLI participated in unauthorized dredging, construction activity, grading, diking, culvert installation and filling of wetlands without first obtaining SFWMD's approval and awarding the District $81,900 in civil penalties. The appellate court determined that the trial court improperly based its finding on a preponderance of the evidence standard and not on the clear and convincing evidence standard. 37 Fla. L. Weekly D2089a (5th DCA, Aug. 31, 2012). Subsequently, the district court of appeal granted SFWMD's request and certified the following question: "Under the holding of *Department of Banking & Finance v. Osborne Stern & Co.,* 670 So. 2d 932 (Fla. 1996), is a state governmental agency which brings a civil action in circuit court required to prove the alleged regulatory violation by clear and convincing evidence before the court may assess monetary penalties." 37 Fla. L. Weekly D2528a (5th DCA, Oct. 26, 2012). Status: On March 7, 2013, the Florida Supreme Court accepted jurisdiction and dispensed with oral argument.

Martin County Conservation Alliance, et al v. Martin County, et al, Case No. SC11-2455. Petition for review of 1st DCA decision in *Martin County Conservation Alliance, et al v. Martin County*, Case No. 1D09-4956, imposing a sanction of an award to appellees of all appellate fees and costs following an earlier decision of the district court that "the appellants have not demonstrated that their interests or the interests of a substantial number of members are 'adversely affected' by the challenged order, so as to give them standing to appeal." 73 So.3d 856 (Fla. 1st DCA 2011). Status: The Court accepted jurisdiction on May 11, 2012. On May 9, 2013, the Court dismissed review after determining that jurisdiction was "improvidently granted."

FIRST DCA

State of Florida v. Basford, Case No. 1D12-4106. Appeal from order of partial taking in claim for inverse condemnation against the State of Florida as a result of the passage of Article X, Section 21, Limiting Cruel and Inhumane Confinement of Pigs During Pregnancy. Status: Oral argument held on May 15, 2013.

FINR, II, Inc. v. CF Industries, Inc. and DEP, Case No. 1D12-3309. Petition for review of final DEP order granting CF's applications for various approvals, including environmental resource permit, conceptual reclamation plan, wetland resource permit modification and conceptual reclamation plan modification. Status: Notice of appeal filed July 9, 2012; request for oral argument denied March 5, 2013.

FOURTH DCA

Archstone Palmetto Park LCC v. Kennedy, et al, Case No. 4D12-4554. Appeal from trial court's order granting final summary judgment determining that the 2012 amendment to section 163.3167(8), Florida Statutes, does not prohibit the referendum process described in the City charter prior to June 1, 2011. Status: Notice of appeal filed December 19, 2012.

Author's Note: Legislation enacted during the 2013 Regular Session may moot this appeal. See HB 537 and HB 7019.

DACS v. Mendez, et. al., Case No. 4D11-4644 and 4D12-196. Appeals from final judgments in class actions finding the Florida Department of Agriculture and Consumer Services (DACS) liable and awarding damages for the destruction of citrus trees by DACS. The issues in the appeal and cross appeal involve post-judgment proceedings on how, or whether, to allow the plaintiffs to execute on the judgments against a state agency. Status: On July 25, 2012, the court held that the applicable statute precludes the issuance of a writ of execution against DACS and declined to reach the constitutional issues at this time. 37 Fla. L. Weekly D1775a. On October 10, 2012, the court certified the following question to be of great public importance: "Are property owners who have recovered final judgments against the State of Florida in inverse condemnation proceedings constitutionally entitled to invoke the remedies provided in section 74.091, Florida Statutes, without first petitioning the Legislature to appropriate such funds pursuant to section 11.066, Florida Statutes?" 37 Fla. L. Weekly D2361b. On November 30, 2012, the Florida Supreme Court declined to accept jurisdiction.

U.S. SUPREME COURT

Koontz v. SJRWMD, Case No. 11-1447. Petition for writ of certiorari to review the decision by the Florida Supreme Court in *SJRWMD v. Koontz,* 36 Fla. L. Weekly S623a, in which the Court quashed the decision of the 5th DCA affirming the trial court order that SJRWMD had effected a taking of Koontz's property and awarding damages. Status: Petition granted October 5, 2012; oral argument held on January 15, 2013.

DEP Update

by Randy J. Miller, II, Senior Assistant General Counsel

Rulemaking Update:

Risk-Based Corrective Action Rule Consolidation

The Florida Department of Environmental Protection ("DEP") published a Notice of Rule Development for Chapter 62-780, Florida Administrative Code ("F.A.C."), in March 2012. The purpose of the rulemaking was to consolidate the DEP's four contaminated site cleanup rule chapters into the existing Chapter 62-780, F.A.C, for consistency and ease of use. Currently, the DEP has four Risk-Based Corrective Action (RBCA) cleanup rules that apply to different cleanup program areas which include Chapters 62-770, 62-780, 62-782, and 62-785, F.A.C.

The proposed consolidated Chapter 62-780, F.A.C., accommodates the minor differences between the rules and provides a single set of requirements for contaminated site cleanup. This consolidation was strictly an administrative consolidation of the chapters, and while there were a few clarifications and updates made, no substantive requirements were changed as a result of this effort. This rule consolidation also allows the DEP to propose the repeal of the other three cleanup rule chapters in support of the Governor's Executive Order #11-211. Once adopted, responsible parties and cleanup professionals will be able to use a single document to reference cleanup criteria for any type of contaminated site in Florida.

The DEP published a Notice of Change in the Florida Administrative Register (FAR) on April 9, 2013, to resolve concerns raised by the Florida Legislature's Joint Administrative Procedures Committee (JAPC). The next step will be filing the final rule language; i.e., the Certification Package, with the Department of State. The DEP anticipates that the consolidated Chapter 62-780, F.A.C., will be effective in late May 2013. The above-described rulemaking has been referred to as "Phase One 62-780 Rulemaking" and, in recent months, has been ongoing concurrently with "Phase Two 62-780 Rulemaking" (described below).

Associated Industries of Florida (AIF) Petition

The DEP initiated rulemaking on Chapters 62-780 and 62-777, F.A.C., in September 2011 in response to a petition filed by the AIF. The DEP staff worked internally to develop a Workshop Draft of Chapter 62-780 rule language; however, the AIF representatives acknowledged that it made sense to consolidate the four RBCA rules first, and then draft amendments to the consolidated Chapter 62-780 (i.e., thus Phase Two 62-780 Rulemaking).

The DEP held the first rule workshop to address the issues raised by the AIF petition on Tuesday, March 5, 2013, in Tallahassee and via webinar. The proposed revisions intended to clarify that the "Referenced Guidelines" are guidance and not enforceable, added a hierarchy of information sources for reference when developing alternative cleanup target levels, specified the information needed when performing a probabilistic risk assessment, and established criteria for supporting a Site Rehabilitation Completion Order based on alternative cleanup target levels, but without institutional or engineering controls. The DEP received minimal comments following the workshop and has incorporated some of the suggested changes, as it deemed appropriate. The DEP does not anticipate holding a second rule workshop for this Phase Two 62-780 Rulemaking. However, the DEP is proposing very minor revisions to its Institutional Controls Procedures Guidance (ICPG), and has agreed to post the ICPG revisions to the DEP's website for a two-week informal comment period prior to seeking adoption of the Phase Two 62-780 Rulemaking. Following the ICPG posting and comment period, the DEP will proceed with publishing a Notice of Proposed Rule, which is subject to JAPC review and comment.

Chapter 62-777, F.A.C., was also noticed for workshop on March 5, 2013, in response to the AIF Petition for Rulemaking; however, the DEP did not propose any changes to this rule chapter, and the DEP did not receive any questions or comments on Chapter 62-777, F.A.C.

Phase Three 62-780 Rulemaking

Following adoption of the Chapter 62-780, F.A.C., changes in Phase Two Rulemaking, the DEP intends to initiate rulemaking once again to address a variety of issues with Chapter 62-780, F.A.C. These include various issues that have been discussed at workshops and meetings, which will help to clarify rule provisions and provide consistency across programs. Interested stakeholders will have the opportunity to raise issues for which they have expressed concern, including substantive changes that were offered, but were not accepted, during the Phase One 62-780 Rulemaking, which was limited to merging the four cleanup rule chapters and/or during the Phase Two 62-780 Rulemaking, which was limited to issues raised in the AIF Petition.

Used Oil and Hazardous Waste

The DEP published a Notice of Proposed Rule (NPR) for Chapters 62-710 and 62-730, F.A.C., on January 10, 2013. The DEP published a Notice of Change for Chapter 62-710, F.A.C., on February 19, 2012. Chapters 62-710 and 62-730, F.A.C. have an effective date of April 23, 2013.

DEP Outreach

The DEP partnered with the Southwest Florida Regional Planning Council to host the first Florida Brownfield Symposium and Workshop on March 1, 2013. This seminar aimed to inform the community of the economic, legal and practical aspects of brownfield redevelopment in Southwest Florida.

"Brownfield redevelopment represents environmental as well as economic benefits to all communities," said Jorge Caspary, DEP Division of Waste Management Director. "This redevelopment cleans up contamination, creates jobs and strengthens communities."

More than 100 developers, investors, realtors and other community members attended the free workshop, which included presentations from

local leaders with practical experience in cleaning up and redeveloping these brownfield sites. A brownfield site is a property where expansion, redevelopment or reuse may be complicated by the presence or potential presence of environmental pollution. DEP Brownfields Liaison Kim Walker discussed the DEP's role in brownfield redevelopment and brownfield designation.

The Florida Brownfields Program facilitates redevelopment and job creation by empowering communities, local governments and other stakeholders to work together to assess, clean up and reuse sites that have been previously impacted by pollutants. The program focuses on contaminated site cleanup and economic redevelopment associated with brownfield sites. To make the program's incentives available to a community, a local government must designate a brownfields area by resolution. Local governments have designated 330 current brownfield areas statewide.

This program uses economic and regulatory incentives to encourage the use of private revenue to restore and redevelop sites, create new jobs and boost the local economy. Since its inception in 1997, the program has helped clean up 57 contaminated sites, confirmed and projected more than 40,000 direct and indirect jobs and made roughly $1.8 billion in capital investment for designated brownfield areas, according to data in the Florida Brownfields Redevelopment Program 2011-2012 Annual Report.

The DEP is also responsible for awarding tax credits to encourage participants to conduct voluntary cleanup of brownfield sites. In 2012, the DEP approved more than $5.1 million in Voluntary Cleanup Tax Credits for site rehabilitation work completed in designated brownfield areas in 2011.

DEP News

Matthew Z. ("Matt") Leopold has joined the DEP as the new General Counsel. Matt comes to the DEP after spending six years in Washington D.C. at the U.S. Department of Justice, Environment and Natural Resources Division. He brings extensive knowledge of federal environmental law and policy to the DEP. He has worked on a broad range of environmental and natural resource litigation in federal courts and for the past two years was a member of the BP oil spill trial team. In his policy role, Matt counseled the White House and multiple federal agencies on legal issues raised by important policy initiatives, such as the recent National Oceans Policy, as well as regulatory and legislative matters.

Prior to DOJ, Matt worked in the Washington office of former Governor Jeb Bush as federal policy advisor on environmental matters, serving the DEP and the water management districts largely on congressional issues arising in the Everglades restoration effort. At that time, he also helped to negotiate Florida's interests in federal legislation, such as the Gulf of Mexico Energy Security Act of 2006, which prevented new oil and gas exploration in sensitive federal waters in the eastern Gulf, while allowing for additional exploration in other areas.

Raised and educated in Florida, Matt earned his J.D. at the Florida State University College of Law and his undergraduate degree from the University of Florida. Matt and his wife Kim are proud parents of three young children and are happy to have this opportunity to return to Florida to raise their family.

Law School Liaisons

Barry University School of Law Hosts 2013 Environmental and Earth Law Summit

by David Deganian, Visiting Assistant Professor of Law, Director, Environmental and Earth Law Clinic

On March 22, Barry University School of Law hosted more than 70 guests at its 2013 Environmental and Earth Law Summit, a program that spotlights leaders working to solve Florida's most significant environmental problems. This year's program, *The Worth of Water: Meaningful Legal Protections for Rivers, Lakes, and Springs*, included panels of distinguished attorneys, scientists, community activists, and environmental regulators.

Professor David Deganian, who led the subcommittee that planned the event, described the goal of this year's Summit as "an effort to bring together experts and individuals who are on the front lines of critical legal battles to protect Florida's waters from decline." This theme marks a transition from Barry Law focusing exclusively on environmental justice issues to include other pressing ecological issues of our time.

The Summit was presented by several law school organizations, including its Environmental Responsibility Committee, the Center for Earth Jurisprudence, Environmental & Earth Law Journal, Environmental Law Society, and Student Animal Legal Defense Fund. It was funded in part by the Environmental and Land Use Law Section of the Florida Bar.

Heather Culp, a Barry Law student and President of the Environmental Law Society, described the event as "an excellent opportunity for students to learn about local environmental issues, meet and interact with prominent individuals in the

Law School Liaisons continued....

field, and to take action while still in law school to combat environmental degradation in their communities."

Kevin Spear, a senior reporter and award-winning environmental journalist with the *Orlando Sentinel*, delivered the summit's keynote address. Mr. Spear spoke of his recently completed yearlong investigation of the health of Florida's rivers that resulted in a three-part series, "Down by the River." His investigation examined 22 rivers statewide and included personal visits, research, and interviews with citizens, experts, advocates, and government personnel.

"Mr. Spear's presentation was eye-opening," said Jane Goddard, Associate Director of the Center for Earth Jurisprudence. "It reminded us of the important work of environmental reporters who keep citizens informed about shortsighted policies that exploit and degrade Florida's waters."

The Summit was kicked off by award-winning author and Equinox Documentaries filmmaker Bill Belleville, who described the value of Florida's extraordinary waters both to the future of the state and to the ecosystems that rely upon them. After Mr. Belleville's presentation, attorney John Thomas and his client Karen Ahlers discussed their efforts to spearhead an independent review of a proposed consumptive use permit for Adena Springs Ranch, a 25,000-acre cattle ranch and slaughterhouse. A panel of two attorneys, Jason Totoui, General Counsel for the Everglades Law Center, and Andrew Miller, Executive Director of the The Public Trust Legal Institute of Florida, along with Cris Costello, Regional Representative with the Sierra Club, then presented strategies, legal and otherwise, for the protection of Florida's waters. Environmental experts and former state regulators Jim Stevenson and Sonny Vergara closed the event with a moderated discussion of the role of science in political decision-making.

Professor Pat Tolan, Chair of the Environmental Responsibility Committee, noted that the day's events were a huge success, stating, "There's no replacement for clean water as a life-sustaining force, and it is only fitting to showcase the urgent threats to water as the focus of our first Environmental and Earth Law Summit."

About Barry School of Law

Established in 1999, the Barry University Dwayne O. Andreas School of Law in Orlando offers a quality legal education in a caring, diverse environment. A Catholic-oriented institution, Barry Law School challenges students to accept intellectual, personal, ethical, spiritual, and social responsibilities, and commits itself to assuring an atmosphere of religious freedom. Barry Law School is fully accredited by the American Bar Association and has a current enrollment of more than 750 students from around the world. More information is at www.barry.edu/law.

The Florida State University College of Law's Environmental Program: 2013 Summer Update

by Prof. David Markell

The Florida State University College of Law is honored that the latest U.S. News & World Report ranked our Environmental Program in the top 20 nationwide again this year, for the 9th consecutive year. We provide below a summary of recent events and accomplishments:

Spring 2013 *Environmental Forum*

Our Spring 2013 *Environmental Forum* focused on hydraulic fracturing, a topic that is receiving enormous attention nationwide. Entitled *Effectively Governing Shale Gas Development*, the *Forum* featured leading national commentators, including Professors **Emily Collins** (Pittsburgh), **Keith Hall** (LSU), and **Bruce Kramer** (Texas Tech). Professor Hannah Wiseman moderated the *Forum*.

Spring 2013 *Distinguished Environmental Lecture: Racing to the Top: How Regulation can be Used to Create Incentives for Industry to Improve Environmental Quality*

This Spring the College of Law welcomed **Wendy Wagner**, the Joe A. Worsham Centennial Professor of the University of Texas School of Law, to provide the College of Law' Spring 2013 *Distinguished Environmental Lecture*. Professor Wagner's lecture was entitled *Racing to the Top: How Regulation can be Used to Create Incentives for Industry to Improve Environmental Quality.*

Professor Wendy Wagner

Spring 2013 *Environmental Enrichment Series*

The College of Law's Spring 2013 *Environmental Enrichment Series* included several prominent scholars and government officials: **Professor Dan Cole**, Maurer School of Law at Indiana University, **Professor Cherie Metcalf**, Queens University Faculty of Law, **Kelly Samek** (LL.M.), Senior Assistant General Counsel, Florida Department of Environmental Protection, and **L. Mary Thomas** ('05), Assistant General Counsel, Executive Office of Governor Rick Scott.

Spring 2013 *Environmental Colloquium*

The College of Law's Environmental, Energy and Land Use Program honored several students during its Spring 2013 Colloquium. **Steven J. Kimpland** (Environmental LL.M. expected May 2013) and **Kelly Samek** (Environmental LL.M. winter 2012) presented papers, and **Kristen Franke**, **Forrest S. Pittman**, **James Flynn**, **Andrew R. Missel**,

Law School Liaisons continued....

and **Evan J. Rosenthal** received recognition for having written Outstanding Environmental, Energy and Land Use Law Essays.

Visiting Scholar for Spring 2013 Semester

The Florida State University College of Law hosted **Professor Lana Ofak**, University of Zagreb, as a fellow with the Junior Faculty Development Program (JFDP) of the Bureau of Educational and Cultural Affairs (ECA), U.S. Department of State, for the spring semester. Professor Ofak, who is an administrative law professor in Croatia, audited our energy, environmental, and land use classes to better understand how she can work toward forming an environmental law program in Croatia. She also compared notes with the College of Law professors on differences and similarities between our administrative law systems.

Student Activities and Accomplishments

Environmental Moot Court Team: **Kevin Schneider** ('13), **Trevor Smith** ('13) and **Sarah Spacht** ('14) placed second in the quarter finals with Smith receiving an honorable mention as Best Oralist in the 2013 Annual National Environmental Law Moot Court Competition at Pace Law School in White Plains, New York, in February. The team was coached by **Tony Cleveland** ('76), **Segundo Fernandez** and **Preston McLane** ('09).

(L-R) Trevor Smith, Sarah Spacht & Kevin Schneider

Energy & Sustainability Moot Court Team: **Angela Wuerth** ('13) and **Andrew Missel** ('13) won second place in the third annual National Energy and Sustainability Moot Court Competition at West Virginia University College of Law on March 16, 2013. **Professor Hannah Wiseman** and **Jennifer Kilinski** ('12) coached the team.

(L-R) Angela Wuerth & Andrew Missel

Kevin Schneider's ('13) article *Concentrating on Healthier Feeding Operations: Using the National School Lunch Program to Make the American Food System More Sustainable*, will be published in 29 J. Land Use & Envtl L.__ (forthcoming 2013).

Andrew Thornquest's ('13) paper entitled *The New Wave of Florida Energy: The Regulatory Path to Harnessing Marine Hydrokinetic Power* won first place in the ABA Section of Environment, Energy, and Resources Public Land Student Writing Contest.

Chris Hastings ('15) has accepted an internship with the Environmental Protection Commission of Hillsborough County in Tampa, Florida and an internship with the Center for Biological Diversity in St. Petersburg, Florida for summer 2013.

Trevor Smith ('13) was recently accepted into the Air Force JAG Corps and will be heading to Officer Candidate School at Maxwell Air Force Base in Montgomery, Alabama, after graduation in May 2013.

Lauren Brothers ('14) will be externing this summer with EPA Region 2's office in New York City.

Alumni Accomplishments and Honors

Laura Atcheson ('11) joined the United States Senate Committee on Environmental and Public Works as a Clean Water Act attorney.

Matthew Leopold ('05) recently joined the Florida DEP as General Counsel.

We hope you will join us for one or more of our programs. For more information about our programs, please consult our web site at: http://www.law.fsu.edu, or please feel free to contact Prof. David Markell, at dmarkell@law.fsu.edu. For more information about our Environmental Law Program, please visit http://www.law.fsu.edu/academic_programs/environmental/index.html.

UF Law Update

Submitted by Mary Jane Angelo, Director, Environmental and Land Use Law Program, University of Florida Levin College of Law

ELULP Awards Degrees, Certificates

The Environmental and Land Use Law Program awarded LL.M. degrees to four students, including Becky Convery, Chester "Jay" Fields, Jesse Reiblich, and Alexis Segal. An additional seven J.D. graduates received certificates in environmental and land use law. They are Vivek Babbar, Rachel Bruce, Samantha Culp, Tara DiJohn, Devon Haggitt, Stephen McCullers, and Chelsea Sims.

ELULP Students Plan Externships

Ten ELULP students will work in externships this summer throughout Florida. They include: Anne Boone, Alachua County Forever, Gainesville; Amanda Broadwell, National Oceanic and Atmospheric Administration, St. Petersburg; Melissa Fedenko, County Attorney's Office, Pasco County, New Port Richey; Garrick Harding, County Attorney's Office, Brevard County, Melbourne; Stephen

Law School Liaisons continued....

LAW SCHOOL LIAISONS
from page 11

Holmgren, Public Trust Environmental Law Institute of Florida, Jacksonville; Jimmy Mintz, Environmental Protection Commission, Hillsborough County, Tampa; Jon Morris, Division of Administrative Hearings, Judge Bram Canter, Tallahassee; Zach Rogers, Florida Fish and Wildlife Commission, Tallahassee; Michael Sykes, County Attorney's Office, Brevard County, Melbourne; Spencer Winepol, Audubon of Florida, Miami.

Environmental Students Visit Belize Cacao Nursery

UF Law Conservation Clinic students visited with representatives of the Belize Foundation for Research and Environmental Education (BFREE) and farmers from the Trio Village in Southern Belize. The clinic students have been working with BFREE to create a private system of payments for environmental services to compensate the farmers for converting a portion of their farm to shade-grown cacao, which is used to manufacture chocolate. The farmers have entered into agreements with BFREE drafted by the Clinic. Project funding is provided through a novel use of monies from a Natural Resource Damages Act settlement in the United States. Students on the UF Law Belize Spring Break Field Course had the opportunity to visit the BFREE field station where the cacao seedlings are started, visit the farmers in Trio Village, and learn about the nexus between neo-tropical migratory birds in Belize and Massachusetts that provided the justification for the use of settlement funds.

ELULP Recognized in Rankings

UF Law's environmental and land use law program placed among the top environmental law programs in the recently released rankings of *U.S. News & World Report*. ELULP was ranked fifth among public law schools and 12th overall in environmental law.

ELULP Director Mary Jane Angelo said, "We are proud that UF's Environmental and Land Use Law Program continues to be distinguished as a top program in this critical area. We have a large and dynamic program, and the faculty and students work very hard through projects like our annual Public Interest Environmental Conference, which attracted 250 participants to Gainesville this year, to make a genuine impact on current environmental issues."

UF Fellowship Honors Thom Rumberger

Leading Florida attorneys and environmentalists are raising funds for the E. Thom Rumberger Everglades Foundation Fellowship Program. The efforts are led by Rumberger's law firm, Rumberger, Kirk & Caldwell, and UF Law to endow the program which has a fundraising goal of $300,000 for environmental law scholarships.

Jon Mills, Director of the Center for Governmental Responsibility and Dean Emeritus of UF law, worked with Rumberger on landmark environmental and constitutional cases. He said, "We're going to have a permanent legacy of students who represent the kind of principled commitment and integrity that Thom Rumberger represented."

"What this fellowship will do is create the opportunity for students to work in the public interest areas, Everglades restoration in particular … in order to build a career," explained UF Law Dean Robert Jerry. "I promise you that we will use your investment in this fellowship most wisely and the future returns on this investment will be wonderful."

To donate to the E. Thom Rumberger Everglades Foundation Fellowship Program go to www.uff.ufl.edu/appeals/Rumberger.

Insiders Guide to the Annual Update available online at www.eluls.org

The Florida Bar Continuing Legal Education Committee and the Environmental & Land Use Law Section present

2013 ELULS Annual Update

(Including Ethical Challenges for the Environmental Lawyer and Consultant)

Celebrating 40 Years of Service to its Membership

Course Classification: Advanced Level

August 8-10, 2013

Sawgrass Marriott Golf Resort & Spa
1000 PGA Tour Boulevard
Ponte Vedra Beach, FL 32082
800-457-4653

Course No. 1616R/1617C
1615C

Schedule of Events

Wednesday

4:00 p.m. – 6:00 p.m.
Executive Council Meeting (open to all attendees)

Thursday

8:00 a.m. – 8:30 a.m.
Late Registration

8:30 a.m. – 8:35 a.m.
Opening Remarks/Introduction

8:35 a.m. – 9:20 a.m.
Situational Ethics: Can Circumstances Affect the Ethical Responsibilities of Environmental Attorneys and Professionals?
Anna H. Long, Sundstrom, Friedmand & Fumero, LLP
L. Thomas Roberts, E. Sciences, Inc.

9:20 a.m. – 10:05 a.m.
Lawyers, Consultants, and Clients – The Ethics, Legalities, and Implications of Data Reporting
Kellie D. Scott, Gunster
William Ware, Geosyntec Consultants

10:05 a.m. – 10:35 a.m. **Break**

10:35 a.m. – 11:20 a.m.
Case Study Evaluations - Ethical Challenges in the Environmental Industry
Frank L. Hearne, Mechanik, Nuccio, Hearne & Wester, P.A.
Terry Griffin, Cardno TBE

11:20 a.m. – 12:05 p.m.
Ethical Conundrums with Emerging Chemicals
Justin P. Hofmeister, The Goldstein Environmental Law Firm, P.A.
Derek E. Huston, HSW Engineering, Inc.

12:05 p.m. – 1:10 p.m.
Substantive Committees Luncheon (open to all attendees)

1:15 p.m.
Keynote Introduction

1:20 p.m. – 2:10 p.m.
Keynote Address: Journey to Sustainability—The Courage to Change
Claude Ouimet, Senior V.P. & G.M., Interface Canada and Latin America

2:10 p.m. – 3:15 p.m.
Ethics for Environmental and Sustainability Reporting
Jacob T. Cremer, Smolker, Bartlett, Schlosser, Loeb & Hinds, P.A.
Thea D. Dunmire, ENLAR Compliance Services, Inc.

3:15 p.m. – 3:45 p.m. **Break**

3:45 p.m. – 4:45 p.m.
Rising Criminal Enforcement: Keeping Your Client Out of the Clink
Stacy Watson May, The Law Firm of Stacy Watson May, P.A.
James E. Felman, Kynes, Markman & Felman, P.A.

4:45 p.m. – 5:30 p.m.
Legislative Update
Lawrence E. Sellers, Jr., Holland & Knight LLP
Terry E. Lewis, Lewis, Longman & Walker, P.A.

5:30 p.m. – 5:35 p.m.
Session Summary and Announcements

5:35 p.m. – 6:30 p.m.
Reception

6:30 p.m. – 8:30 p.m.
EcoWalk – Guana Reserve Interpretive Beach Walk
ESciences

7:30 p.m. – 9:30 p.m.
Entertainment
John Henry Hankinson & The Non-Essentials

Friday

Concurrent Sessions
A) Track A B) Track B

8:25 a.m. – 8:30 a.m.
A) and B) Opening Announcements

8:30 a.m. – 9:15 a.m.
A) Natural Gas Pipelines in Florida
Virginia C. Dailey, Hopping Green & Sams
Al Taylor, Williams Gas Pipeline/Gulfstream Natural Gas at Williams Company
B) Integrating Water Conservation into Sustainable Development & Green Building
Nicole C. Kibert, Carlton Fields
Roger W. Sims, Holland & Knight
Veronika Thiebach, St. Johns River Water Management District

9:15 a.m. – 10:00 a.m.
A) Sea Changes in Solid and Hazardous Waste Regulation and Remediation in Florida
Ralph A. DeMeo, Hopping Green & Sams
David Riotte, Geosyntec Consultants
B) A Developer's Guide to Navigating Bug and Bunny Issues with the Wildlife Agencies
Amelia Savage, Hopping Green & Sams
Harold G. "Bud" Vielhauer, Fish & Wildlife Conservation Commission
Dave Hankla, U.S. Fish & Wildlife Service

10:00 a.m. – 10:30 a.m. **Break**

10:30 a.m. – 11:15 a.m.
A) All That Glitters is Not Gold: Pitfalls of Word Choice in Documents
Rory C. Ryan, Ryan Law
Joel E. Balmat, HSW Engineering, Inc.
B) Overcoming Encumbrances for a Mitigation Bank
Katherine E. Cole, Hill Ward Henderson
Abbey Naylor, Birkitt Environmental Services, Inc.

11:15 a.m. – 12:00 p.m.
A) Air Update: New NAAQS, Boiler MACT, and More
Robert C. McCann, Jr., Golder Associates, Inc.
David S. Dee, Gardner, Bist, Wiener, Wadsworth, Bowden, Bush, Dee, LaVia & Wright, P.A.
B) Land Use Practice Post-DCA: What are Important State Resources and Facilities and What's DEO's Jurisdiction?
Derek V. Howard, Monroe County Attorney's Office
Richard J. Grosso, Shepard Broad Law Center, Nova Southeastern University
Tara W. Duhy, Lewis, Longman & Walker, P.A.

12:00 p.m. – 1:40 p.m.
Section Annual Meeting and Awards Luncheon

1:40 p.m. – 2:50 p.m.
General Counsels' Roundtable
Moderator: Timothy J. Center, Centerfield Strategy
Matthew Z. Leopold, Department of Environmental Protection
Robert N. Sechen, Department of Economic Opportunity
Laura J. Donaldson, Southwest Florida Water Management District
Harold G. "Bud" Vielhauer, Fish & Wildlife Conservation Commission
John W. Costigan, Department of Agriculture & Consumer Services

2:50 p.m. – 3:35 p.m.
Administrative Law Update
Mary F. Smallwood, GrayRobinson, P.A.

3:35 p.m. – 4:05 p.m. **Break**

4:05 p.m. – 4:55 p.m.
Large-Scale Restoration I: The Gulf of Mexico
John Henry Hankinson, Jr., Former Executive Director, Gulf Coast Ecosystem Restoration Task Force
Janet E. Bowman, The Nature Conservancy

4:55 p.m. – 5:45 p.m.
Large-Scale Restoration II: The Everglades
Gregory M. Munson, Department of Environmental Protection
Shannon A. Estenoz, U.S. Department of the Interior
Jane C. Graham, Audubon Florida

5:45 p.m. – 5:50 p.m.
Closing Remarks

5:50 p.m. – 7:30 p.m.
Reception

8:00 p.m.
Young Lawyers Committee Social

Saturday

ELULS Committee Meetings (open to all attendees)

8:30 a.m. – 10:00 a.m.
Affiliate Membership

9:00 a.m. – 10:00 a.m.
Law School Liaison

10:00 a.m. – 12:00 noon
Continuing Legal Education

12:00 noon – 2:00 p.m.
Public Interest

CLE Credits

2013 Environmental and Land Use Law Annual Update (1616R)
General: 16.0 hours
Ethics: 5.0 hours

CERTIFICATION PROGRAM
(Max. Credit: 16.0 hours)
City, County & Local Government: 16.0 hours
Real Estate Law: 16.0 hours
State & Federal Gov't & Administrative Practice: 16.0 hours

2013 Ethical Challenges for the Environmental Lawyer and Consultant (1615C)
General: 3.5 hours
Ethics: 3.5 hours

CERTIFICATION PROGRAM
(Max. Credit: 3.5 hours)
City, County, Local Gov't: 3.5 hours
Real Estate: 3.5 hours
State & Federal Gov't & Administrative Practice: 3.5 hours

Seminar credit may be applied to satisfy CLER / Certification requirements in the amounts specified above, not to exceed the maximum credit. See the CLE link at www.floridabar.org for more information.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar News or available in your CLE record on-line) you will be sent a Reporting Affidavit if you have not completed your required hours (must be returned by your CLER reporting date).

Refund Policy

A $25 service fee applies to all requests for refunds. Requests must be in writing and postmarked no later than two business days following the live course presentation or receipt of product. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid. Registrants who do not notify The Florida Bar by 5:00 p.m., August 1, 2013 that they will be unable to attend the seminar, will have an additional $175 retained. Persons attending under the policy of fee waivers will be required to pay $175.

Hotel Reservations

A block of rooms has been reserved at the Sawgrass Marriott Golf Resort & Spa, at the rate of $129 single/double occupancy. To make reservations, call the Sawgrass Marriott Golf Resort & Spa directly at (800) 457-4653. Reservations must be made by 3:00 p.m. on 7/8/13 to assure the group rate and availability. After that date, the group rate will be granted on a "space available" basis.

Electronic Course Material Notice

Florida Bar CLE Courses feature electronic course materials for all live presentations, live webcasts, webinars, teleseminars, audio CDs and video DVDs. This searchable electronic material can be downloaded and printed and is available via e-mail several days in advance of the live presentation or thereafter for purchased products. Effective July 1, 2010.

TO REGISTER	ON-LINE:	MAIL:	FAX:
	www.floridabar.org/CLE	Completed form with check	Completed form to 850/561-9413

continued....

Registration

Register me for 2013 ELULS Annual Update (Including Ethical Challenges for the Environmental Lawyer and Consultant)

ONE LOCATION: (140), SAWGRASS MARRIOTT GOLF RESORT & SPA (AUGUST 8-10, 2013)

TO REGISTER OR ORDER AUDIO CD OR COURSE BOOKS BY MAIL SEND THIS FORM TO: The Florida Bar, Order Entry Department, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check payable to The Florida Bar, or credit card information filled in below. If you have questions, call 850/561-5831. ON-SITE REGISTRATION, ADD $25.00. **On-site registration is by check only.**

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***E-mail address is required to receive electronic course material and is only used for this order.** **JMW: Course No. 1616R/1617C/1615C**

REGISTRATION FEE (CHECK ONE):

1616R

- ❑ Member of the Environmental & Land Use Law Section: $465
- ❑ Non-section member: $505
- ❑ Full-time law college faculty or full-time law student: $340
- ❑ Persons attending under the policy of fee waivers: $175

Members of The Florida Bar who are Supreme Court, Federal, DCA, circuit judges, county judges, magistrates, judges of compensation claims, full-time administrative law judges, and court appointed hearing officers, or full-time legal aid attorneys for programs directly related to their client practice are eligible upon written request and personal use only, complimentary admission to any live CLE Committee sponsored course. Not applicable to webcast. (We reserve the right to verify employment.)

❑ Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

METHOD OF PAYMENT (CHECK ONE):

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COURSE BOOK – AUDIO CD

Private recording of this program is not permitted. **Delivery time is 4 to 6 weeks after 8/9/13. TO ORDER AUDIO CD OR COURSE BOOKS,** fill out the order form above, including a street address for delivery. **Please add sales tax. Tax exempt entities must pay the non-section member price.** Those eligible for the above mentioned fee waiver may order a complimentary audio CD in lieu of live attendance upon written request and for personal use only.

Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If this order is to be purchased by a tax-exempt organization, the media must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

2013 ELULS Annual Update (Thursday and Friday Sessions)

❑ **AUDIO CD (1617C)**
(includes Electronic Course Material)
$390 plus tax (section member); $430 plus tax (non-section member)
TOTAL $ _____

❑ **COURSE BOOK ONLY (1616M)**
Cost $60 plus tax
TOTAL $ _____

2013 Ethical Challenges for the Environmental Lawyer and Consultant (Thursday a.m. Sessions Only)

❑ **AUDIO CD (1615C)**
(includes Electronic Course Material)
$115 plus tax (section member); $155 plus tax (non-section member)
TOTAL $ _____

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courageous decisions.

The 1985 Growth Management Act (the "1985 Act") appropriately established a strong state role to ensure competent and responsible local implementation of the new program consistent with legislative intent. At the core of state oversight is review of local plans and plan amendments for compliance with state policy and standards, and power to enforce its compliance decisions.

Over the years, as local governments developed state required plans and development regulations, program implementation was assessed. Beginning in the early 1990's, the Florida Legislature began gradually to reduce state oversight.

Small scale plan amendments were fast tracked and state review was ultimately phased out. Urban areas were granted flexibility to apply state standards. Fifty-one percent of local governments were designated dense urban land areas and exempted form mandatory traffic concurrency and development of regional impact review.

In 2007, the Legislature established an alternative state review process for several "highly developed" urban counties and cities. Established as a pilot project, it aimed to expedite and streamline state review of local plan amendments, which it did by cutting review time in half and focusing state review and potential challenges on issues of regional or statewide importance.

The Legislature's Office of Program Policy Analysis & Government Accountability assessed the pilot and gave it generally favorable reviews. In 2009, the alternative review process was authorized statewide for plan amendments that would encourage downtown redevelopment.

The 2011 Act builds on the 2007 alternative review program and applies its expedited process statewide to a large majority of amendments. For year 2012, 87% of 341 proposed amendments received expedited state review. For first quarter 2013, 62% qualified for this review.*

Under expedited review, the state planning agency, the new Department of Economic Opportunity ("DEO"), and other government reviewers must restrict their review of plan amendments to whether the amendment will adversely impact important state resources or facilities. Each regional and state agency may comment on potential impacts within its jurisdiction. DEO may only comment on impacts outside the jurisdiction of other agencies. Regional planning agencies may comment on potential adverse effects to regional resources or facilities identified in a Strategic Regional Policy Plan ("SRPP"). The state planning agency may challenge a plan amendment only if it determines there will be an adverse impact to important state resources or facilities. This determination must be based solely on comments from the review agencies, including DEO.

During 2012, the review agencies found that 12 of 341 proposed amendments would produce adverse impacts. For first quarter 2013, three proposed amendments were flagged. All of the reviewers' concerns were resolved and DEO has not challenged any local plan amendments.*

Another state review process called coordinated review is more expansive and applies to larger scale amendments relating to rural land stewardship areas, sector plans, areas of critical state concern and local plan updates.

Coordinated review considers state statutory planning policies and may result in a state compliance determination similar to the practice under the 1985 Act. It also includes review agency comments on adverse impacts to important state resources or facilities. For 2012, coordinated review applied to 13% of proposed amendments and 38% of amendments were subject to this process in first quarter 2013. *

How does the state define the operative terms, "important state resource and facility" and "adverse impact?" Pre-2011, the state policy polestars were rule 9J-5, Florida Administrative Code ("F.A.C.") and the State Comprehensive Plan. The 2011 Act repealed rule 9J-5 and expressly took the state plan out of the review process. Furthermore, the 2011 Act doesn't define the new operative terms. Instead, potentially ten different agencies will determine if a plan amendment will adversely impact an important state resource or facility based on individual amendment circumstances.

Lacking basic definitions for these seminal terms, the new process will likely produce fragmented, situation based, incremental policy that undercuts the surviving state oversight role. Unfortunately, and paradoxically, in light of supporters' goals to simplify and streamline the 1985 Act, establishing meaningful, predictable state implementation standards was not a legislative priority. This is underscored by the prohibition that DEO not refine these broad terms by rules.

This lack of clear, consistent state policy favors no one. The private sector cannot determine up front the standards for complying with state requirements. Uncertainty will dampen desired new economic development opportunities and discourage lenders interested in underwriting these opportunities.

Local governments and applicants will have to deal with several state and regional agencies which may comment on amendments based on particular situations and apply current and potentially changing agency and administration preferences and biases. The state planning agency will be mightily challenged to coordinate, integrate, and develop a rational state policy from all this.

From the Governor and the Legislature's perspectives, how do you define success, develop benchmarks and metrics to measure progress, and determine if legislative intent and executive branch plans are fulfilled lacking clear, articulated definitions of operative terms?

Similar challenges face communities and citizens who want to hold planners and elected officials accountable for good planning results. We need to reconsider the current piecemeal, unpredictable process that produces state policy. After all, state law requires local governments to provide "meaningful, predictable planning standards." Shouldn't the state be subject to the same requirement?

To be relevant, any statutory revision should recognize current political reality and biases, and therefore reflect the general policy framework of the 2011 Act. It also should promote a strategy of DEO's draft state

continued....

economic development plan to provide a predictable legal and regulatory environment.

Here's a proposal: the Legislature should statutorily define the operative terms, important state resources and facilities, and adverse impact. This is core legislative policy-making and a legislative prerogative and responsibility. For reference points, the Legislature can review current state planning policies noted below, the statutory definitions of development of regional impact and the general law guidelines for designating an area of critical state concern. Other useful reference points are the SRPPS, which identify regionally significant resources and facilities.

Depending on the specificity of the statutory definitions, they can be further refined by rules developed by the Governor and Cabinet with the assistance of DEO and other review agencies. If the Legislature decides not to statutorily define the operative terms, rules should be developed and could be subject to legislative review and possible action.

Rulemaking is more than a policy choice. Standing alone, the undefined operative terms are vulnerable to constitutional attack because they are broad, vague, variable and delegate unrestrained legislative policy making to the executive branch review agencies.

Consider this: how important does an important state resource or facility have to be to qualify under the 2011 Act? Basic? Valuable? Significant? Essential? Imperative? The answer is possibly any or all because all of these words are synonymous with the word "important."

And as to adverse impact, how much wetland destruction or use of remaining road capacity is enough to satisfy the statutory standard? In addition to prima facie legal issues, the undefined terms raise questions under the Florida Administrative Procedure Act, the APA. For example, are state and regional review agencies limited by their own adopted rules in determining adverse impact to an important state resource or facility? If not, and the agencies generally apply non-rule policy, will they violate the APA by ultimately not adopting the policy as rules? And if they base their findings on ad hoc determination in individual cases and do not apply policy uniformly, are their decisions subject to judicial equal protection and substantive due process challenge?

These problems can and should be resolved by the Legislature, which is preferable to litigation that could invalidate the state oversight heart of the 2011 Act. I understand that dissatisfaction with the recent revisions has led some critics to consider litigation. Before they act, I hope they will consider the consequences if the 2011 Act is invalidated. What might replace it, and would the Governor and Legislature support materially different new planning legislation?

Burden of Persuasion

I've noted the saliency of the operative terms for state review and enforcement. What if a local government disputes a state finding of adverse impact to an important state resource or facility? If the issue goes to hearing, the state carries a heavy burden. To prevail, it must show by clear and convincing evidence that its determination is correct. Clear and convincing means a finding can be made with firm conviction and without hesitation, in other words is highly probable. This is a much

higher bar than the preponderance or weight of the evidence test that applies to almost all administrative proceedings.

Why such a high bar for the state, especially in situations that call for a subjective policy judgment without the benefit of definitive guidelines? For context, under the 2011 Act, if the state challenges a local determination that a plan amendment complies with state standards, the local decision is presumed correct and the state carries the burden to prove non-compliance by a preponderance of the evidence. Why should the burden of persuasion be different for a state finding of adverse impact to an important state resource or facility?

The clear and convincing standard is an unnecessary disincentive for the state to perform its overview role effectively. The playing field should be leveled. The preponderance of the evidence standard is the right test when government agencies can't agree, and the statutory revision should be made.

Clarifying Compliance Standards

The 2011 Act preserves the rights of affected persons and DEO under coordinated review to challenge an amendment as not in compliance with state planning standards. Recall this is a broader base for challenge than the state has under expedited review, which is restricted to impact analysis.

Like the 1985 Growth Management Act, the 2011 Act provides directions and mechanics for preparing local plans and plan amendments. It also includes many substantive planning policies that local plan amendments must address. Some policies were part of former rule 9J-5 that was included in the 2011 Act. Many were added separately to the statutes over a 25 year period. Some are specific, such as policies relating to urban sprawl, land use need, wetland protection and coastal land management.Most are broad, such as directives to provide affordable housing, plan for multi-modal transportation, ensure the suitability of land use for its intended use, and protect maintain, restore or preserve an extensive list of natural resources and natural areas.

These substantive planning policies form an important base for full compliance review of plan amendments. They are interspersed in various parts of the 2011 Act. To encourage informed public participation and broaden public and local government understanding of the recent revisions, DEO should compile and organize the statutory policies applicable to compliance determinations in a user friendly document. This guidance document should explain the relevance of the policies to compliance review and the options for citizen participation in the amendment process and compliance enforcement. Public information and education are DEO oversight responsibilities.

The suggested document will help clarify a new, complex process. It also will provide transparent benchmarks for compliance review drawn from the new legislation.

Going Forward

The 2011 Act swung the intergovernmental planning pendulum much further toward local government and significantly reduced the state's oversight role. But an important state role still exists and major parts of the state planning program remain. Local plans and amendments must be proposed, considered, reviewed and challenged pursuant to uniform state established processes. Development approvals and required local regulations must be consistent with adopted plans; the plan is still the primary policy document. The state and a broad range of affected citizens may challenge local action for non-compliance with state standards. Citizens are offered liberal opportunities and public notice to participate in local decisions. And local governments may and a large majority continue to apply state policies that are no longer mandatory, such as transportation, recreation and parks and school concurrency. The bottom line: Florida still provides a solid planning foundation for local governments and communities to build on.

We haven't yet seen the full effect of the 2011 Act. DEO community planners will be challenged not to be overwhelmed by DEO's primary economic development mission. Whether and how local governments choose to use their new authority remains to be seen.

However, to encourage and support effective local implementation, the Legislature must exercise uncommon restraint. Annual incremental substantive "tweaks" to the state program undermine local efforts to build stable, consistent and effective programs and contradict the Legislature's goal to devolve primary planning responsibility and accountability to localities. To paraphrase a powerful home rule mantra of the 2011 Act proponents: the Legislature should "let local governments be local governments," subject to clearly articulated state standards and policy, continuous community oversight and periodic comprehensive legislative review.

In June 2012, the American Planning Association reported that according to its national poll, two-thirds of polled citizens believe their community needs more planning to promote economic recovery. Hopefully, local governments will take note and recognize that future economic vitality is integrally linked to providing quality living experiences, necessary infrastructure, and meaningful regional collaboration. And perhaps this recognition will inspire a new wave of creative, citizen engaged community planning. The tools exist; it's a question of community desire.

The 2011 Act was branded by proponents as significant growth management reform. Reform means to change for the better, to improve. But it may also mean to end. I'm optimistic the recent legislation may be a catalyst in many communities for improvement and not the beginning of the end of the state planning program. But to borrow a phrase from *The New York Times* columnist Tom Friedman, I'm now a paranoid optimist.

Endnote:

*The data regarding DEO activity during years 2012 and 2013 were provided by the DEO Division of Community Planning.

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